

A New Direction For EPA Enforcement Program

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After two decades, the U.S. Environmental Protection Agency is overhauling its enforcement framework and transitioning to a paradigm that will apply a “broader set of compliance assurance tools,” expanded state roles and a shift away from concentrating on specific industrial sectors. The EPA’s Office of Enforcement and Compliance Assurance announced this planned shift in a memorandum addressed to the EPA’s regional administrators dated Aug. 21, 2018.[1]

Dubbed “National Enforcement Initiatives,” or NEIs, under the Obama administration and “national priorities” before that, the current national enforcement priorities will be renamed “National Compliance Initiatives,” or NCIs, beginning in fiscal year 2019. According to the EPA’s OECA, the name change is intended to signal that other approaches than traditional

enforcement should be employed, and increased compliance should be the central goal of the enforcement program. Traditional enforcement approaches include conducting facility inspections, developing formal enforcement cases, issuing administrative compliance and penalty orders, and initiating civil litigation in federal court with the U.S. Department of Justice to resolve compliance issues. Nontraditional approaches include increasing the use of the EPA audit policy, training state enforcement personnel, working with industry on a voluntary basis to correct compliance issues, and providing regulatory information to the regulated community to clarify regulatory requirements.

The NEIs currently run from FY 2017 to FY 2019. The OECA memorandum outlines a process to select NCIs for a four-year cycle that will run from FY 2020 to FY 2023, which would start in the last year of the administration’s current term.

Much of the Trump administration’s environmental agenda has centered on regulatory amendments and modifications. It is unsurprising that the EPA is pursuing significant changes also in the enforcement policy realm, where the agency has much greater running room under the Administrative Procedure Act.

What Is Changing With the New Enforcement Framework?

The EPA Is Returning Older Sector-Focused Priorities to Core Enforcement

The EPA is moving away from enforcement priorities focused on particular industrial sectors. Traditionally, the agency-targeted sectors such as oil and gas, agriculture, refineries, power plants and municipalities for heightened enforcement attention based on a judgment that facilities in these sectors demonstrated compliance issues on a national scale and needed federal enforcement oversight. The EPA’s OECA has announced that it will be retiring several of the NEIs to the base enforcement program: oil and gas, agriculture (concentrated animal feeding operations), municipalities (sewer overflows), and new source review/prevention of significant deterioration issues at larger facilities.

These sectors will no longer be a focus of the federal enforcement program, but they would return to the core environmental programs that are implemented by the states in the first instance. A key rationale for returning these sectors to the core program is that the environmental compliance issues that originally made them national targets have been resolved, and compliance has been generally achieved throughout the sector.



What this means is that the EPA headquarters will no longer require regions to conduct minimum numbers of investigations and enforcement actions against entities in these sectors. The states and the EPA regional offices will have greater latitude to investigate and pursue potential noncompliance according to compliance patterns in their particular geographic areas without the previous oversight from the EPA headquarters.

The EPA Is Keeping Newer Priorities Focused on More Significant Noncompliance

The agency will continue a heightened focus on facilities with a higher risk of accidental releases (based on prior noncompliance patterns, catastrophic incidents and other more significant noncompliance), as well as noncompliance associated with hazardous air pollutants, unauthorized industrial discharges and toxic air emissions from hazardous waste facilities.

Entities with noncompliance in these programs, particularly where there are potential impacts on vulnerable populations such as urban areas or environmental justice communities could face nationally led enforcement investigations and follow-up actions if warranted. Facilities where releases have caused injuries and offsite impacts could still face substantial and high-profile enforcement consequences, including federal court proceedings involving the DOJ.

Greater Emphasis on Compliance Approaches Rather Than Traditional Enforcement — To a Degree

The EPA intends to utilize a suite of more compliance-oriented approaches in assuring compliance, as an alternative to traditional practices such as site inspections, information requests, and issuance of orders and referrals to the DOJ. These alternative tools include compliance assistance, informal enforcement, expedited settlement offers and, potentially, auditing approaches. In the past, the EPA has also deployed memoranda of agreement and other instruments as alternatives to formal enforcement mechanisms such as orders and consent decrees.

Greater use of nontraditional enforcement approaches is imperative in any event given the declining resources the EPA has experienced over the past several years. In FY 2017, the EPA had a workforce of 15,408 employees, down from 17,100 in FY2012, a drop of approximately 10 percent for an agency that across the federal family is already very small. Developing enforcement cases with field inspections and negotiating settlements, particularly with larger and more complex types of noncompliance, is a cumbersome process for all parties involved, and it often takes several years.

Compliance Assistance

Compliance assistance, such as workshops with state co-regulators and web tools, has waxed and waned over the past administrations, expanding during the George W. Bush years and declining in the Obama era. Prior to the Aug. 21 OECA memorandum, Trump administration EPA officials had emphasized that compliance assistance should take on an expanded role in the federal enforcement framework.

Auditing

Auditing and voluntary disclosures could also occupy a greater role in compliance monitoring and resolution. The agency recently announced a renewed emphasis on the federal audit policy, building on the significant success of its electronic disclosure system. The EPA has also issued a proposed framework for new owners in the oil and gas sector under the voluntary disclosure program.

New Enforcement Framework Infused by Cooperative Federalism and the Rule of Law

The OECA memorandum announcing the NCI scheme makes clear that the roles that states play in compliance monitoring and enforcement will be examined and likely expanded. This message fits with the administration's theme of cooperative federalism. In the enforcement context, that means a more active

role for state enforcement of authorized programs, which would apply to many of the NCIs remaining after the current national cycle. This takeaway particularly applies to enforcement under the Clean Air Act and Clean Water Act, as states are authorized to implement and enforce many of the regulatory programs under those laws that are involved in the remaining NCIs.

The Trump administration EPA and DOJ have also stressed that they will enforce environmental requirements within the four corners of the law, suggesting that injunctive relief that is not specifically prescribed by underlying statutes and regulations may not be pursued in new actions to implement the NCIs. Some critics of the agency's enforcement have identified the prior administration's "Next Generation Compliance" initiative as pressing injunctive relief measures outside the clear bounds of regulatory requirements.

What Is Not Changing?

Traditional Enforcement Will Still Occur

The EPA has acknowledged the importance of conducting compliance monitoring and undertaking follow-up enforcement to assure compliance, maintain a level playing field and achieve a deterrent effect. Companies should still expect to see inspections, Clean Air Act Section 114 requests, Clean Water Act Section 308 requests, and enforcement actions in the NCI areas and core programs, particularly if there is prior noncompliance with these requirements, or their facilities are located in or near environmental justice communities, nonattainment areas and impaired watersheds.

Facilities with a pattern of noncompliance or where accidental releases have occurred are also likely to face federal enforcement scrutiny. In the event of injuries or other catastrophic events, the agency would likely refer a case to the DOJ for civil judicial or criminal proceedings.

Regional Differences in Enforcement Will Continue

The EPA's enforcement framework is designed to establish broad directives for national enforcement, while allowing the EPA regions flexibility to address the unique compliance issues in their geographic area. Regions also have varying philosophies regarding the use of traditional enforcement versus other approaches to compliance assurance. For example, some regions tend to invest more resources in developing cases for referral to the DOJ, while other regions believe a larger compliance footprint can be achieved with many small administrative enforcement actions, or informal enforcement such as expedited settlement offers or even resolution of noncompliance without a written agreement.

Career Teams May Still Pursue Sector-Focused Enforcement

EPA enforcement staff have been implementing national enforcement initiatives focused on oil and gas facilities, as well as agricultural operations for a number of years. They have leveraged authorities such as the Clean Air Act and Clean Water Act to bring significant enforcement cases against upstream and midstream oil and gas operators, for example, and have developed relatively standard information requests, particularly under Section 114 of the Clean Air Act. Regulated facilities may still experience these activities from regions over the next few years, notwithstanding a programmatic shift announced by the EPA's OECA.

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[1] See "Transition from National Enforcement Initiatives to National Compliance Initiatives," Susan Parker Bodine, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance at 1 (Aug. 21, 2018).

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