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EPA Enforcement: Next-Generation Compliance Program

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Special to the Legal

We may be at the dawn of a new age of demonstrating compliance with the U.S. Environmental Protection Agency's regulations. Over the last 18 months, the EPA has begun introducing several new enforcement strategies and tools, including automated compliance monitoring. The EPA refers to these efforts as its "Next-Generation Compliance" program. Although the EPA has not officially announced the NGC program, it has referred to and incorporated NGC into its strategic thinking, including its national enforcement initiatives for fiscal years 2014-16, and more recently in its draft strategic plan for fiscal years 2014-18.

Through NGC, the EPA proposes less reliance on traditional facility inspections conducted by EPA employees or contractors in favor of increased electronic or automated reporting to the EPA by the regulated parties themselves. Such self-reporting will then also be available for public review. The EPA believes that advances in automatic emissions/pollutant monitoring and information technology will provide industry, government and the public with new and better information on environmental compliance, and increase opportunities to reduce and prevent pollution.

NGC includes the following five components:



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• **Advanced pollution monitoring.**

The EPA anticipates that advanced pollution-monitoring technologies will soon be accurate and affordable enough to be deployed on a wide scale. For example, the EPA may seek to require use of infrared cameras to detect emission leaks or fence-line monitors around the perimeter of a facility to detect emissions or identify violations and promote compliance.

• **Requirements providing built-in compliance.**

This approach to compliance/enforcement includes regulatory requirements that focus on compliant technologies that reduce generation or emission of discharges, rather than requiring an individual facility to determine how to control its pollution. For example, the EPA could allow equipment manufacturers to obtain

certification that equipment meets specified standards. Users could then comply with the EPA's requirements by purchasing certified equipment and operating it in accordance with manufacturer instructions.

• **Electronic reporting.**

The EPA anticipates making better use of information technology to transition from paper to electronic reporting of permit and compliance data, and other relevant information. The EPA believes this transition will improve management of and compliance with environmental programs.

• **Increased transparency.**

The EPA anticipates making existing and new information provided electronically by automatic pollution-monitoring devices more publicly available.

• **Innovative enforcement approaches.**

The EPA anticipates incorporating NGC tools, such as advanced monitoring or electronic reporting, as requirements set forth in prospective settlement agreements.

POTENTIAL IMPLICATIONS

Though work remains for the EPA to flesh out the details of NGC, enough information has emerged to raise a host of potential questions and concerns for the regulated community.

• **Will NGC lead to enforcement actions based purely on automated electronic data?**

As part of the EPA's enforcement

goals outlined in the 2014-18 draft strategic plan, it notes that “vigorous enforcement” is crucial to advancing the EPA’s “mission to protect human health and the environment” and that “addressing noncompliance swiftly and effectively ... deters others from violating the law.” At the same time, the EPA proposes to reduce the number of site inspections it conducts from roughly 20,000 to 14,000 per year between 2014 and 2018. At first glance, reduced inspections would appear to lessen the compliance burden on regulated facilities. But less person-to-person interaction between facilities and EPA inspectors, coupled with the EPA’s stated mission to vigorously enforce the law despite fewer inspections, could lead to enforcement actions based only on automated data, devoid of any context, which, if understood by the EPA, might have eliminated the alleged violation. Furthermore, some in the regulated community are skeptical that the EPA can develop accurate detection technologies and have urged the EPA to work with industry groups as NGC efforts move forward. The regulated community should pay particular attention to the development of pollution-monitoring and detection technology, as the potential for enforcement based solely on the use of these technologies appears to be a true concern.

• **Will NGC lead to increased citizen suits?**

The EPA has already engaged in efforts to increase publicly available information regarding source compliance, updating its publicly

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accessible Internet enforcement database at the end of 2013. While the EPA has committed to increasing transparency, it has seen its enforcement budget reduced in an era of increasing government austerity. The EPA proposed in the 2014-18 draft strategic plan to reduce the number of enforcement actions that it brings over the next five years. But much like decreased site inspections, less EPA-initiated enforcement may prove to be a Trojan horse for industry. Though budgetary constraints may decrease EPA-initiated enforcement, the EPA has made clear since announcing NGC that it believes there is widespread noncompliance with and underenforcement of environmental regulations. All of the major federal environmental statutes allow affected citizens to bring enforcement actions against violators of a given statute when the EPA has not engaged in its own enforcement. Some have speculated that the EPA’s stated commitment to increasing transparency is aimed

at prompting citizens to enforce the regulations in the EPA’s stead. Regardless of the EPA’s intent, there’s no question that more publicly accessible compliance data will make it easier for citizen plaintiffs to obtain evidence necessary to initiate citizen suits.

• **Will NGC cause the EPA to regulate facilities through enforcement?**

Some of the EPA’s recent enforcement efforts signal that it is seeking to require sources to commit to automated and advanced monitoring efforts as part of settlement agreements that resolve enforcement actions. For example, recent consent decrees under two Clean Air Act programs—leak detection and repair and flaring—have consistently included requirements to conduct advanced monitoring, beyond what the applicable regulations require. If there is noncompliance with these requirements, the settlement agreements prescribe stipulated penalties that are automatically triggered to be paid to the EPA. Given this recent history and the EPA’s clear emphasis on NGC, the EPA may decide that enforcement, rather than formal regulation, is a more efficient means to promote NGC.

Businesses of all types should be on the lookout for the EPA to implement NGC in their industries, and carefully evaluate the potential benefits and pitfalls of these new compliance strategies.

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