

EPA's New Enforcement Priorities Target the Energy Extraction Industry

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As many interested environmental and industry groups have lauded and bemoaned respectively, the Environmental Protection Agency ("EPA") recently finalized its enforcement priorities for 2011 through 2013. While some goals (namely, new source review, mineral processing, air toxics, and concentrated animal feeding operations) appeared as priorities on the 2008 - 2010 list, EPA has added "energy extraction" pollution as a new enforcement initiative. This priority, specifically targeting Eastern mountaintop mining operations, oil and natural gas wells, and other gas shale play activities, has the potential to place new burdens on two already heavily regulated industries.

EPA published its final determination of priorities on February 22, 2010, after soliciting public comment in the Federal Register on January 4, 2010 (75 F.R. 146)(the public comment period ended on January 20). In the final, pared-down list, EPA's Office of Compliance and Enforcement named the following "National Enforcement Initiatives for FY 2011-2013,"¹ reducing the number of priorities from previous years:

- Keeping raw sewage and contaminated stormwater out of our nation's waters
- Preventing animal waste from contaminating surface and ground waters
- Cutting toxic pollution that affects communities' health
- Reducing widespread air pollution from the largest sources, especially the coal-fired utility, cement, glass, and acid factors
- Reducing pollution from mineral processing operations
- Assuring energy extraction sector compliance with environmental laws

All goals but the last have been on EPA's list since 2008. The addition of energy extraction may be understood in part by EPA's priority selection process. EPA's Office of Enforcement and Compliance Assurance ("OECA") reached out to other EPA divisions and regions, state governments, Indian tribes, environmental media, environmental advocacy groups, environmental justice policy groups, and the public. OECA seems particularly receptive to groups such as EarthJustice, Appalachian Voices, and the Sierra Club, whose public comments praise EPA's actions in targeting coal-fired power plants but encourage using multiple means to restrict coal mining and its alleged pollution of groundwater and injurious air emissions. These groups further suggested that EPA increase oversight of state agencies that are "chronically underfunded and frequently overmatched by powerful polluters with deep pockets."

These environmental groups' concerns find expression in EPA's background report on energy extraction enforcement. By its own admission, the agency believes that enforcement should be increased for mountaintop mining and oil and natural gas operations merely because these areas are expanding. In what it terms "an unprecedented acceleration of oil and gas leasing and development," EPA believes drilling, mining, and related development threatens the safety of drinking water, groundwater, and ambient air.

The Energy Extraction priority specifically targets Region 3 mountaintop mining sites, citing environmental justice concerns. The report recounts that 26 of the 28 currently permitted sites surround either low income

communities or environmentally sensitive ecosystems. Impacts of these operations are claimed to be degradation of stream and river quality, drinking water source risk, disappearing streams, hazardous air pollutants (such as benzene, toluene, formaldehyde, volatile organic compounds, and nitrous oxides), and disparate effects on minorities and low income communities.

Oil and gas operations are similarly identified as a major concern. The "pace and intensity of energy development in the intermountain west" has caught the EPA's attention. Regions 6 and 8 are targeted for concerns with natural gas, including air toxics, ozone, greenhouse gases, water disposal, truck traffic, and construction or pipeline noise. Oil and gas operations are also blamed for water treatment plants' exceedances of total dissolved solids limits. In this regard, some in Congress have made no secret of their distrust of shale and other gas drilling techniques. Representatives Henry Waxman (D-CA) and Edward Markey (D-MA), both of the House Energy and Commerce Committee, have made repeated proposals to require operators to disclose to EPA the chemicals employed in the fracturing and drilling process.

EPA proposes to remedy these purported environmental ills by increasing enforcement activities under a web of already mandated statutory obligations. OECA lists its preferred tools for increased enforcement as the Clean Air Act ("CAA"); the Clean Water Act focusing on §§402 and 404 permits ("CWA"); the Safe Drinking Water Act ("SDWA"); the Oil Pollution Act ("OPA"); the Spill Prevention, Control and Countermeasures ("SPCC") program; Underground Injection Control programs; and the Resource Conservation and Recovery Act ("RCRA"). Not surprisingly, EPA's report makes no mention of the fact that most if not all mountaintop mining and oil and natural gas operations are already required to satisfy these environmental protection programs, including increasingly more stringent permitting programs.

Oddly enough, compliance assistance is mentioned only briefly as a means to remedy the perceived impairments caused by the energy extraction sectors. EPA, it seems, is far more ready to extol "targeted enforcement at facilities coupled with an enhanced deterrence effect" than outreach aimed at helping companies understand their statutory obligations and meet their environmental protection duties.

The OECA budget for 2010 is far more than hype, however. In its fiscal year 2010 budget, EPA touts a \$32 million increase in the OECA allotment, to over \$600 million. The budget report includes money for additional enforcement staff to help meet these new enforcement goals. Improving compliance is the single largest line item in EPA's environmental stewardship program. This large increase in funds committed to enforcement may give the agency even more manpower and resources to target and impede mountaintop mining, oil, and natural gas operations.

In order to combat EPA's new initiatives, management must be more vigilant than ever. Taking a proactive approach to avoid environmental violations will be the first defense. Operations may also face an increased need to contest administrative violations and penalties. Compliance assistance and planning may also help decrease the risk of crippling enforcement actions. Attorneys in Dinsmore & Shohl's Natural Resources Practice Group have substantial experience in assisting these targeted industries with prevention, planning, and enforcement defense.

(1) For descriptions of each priority, see <http://www.epa.gov/compliance/data/planning/initiatives/initiatves.html>.