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EPA In The Trump Era: Enforcement And Compliance Changes

By **Wayne D'Angelo** (February 26, 2018, 4:40 PM EST)

Since President Donald Trump took office just over one year ago, much has changed at the U.S. Environmental Protection Agency. In this Expert Analysis series, former EPA general counsels and agency members discuss some of the most significant developments and what they mean for the future of environmental law in the U.S.


Wayne D'Angelo

Full disclosure: I was not an attorney when I worked at the U.S. Environmental Protection Agency. By day, I served as the director of strategic planning and advance in the administrator's office and later as a clerk in the general counsel's office. By night, I was a highly-caffeinated law student at George Mason University who was profoundly grateful to the classmates who took notes on the many nights I was working late or visiting an EPA regional office.

Every material action at the EPA passes through the administrators' office and the general counsel's office. So, if you asked me at the time, I would have told you with utmost conviction that I was a central figure in all the major environmental policy initiatives of President George w. Bush's first term. With the wisdom of hindsight and a bit more humility, I am now equally certain I was not.

Nonetheless, my time in the administrator's office really helped me appreciate the circumstances — real or imagined — that drive the environmental policy oscillations between administrations. My responsibilities including arranging and attending meetings and press events with regulated entities, trade associations, environmental and community groups, and EPA employees in every region allowed me to see and touch a number of important issues. More importantly, I heard firsthand — often at high volume — what people thought of the EPA and the Republican administration that had taken over its leadership.

Regulated entities would politely listen to our plans for high-level policy changes, but when it came time for Q&A, they would let loose thundering frustration about wholly unrelated EPA inspection or enforcement actions that they viewed as unfair. Not to be outdone, environmental groups would boisterously denounce any effort to devote agency resources to compliance assistance.

We know little about the Trump EPA's approach to enforcement and compliance, and yet many have

offered conclusions by parsing that scant data. Having been at the EPA during a major swing between administrations, my opinion is that it is far too early for verdicts. This administration has barely arranged its architecture. The assistant administrator for the EPA's Office of Enforcement and Compliance Assurance (OECA) was confirmed less than 90 days ago, regional administrators have not yet been appointed for each regional office, and dozens of midlevel appointments remain unfilled.

Even with a full roster of presidential appointments, the EPA's diffusely held enforcement power does not lend itself to abrupt changes. The EPA's investigative and enforcement powers are dispersed among hundreds of EPA personnel across 10 regional offices — it is a massive ship with many rudders that make even modest coarse corrections slow and complicated.

Indeed, while fiscal year 2017 enforcement figures show year-over-year declines in the number of inspections and enforcement actions, the EPA still conducted nearly 12,000 inspections/evaluations, initiated hundreds of enforcement matters, and saw substantial increases in criminal and civil penalties. Again, the EPA's enforcement machine does not turn on a dime, and a year of enforcement data does not establish a trend — particularly when that year straddles the administrations of President Barack Obama and President Donald Trump.

While the first 12 months may not have forever cemented this administration's approach to environmental enforcement and compliance, year two of the administration is as good a time as any to offer a few first impressions.

Changing Approaches

The EPA's approach to enforcement and compliance is largely reset by each new administration because the rules governing the EPA's exercise of enforcement discretion are mostly embodied in guidance materials which lose effect as easily as they come into existence. New administrations may borrow from previous efforts, but each ultimately set their own course.

Under President George W. Bush, the OECA focused on compliance assistance, sector engagement and expansion of audit and self-disclosure policies. Under Obama, the OECA focused on modernizing and expanding the EPA's investigatory and enforcement tools — like desktop data analysis and enhanced monitoring technology and techniques. Under Trump, the OECA will likely focus on …

Cooperative Federalism? In January 2018, the EPA's new Assistant Administrator for OECA, Susan Bodine, directed the EPA's regional offices to plan and coordinate inspections and enforcement actions with states that have been designated enforcement authority. The guidance also instructed regional offices to defer to state enforcement authorities and to only initiate enforcement actions independent of the states when specific criteria were met.

This guidance has been maligned (and cheered) as a sign that the EPA is offloading its enforcement role on the states. While I believe that the guidance is meaningful, I don't view it as particularly controversial because ceding enforcement deference to states does not amount to federal abandonment of the field. Cooperative federalism is already mandated in several environmental statutes, and every state enforcement program that would be afforded deference pursuant to this guidance has already been reviewed by the EPA and specifically granted authority over enforcement and compliance.

Indeed, it is entirely rational that states be afforded discretion to interpret the permits they wrote and access compliance at the facilities they better understand. In private practice, I have repeatedly

encountered circumstances where EPA enforcement personnel who played no role in negotiating or drafting a state-issued permit will bring an enforcement action based on an interpretation of the permit that is wholly inconsistent with the interpretation of the state permit writers. Although certain circumstances occasions may warrant this "overfile" approach, more often it simply makes enforcement less efficient and obligations less clear.

More Centralized Investigatory Decisions? In May 2017, the EPA issued guidance establishing new procedures for regional offices to issue information collection requests, or ICRs under the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act. Under the policy, the EPA regions must obtain approval from headquarters to issue an ICR that requires sampling or testing. Headquarters approval is also required when the region has no specific indication of a potential violation, and when there is disagreement between the regional office and a state with delegated enforcement authority.

While I recognize that constraints on the EPA's investigatory powers can undermine compliance, this memorandum does not impose any meaningful constraints. To begin with, the guidance does not prohibit the issuance of an ICR — it merely adds a procedural step in three reasonable circumstances. It is entirely prudent to require HQ approval before issuing an ICR to a company that is not believed to be in compliance. In fact, it can help the EPA improve the dialogue with those in the regulatory community who believe (rightly or wrongly) that ICRs have been used as fishing expeditions. It is equally reasonable that the EPA take an extra step to ensure that the agency's issuance of an ICR imposing sampling and testing costs is necessary.

It is also reasonable to require HQ approval when the ICR is in pursuit of an alleged violation with which the state disagrees. Again, this condition only applies to those state programs to which the EPA, after scrutinizing review, has granted enforcement authority. It hardly seems impertinent to require some modest additional scrutiny before clawing back some of that authority.

Clear Violations of Laws and Statutes? In January 2018, the U.S. Department of Justice issued a memorandum directing its civil litigators to limit their use of agency guidance in civil enforcement actions. According to the memorandum, the DOJ will no longer use noncompliance with guidance documents as a basis to prove statutory or regulatory violations. Guidance documents can be used to explain or interpret legal mandates, but "cannot create binding requirements that do not already exist by statute or regulation."

This memorandum is particularly important in the context of environmental compliance and enforcement because the EPA frequently issues notices of violations for alleged noncompliance with agency guidance or informal interpretations. Knowing that the DOJ will no longer accept referral of enforcement cases based on alleged violations of agency guidance and informal interpretations, the EPA will likely bring fewer such cases, and these decreases will be reflected in annual enforcement statistics. Notwithstanding any short-term decreases that may result, I believe, in the long view, this approach stands to deliver a significant environmental benefit.

Regulated entities do not comply with the requirements that they don't know about or understand. Regulations, promulgated through notice and comment rulemaking, provide that knowledge and understanding. Regulations also provide a level of certainty that guidance does not. While the regulations can be undone through subsequent rulemaking, they remain far less ephemeral than guidance. Companies make investment decisions on time horizons that bear no relationship to election cycles, and shun the volatility of the guidance documents that are most vulnerable to political whims. That is not to say that the regulated community favors more regulation. Far from it. The industries and

companies with whom I work, however, crave certainty and predictability far more than they fear any particular regulation.

Compliance Assistance? Assistant Administrator for OECA Susan Bodine has begun to outline plans to improve regulatory compliance through "informal enforcement" procedures under which EPA inspectors can identify compliance issues to companies and provide them an opportunity for prompt correction. Granting that there are circumstances where "informal enforcement" would be inappropriate, having participated in a number of environmental compliance audits at complex facilities, I can attest that even the most attentive company can be tripped up by an open-parts washer, unmarked drum or misplaced record. While all known violations need to be addressed, I don't believe that every observed violation should result in an enforcement action — particularly when issuing a citation would impede abatement and sap agency resources. As further caution for those grading OECA based solely on enforcement statistics — here again is an approach that will likely result in fewer enforcement actions but also probably improve compliance.

OECA is also likely to improve compliance through increased utilization of the EPA's audit policy. The audit policy provides companies penalty mitigation incentives to identify and self-disclose potential violations. The program was extensively utilized by the regulated community in the George w. Bush administration, but less utilized during the Obama administration. The audit policy does not amount to "self-policing" and it does not provide violators any free passes. In fact, companies must meet numerous strict conditions and deadlines, while also abiding by any state-mandated conditions and deadlines. The penalty mitigation can be significant, but it is well-earned by the participating companies. Indeed, the audit policy provides a boon to the EPA. Companies incur the costs of investigation, and disclose and correct violations that the EPA may never have discovered and that companies may not have otherwise corrected. And because the audit policy requires cooperation between the regulators and the regulated, enforcement and legal fees are minimized while an incredibly important dialogue is started.

Conclusion

In sum, my experience inside a first-term EPA leads me to caution those parties that would draw early and definitive conclusions about this administration's approach to enforcement. Enforcement statistics matter, but they are not a proxy for environmental protection. Although enforcement statistics make for easy talking points, environmental groups should not forget that the real goal is compliance. To that end, those regulated entities that misconstrue this administration's efforts to improve compliance as an opportunity to shun their obligations are taking an enormous risk, and missing an even bigger opportunity. At a time when the EPA is seemingly focused on compliance assistance, facilities should be equally focused on availing themselves of this assistance. Companies should use the EPA's sector engagement opportunities to help agency staff better understand their operations and compliance difficulties. Companies should also consider rising out of their defensive crouches to figure out ways to improve their environmental compliance and stewardship, including auditing their compliance programs and, if necessary, disclosing potential violations pursuant to the EPA's audit policy.

Wayne J. D'Angelo is a partner and co-chair of the energy practice at Kelley Drye & Warren LLP in Washington, D.C. He previously served as a presidential appointee at the EPA working directly for the administrator and general counsel.