



Current Enforcement Topics

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Overview

- Trump Administration's Regulatory Reform Efforts
- Federal Enforcement Updates
- State Enforcement Updates
- Citizen Enforcement Updates



Trump Administration's Regulatory Reform Efforts



Trump Administration – Big Picture

- Emphasis on state rights and cooperative federalism.
- Concern with over-burdening the manufacturing, oil & gas and agricultural sectors.
- Streamlining of permitting and regulatory processes which are viewed as impediments to economic growth.
- Revisiting Obama Administration initiatives.



Hurdles to Regulatory Reform

- Inherent limitations on Presidential powers.
- Statutory mandates.
- Court decisions interpreting environmental statutes and regulations.
- Past EPA precedent, interpretations and policies.
- Citizen suit enforcement.
- State actions to offset the perceived absence of federal leadership on environmental initiatives.
- EPA approved state plans which may be contrary to initiatives.



Tools to Implement Environmental Agenda

Reduce Federal Enforcement	<ul style="list-style-type: none">• Agency discretion (EPA and US DOJ)• Priorities and budgets
Defund Programs	<ul style="list-style-type: none">• Use budgeting process to direct EPA action
Preempt State Law	<ul style="list-style-type: none">• Use federal deregulation initiatives to preempt state regulation
Subject Rules to Cost-Benefit Analysis	<ul style="list-style-type: none">• Discretion on calculation of regulatory costs and benefits
Implement New Procedures	<ul style="list-style-type: none">• Constrain agency regulatory power using new procedures
Change Federal Statutes	<ul style="list-style-type: none">• Change major federal statutes to further goals



Tools to Implement Environmental Agenda

Executive Orders (EO)	<ul style="list-style-type: none">• Reverse President Obama EOs• Issue new EOs
Presidential Actions re Public Lands and Resources	<ul style="list-style-type: none">• National monument declarations• Open lands to oil development and leasing
Fast Tracking Federal Approvals	<ul style="list-style-type: none">• Jan 24, 2017 – EO re infrastructure projects• Keystone XL and Dakota Access Pipelines
Paris Agreement	<ul style="list-style-type: none">• Withdraw under terms of the agreement
Reversing or Revising EPA Rules	<ul style="list-style-type: none">• Requires “notice and comment” rulemaking• Judicial Review
Congressional Review Act	<ul style="list-style-type: none">• Reach back date of June 13, 2016
Revise or Create Policy and Guidance	<ul style="list-style-type: none">• Many examples



Caution With Federal Reforms

- Gaps between what EPA approved for implementation in a state and what the reforms now allow.
- States unwilling to implement reforms.
- Legal challenges to reforms.
- Challenges to discreet permits and other agency decisions that rely upon reforms.
- Citizen suits.
- Elections could change the political dynamic supporting reforms.



Federal Enforcement Updates



Federal Enforcement Statistics

- Between 2009 and through 2018 there were 13,000 federal environmental cases filed.
 - Nearly 7,000 associated with the Deepwater Horizon
- Government entities most active parties.
- After the government, ENGOs were the most active plaintiffs, in order:
 - Center for Biological Diversity, Sierra Club, WildEarth Guardians, Conservation Law Foundation, Natural Resources Defense Council.
- The most common findings were no NEPA violation, Clean Water Act violations and Clean Air Act violations.
 - The latter two were mainly on consent.



Cooperative Federalism

- In 2019, EPA published a policy formalizing a Trump Administration priority to “rebalance the power between Washington and the states to create tangible environmental results for the American people.”*
- EPA will defer to states for the enforcement of authorized environmental programs.
- EPA may get involved in certain situations, such as:
 - Violations that are part of the National Compliance Initiative;
 - Situations involving multi-state or multi-jurisdictional interests or interstate impacts;
 - Emergency situations where there is substantial risk to human health or the environment;
 - Situations where the state may lack the equipment, resources, or expertise to deal with the issue; and
 - Serious situations that may warrant criminal enforcement.

* “Enhancing Effective Partnerships Between EPA and the States in Civil Compliance Assurance Work” from Susan Bodine to EPA Regional Administrators (July 11, 2019).



EPA's Rebranded Enforcement Program

- In September 2018, EPA announced it will transition from “National Enforcement Initiatives” (NEI) to “National Compliance Initiatives” (NCI).
 - Change effective for fiscal year 2019.
 - New NCIs recently issued for FY2020-23.
 - NCI process will occur every four years (currently two) to better align with other EPA programs.
 - Represents first major shift in EPA's enforcement program in 20 years.
- Focus on developing and applying a broader set of compliance assurance tools.



FY 2020-23 National Compliance Initiatives

1. Reducing Significant Noncompliance with NPDES Permits.
2. Preventing Animal Waste from Contaminating Surface and Ground Water.
3. Reducing Risks of Accidental Releases at Industrial and Chemical Facilities.
4. Cutting Hazardous Air Pollutants (HAPs).
5. Reducing Excess Emissions from Stationary Sources.
6. Reducing Toxic Air Emissions from Hazardous Waste Facilities.
7. Reducing Noncompliance with Drinking Water Standards at Community Water Systems.
8. Stopping Aftermarket Defeat Devices for Vehicles and Engines.
9. Lead Action Plan.



Updates to EPA's Audit Policy

- In May 2018, EPA announced a “renewed emphasis” on encouraging self-disclosure of federal environmental violations.
- Clarification of existing self-disclosure policies via updated FAQs and interpretive guidance documents.



Updates to EPA's Audit Policy (cont.)

- Enhancement and promotion of *eDisclosure* System.
- New Owner Audit Policy (particular area of focus).
 - Audit agreements that tailor disclosure to a new owner's needs.
 - Waiver of economic benefit penalties that might otherwise apply for delayed expenditures.
 - A "more generous" application of voluntary discovery condition allowing for "consideration of all violations which would otherwise be ineligible for Audit Policy consideration" (*i.e.*, violations that would be required to be identified through mandatory monitoring, sampling, or auditing).
- Development of a New Owner Clean Air Act Audit Program for the Oil and Gas Sector.
 - Will serve as a template for more sectors in the future.



EPA's Next Generation Compliance Initiative

- In an April 2018 memo, EPA withdrew its prior “Next Gen Enforcement” memo and clarified that there is no “default expectation” that “innovative enforcement” provisions not required by statute or regulations will be routinely sought in federal enforcement cases.
 - “Innovative enforcement” provisions may be sought on a case-specific basis (e.g., repeat violations, mitigation for environmental harms).
 - “Innovative enforcement” provisions could include things like fence-line monitoring linked to a web site.



CAA Section 114 Information Requests

- Authorizes EPA to seek information and require monitoring of emissions.
- EPA claims that it is working towards “eliminating overly broad and unduly burdensome requests for information.”
- Trump Administration Policy requires EPA Regional Offices to cooperate with states when issuing information requests.
 - EPA must use “best practices” to gather information, including first seeking information from a state.
 - Trump Administration once required EPA Regional Offices to get approval from EPA HQ before serving information requests on companies, but no longer required.



Third Party Mitigation Payments

- USDOJ memorandum titled “Prohibition on Settlement Payments to Third Parties” (June 5, 2017).
 - Ending the practice of “includ[ing] payment to various non-governmental, third party organizations as a condition of settlement with the United States.”
 - Prohibition on “directing or providing” payment to any third-party entity not a party to the enforcement action.
- Three exceptions:
 - “[A]n otherwise lawful payment or loan that provides restitution to a victim or that otherwise directly remedies the harm that is sought to be redressed, including, for example, harm to the environment.”
 - Payments for legal or other professional services rendered in connection with the case (i.e., attorneys fees).
 - Payments expressly authorized by statute, including restitution and forfeiture.



SEPs in State and Local Government Settlements

- On August 21, 2019 Jeffrey Clark, Assistant Attorney General, issued a memorandum diminishing state and local governments' ability to use SEPs in settlements of federal environmental enforcement actions.
- Applies a November 2018 DOJ policy that restricts the federal government from entering settlements with state and local governments that “achieve general policy goals or []extract greater or different relief from the defendant than could be obtained through agency enforcement authority or by litigating the matter to judgment.”



Use of Agency Guidance in Civil Enforcement Cases

- January 2018, U.S. DOJ memo instructing its lawyers to limit the use of agency guidance documents in affirmative civil enforcement actions (*i.e.*, where the government sues regulated parties for civil forfeitures).
 - No use of guidance (1) to prove a party violated applicable law or (2) to presume that violation of law occurred.
 - U.S. DOJ attorneys may not use their enforcement power to convert “guidance” into binding rules.
 - U.S. DOJ may use agency guidance in determining the appropriateness of bringing an enforcement action.
- Memo defines guidance as 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.”



Guidance on Guidance - Federal

- EPA Office of Water - Policy on Draft Guidance Documents (Aug. 6, 2019).
 - All draft documents issued more than two years ago and not finalized are rescinded.
 - Any draft documents that have been recently issued must be finalized within 2 years of the draft date or will automatically be rescinded.
 - Any future draft document not issued in final within 2 years of draft date shall be automatically rescinded.
- Two Presidential Executive Orders issued on October 9, 2019:
 - Transparency in agency guidance.
 - Restrictions on using guidance to establish legal violations.



Tax Cuts and Jobs Act (TCJA) and Enforcement

- When are environmental enforcement payments deductible for federal income tax purposes?
- Governed by I.R.C. § 162(f)
- Prior Law - As a general matter:
 - Fines and penalties (punitive payments): Not deductible.
 - Compensatory payments (remediation, supplemental environmental projects): Deductible.
 - No identification of whether a payment is deductible is required in a settlement agreement, stipulation, or consent order.



Tax Cuts and Jobs Act (TCJA) and Enforcement

- Tax Cuts and Jobs Act
 - Deductions more restricted.
 - Broad prohibition on deductions for amounts “paid or incurred . . . to, or at the direction of, a government or governmental entity in relation to the violation of any law or the investigation or inquiry by such government entity into the potential violation of any law.”



Tax Cuts and Jobs Act (TCJA) and Enforcement

- Exceptions:
 - Restitution: Amounts “identified as restitution for damage or harm caused by a violation of law or potential violation of law.”
 - Compliance Costs: Amounts “paid to come into compliance with any law which was violated or otherwise involved in the investigation or inquiry.”
- Reimbursement of government agencies investigation and litigation costs are *not* deductible as restitution.
- Payments must be identified as “restitution” or “compliance costs” in the settlement agreement, stipulation, or consent decree to be eligible for deduction.
 - Necessary, but not sufficient – payer must still demonstrate that the payment qualifies as deductible.



“Smart Sectors” Compliance Data

- EPA “Smart Sectors” program tracks historical compliance information and economic data for thirteen industry sectors.
 - EPA has stated that this tool will not be used for regulatory purposes, but rather to provide the public and industry additional information and data so as to “unlock better and faster environmental achievement.”
 - While there are no plans to use the data for regulatory purposes, the Office of Policy’s leadership considers part of its role to highlight potential sector concerns to other offices within the agency.
- Sectors: Aerospace, Agriculture, Automotive, Cement, Concrete, Chemical, Manufacturing, Construction, Electronics and Technology, Forestry, Paper and Wood Products, **Iron and Steel**, Mining, Oil and Gas, Ports and Maritime Transportation, Utilities and Power Generation.



Administrative Law Judges

- Traditionally, federal administrative law judges (ALJs) were appointed through competitive service procedures.
 - A recent U.S. Supreme Court (*Lucia v. SEC*) opinion concluded ALJs at the Securities and Exchange Commission (SEC) are “inferior officers,” and thus must be appointed by the President or agency heads under the Constitution.
- The Trump Administration issued an Executive Order exempting all ALJs from civil service, concluding that the same logic used in the *Lucia* case would apply to “some – and perhaps all” ALJs.
 - Ends competitive examination and competitive *hiring* for ALJ appointments
 - Does not alter removal procedures which are fixed by statute. Under the APA, ALJs are removable only for good cause, and this has not changed.
 - Once appointed ALJs remain tenured, career civil servants who will not change over with a new administration.
 - EO will provide agency heads considerable flexibility in appointing new ALJs, which may have significant impacts on the approach and decisions rendered by these individuals.



State Enforcement Updates



New Governor

- Governor Evers
 - Elected on November 7, 2018.
 - Sworn in on January 7, 2019.
- On January 22, 2019, declared 2019 the “Year of Clean Drinking Water.”
 - PFAS (Per- and Polyfluoroalkyl Substances) and Emerging Contaminants.
 - Nitrates in surface water and groundwater.



New Attorney General

- Attorney General Josh Kaul.
- Merged Environmental Protection Unit and Consumer Protection under the new Public Protection Unit (PPU).
 - PPU will have a single director allowing WDOJ to shift the open position of a second unit director to a new environmental attorney.
 - 6 attorneys assigned to environmental cases.
- “The creation of the Public Protection Unit is a step toward revitalizing the enforcement of our consumer protection and environmental laws.”
(Attorney General Kaul)



WDOJ Environmental Enforcement Data

Year	Fines	Expenditures (Injunctive Relief/Restoration/SEPs)
2015	\$724,768.36	\$9,000.00
2016	\$470,715.99	\$1,030,386.00
2017	\$1,450,025.70	\$260,263,500.00
2018	\$1,584,077.70	\$6,357,278.25
2019 (Quarters 1 & 2)	\$675,987.90	0



2018 Wisconsin Enforcement Actions

- Calendar Year 2018:
 - 46 State Enforcement Judgements.
 - 1 Joint State-Federal Superfund Judgment.
- Calendar Year 2019:
 - - 8 State Enforcement Judgements.
 - 1 Joint State-Federal Settlement.



2017 Wis. Act 369 – Legislative Oversight of Settlements

- 2017 Wis. Act 369 (“Act 369”) was enacted in the December 2018 Extraordinary Session (aka Lame Duck Session) and signed by Governor Walker.
- Limits the power of the WI Attorney General to unilaterally settle litigation by requiring settlements first be submitted to the Legislative Joint Committee on Finance for approval.
- Requires all settlement funds be automatically deposited into the state’s general fund.
 - Removes AG authority to expend settlement funds.



2017 Wis. Act 369 – Legislative Oversight of Settlements

- Provides ability for legislature to intervene at any time in any WDOJ litigation pending in state or federal court.
- Legal Challenges to Act 369.
 - Numerous legal challenges pending in state and federal courts
 - On 8/1/2019, WI Legislature filed suit against AG Kaul to enforce compliance with Act 369.



Guidance on Guidance - Wisconsin

- Act 369 made changes to agency rulemaking authority.
 - A guidance document cannot have the same effect as an administrative rule.
 - Requires a comprehensive review before an agency may issue the guidance.
 - Agency must post the guidance document on its website.
 - Allow for public comments.
 - Private parties may petition an agency to promulgate a rule in place of a guidance document.
- Any guidance document that has not been adopted in accordance with Act 369 shall be rescinded. (Forces agencies to reissue existing guidance documents and follow the new procedures.)
- Must provide a statutory or rule citation for any interpretation of law made in the guidance document.
- Certification by the Secretary of the Department.



Agency Deference

- WI Courts were required to defer to the experience and technical knowledge of the agency interpreting state law.
- On June 26, 2018, the WI Supreme Court issued a decision in *Tetra Tech v. Department of Revenue* that ended agency deference.
- Act 369 codified the WI Supreme Court's decision into statute and specifies that no agency may seek deference in any proceeding based on the agency's interpretation of any law.



Citizen Enforcement Trends



Citizen Science

- Citizen Science Association (CSA) recently asserted that citizen science is “Going from a pure science focus to a more law and policy focus...”
- Two areas of focus:
 - Adapt data gathering practices to better conform with current regulations.
 - Work with regulators to incorporate citizen science data into agency work.
- CSA is working with the Harvard Law School’s Emmett Environmental Law and Policy Clinic to assist with citizen science issues.



Hand-held Air Monitors and “Citizen Science”

- The availability of low-cost, hand-held air monitors that purport to accurately measure air quality (PM_{2.5}, VOCs, etc.) has increased in recent years.
- These air monitors are increasingly being used by citizens to measure air conditions (e.g., take readings at fence lines), despite questions about their reliability and accuracy.
- Both the Wisconsin Department of Natural Resources and U.S. EPA have been studying these monitors and how, if at all, data from them should be used.



Attribution Science – Climate Change Litigation

- Scientific approach purporting to demonstrate precisely how much burning of fossil fuel is responsible for worsening climate-linked developments and attribute that responsibility to specific fossil-fuel companies.
 - Concluded that 90 companies have contributed nearly two-thirds of the world's industrial emissions.
- Plaintiffs plan to sue in state courts using common law provisions including claims for public nuisance (a party is interfering with the rights of citizens) and product liability (the dangers of using a product must be communicated to the public).
- A trial began this week in a case prosecuted by the New York Attorney General against Exxon alleging securities fraud (that the company deceived investors on the future costs of climate change).



Attorneys' Fees in Citizen Suits

- Environmental groups and private citizens who prevail in lawsuits against EPA are typically entitled to attorneys' fees under the Equal Access to Justice Act and certain environmental statutes.
- U.S. DOJ has scrutinized requests for fees from environmental groups prevailing in lawsuits against the government and barred third-parties from obtaining attorneys' fees in cases that are settled with the government.



Sue and Settle

- Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements (October 16, 2017)
 - Designed to end perceived “sue and settle” practices between the EPA and ENGOs.
 - Seeks improved levels of public participation and transparency in EPA consent decrees and settlement agreements.



Questions?



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