Environmental Protection in the Trump Era

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Environmental Protection in the Trump Era.

CHAPTER 9:

Cutting Enforcement of Environmental Law

Federal agencies and Department of Justice attorneys have considerable discretion in deciding whether, when, and how to enforce regulatory requirements, and enforcement priorities often change with a new administration. The **Trump Administration's stated support for deregulation** and its early plans to dramatically cut EPA's enforcement budget **suggest likely cutbacks** in federal **environmental enforcement,** and federal oversight of state enforcement, in the coming years.

Process.

Federal environmental laws establish a broad array of enforcement tools to help ensure compliance, including:

- agency notices of violation;
- agency orders requiring cleanup, compliance, or assessing civil penalties; and
- judicial proceedings for civil penalties, cost recovery, injunctions, or criminal sanctions.

The agency charged with administering a specific statute determines whether to initiate an enforcement action. If the case involves judicial proceedings (civil or criminal), the Department of Justice (DOJ) represents the agency in court and settlement negotiations. **Most civil environmental enforcement cases are resolved by settlement** between the parties.

Federal-State Relationship in Enforcement. In some areas, notably requirements governing activities on federal lands and prosecution of federal crimes, federal agencies have exclusive or near-exclusive enforcement authority. Under many federal pollution control laws, states with delegated and approved programs have the primary role in implementation and enforcement, but the federal government oversees state programs and has concurrent enforcement authority**. EPA and states enter into and periodically review Memoranda of Agreement governing implementation** of these delegated or approved programs, including enforcement practices. EPA's "Revised Policy Framework for State/EPA Enforcement Agreements" describes the **circumstances that would give rise to federal enforcement**: when state enforcement is untimely or inappropriate; a state requests federal enforcement; a national legal precedent is involved; or there is a violation of a federal order or consent decree.

Areas to Watch

Federal Agencies. While the Administration has not yet detailed its environmental enforcement approach, agencies will likely establish new enforcement priorities that refocus resources among regulated activities and industries. For example, current EPA priority areas that might be deemphasized include natural gas extraction/production and water pollution from animal waste. The Administration might also change course on federal agencies' efforts to integrate environmental justice considerations into enforcement and other regulatory actions (see Chapter 13).

In addition to revising enforcement priorities, there are myriad ways DOJ, EPA, and other agencies might curtail federal enforcement. Deregulatory pressures in enforcement can take different forms, including:

- the initiation of fewer actions;
- slower schedules for bringing enforcement actions;

Agency Discretion. Agencies and DOJ exercise prosecutorial discretion in **deciding which enforcement cases to pursue with their limited resources** and how to conduct those cases. Relatively few provisions in the major environmental laws have been found to impose a mandatory and enforceable duty to undertake an enforcement action. Agencies also establish written policies that guide their enforcement decisions in specific types of cases. In lawsuits challenging agency enforcement decisions or policies, courts generally apply a presumption in favor of agency discretion, and look to the particular statute to determine whether Congress has constrained that discretion.

Federal agencies also may establish broad priority areas for focusing enforcement resources. EPA, for example, selects "National Enforcement Initiatives" every three years.

Discussion.

In short, **federal agencies have considerable discretion as to whether and how to pursue enforcement of federal laws**. The Trump Administration is likely to exercise this discretion by **revising the enforcement priorities** within each agency, pursuing a **more limited environmental enforcement role** across federal programs, and **reducing its oversight of states' efforts to enforce** those programs where states have primacy.

The impacts of weaker federal enforcement will generally be greatest in states with less active enforcement programs and on issues where federal agencies have exclusive or near-exclusive authority to enforce federal requirements (e.g., Department of Interior regulation of offshore oil and gas development or illegal wildlife trade). Criminal prosecutions could be affected significantly by a smaller federal presence, given the prominent federal role in that area.

Areas to Watch

- decreased penalty demands or more relaxed compliance schedules in consent agreements; and
- decreased federal oversight of state permitting and enforcement efforts.

Congress. Congress might also seek to weaken enforcement generally by continuing to cut federal agency budgets and staff (see Chapter 10), or by enacting substantive legislation—e.g., to curtail existing enforcement authorities or reduce monitoring/reporting requirements. For example, H.R. 622 ("Local Enforcement for Local Lands Act"), introduced in January, would terminate the law enforcement function from the Bureau of Land Management and U.S. Forest Service and authorize local law enforcement to carry out federal responsibilities. Another House bill, H.R. 732 (the "Stop Settlement Slush Funds Act") and companion Senate bill (S. 333), would limit the use in settlement agreements of SEPs and other payments by defendants that do not "directly remed[y] actual harm" caused by the defendant.

Opportunities for Public Engagement.

Some **federal laws allow the public to review and comment on the proposed resolution of an enforcement matter**—e.g., the Clean Water Act requires public notice and an opportunity to comment on civil penalty orders, while RCRA (the federal solid waste law) requires notice and comment and an opportunity for a public meeting on proposed settlements.

More generally, DOJ has issued by rule its formal policy of providing the public an opportunity to comment on a proposed consent decree before judgment is entered by the court. The **public may also have an opportunity for input on an agency's proposed enforcement priorities. Fo**r example, EPA took public comment and solicited feedback from stakeholders prior to finalizing its 2017-2019 National Enforcement Initiatives.

Most major federal environmental laws authorize citizens to bring suit to enforce the laws themselves where the government has failed to take action. In addition, under the Administrative Procedure Act, citizens are generally authorized to bring suit against the federal government to challenge agency actions that are procedurally or substantively unlawful. Citizen enforcement can be expected to increase in the event of a decrease in government enforcement. Where federal or state government action has been initiated, citizens or environmental groups also may be able to intervene as a party and play a direct role in pursuing the violations, including involvement in settlement negotiations.

Action Areas to Watch. *Federal Agencies.* While the Administration has not yet detailed its environmental enforcement approach, agencies will likely establish new enforcement priorities that refocus resources among regulated activities and industries. For example, **current EPA priority areas that might be deemphasized include natural gas extraction/production and water pollution from animal waste.** The Administration might also change course on federal agencies' efforts to integrate environmental justice considerations into enforcement and other regulatory actions (see Chapter 13).

In addition to revising enforcement priorities, **there are myriad ways DOJ, EPA, and other agencies might curtail federal enforcement**. Deregulatory pressures in enforcement can take different forms, including:

- the initiation of fewer actions;
- slower schedules for bringing enforcement actions;
- decreased penalty demands or more relaxed compliance schedules in consent agreements; and
- decreased federal oversight of state permitting and enforcement efforts.

Looking at actions underway, the agencies might delay resolution of those cases or reach settlements that are less aggressive. The Administration might also advance a less aggressive approach to enforcement through reduction in agency staff or through reorganization of enforcement responsibilities within the agency. Federal agencies might also **reduce their funding and technical assistance to the states**, making it more difficult for states to fill enforcement gaps. Agencies can change their approach to enforcement directly through written or informal policies. For example, the Department of Justice recently **moved to restrict the use of supplemental environmental projects (SEPs), a mechanism where polluters pay** some settlement funds to a third party to carry out environmental remediation or conservation work. A June 5, 2017, Memorandum from the Attorney General prohibits settlement payments to third parties unless expressly authorized by statute or unless the payment "directly remedies the harm that is sought to be redressed."

DOJ applied the new policy several weeks later to change the terms of a court-entered consent decree in a Clean Air Act case that the Obama Administration brought against Harley-Davidson Motor Co. The substitute decree filed by DOJ is identical to the original settlement terms except that it *removes* a requirement for the company to carry out a $3 million penalty mitigation project to reduce air emissions from woodstoves.

Congress. **Congress might also seek to weaken enforcement generally by continuing to cut federal agency budgets and staff** (see Chapter 10), or **by enacting substantive legislation – e.g., to curtail existing enforcement authorities or reduce monitoring/reporting requirements** For example, H.R. 622 ("Local Enforcement for Local Lands Act"), introduced in January, would terminate the law enforcement function from the Bureau of Land Management and U.S. Forest Service and authorize local law enforcement to carry out federal responsibilities. Another House bill, H.R. 732 (the "Stop Settlement Slush Funds Act") and companion Senate bill (S. 333), would limit the use in settlement agreements of SEPs and other payments by defendants that do not "directly remed[y] actual harm" caused by the defendant, similar to the limitations imposed by the recent DOJ memorandum.

Following are **other bills introduced in 2017 that threaten the ability of citizens and public interest groups to directly enforce environmental laws** or to ensure that federal agencies are fulfilling their legal obligations:

- H.R. 3131 (Endangered Species Litigation Reasonableness Act), introduced in the House of Representatives on June 29, 2017, **would amend the Endangered Species Act to impose new limitations on attorney fees** in cases brought under the Endangered Species Act (ESA). It does so by subjecting fees under the ESA to the Equal Access to Justice Act, which imposes several limits on fees paid by the United States government. Specifically, it generally limits the hourly rate for attorney fees to no more than $125/hour, eliminates fees when the government's position is "substantially justified," and limits the type of individuals or organizations that can receive fees. Currently, attorney fees under the ESA are not subject to these limitations.

- H.R. 985 ("Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act") would **add new barriers to class action suits in federal court** and to federal multi-district litigation—two different procedural pathways for grouping the claims of individual plaintiffs. The changes to the class action process include raising the bar for class certification and delaying or capping fees for class counsel. This bill was passed by the House on March 9 and is now pending before the Senate.

- H.R. 720 and S. 237 (The "Lawsuit Abuse Reduction Act") would **modify the sanctions provision of the Federal Rules of Civil Procedure by making sanctions for "frivolous" lawsuits mandatory rather than a tool that can be used at the discretion** of the district court judge. Under this bill, sanctions must include reimbursement of all reasonable expenses due to the violation necessitating the sanctions; the sanctions may also include case-specific consequences, such as dismissing a case, or the levying of additional penalties for deterrence purposes. The bill would also make it impossible for a party to avoid sanctions by withdrawing the objectionable claim or other action within 21 days, as can be done under the present rules. This bill was passed by the House on March 10 and is pending before the Senate.