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EPA updates priorities: first time in years

by Tom Boer and Sam Brown

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The U.S. Environmental Protection Agency has selected new national enforcement initiatives that will direct inspection and enforcement resources for at least the next three years beginning in October. This is the first time in five years that the EPA has updated its initiatives.

Under these new initiatives, the EPA will apply additional enforcement resources to target the chemical manufacturing, metals manufacturing, mining and food processing industries. It will increase inspections at all facilities subject to the Clean Air Act general duty clause requirements, particularly where it believes there may be a risk of catastrophic releases. The EPA will also continue or expand its enforcement focus on concentrated animal feed operations and industrial facilities with substantial air emissions.

This announcement is particularly important because the EPA is highlighting where it will target its limited enforcement budget. Industry in relevant sectors can expect increased inspections in the coming years and faces an overall greater risk of federal and state enforcement actions. The announcement, however, provides industry with an advance opportunity to prepare for increased scrutiny, address environmental compliance issues and decrease the risk of enforcement in the coming years.

Impact of Declining Budget

EPA's budget declined by approximately 20 percent between FY2010 and FY2015. With falling resources, the EPA has committed to do more with fewer dollars. In its FY2015 budget, the EPA recognized the "tight fiscal climate at both the federal and state level" and committed to "focus federal enforcement on the most important environmental problems where noncompliance is a significant contributing factor and where federal enforcement attention can have a significant impact." Under this approach, the EPA has stated that its top enforcement priority will be "large, complex cases that require significant investment and long term commitment." Although the EPA pursues fewer cases under this approach, the agency has concluded that the "strategy leads to significant environmental and health gains."

Enforcement data confirms the EPA's focus on larger matters by showing a decreasing number of cases being resolved annually but with civil penalties, on average, higher. For example, in FY2015 the EPA concluded approximately 2,300 civil judicial and administrative cases and collected approximately \$205 million in penalties. In FY2011, however, the EPA concluded more cases — approximately 3,000 — but collected less in total civil penalties, amounting to around \$162 million.

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A shrinking budget has also reduced physical inspections. Between FY2011 and FY2015, the number of annual inspections decreased from just under 20,000 to about 15,000. To compensate, the EPA has said it will “pursue additional means to gather information about facility compliance.” One focus is the EPA’s Next Generation Compliance strategy where advanced emissions and pollutant detection technology may be required for regulated industry so the government, and the public, can more easily track environmental parameters and assess potential noncompliance. The EPA also aims to further leverage its limited enforcement resources via the use of technology. As a result, sectors identified in EPA’s enforcement initiative may be at a substantially increased risk of inspection compared to prior years and those inspections may be more thorough and use more advanced technologies.

National Enforcement Initiatives

The EPA reviews its national enforcement initiatives on a three-year schedule and selects initiatives based upon its identification of “national environmental problems where there is significant noncompliance with laws, and where federal enforcement efforts can make a difference.” In the coming years, the EPA will pursue seven enforcement initiatives, including two new initiatives, a new focus for an existing initiative, and continued pursuit of four of its prior initiatives. Two new initiatives are:

Industrial pollutants. The EPA will focus enforcement priority on discharges from specific industries — including chemical manufacturing, metals manufacturing, mining and food processing — to reduce unauthorized discharges of industrial wastewater. The EPA will target enforcement by using water pollution data, including permit information collected by regulated industry. This aligns with new EPA rules mandating electronic compliance monitoring reporting to provide regulators with a timelier and nationally consistent set of data about industrial wastewater discharges. The EPA is also requesting that authorized state programs provide the EPA with electronic copies of documentation about facility compliance — including inspection reports, water quality data, and notice of violation — by the end of the year.

Reducing risks of accidental releases. The EPA will increase efforts to prevent catastrophic accidents and explosions that threaten employees and emergency responders, and release chemicals that threaten human health and the environment in neighboring communities. This initiative will target the prevention of accidents by ensuring that facilities are conducting and documenting required training, equipment maintenance, inspections and other precautions to reduce the risk of any release. The EPA will particularly focus on facilities located in low-income or minority communities.

In support of its initiative goals, last month, the EPA proposed revisions to rules implemented under the Clean Air Act that will impose additional requirements on certain facilities storing toxic or flammable chemicals.

The EPA will expand or continue focusing inspection and enforcement resources on four areas that were originally identified as priorities in 2011:

- It is expanding its existing enforcement initiative targeting toxic air pollution emissions. This initiative has focused on reducing the emissions of hazardous air pollutants from leaks and flares. The EPA’s expansion will also target large product storage vessels, impoundments and facilities that generate, treat, store or dispose of hazardous wastes. Particular scrutiny will be applied to compliance with leak detection and repair requirements at regulated facilities.
- It will continue to ensure that large industrial facilities, like coal fired power plants and acid, glass and cement manufacturing facilities, comply with Clean Air Act requirements when building new facilities or modifying existing ones.
- Also, the EPA will continue to scrutinize energy extraction activities, particularly in the natural gas sector, for emission violations.

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- In the water program, the EPA will continue to pursue unpermitted municipal raw sewage and storm water discharges that threaten water quality, including from industrial facilities that discharge into municipal systems.
- The EPA will continue to target violations at large agricultural facilities — called concentrated animal feeding operations — that impair natural resources or adversely impact communities.

Although these initiatives guide the deployment of the EPA's resources, they also influence state enforcement trends. The EPA will include these new initiatives in an update to national guidance documents and it is expected that many states will coordinate their enforcement priorities with the EPA.

Steps to Take Now

Companies with activities that fall within any of these initiatives should expect increasing scrutiny from the EPA and state regulators. EPA enforcement staff will implement the new initiatives by developing new priorities to scrutinize subject sectors. As a result, industry should not assume that the lack of recent inspections or the failure of regulators to pursue emission exceedances previously reported under various permitting programs means they will not be subject to enforcement under the new initiatives.

Regulated facilities in targeted sectors should proactively identify and correct any compliance deficiencies. Generally, facilities in targeted sectors should consider the benefit of conducting third-party auditing in consultation with legal counsel. Such audits can identify areas requiring further compliance effort and, if deficiencies are identified, facilities may also benefit from self-reporting of any noncompliance.

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