

Post-Election Update: Environmental Enforcement

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President Obama's re-election is expected to bring continued, aggressive enforcement efforts at the civil and criminal levels. To the extent that legislative initiatives on key issues like climate change, shale gas, and offshore drilling are delayed or given a lower priority, the Obama Administration may seek to allay environmentalist concerns through public efforts to hold industry accountable to existing laws and regulations. Several initiatives already underway – including EPA's National Enforcement Initiatives - are expected to intensify with efforts to expand the Agency's information request authorities, its facility inspection authorities, and its technical tools for enforcement. Additional, heightened environmental enforcement is expected via other agencies, including the DOE, DOI and the SEC. The outlook for environmental enforcement efforts at DOE and DOI are addressed in our reports on energy and offshore issues. Several specific areas of EPA's heightened enforcement efforts are discussed in this update.

EPA's National Enforcement Initiatives

EPA's Office of Enforcement and Compliance Assurance (OECA) has identified the following as its primary enforcement initiatives:

- Seek major capital improvements through New Source Review (NSR) enforcement at large industrial sources;
- Obtain compliance with National Emission Standards for Hazardous Air Pollutants at a wide variety of industrial sectors;
- Address municipal sewer collection systems, which will require cities to undertake substantial infrastructure expenditures nationwide;
- Tackle water discharges from concentrated animal feeding operations within the agricultural industry;
- Seek injunctive relief at mineral processing operations; and
- Develop and implement a multi-media national enforcement program targeted at the energy extraction (domestic oil and gas development) industry.

Leveraging these initiatives, we expect OECA to be a major force in setting the policies at EPA. OECA helps set policies by ensuring that new regulations and policies allow the agency to

establish liability easily and in a strict liability fashion, where possible. OECA strives to make these policies consistent with positions taken in enforcement litigation.

In the last four years, EPA has had several very public disagreements with the states, such as Texas. Over the next four years, we would expect even more high profile challenges to Texas' and other state's environmental regulatory programs. Challenges to state practices are more likely where EPA Headquarters perceives that a state's enforcement program is not adequately performing or where state and local permitting authorities issue permits or regulations that make it difficult for EPA and citizens to bring enforcement actions.

EPA's Requests for Information

Over the past two years, EPA enforcement has issued Requests for Information (RFIs) to upstream oil and gas companies with increasing frequency and scope. We expect this effort to continue. Areas of focus have been under the Clean Air Act, Safe Drinking Water Act, Clean Water Act, solid waste and public right to know statutes and even Superfund. Through these RFIs, EPA seeks a vast amount of internal company information, which is not publicly available and is highly burdensome to collect. EPA's enforcement team then uses the information provided to develop an enforcement case against the responding company. Failure to properly respond to the RFIs may result in further enforcement action and penalties. Also, unless a responding company asserts and successfully maintains confidential business information claims on its responses, the responses are often made accessible to potential plaintiffs and their lawyers who use the information in private litigation.

Industry has contended that many RFIs and facility inspections are exceeding EPA's authority. In many instances, RFIs seek information not relating to actual compliance with permits and at times can be much broader than what a court may allow in litigation.

Using Advancements in Technology and Obtaining Super-Compliance

EPA enforcement is developing and using advanced monitoring technologies, such as infrared cameras, to support bringing new enforcement cases. Advancements in air emission monitoring technology have allowed EPA to allege violations that were never contemplated before because there was no way to detect those particular emission sources in the past. As we head to a second Obama term, it is important to note that, within the last two years, EPA has used these new techniques to gather data regarding emissions from large facilities and has used that information to assess penalties and require capital improvements at those facilities. As a result, those facilities faced significant unplanned capital improvement costs. Such unanticipated capital expenditures could upset the economic viability of many industrial sites around the country.

Enforcement officials have also continued seeking "super-compliance" with existing regulations as a condition to settlement agreements. In order to avoid costly litigation, companies have agreed to pay substantial penalties and to comply with emission or discharge requirements that are much more stringent than currently required under law. These new "super-compliance" standards often become the baseline for future settlements and regulations, thus requiring an entire sector to meet ever-increasing limits established by the enforcement office.

Greenhouse Gas Enforcement

During the first-term of the Obama Administration, EPA focused on regulating Greenhouse Gases (GHGs). In its second term, EPA is expected to shift its focus to enforcement of those new

GHG regulations. To carry out this goal, we would expect EPA to develop an initiative to enforce compliance with the GHG reporting rule and to renew its focus on NSR to address GHG control technologies. This may begin at the regional level and then grow. When alleging NSR violations, EPA will likely seek to enter into new NSR settlement agreements that impose strict GHG limits and advanced monitoring requirements.

Enforcement of the renewable fuels standards is yet another area where we expect to see increased enforcement because OECA can use that enforcement action as an opportunity to issue press releases claiming credit for GHG emission reductions. In addition, EPA will likely try to reduce methane emissions from oil and gas fields by seeking NSR relief and requiring companies to install emission control technology to reduce VOCs, such as methane.