

EPA Signals Enforcement Direction Shifts

The EPA has made public an April 30 memo from the acting assistant administrator for the Office of Enforcement and Compliance Assurance (OECA) to the national and regional enforcement managers that signals clear and specific enforcement policy expectations, at least in the stressed communities and environmental justice context (referred to herein as the EJ enforcement memo or the memo). And while the specific subject of the memo is enforcement's approach in support of greater environmental equity, there are multiple and notable references to overall enforcement policy direction.

The memo is "assuming current resources" and does not contain bold new initiatives, although there are references to planned focus on environmental justice in connection with "national initiatives" and a reference to the prospect for use of "additional resources" in the community involvement context. The April 30 memo is very much a "what we can do right now" agenda, but goes into the "hows" of enforcement in ways that almost certainly point to future approaches in these areas at EPA. [The memo is available here.](#)

This summary discusses the key developments in the memo.

More and More Comprehensive, Targeted Inspections

The memo starts with an expectation that EPA field personnel will evaluate, target, and inspect facilities that present the greatest opportunity to address pollution impacts, especially in stressed communities. While acknowledging the limitations imposed by the COVID-19 pandemic and touting the continued "use of offsite compliance monitoring tools" like information requests, the clear message is that well-designed and planned inspections are expected to increase in number and rigor particularly in traditionally overburdened communities.

Emphasis on Early and Fulsome Injunctive Relief, with a Renewed Enthusiasm for "Next Generation" Tools

In addition to an increased virtual and physical enforcement presence, the memo places strong emphasis on the use of enforcement to achieve results in communities where violations are contributing or have contributed to adverse impacts. It follows closely on the heels of a similar memo dated April 26, 2021: [Using All Appropriate Injunctive Relief Tools in Civil Enforcement Settlements](#). The April 26 memo (not specific to the environmental justice context) in effect re-embraces the use of such injunctive relief as fence line monitoring (as in regularly sampling for environmental impacts at a facility's boundary), third-party oversight of comprehensive corporate compliance programs, and other "next generation" approaches articulated in a January 8, 2015, policy. The April 26 memo also supersedes an April 3, 2018, memo that had expressly deemphasized this type of injunctive relief and had superseded the 2015 policy. The [Appropriate Use of Compliance Tools in Civil Enforcement Settlements Memo](#) is [provided here](#).

Taken together, these documents clearly indicate an expectation that EPA enforcement case teams will likely seek broad and creative injunctive relief in settlements, and particularly in cases involving adverse impacts on stressed communities, with a keen eye toward the use of creative solutions designed to make a real life impact on human health and the environment in these communities.

Expectations for Civil Penalties

While there is only one reference to civil penalties in the EJ enforcement memo, the reference is clear and unqualified. Enforcement teams are expected to "seek penalties." While the EPA over the last few years has not clearly stated major new policies relating to penalties in civil enforcement, as recently as October 19, 2020, the EPA's assistant administrator for OECA was quoted as saying,



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“... at one end are persons who are trying to comply but need help understanding. For those we ... forego penalties. At the other end are persons who violate the law despite knowing”

It seems likely that the express, unqualified reference to seeking civil penalties in the April 30 memo represents a clear embrace of classic deterrence-based use of statutory penalty tools, without a separate approach of providing penalty relief for the cooperative but uniformed member of the regulated community. Therefore, parties found to be in violation should expect that the EPA will seek robust penalties as permitted by law.

Focus on Mitigation and Potential for Supplemental Environmental Projects

Beyond classic injunctive relief to promote compliance, the EJ memo encourages requirements that redress the harms caused by violations. This can be achieved through injunctive relief or administrative orders providing for the mitigation of the violations or Supplemental Environmental Projects (SEPs) which are projects that, as part of settlement, EPA will provide some penalty relief for all or some of the cost of a project voluntarily undertaken by the violator which has a general nexus to the violations at issue.

While mitigation relief has not been constrained through policy, the use of SEPs previously was halted in judicial cases by determination of the Department of Justice.

The Department of Justice, on February 4, 2021, formally rescinded several policies relating to environmental enforcement, including the March 12, 2020, policy effectively halting SEPs in civil settlements with private defendants. However, the fate of the December 16, 2020, DOJ rule on the subject is not yet resolved. The December 16, 2020, DOJ rule effectively sought to outlaw SEPs both as a matter of constitutional law on the grounds that Congress, not the executive branch, has the power to appropriate funds. In addition, DOJ took this action based on the Miscellaneous Receipts Act that, according to critics of SEPs, requires every federal penalty dollar must be deposited to the Department of Treasury and not diverted to voluntary environmental projects. Because the government’s position on SEPs remains open, the EJ enforcement memo simply expresses hope for the availability of such tools in judicial cases. While the official approach to SEPs remains in limbo, we expect that the EPA will seek to incorporate meaningful environmental outcomes via the concept of mitigating the harm of the violations — an approach that is provided for in the law and does not run up against the same potential legal hurdles of SEPs — in the short term. The DOJ rule on SEPs is [available here](#).

State Oversight and Approaches to “Co-Regulators”

In yet another policy area where the EJ enforcement memo may signal broader policy direction, the April 30 memo addresses approaches to state (and other co-regulators) enforcement actions. Specifically, the memo says “If there is a situation where a community’s health may be impacted by noncompliance, and our co-regulator is not taking timely and appropriate action, we should not hesitate to step in.” While this is hardly a particularly aggressive approach to the so-called “overfiling” situations, it may be significant that the memo expressly distances itself from any inconsistency contained in OECA’s July 11, 2019, [Guidance Enhancing Effective Partnerships Between the EPA and the States in Civil Enforcement and Compliance Assurance Work](#). That memo refers to a policy of “general deference” to State enforcement decision-making. Certainly, the EJ enforcement memo sends a signal to state and local environmental regulators that the EPA will be more likely to intervene in a situation in an underserved community to the extent that the state or local approach to enforcement is materially lacking in penalty and/or corrective action.

Higher Profile and Enhanced Communication

The EJ enforcement memo does not break new ground on community outreach and engagement, noting instead the existing communications framework for cleanup programs and a hope that new resources could permit similar mechanisms for other types of enforcement. Interestingly, it touts the use of press communications and releases. It notes the public availability of considerable enforcement data and generally encourages proactive citizen assistance for the use of available relevant data bases.

Conclusion

As the EPA continues to implement its enforcement responsibilities while integrating its political leadership and reflecting the administrator's priorities, expect increasingly clear indications of how, when, and why EPA will conduct enforcement and compliance activities. The April 30 EJ enforcement memo, in context with other recent developments, gives an early look at how key enforcement policy directions are likely to go. And it will continue to be smart to stay ahead of EPA enforcement through sound corporate compliance programs, self-compliance audit and correction programs and, where appropriate, self-disclosure to EPA/state regulators to mitigate the risk of penalties. While these concepts are valuable in any context, companies with operations in areas that the agency may consider to be of environmental justice concern (which can be determined using EPA screening tools) should consider expediting such actions as they prepare for an EPA-signaled increase in federal, state, and local enforcement oversight. At present, the EPA utilizes its EJ Screen tool to determine which areas may be disproportionately impacted by adverse environmental conditions and uncorrected violations. The EPA Screen tool is available [here](#). In addition to the Biden administration's express focus on environmental justice, certain states have or soon may seek to address these concerns. For example, in October, New Jersey passed a wide-sweeping law incorporating environmental justice into environmental permitting process and decisions. See Cozen O'Connor's prior alert on this New Jersey development [here](#). As the Biden administration continues to emphasize action to address environmental concerns in underserved communities, we can expect to see additional federal guidance and even sharper state focus on addressing environmental disparities.

Cozen O'Connor attorneys are available to assist clients in evaluating how these new shifts might impact their businesses and how to mitigate enforcement risk in this changing environment.