

## Part 2: Environmental Policy Under Obama: A Changing Climate in Washington

*Below is the second in a four-part series examining how environmental policy, regulation, legislation, and jurisprudence is set to change under the Obama Administration, and how these changes might affect regulated industry. The Kelley Drye & Warren Environmental/Occupational Health and Safety Practice Group counsels clients on legislative and regulatory policy, and compliance and litigation strategies under the full range of environmental and OSHA programs.*

### **SERIES 2. Increased Threat of Environmental Enforcement**

The EPA is set to undergo a major policy shift in terms of environmental enforcement from the past eight years. Many critics (whether justified or not), particularly in the environmental community, have accused the Bush Administration of not vigorously pursuing environmental enforcement. Over the course of the past eight years, EPA enforcement funding has steadily decreased, resulting in lower enforcement numbers. By all accounts, President Obama will look to halt this trend by encouraging more enforcement and better funding. As a result, regulated industry can expect to see increased activity in both civil and criminal enforcement activity.

From the outset, the Bush Administration signaled a departure from the previous Administration with respect to how EPA would conduct environmental

enforcement and regulation. Only a few days into Administrator Christine Todd Whitman's tenure at EPA, former President Bush called for Congress to set aside \$25 million from EPA's Office of Enforcement and Compliance Assurance ("OECA") budget to be used for grants to individual states to help fund their enforcement programs.<sup>1</sup> While Congress did not accede, Bush's request sent a loud signal to EPA that his Administration intended to either de-emphasize enforcement, or rely on the individual states to carry out enforcement. Either way, the tide was shifting.

Other developments early on in the Bush Administration sent similar signals. The White House abandoned the Kyoto Protocol in 2001, despite Administrator Whitman's strong support for the initiative, and pushed not to finalize a proposed standard as to the allowable concentration of arsenic in drinking water. About the same time, the White House undertook a systemic reform of its New Source Review ("NSR") program under the Clean Air Act ("CAA") by re-writing the NSR rules and slowing the pace of NSR investigations and litigation. Some have argued that the NSR "reform" was in response to significant campaign contributions and other lobbying efforts on behalf of the electric power industry, intended solely to prevent further enforcement for NSR violations in the industry. The moves to "reform" the NSR program, combined with the decision to abandon the Kyoto Protocol, were so controversial, not only within the environmental community, but among top EPA staff, that several high profile EPA officials, including

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<sup>1</sup> Mintz, Joel A., "Treading Water: A Preliminary Assessment of EPA Enforcement During the Bush II Administration." 34 ELR 10933, 10935 (October, 2004).

Administrator Whitman and Eric Schaeffer, then head of the Office of Regulatory Enforcement, resigned from the Agency shortly into Bush's first term.

EPA enforcement and inspection numbers also began to decline at the beginning of the Bush Administration. By FY02, the number of cases EPA had referred to the Department of Justice ("DOJ") for civil judicial enforcement fell by 20 percent, and the federal government's civil enforcement case settlements declined by 50 percent in FY02 compared with the average civil settlements in the three years prior. Criminal enforcement penalties also decreased from \$202 million in FY00 to \$62.2 million in FY02, while facility inspections declined from 20,417 to 17,688. This trend continued throughout Bush's tenure. Civil penalties collected by DOJ for the prosecution of environmental violations declined an average of 24 percent between FYs 2002 and 2006.<sup>2</sup> During that same time, criminal penalties declined 38 percent, while the number of complaints filed by DOJ dropped by 70 percent. The Government Accountability Office ("GAO"), in a September 2008 report, found that the total penalties assessed by EPA, when adjusted for inflation, declined from \$240.6 million to \$137.7 million between FYs 1998 and 2007.<sup>3</sup>

Not surprisingly, enforcement under specific EPA programs also declined. For example, a recent report to President Obama from the House Oversight and Government Reform Committee and the House Transportation and Infrastructure Committee indicates

a dramatic decline in enforcement actions under the Clean Water Act ("CWA"). According to the report, hundreds of CWA violations have not been pursued, civil penalties have been reduced, and existing enforcement actions have experienced significant delays. The report attributes these trends in part to the June 2006, U.S. Supreme Court decision in *Rapanos v. U.S.*, 126 S. Ct. 2208 (2006), as well as the Bush Administration's guidance implementing the decision. Rep. Henry Waxman (D-CA) stated that "the clean water program has been decimated as hundreds of enforcement cases have been dropped, downgraded, delayed, or never brought in the first place."<sup>4</sup>

In addition, Congressional funding for EPA has decreased every year since 2004, from \$8.4 billion in 2004, to \$7.5 billion in 2008. The Bush Administration, has again proposed to cut the Agency's budget for FY09 by \$330 million to \$7.14 billion, the lowest for the Agency since 1997.<sup>5</sup> All told, despite some major enforcement and regulatory successes under former President Bush,<sup>6</sup> these funding, inspection, and enforcement numbers have led many to argue that EPA has been under-funded and has under-performed.

All of this has created the perception that EPA is in need of drastic changes under the new Administration. Because the current Congress failed to act on the Agency's appropriations earlier this year, however, EPA is operating under a continuing resolution until March. The American Federation of Government Employees ("AFGE"), a labor union representing EPA employees

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<sup>2</sup> Schaeffer, Eric., "A Fresh Start for EPA Enforcement." 38 ELR 10385 (June, 2008).

<sup>3</sup> Environmental Enforcement: EPA Need to Improve the Accuracy and Transparency of Measures Used to Report on Program Effectiveness, GAO Report, September 18, 2008.

<sup>4</sup> Roeder, Linda, "Enforcement of Clean Water Act Has Declined, House members Tell Obama," BNA Environment, December 17, 2008.

<sup>5</sup> "Congress Warns EPA Funding Cuts May Hamper Key Regulatory Efforts", Inside EPA.Com, March 6, 2008.

<sup>6</sup> For example, on October 8, 2007, in an unprecedented CAA settlement, American Electric Power agreed to install \$4.6 billion in equipment to reduce emissions, as well as pay a \$15 million civil fine. Shogren, Elizabeth, NPR; Power Company to Pay \$4.6 Billion Settlement, October 9, 2007.

has already suggested EPA seek \$9 billion for FY09. In a letter responding to the AFGE letter, President Obama vowed to bolster EPA enforcement and scientific integrity, writing that “EPA’s mission to protect the environment has slowed, and in some cases, has been jeopardized outright. This is due to the failed leadership of the past eight years . . .”<sup>7</sup> It is unlikely Congress will amend the appropriations bill drafted last year meaning that EPA’s FY09 funding will likely remain low. That said, it is clear that Obama intends to transform the Agency. All eyes will be on EPA’s upcoming funding request for FY10, which likely will also include increases in infrastructure spending under the new stimulus bill, as it will provide a good indication of how serious Obama is about heightening EPA activity. For now, regulated industry can expect a substantial increase in EPA enforcement activity over the coming years.

### **Environmental Law/Occupational Health and Safety Practice**

Kelley Drye’s Environmental/Occupational Health and Safety Practice Group specializes in providing comprehensive solutions for complex problems to facilitate effective business strategies. We provide both advice and representation for clients participating in rule-making and policy-making activities by federal regulatory agencies, including the U.S. Environmental Protection Agency, the Occupational Safety and Health Administration, the U.S. Fish and Wildlife Service, and the U.S. Army Corps of Engineers.

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<sup>7</sup> InsideEPA.com, “Not Alone at EPA”, November 17, 2008.