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Enforcement Update: DOJ, EPA Announce Key Changes to Enforcement Approaches

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In recent days, the U.S. Environmental Protection Agency (EPA) and federal Department of Justice (DOJ) announced several key agency initiatives relating to federal enforcement activities. The changes help fulfill the Trump Administration's pledges to tackle regulatory reform efforts and recommit the federal government to a more collaborative approach to working with state government. These reforms will impact federal enforcement of environmental laws.

1. State Role in Environmental Enforcement

On January 22, EPA released plans to develop a more "collaborative partnership" with states relating to environmental enforcement efforts.

When EPA Administrator Scott Pruitt took the reins at the agency, he almost immediately announced that the agency would, under his leadership, double down on efforts to ensure that EPA embraced the notion of cooperative federalism—the idea that EPA should work with states in a collaborative (not adversarial) fashion to achieve environmental results.

Nearly all states administer one or more programs that implement federal environmental law provisions locally pursuant to "delegated authority" from EPA. These state programs are subject to certain compliance assurance activities, such as inspections and federally initiated enforcement activities, when EPA deems necessary, to ensure compliance with federal requirements.

Under this new directive, EPA announced it would generally defer to the states in their administration of authorized programs, citing their role as the "primary day-to-day implementer" of delegated programs. The plan provides specific examples of when federal involvement in state inspection and enforcement actions is warranted. EPA's guidance also indicates that when it identifies a violation at a facility, it will generally grant state requests to take the lead on enforcement, unless EPA believes there is a reason for some level of EPA involvement.

Additionally, this plan recommits EPA to improving state-federal relations. If EPA's regional leadership and state officials do not agree on how to resolve a particular matter, EPA's guidance requires the agency to elevate the matter to a senior administrator to ensure a consistent treatment of states and regulated entities nationwide. Moreover, EPA's directive also admonishes regional EPA leadership to undertake periodic meetings and joint planning with state officials.

An increased role for states in enforcement activities is likely positive for the regulated community, as it means more decisions may be made closer to home with faster response times and, in some cases, by officials who have a better sense of the facility's operation and regulatory history. While the guidance makes clear that EPA will continue to oversee state programs, the regulated industry may also see indirect benefits stemming from EPA efforts to improve communication and collaboration with the states, as well as the willingness of EPA upper management to ensure consistent implementation and enforcement of environmental programs across the EPA regional offices.

2. Limiting Use of Agency Guidance in Civil Enforcement Proceedings

Also in late January, DOJ leadership issued a memorandum instructing its lawyers to limit the use of agency guidance documents in affirmative civil enforcement action—i.e., those actions where the government sues regulated parties for civil forfeitures for alleged regulatory violations or noncompliance. Generally, guidance documents are statements of policy designed to advise the regulated community about the agency's understanding of the law and approach to enforcing the law. DOJ's new policy defines "guidance document" to mean an "agency statement of general applicability and future effect, whether styled as 'guidance' or otherwise, that is designed to advise parties outside of the federal Executive Branch about legal rights and obligations."

This DOJ enforcement policy is an extension of its "Guidance Policy" memorandum issued in November 2017. The Guidance Policy prohibited federal agencies from issuing guidance documents that purport to create legal rights or impose binding obligations on persons or entities outside of the federal government. That policy also prohibited agencies from using guidance to coerce regulated parties into taking action based on requirements not contained in federal statute or lawful regulation. The Guidance Policy mirrors regulatory reform efforts that have taken hold at the state level, including Wisconsin's 2011 Act 21.

DOJ's enforcement policy makes clear that its attorneys should consider the Guidance Policy's role in "determining the legal relevance" of other agency guidance when bringing civil enforcement suits. More specifically, because DOJ's guidance policy makes clear that guidance documents cannot create binding regulations, DOJ attorneys may not use their enforcement power to convert guidance into binding rules. With limited exceptions, DOJ will not use guidance to prove a party violated applicable law or to presume that a violation of law occurred.

DOJ's enforcement policy should curtail any federal agency efforts to apply guidance as de facto regulatory requirements in enforcement proceedings. Before bringing an enforcement action, agencies will need to identify a specific provision of a statute or lawfully promulgated rule on which to base its action. Regulated parties subject to enforcement proceedings at any level should consult with their attorneys to determine whether an agency may be using guidance provisions as the basis for an enforcement action in contravention of this policy.

3. Increases in Informal Enforcement on the Way?

Susan Bodine, a senior official in EPA's Office of Enforcement Compliance Assurance, also recently announced at a recent EPA meeting that she hopes to create pilot programs involving informal enforcement actions. While Bodine cautioned that such a program would likely lead to fewer formal enforcement cases brought by EPA, the primary goal of the effort would be to encourage regulated entities to return to compliance.

In summary, the Trump Administration's federal deregulatory agenda is starting to take shape in many areas. These three recent developments in the area of federal enforcement should foster more consistent interpretations of federal environmental laws, limit opportunities for "regulation via enforcement," and empower the regulated community to more closely work with their state regulators on what are often very complicated regulatory programs.

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