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## ENVIRONMENTAL LAW

# Update on the EPA's 'Next Generation Compliance' Strategy

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*Special to the Legal*

Beginning in 2014, the U.S. Environmental Protection Agency (EPA) began rolling out a suite of new enforcement strategies and tools that the EPA has referred to collectively as “next generation compliance.” Next generation compliance or NGC refers to five overlapping EPA initiatives, each centered on the use of existing and emerging technology as a way to achieve greater environmental compliance by the regulated community. The five overlapping initiatives include the following: (1) built-in compliance using more effective rules and permits; (2) advanced monitoring; (3) electronic reporting; (4) increased transparency; and (5) innovative enforcement.

Shortly after the EPA began rolling out the NGC program, we wrote an article for The Legal projecting what NGC could mean for the regulated community. Now that we are several years into the program, we can evaluate how the program has been implemented to date and identify some challenges that the EPA and interested stakeholders face in the years ahead. Developments on the major components of NGC are discussed in further detail below.



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### **BUILT-IN COMPLIANCE USING MORE EFFECTIVE RULES AND PERMITS**

This NGC element is designed to encourage better compliance by the regulated community through the establishment of regulations and permits that are easily understood and that reinforce compliance as a facility's default option. To accomplish these twin objectives, The EPA has committed to using language that is easy to follow, and where possible, to incorporate technological or reporting elements that can help facilities monitor their own performance and modify

their processes when necessary to avoid noncompliance.

Over the last two years, the EPA has incorporated NGC elements into a number of rulemakings. For example, the EPA recently finalized a rule requiring petroleum refineries to install monitors that measure benzene concentrations at each facility's fenceline (i.e., the facility

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border). If the fenceline monitors show that benzene concentrations have exceeded an “action level” described in the rule, the facility must undertake certain corrective actions to reduce fenceline benzene concentrations. The EPA asserts that technology such as fenceline monitoring ensures that neighboring communities are protected from air emissions, and alerts a facility if an operational change is needed.

Another recent effort by the EPA to incorporate NGC tools into rulemaking is the mandatory use of GPS technology as part of a facility's reporting obligations. For example, under the EPA's new landfill regulations, regulated facilities will be required to report the GPS coordinates of all surface monitoring exceedances through use of a GPS device. The EPA has explained that the use of GPS technology will provide accuracy and precision that will allow for both the EPA and facilities to have a better understanding of system performance. The advanced data also could make it easier for the EPA or state inspectors to locate the exact location of a monitoring exceedance.

## ADVANCED MONITORING

One of the most important features of NGC is the EPA's increased emphasis on "advanced monitoring" technologies to provide data to regulated entities, the government, and the public on both ambient environmental conditions and facility-specific water discharges and air emissions. Although there is no singular definition of "advanced monitoring," the term generally refers to monitoring technology that is mobile, lower in cost compared to current technology, and is capable of providing instantaneous results without waiting for laboratory testing.

Advanced monitoring is an excellent example of the overlapping nature of the NGC program. As noted above, advanced monitoring-related requirements have been incorporated directly into recent EPA rulemakings applicable to the petroleum refining and landfill industries. In addition to rulemakings, the EPA has made it a priority to include advanced monitoring in settlement agreements with regulated entities, as discussed in greater detail below.

When advanced monitoring is proposed for use through a rulemaking, settlement agreement, operating permit, or enforcement order, the regulated facility should closely evaluate how the data will be used, whether the data will be made available to the public and in what format,

and whether the monitoring technology is reliable. As an example, we recently dealt with a state that is seeking to mandate the use of fenceline monitoring technology. A major problem with the fenceline monitoring, however, is that monitoring technology that can measure the particular pollutant at issue does not currently exist, nor is there a clear consensus as to how the data that would be generated should be used.

## ELECTRONIC REPORTING

Since 2013, the EPA has been operating under a policy to prioritize electronic reporting during the regulatory development process. Many of the EPA's promulgated rules since that time have included various degrees of electronic reporting. As the EPA continues to improve upon its data systems and further standardizes its electronic reporting processes, the regulated community can be sure that the trend will continue towards increased reliance on electronic reporting with varying degrees of automation.

## TRANSPARENCY

The EPA's goal under this prong of the NGC program is to provide the public with better information on pollution and its sources, in addition to documenting the performance of regulated entities subject to various environmental regulations. The EPA intends for the publicly available information generated through NGC tools to serve as a check on regulated entities that will create incentives to improve environmental performance. Given that transparency requires environmental information to be publicly available, the EPA has explained that the increased use of advanced monitoring and electronic reporting are crucial to advancing this element of the NGC program.

As the NGC program continues to move forward, regulated entities must adapt to a world where their environmental data increasingly becomes more publicly available, and as a result more subject to scrutiny. Translating the data into useful public information will be a crucial

consideration for both the EPA and the regulated community.

## INNOVATIVE ENFORCEMENT

In January 2015, EPA assistant administrator Cynthia Giles issued a memorandum to the EPA legal counsel and program personnel making clear that NGC compliance tools are to be considered for all civil and judicial settlements of the EPA enforcement matters. The Giles memo explains that NGC tools can be incorporated as part of a settlement's injunctive relief component, mitigation, or through a supplemental environmental project.

Some examples of NGC tools that have been included in the EPA settlements include installation of continuous fenceline monitors and weekly reporting of fenceline monitoring data on a publicly available website, use of infrared cameras to measure fugitive emissions of volatile organic compounds, automated release detection from underground storage tanks, and continuous transmission of monitoring data to a central location for ease of access.

Going forward, the regulated community should be aware that the EPA may seek to incorporate NGC elements into future rulemakings, permits, settlement agreements, and enforcement orders. In addition, as automated technologies continue to be made available and as government budgets continue to shrink, we expect that more states will follow the EPA's lead by incorporating NGC tools into their enforcement strategy. •

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