

Robinson+Cole

Environmental + Utilities



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## Environmental Enforcement Actions Could be Curtailed by New DOJ Policy

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In a shift of federal policy with potentially sweeping implications for civil enforcement, the U.S. Department of Justice (DOJ) recently announced it will no longer rely on guidance documents as the basis for bringing enforcement actions. The DOJ, rather than the agencies themselves, oversees and prosecutes a host of government cases that meet certain penalty thresholds. The new policy is particularly significant for environmental enforcement actions, which often reference requirements laid out in agency guidance, as opposed to formally promulgated regulations and statutes. Agency guidance is not subject to formal rulemaking procedures, however, and as a result cannot create legally binding requirements. When regulations and statutes are ambiguous or vague, the government often invokes agency guidance for clarification, specificity, and detail. The Environmental Protection Agency (EPA), for example, utilizes guidance documents to guide private party remediation efforts at Superfund sites and to effectuate the enforcement of Superfund settlements and unilateral administrative orders. Clean Water Act and Clean Air Act matters, including mobile source and new source review cases, rely heavily on agency guidance. At a time when federal agencies are pulling back on their regulatory frameworks, and repealing individual regulations, let alone promulgating new ones, the agencies' inability to rely on guidance could have far-reaching implications for their enforcement efforts.

The new policy is another business-friendly action on behalf of the Trump administration and the Attorney General's office. Attorney General Jeff Sessions laid the foundation for the new policy in a November 16, 2017, memorandum ([Guidance Policy](#)) stating the DOJ would cease the practice of issuing guidance documents that purported to create binding requirements. The DOJ made clear its position that such guidance documents do not fit within the lawful exercise of regulatory power, and "evad[ed] required rulemaking processes by using guidance memos to create de facto regulations." The Guidance Policy outlines a series of principles which should be followed to ensure that guidance documents do not inappropriately circumvent the rulemaking process.

On January 25, 2018, the DOJ issued a further [memorandum](#) clarifying the scope of the Guidance Policy, in particular establishing that the policy applies broadly to DOJ enforcement actions as well. Because "[g]uidance documents cannot create binding requirements that do not already exist by statute or regulation," they will no longer be used to prove violations of applicable law. In affirmative civil enforcement (ACE) actions brought by the EPA and the Department of Labor, among other agencies, effective immediately the DOJ will not "use its enforcement authority to effectively convert agency guidance documents into binding rules."

Though not all agency guidance is covered by the new policy, the EPA and other agencies will have to carefully consider whether its reliance on guidance in enforcement matters will be supported by the DOJ. Agency guidance, however, will continue to play an important role in the relationship between regulators and the regulated. The policy makes clear that guidance is still integral in "educating the public" by explaining or paraphrasing the law, and, in the enforcement context, a party's familiarity with guidance may serve as a basis to establish knowledge of particular requirements. "However, the Department should not treat a party's noncompliance with an agency guidance document as presumptively or conclusively establishing that the party violated the applicable statute or regulation."

While the new policy is prospective, defense counsel should carefully scrutinize the stated basis for

agency enforcement in pending cases, whether they involve a notice of violation, an administrative enforcement proceeding, or even in settlement negotiations. And while the new policy prohibits agencies from affirmative use of guidance in enforcement matters, it in no way limits or undermines a defendant's ability to cite compliance with guidance as a basis to avoid or mitigate penalties.

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The attorneys of Robinson+Cole's Environmental, Energy + Telecommunications Group represent clients in a variety of enforcement matters. For further information regarding this matter, please contact one of the lawyers listed below or another member of our Practice Group:

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