Examining EPA’s Transparency Trend and Regulatory Enforcement

In 2016, the Environmental Protection Agency (EPA) launched its Next Generation Initiative to promote transparency, improve online access to information, and increase monitoring activities. The agency also issued a new National Enforcement Initiative focused on storage tanks. Collectively, these initiatives have introduced new resources for the public to amass an ever-increasing amount of facility and industry data. John King of Breazeale, Sachse & Wilson will review these initiatives, exploring the various mechanisms by which the public may utilize the information, such as citizen suits and/or class action damage claims and share ways in which companies can minimize these potential risks.

ABOUT THE SPEAKER

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EXAMINING EPA’S TRANSPARENCY TREND AND REGULATORY ENFORCEMENT

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OUTLINE

- Next Generation Compliance
- Enforcement Priorities
- FY18 Budget

- Data and information is kept at the facility
- Data and information is sent to/available to EPA/state
- Data and information is available to the public
- Data and information is created by the public
- Uncertainties

- In General
- Community Panel?

- EPA’s modern approach to compliance which takes advantage of new tools and approaches

- “Next Generation Compliance is an integrated strategy, designed to bring together the best thinking from inside and outside EPA on how to structure regulations and permits combined with new monitoring and information technology, expanded transparency, and innovative enforcement.”

- Next Gen “will better motivate the regulated community to comply … and inform the public about their performance.”

- Most importantly, [Next Gen] will help ensure that all Americans … have access to information that allows them to more fully engage in environmental protection efforts.”

- Five interconnected components
Next Generation Compliance: 2014 – 2017
(October, 2014)

- **More Effective Regulations and Permits**
  - “Move us towards improved compliance as the ‘default’ option”
  - Offers “real time information to communities … [to] help inspire facilities to improve compliance”

- **Advanced Monitoring**
  - Technologies, such as infrared cameras, will be identified to make the “invisible visible”
  - “Help the public … find pollutant discharges, environmental conditions, and noncompliance”
BACKGROUND – NEXT GENERATION COMPLIANCE

Next Generation Compliance: 2014 – 2017
(October, 2014)

- **Electronic Reporting**
  - Allows government to “spot pollution and compliance issues and respond quickly”
  - “The default assumption for new regulations”
  - Allows the public to “more quickly identify violations, and then more quickly address them”

- **Transparency**
  - Provides the public with better information about “the performance of regulated sources”
  - Allows the public to assess impacts
  - Allows the public to “act … to hold facilities accountable and advance environmental justice”

- **Innovative Enforcement**
  - Can use Next Gen to identify serious violators
  - Use data sets to focus monitoring and enforcement
BACKGROUND – NEXT GENERATION COMPLIANCE

Next Gen in Rules

  - Requires a publicly accessible web-site with plans, reports, and compliance items
  - Preamble flatly states that criminal penalties exist for posting false information
  - Leaves enforcement primarily to citizens via citizen suits

  - First-ever requirement for fenceline monitoring to measure benzene emissions
  - Benzene above ‘action level’? Perform root cause analysis, corrective action
  - Maintain large amounts of data at the facility, which must be accessible within 24 hours
    Sample results for monitors
    Documentation of all corrective actions taken
  - Upload certain data to EPA

• 2016 Oil & Gas Methane Rule - 81 FR 35824 (June 3, 2016)
  - PE certification and electronic reporting
  - Digital picture reporting

  - Third-party audit after reportable release
  - Public availability of information through easily accessible means, such as web-site
BACKGROUND – NEXT GENERATION COMPLIANCE

• Settlements - Giles Memorandum, January 8, 2015
  - Calls on all EPA regions to use Next Gen in civil enforcement settlements
  - Tools to incorporate in settlements are:
    Advanced monitoring
    Third party verification
    Electronic reporting
    Public accountability through transparency of compliance data

• Compendia of Next Generation Compliance Examples
  - Examples of EPA’s use of Next Gen in settlements
    Available on EPA’s web-site
  - Enbridge Consent Decree, September, 2016
    Required to assess alternative leak detection technologies
    Report results to EPA
  - Nevada DOT, July, 2016
    Upgrade water quality monitoring devices to provide continuous monitoring
    Transmit all data to central location
    Upload to publicly available platform
    Must prominently post certain documents on its public web-site
    May remove after one year
BACKGROUND – ENFORCEMENT PRIORITIES

• National Enforcement Initiatives for 2017 – 2019
  - Announced February 18, 2016
  - Beginning October 1, 2016

Air
  • Reducing Air Pollution from the Largest Sources
  • Cutting Hazardous Air Pollutants (Expanded initiative for FY17-19)

Energy Extraction
  • Ensuring Energy Extraction Activities Comply with Environmental Laws

Hazardous Chemicals
  • Reducing Pollution from Mineral Processing Operations (Returning to base program level in FY17)
  • Reducing Risks of Accidental Releases at Industrial and Chemical Facilities
    (New initiative for FY17-19)

Water
  • Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation’s Waters
  • Preventing Animal Waste from Contaminating Surface and Ground Water
  • Keeping Industrial Pollutants Out of the Nation’s Waters (New initiative for FY17-19)
BACKGROUND – ENFORCEMENT PRIORITIES

• Cutting Hazardous Air Pollutants
  - Used advanced monitoring and found that emissions are greater than permitted/estimated
  - Focus on leaks, flares, and excess emissions from industries
  - Expanded to include air emissions from large product storage tanks
  - Focus on identifying and addressing violations of LDAR for product storage tanks

• Ensuring Energy Extraction Activities Comply with Environmental Laws
  - Need to assure energy sources developed in an environmentally protective manner
  - Some techniques for NG extraction pose a significant risk to public health and the environment
  - Continue to address pollution through greater use of …
    Advanced pollution monitoring
    Reporting techniques
    Next Generation technologies (infrared cameras to make the ‘invisible visible’)

• Reducing Risks of Accidental Releases at Industrial and Chemical Facilities
  - Focus on reducing risks of accidents through innovative accident prevention measures
FY18 BUDGET

EPA Fiscal Year 2018 Justification for Appropriation Estimates, May 2017

• Budget

- Overall budget reduced by $2.6B ($8.2B to $5.6B)
- Grants to states reduced about $700M ($3.6B to $2.9B)
- Environmental Program & Management reduced about $900M ($2.6B to $1.7B)
- Employees reduced 25% to 11,611

• Enforcing Laws and Ensuring Compliance

  - Compliance Monitoring
    Field inspections and assistance will focus on programs not delegated to states
    Will provide targeted oversight and support to states
    FY18 Budget: $87.2M

  - Civil Enforcement
    Focus on direct implementation responsibilities and the most significant violations
    Direct implementation - programs not delegable, states do not have authority
    Significant violations - those with substantial impacts to human health
    FY18 Budget: $143.3M

  - Criminal Enforcement
    Focus on the most egregious cases
    That is, those with significant human health, environmental, and deterrent impacts
    FY18 Budget: $44.5M
LEGAL IMPLICATIONS

Data and information is...

- kept at the facility
- sent to/available to EPA/state
- available to the public
- created by the public
LEGAL IMPLICATIONS

Data and information is kept at the facility

- Historically, regulations required the creation of an operating record that must be maintained at facility
- Recent rules require retention of very detailed information
  - Petroleum Refinery Rule
    Record-keeping requirements for storage vessels, flares, and monitoring
    As to fenceline monitors, required to maintain …
    Coordinates of all fenceline monitors
    Meteorological information
    Sample results for each monitor
    Documentation of corrective action
  - 2016 Oil & Gas Methane Rule
    Each well completion
    Any deviations from rules during completion
    Generally, maintain all these records for five years
    Allows some electronic record-keeping
    Any electronically submitted record may be maintained electronically (O&G Rule)
    Format must be readily accessed within 24 hours (PR Rule)
    Records available in citizen suit or damage claim
LEGAL IMPLICATIONS

Data and information is sent to/available to EPA/state

- General considerations
  - Validity of data
    Hard to refute when you submit your own data
    Usually submitted with certification attesting that it is true and correct
  - Criminal
    28 USC §1001 – false statement to federal official/agency
    False reports?

- Enforcement
  - Administrative actions
    Notice of Violation
    Consent Order
    Compliance Order
    Penalty Assessment
  - Judicial
    Formal enforcement action filed in a court
LEGAL IMPLICATIONS

Data and information is sent to/available to EPA/state

- Site visits or inspections
  - Continued non-compliance could (probably will) prompt a visit
  - Potentially leads to more violations and more enforcement

- CAA §114 Letter
  - Easy way to obtain more information about what is occurring at facility

- Placement on list of violators
  - ECHO contains a list of violators and classifies violations (e.g., HPV)

- Confirm/raise EPA suspicions about compliance?
  - In Pet. Refinery Rule, EPA stated that exceedence of action level presupposes “facility estimate of … HAP emissions was not accurate,” 79 FR 36919-36920 (June 30, 2014)
  - “Perimeter or fenceline monitoring provides an indicator of the level of emissions at refineries and is a way to ground-truth fugitive emission estimates.” EPA Presentation to SAB, June 13, 2013
LEGAL IMPLICATIONS

Data and information is available to the public

- Internet
  - Company maintained web-sites (e.g., CCR Rule, RMP Rule)
  - EPA’s web-site

- FOIA/public records request
  - Agency must maintain records under a retention policy
  - Public may obtain upon request
  - Savvy NGOs/plaintiff lawyers may obtain documents to maintain own files

- Subpoena to facility to obtain operating record
  - Available in a judicial proceedings
    - Citizen suit or damage claim
  - Required format may make it difficult to claim records are hard to compile
LEGAL IMPLICATIONS

Data and information is available to the public

Citizen action

- Citizen suits
  - Used to enforce laws/regulations when agency is not doing so
  - Two main types of citizen suit provisions
    - Suit against company to enforce law
    - Suit against government to perform a non-discretionary act
  - Limitations
    - Notice to company and agency is required prior to filing suit
      - Possibility of correction prior to legal action
    - Suit is barred if agency is ‘diligently prosecuting’ a suit for same violations
      - *Gwaltney*: “wholly past violations”
    - Standing to sue

- Public hearings/comments
  - Information can be used as basis for opposition to modification/expansion
LEGAL IMPLICATIONS

An event ...

Such as a release or spill

Causes ...

‘Harm’ or nuisance to people in surrounding area

Resulting in ...

Shelter-in-place
Evacuation
Medical bills
Mental anguish
Lost wages

- Usually based on state law tort principles
- Available compliance/emission data can be obtained and used against company

-Negligence - violations of regulations could mean failure to fulfill a ‘duty’
-Fenceline monitoring in PR Rule establishes amount of benzene
-Emissions data may be used for modeling purposes
LEGAL IMPLICATIONS

Data and information is created by the public

- “Citizen science includes public participation in scientific research and many other activities designed to improve the public’s understanding of their environment, including local air quality.”

- Next Generation Air Monitors (NGAM): EPA is developing new air measurement technologies, including sensors, to increase the ability of individuals and communities to learn about their local air quality.

AirCasting App  
AirCasting Air Monitor  
CairClip air sensor
LEGAL IMPLICATIONS

Uncertainties

• Future of Next Gen?
  Will Next Gen concepts continue to be placed in rules or settlements?
  Will Next Gen concepts be removed from rules?
  With less money, will EPA rely on Next Gen?

• How will the FY18 Budget affect federal enforcement?
  Less federal enforcement in delegated areas, like CAA/NPDES?
  More citizen suits?

• How will the FY18 Budget affect state enforcement?
  Will states charge more fees/assess more penalties to fund state action?
  Will states reduce regulatory burdens?
  Will states return delegations to EPA?
  More citizen suits?
  More complaints, such as odor, to force state to conduct an inspection?
PROTECTIONS

• Comply with the applicable rule
  - Document all efforts
  - Lower emissions as much as possible
    Less emissions in plant mean less at fenceline or in community
  - Be aggressive in finding and addressing leaks/releases from valves, seals, etc.

• Conduct internal audits, monitoring, and modeling
  - All under attorney-client privilege
  - Use infrared cameras to detect unknown problems, leaks, or emissions
  - Modeling of …
    Projected emissions may help refine design to reduce emissions
    Permitted emissions may provide defense or information

• If possible, use provisions of rule to help with defense
  - PR Rule allows collecting background samples
    Could show that offsite source is contributing to exposure
  - PR Rule gives some flexibility on location of monitor
    Closer to center of plant if all monitors external to sources
    Creates separation between monitors and community
PROTECTIONS

- Consider forming a community panel to provide accurate and truthful information to neighbors
  - Provide monitoring results?
  - Provide modeling results?

- Develop trust over time
  - Get them to report issues to you versus agency

- Attempts to gain trust may be (have been?) undermined
  - EPA EJ workshops as part of PR Rule served to heighten ‘us v. them’ mentality
  - NGOs demonize fossil-fuel
  - Information will only ‘confirm’ pre-dispositions that company is ‘evil’
TAKEAWAYS

Data will be collected, stored, and made available to the public and agencies

• Part of ongoing trend of transparency
• Uncertainty regarding continued use of Next Gen concepts and level of enforcement

Be prepared

• For an increasing amount of scrutiny and activity by the public
• For additional inquiries and/or inspections by agencies
• For additional litigation in the form of citizen suits and/or damage claims

Protect yourself

• Comply with rule
• Check compliance with rule through internal audits, monitoring, and/or modeling
• Reduce emissions as much as possible
QUESTIONS?

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See also
'Emission Shaming' - EPA's Latest Compliance Tactic And How To Protect Yourself
by John B. King
Available at
www.bswllp.com and www.bswenviroblog.com