

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2015

PHILADELPHIA, FRIDAY, JANUARY 8, 2016

VOL 253 • NO. 5

An **ALM** Publication

ENVIRONMENTAL LAW

EPA's Environmental Enforcement: What Will 2016 Bring?

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Special to the Legal

The U.S. Environmental Protection Agency (EPA) had a busy year in 2015, launching its Clean Water Rule, the Clean Power Plan, and proposed new rules for oil and gas operations, among other new regulatory developments. On the enforcement side, the EPA centered its efforts on achieving compliance, deterring future noncompliance and raising the bar for poor performers. In its Dec. 16 press release describing fiscal year 2015 environmental enforcement results, the EPA noted that the year was highlighted by large cases that will reduce pollution, level the playing field for responsible companies, and protect public health in communities across the country. Looking forward to 2016, companies that are subject to complex environmental regulatory programs and the practitioners who advise them can gain an understanding of EPA enforcement trends and objectives through a review of EPA's 2015 efforts and current enforcement policies.

LOOKING BACK AT 2015

Highlights of the EPA's fiscal year 2015 enforcement efforts include: \$7 billion in investments by companies in actions and equipment to control pollution and clean up contaminated sites; \$404 million in combined federal administrative, civil judicial penalties and criminal fines; \$4 billion in court-ordered environmental projects resulting from criminal prosecutions; 129 combined years of incarceration for sentenced defendants; \$1.98 billion in commitments from responsible parties to clean up Superfund sites; and \$39 million for environmental mitigation projects that provide



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direct benefits to local communities across the country, according to the EPA's website. While the EPA's enforcement numbers are substantial, they indicate a decrease in some metrics. For example, the EPA initiated fewer civil cases and launched fewer criminal investigations in 2015 than in prior years, noting that its strategy of pursuing complex, high-impact cases led to fewer actions overall. Citing an overall decrease in site inspections due to budget considerations, the EPA also notes its efforts to gather compliance data through supplemental measures in addition to "on the ground" inspections.

NEXT GENERATION COMPLIANCE TOOLS

The EPA has indeed sought to be more strategic in its enforcement efforts. In particular, the EPA's civil enforcement action settlements demonstrate its use of Next Generation Compliance tools, as directed in a January 2015 memo from Cynthia Giles to EPA counsel and enforcement personnel. Next Generation Compliance tools include innovative enforcement, advanced monitoring techniques, third-party verification of compliance with settlement obligations, electronic reporting, and public accountability through increased transparency

of compliance data. These tools, already appearing in EPA settlement efforts, have the potential to significantly change the nature and long-term effect of EPA enforcement actions for both regulated entities and the public. Perhaps most significant among the Next Generation Compliance tools are advanced monitoring and public transparency, which the EPA intends to combine in an effort to provide regulators and the public with real-time measurement of pol-

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lutants in the ambient environment. The EPA notes that advanced monitoring techniques are those that are not yet in widespread use in a particular sector or regulatory program, monitor pollutants instantaneously without the need for laboratory analysis, and provide "acceptable" data quality and completeness. The EPA envisions that collected data will provide for immediate facility response where necessary, and can be provided contemporaneously to regulators and the public through electronic or other notifications. According to the EPA: "A facility collecting real-time environmental data may be able to quickly remedy emissions or discharges

over an allowed limit or identify problematic spikes in pollution that might not be as apparent with averaged samples. Advanced monitoring is likely to be most effective when the information is immediately available to the facility operators so they can quickly investigate and respond to elevated pollution levels. Further, advanced monitoring becomes a more powerful compliance driver when the information is also provided to the EPA, states, and/or the public. Facilities are more likely to take extra caution to self-police and ensure their operations are addressing pollution problems when the information is transparent.”

Where not otherwise prescribed by applicable law, these monitoring and transparency tools are sure to raise many questions relating to the means of collecting data, the reliability of collected data, determinations of action or impact levels associated with the monitored pollutant, the legal and practical implications of data availability, and the permanence of monitoring and transparency requirements beyond the term of settlement.

In one high-profile 2015 settlement, Houston-based oil and gas exploration and production company Noble Energy resolved allegations of noncompliance with vapor control system operating requirements applicable to condensate tank systems. Among other aspects of injunctive relief, mitigation projects and supplemental projects expected to cost Noble Energy close to \$70 million, the company agreed via consent decree to install Next Generation continuous pressure monitors with continuous data collection (once per 15 seconds) on a cross-section of its 2,400 Colorado tank systems to verify that the systems are not experiencing increased pressure readings indicative of excess VOC emissions. Certain “trigger point” readings require the company to undertake immediate investigation and/or root cause analysis activities. Noble also agreed to prepare and make publicly available reports describing its vapor control system engineering evaluations and modifications, intended to provide other companies with the opportunity to learn from Noble’s findings and apply them to their own storage tank systems. A clear message to other oil and gas operations, the Noble Energy settlement raises the bar for compliance demonstration and transparency beyond current regulatory requirements.

EPA NATIONAL ENFORCEMENT INITIATIVES

In addition to its Next Generation components, the Noble Energy settlement demonstrates the

EPA’s continued progress on its fiscal year 2014 through 2016 National Enforcement Initiatives, which include reducing air pollution from the largest sources, cutting air toxics emissions from flares and equipment leaks, and ensuring that energy extraction and production activities comply with environmental laws. Other priorities are reducing pollution from mineral processing operations, keeping raw sewage and contaminated stormwater out of our nation’s waterways, and preventing animal waste from contaminating surface and groundwater. In a Federal Register Notice dated Sept. 15, 2015 (80 Fed. Reg. 55352), the EPA solicited public comment on extending and expanding these initiatives for fiscal years 2017 through 2019 to include toxics emissions from organic liquid storage tanks and hazardous waste management; curbing industrial wastewater pollutants from the mining, chemical manufacturing, food processing and primary metals manufacturing sectors; and reducing the risks and impacts of industrial accidents and releases. In enumerating these proposed priorities, the EPA again emphasized the use of its Next Generation Compliance tools, as well as its intention to focus federal resources on addressing the most important environmental problems and reducing impacts to communities.

eDISCLOSURE PORTAL LAUNCH

While the EPA intends to focus its limited enforcement resources on high-profile and high-impact cases, it has also made an effort to allow for efficient handling of routine enforcement cases through its December 2015 launch of the eDisclosure portal, which is intended to update and modernize the EPA’s handling of self-disclosed civil violations of environmental law. In recent years, the status of the EPA’s so-called Audit Policy, titled “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations,” has been somewhat unclear after the EPA’s announcement in 2012 that it would no longer dedicate resources to implementation of the policy. That announcement created unease among regulated entities that understood the substantial benefits of the Audit Policy; in exchange for meeting the enumerated criteria governing the discovery and self-reporting of environmental violations, the policy provides for full or partial mitigation of gravity-based penalties, no recommendation for criminal prosecution, and no routine requests for audit reports. The eDisclosure portal launch appears to have breathed new life back into EPA’s Audit Policy, providing a streamlined

and efficient means of addressing Audit Policy disclosures via electronic submittal, and for certain types of violations, immediate resolution of the disclosed violations. Category 1 disclosures will include violations of the Emergency Planning and Community Right-to-Know Act (EPCRA) that meet all Audit Policy conditions, other than chemical release reporting violations under EPCRA Section 304 or EPCRA violations that provided significant economic benefit to the violator. Category 1 disclosures will receive an automatic notice of determination confirming that the disclosed violations are resolved with no assessment of civil penalties. Category 2 disclosures include all other violations and will receive an automatic acknowledgement letter pending EPA’s evaluation of the disclosure. Thus, while the eDisclosure portal provides comfort that the EPA will fully apply the Audit Policy to many EPCRA violations, it does not substantively change the Audit Policy or its application to non-EPCRA violations, and its impact on those matters remains to be seen.

LOOKING FORWARD

In 2016, the EPA will continue to focus its enforcement efforts on the current National Enforcement Initiatives, including high-impact air emission sources, air toxics, energy extraction, and stormwater pollution. We can certainly expect high-profile enforcement cases, including the EPA’s civil action against automaker Volkswagen following notices of violation in September and November 2015 for the installation of emission control “defeat devices” in various diesel vehicles. Targets of EPA enforcement actions should expect to address Next Generation Compliance tools such as advanced monitoring techniques and public transparency, which will have significant impacts beyond the traditional enforcement tools of compelling compliance and payment of penalties. •

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