State Of Enviro Enforcement After Trump's Deregulatory Order

By **Justin Savage, Simone Jones and Marshall Morales** (June 9, 2020)

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The Trump administration recently issued Executive Order 13924, which instructs agencies, including the U.S. Environmental Protection Agency and the U.S. Department of Justice to assist reopening businesses and address the economic impacts of the COVID-19 pandemic. The EO aims to accomplish those objectives by promoting the exercise of enforcement discretion and deregulation, provided those measures are consistent with protecting public health and maintaining safety.

Here, we outline the relevant provisions of the EO, analyze the interplay between the EO and the EPA's March 26 COVID-19-related guidance, and offer practical considerations for enforcement actions proceeding against the new EO backdrop.

Companies subject to federal environmental regulations should monitor how the EPA and other federal agencies implement the EO and its potential application in ongoing proceedings or existing consent decrees. While the EO might facilitate regulatory or enforcement relief due to COVID-19, companies should carefully consider the potential downside risks, which may include public scrutiny, media coverage and litigation.

Executive Order 13924

EO 13924, issued on May 19, directs federal agencies to promote regulatory relief during reopening of the economy following state and local stay-at-home orders. Its terms relevant to environmental enforcement actions follow.

Enforcement Discretion

Section 4 specifically contemplates agencies exercising "appropriate temporary enforcement discretion or appropriate temporary extensions of time" — measures that likely need not be specifically allowed under statute.

Rescission and Waiver of Regulatory Requirements

Section 4 also requires agencies to formally identify and invoke emergency authority under current law to modify existing regulatory requirements.

Preenforcement Rulings

Section 5(a) refers to agencies accelerating the pre-enforcement rulings allowed under EO 13892, dated Oct. 9, 2019, whereby a regulated party can request a decision from an agency as to whether planned or future conduct relative to the pandemic (e.g., particular reopening processes or disinfectant practices) complies with the law. The EO sets a July 2020 deadline for agencies to issue specific procedures for pre-enforcement rulings.

Compliance Recognition

Section 5(b) prompts agencies to issue guidance to the regulated community as to how each agency plans to "decline enforcement against persons and entities that have attempted in reasonable good faith to comply with applicable statutory and regulatory standards, including those persons and entities acting in conformity with a pre-enforcement ruling."

Economic Response

Agencies are directed generally under Section 3 "to support the economic response to the COVID-19 outbreak" and "to promote economic recovery through non-regulatory actions."

Consideration of the Principles of Fairness

Section 6 expressly directs agencies to revise their procedures in administrative adjudications to, among other things, reflect that the government bears the burden of proving an alleged violation, rather than the subject of compliance being required to prove compliance.

EPA's COVID-19 Guidance

Until the EPA provides further instruction to stakeholders on how it will implement the EO, it remains to be seen how the EO will intersect with the EPA's existing March 26 general guidance, similarly designed to provide relief in light of COVID-19, but by easing certain monitoring and reporting obligations during the pandemic. The EO's effects, if any, on EPA's related program-specific guidance on remediation likewise are unknown at this juncture.

Nonetheless, even before the EPA issues further direction, the EO provides a basis for arguing for COVID-19 relief in enforcement proceedings, including in negotiating settlements. Regulated companies may wish to urge the EPA and the DOJ to use the EO to inform their enforcement discretion in specific cases before EPA issues any more formal response.

It should be noted that the EPA's general COVID-19 enforcement guidance is the subject of litigation proceeding in the U.S. District Court for the Southern District of New York, filed by various state attorneys general and environmental organizations, with briefing underway. (See New York v. EPA and Natural Resources Defense Council v. Bodine.)

Notwithstanding the lawsuits, EPA Administrator Andrew Wheeler continues to defend the guidance vigorously against claims that it provides carte blanche to ignore environmental laws, most recently in a hearing before the Senate Environment and Public Works Committee on May 20. The guidance will continue to receive public and congressional scrutiny.

The EO in Practice

The EO may be particularly important in matters related to fees and penalties, where many statutes already instruct the EPA to consider a party's ability to pay. Although the EPA's ability-to-pay analysis typically reviews past years' financial statements, the EO may provide a basis for parties to seek EPA consideration of prospective financial information, including current and projected prevailing circumstances.

For parties subject to federal consent decrees, the new EO may inform how the DOJ responds to force majeure notices and other potential noncompliance with consent decree provisions. The EO prohibits the DOJ from accelerating procedures by which a regulated person or entity may receive a pre-enforcement ruling (EO Section 5(a)), but the other sections of the EO would apply.

In considering how the EO may apply, companies should carefully review the force majeure provisions of any decree. A final important factor may be whether the DOJ, including the Environment and Natural Resources Division, issues a policy to implement the EO.

Parties may also consider potential disclosures of noncompliance under the EPA's audit policy, which can substantially reduce penalties. Parties and trade groups should also consider petitioning the EPA or other relevant federal agencies for specific actions under this EO. Such petitions are regularly filed, so there is an established process for their review.

The deregulatory provisions of the EO require careful strategic consideration. As a threshold issue, agencies would likely assess whether a rescission or waiver request fell within its existing interpretative discretion, rather than requiring an amendment through the notice-and-comment rulemaking process.

Deregulatory actions that are subject to notice and comment are likely to move slowly because of the internal agency resources needed to issue a proposal, the time required for public comment, the U.S. Office of Management and Budget review process, and the risk of judicial review. Thus, it may be more advantageous to frame a request for relief as a new interpretation of an existing regulation, rather than a request for a regulatory amendment.

In that regard, in 2015 the U.S. Supreme Court in Perez v. Mortgage Bankers Association granted agencies more discretion to issue interpretative guidance without triggering the rulemaking process (abrogating the U.S. Court of Appeals for the D.C. Circuit's 1997 decision in Paralyzed Veterans of America v. DC Arena LP).

Another issue to consider in seeking deregulatory relief is whether the targeted regulation imposes a specific burden on reopening the economy, as opposed to a regulation that simply imposes a compliance cost. Engagement from the regulated community will be important in providing the EPA and other agencies an adequate record on which to make deregulatory determinations.

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