

INSIGHTS

DOJ ENRD Memo Blog Series: Enforcement Principle 2: “Enhancing Cooperative Federalism”

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On March 12, 2018, Acting Assistant Attorney General for the DOJ’s Environment and Natural Resource Division (“ENRD”), Jeffrey H. Wood, issued a U.S. Department of Justice (“DOJ”) memorandum titled “Enforcement Principles and Priorities” (the “Wood Memorandum”). The Wood Memorandum identified seven enforcement principles for the ENRD. We discussed portions of the Wood Memorandum in our April 19th and April 30th posts. Today, we will discuss the second principle, “Enhancing Cooperative Federalism.”

Enhancing Cooperative Federalism

The third enumerated principle in the Wood Memorandum discusses the relationship between ENRD and state governments in fulfilling environmental enforcement responsibilities.

Federalism is a system of government in which the federal government, the States, tribes, and local governments retain distinct, specified lawmaking powers.

The term “*cooperative federalism*” describes a system that “allow[s] the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.”^[1] This grants the States flexibility in implementing regulations developed by federal agencies—pursuant to lawmaking authority reserved for the federal government—provided that the States adhere to the minimum requirements of the programs.

Aligned with the precepts of cooperative federalism, many environmental laws already enable states and tribes to assume the primary enforcement role. The major pollution-protection statutes – for example, the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act – were structured to facilitate delegation of authority to the states and tribes provided that the implementing statute is at least as stringent as federal statutory requirements. State environmental agencies, in particular, assume this role—a [June 2017 Environmental Council of the States paper](#) found that states have assumed more than 96 percent of this delegable authority.^[2] In some instances, disagreements between the levels of government over specific enforcement matters have caused the federal government to step in and enforce in those instances in which the federal government perceives that a lower level of government is not enforcing adequately (See *Harmon Industries, Inc., v. Browner* and related decisions for examples of this practice, commonly referred to as “overfiling”).

Mr. Wood's memorandum notes this delegation framework and emphasizes that states often resolve environmental matters without the need for any federal involvement. But, in those instances in which the ENRD is involved in an enforcement action, Mr. Wood outlines principles that aim to strengthen the relationship among states, tribes, local governments, and the ENRD.

Informally, where ENRD maintains sole enforcement authority, Mr. Wood wants the division to "seek and consider input from affected states and tribes" and coordinate as much as practicable. More formally, the Memorandum directs ENRD to consider filing joint civil complaints. The most high-profile example of this type of joint action arose from the Deepwater Horizon Oil Spill where ENRD and the states of Alabama, Florida, Louisiana, Mississippi, and Texas filed a joint-complaint against the defendant.. ENRD and Colorado provide a recent example of joint action. The government filed a joint complaint against an energy company alleging Clean Air Act violations. ENRD joined Colorado to enforce Colorado Air Quality Control Commission requirements related to volatile-organic-compound emissions ("VOCs") at alleged to have occurred at the defendant's condensate tanks in the Denver-Julesburg Basin.

The Wood Memorandum did not expand on the criteria for filing such complaints, but notes their effectiveness and cited a [January 2017 joint enforcement guidance document](#) prepared by the National Association of Attorneys General and ENRD in support of the practice.

The cited document, *Guidelines For Joint State/Federal Civil Environmental Enforcement Litigation*, does not prescribe when filing a joint enforcement is proper; rather, the *Guidelines* explain how joint enforcement can be effectively executed. It considers state and federal coordination efforts, case-management tactics, and information-sharing practices.

The Wood Memorandum's focus on cooperative federalism is consistent with the views of EPA and the States on the issue. Cooperative federalism features prominently in EPA's [2018-2022 Strategic Plan](#), which establishes cooperative federalism as one of the three core goals for the agency over the next five years. Within the purview of cooperative federalism, EPA has proposed two objectives:

1. Improve environmental protection through shared governance and enhanced collaboration with state, tribal, local, and federal partners using the full range of compliance assurance tools.
2. Listen to and collaborate with impacted stakeholders and provide effective platforms for public participation and meaningful engagement.

The first objective is particularly significant in the context of enforcement. The objective outlines a series of initiatives to help clarify the Agency's statutory role and its state and tribal oversight responsibilities in ways that aim to reduce the burden on states and tribes and maximize EPA's return on investment. The Strategic Plan positions enforcement activity within a broader scheme of compliance assurance measures such as compliance assistance and monitoring, electronic reporting; grants to states and tribes, and tribal capacity building. To this end, one of the plan's strategic measures is to "increase the number of grant commitments achieved by states, tribes, and local communities" by September 30, 2022.

Notably, Susan Parker Bodine, the Assistant Administrator of EPA's Office of Enforcement and Compliance Assurance (OECA) provided additional guidance in a January 22, 2018 memorandum, [Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States](#). The interim guidance requires each Region to meet with senior leadership in each of its states to facilitate the cooperative federalism goals set forth in the Strategic Plan. Ms. Bodine states that EPA will typically defer to authorized states to implement delegated programs, but she identifies several situations that may warrant EPA involvement. Nevertheless, Ms. Bodine notes that EPA's involvement should only occur *after* "close communication and involvement of upper management of both agencies." Some of the situations where EPA involvement may be warranted include:

- Program audits indicate a deficiency in the State program or a state has demonstrated significant noncompliance
- Emergency situations
- Actions that require specialized EPA equipment or expertise
- Federal and State owned/operated facilities
- Actions to consistently address widespread noncompliance problems in a sector/program (such as the National Enforcement Initiatives), to address companies with facilities in multiple States, or where there are cross-boundary impacts affecting other States, tribes, or nations.
- Program oversight inspections
- Serious violations that need to be investigated and addressed by the EPA's criminal enforcement program

The States are equally engaged on this issue. The Environmental Council for the States—the group that represents state environmental agency leaders—released a June 2017 paper, [Cooperative Federalism 2.0: Achieving and Maintaining a Clean Environment and Protecting Public Health](#). The scope of the paper extends beyond enforcement issues and sets forth principles to guide the role of the States and the federal government related to all aspects of environmental regulation. Key principles include:

- Although the EPA should continue to lead in setting and adopting environmental regulations, the States should be engaged in EPA's process of developing these regulations and the requirements regarding the implementation of regulations.
- States are the preferred implementing entities for delegated federal environmental programs. Where states decline to be the implementing entity or fail to appropriately implement environmental programs, EPA should be the lead implementing entity.
- States should have flexibility to determine how to implement delegated federal environmental programs and EPA should involve the States early in this process to

benefit from their experience.

- States should be the primary enforcement authority for delegated federal environmental programs, but have the ability to access federal enforcement authorities when appropriate.
- States should share information related to delegated federal programs transparently with EPA and the public regarding state environmental action and outcomes.

The paper also lists several issues particularly relevant to Cooperative Federalism including:

- EPA should ensure that adequate capital and operating resources are provided to the states.
- States should focus resources on providing compliance assistance to regulated entities in addition to appropriate enforcement. Both are important for compliance assurance.
- EPA should focus metrics related to the implementation of federal regulations on accomplishing the desired outcome of the federal program instead of measuring accomplishment of tasks

Given the consistent emphasis on cooperative federalism, the Wood Memorandum appears to signal that states will assume a more prominent role in driving enforcement priorities and outcomes as ENRD and EPA implement measures related to this issue. States may gain flexibility in determining which enforcement issues warrant attention and receive the most enforcement resources. These measures may also provide greater clarity to regulated entities in identifying the agency with primary enforcement responsibility. Going forward, states may increasingly assume this role and serve as the clear party for regulated entities to engage to resolve potential violations. A critical aspect of this dual approach is funding. A key issue is whether state and local environmental authorities' budgets are rising commensurately with these responsibilities.




The Wood Memorandum guides federal enforcement officials on how to navigate circumstances where state officials take an assertive stance on particular enforcement cases. Likewise, the Wood Memorandum limits the ability of state officials to argue that the threat of "overfiling" from the federal government necessitates that a regulated party accept a harsher resolution.

This post was the third article in our series on the principles and enforcement priorities set forth in the Wood Memorandum [[prior posts](#)]. Our next post in this series will focus on the third principle in the Wood Memorandum: "Exercising Pragmatic Decisionmaking."

In addition to our coverage of the DOJ and other enforcement-related topics through this series of postings, many of these topics and related topics will be discussed at our Spring 2018 Environmental Law Seminar on May 9, 2018 at Bracewell's Houston office. The seminar will feature discussions with Ann Navaro, Counselor to the Solicitor at the U.S. Department of the

Interior, and Dr. Michael Honeycutt, Director of the Toxicology Division at TCEQ and Chair of EPA's Science Advisory Board, as well as other speakers and Bracewell attorneys. Panel topics will include:

- *Interior: An Inside Look at Policy and Regulatory Developments*
- *EPA's Science Advisory Board: A New Era*
- *Singles and Doubles: What's on Deck for NSR Reform*
- *Infrastructure: The Legal and Political Challenges to Stimulating and Streamlining Development*
- *Trends in Transactions*

For those interested in learning more about the Spring 2018 Environmental Law Seminar or determining if you are eligible to register for the event, please contact Christy Kobeski at christy.kobeski@bracewell.com or (206) 204-6224   .

[1] *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 289 (1980).

[2] *Cooperative Federalism 2.0*, Environmental Council of the States (June 2017), available at <https://www.ecos.org/wp-content/uploads/2017/06/ECOS-Cooperative-Federalism-2.0-June-17-FINAL.pdf>.