



ENVIRONMENTAL ESSENTIALS FOR
IN-HOUSE COUNSEL: “NEXT
GENERATION” ENFORCEMENT AND
COMPLIANCE

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Environmental Essentials
for In-House Counsel
Webinar Series

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AGENDA

- **The Mechanism:** What is Next Gen compliance? Five interconnected components plus one “honorary” element
- **The Targets:** EPA’s proposed National Enforcement Initiatives (f/k/a “Enforcement Priorities”)
- **How to Respond:** What does this mean for environmental auditing and other compliance programs



THE MECHANISM: WHAT IS
NEXT GEN COMPLIANCE?

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WHAT IS NEXT GEN COMPLIANCE?

- Purpose:
 - Increase regulatory compliance, inform the public regarding performance, and reduce regulatory oversight needs
- Five interconnected components:
 - More effective regulations and permits
 - Advanced monitoring
 - Electronic reporting
 - Expanded transparency
 - Innovative enforcement
 - Plus one unofficial element: general duty

MORE EFFECTIVE REGULATIONS, PERMITS (AND ORDERS)

- Compliance “**built in**” to regulations
- Ensure that permits and regulations include clear, effective mechanisms for implementation
 - Avoid need for court interpretation, increase certainty for regulated community
- Example: using manufacturer-certified pollution control equipment instead of emissions rates & monitoring
 - Eliminates need for initial performance testing, saves regulated community time and money
 - Makes it easier for EPA to determine who is in compliance

ADVANCED MONITORING

- Using cutting-edge technology – infrared cameras, continuous air and water monitoring, connectivity
 - More readily available to the public as well
- Detect and quantify pollutant discharges and other noncompliance that have been overlooked
- “Any information available” / “Any credible evidence”
- Heavy emphasis on real-time monitoring and making data publicly available – creates incentive for quick response from industry

ELECTRONIC REPORTING

- Regulated community to provide data directly to the agency in **searchable, electronic format**
- Goals: provide more accurate, complete, and timely information regarding emissions and its sources
 - Save time and resources; reduce transaction costs
- Example: electronic reporting for Greenhouse Gas Inventory
- Example: Region 6 RCRA initiative (lessons)

EXPANDED TRANSPARENCY

- Making monitoring and other data **available to the public** will foster accountability through citizen suits and publicity
 - EPA: providing members of the regulated community access to data about their competitors could promote a “race to the top”
 - EPA: making data public might provide a financial incentive to low performers to improve because investors and insurers will be alerted to violations
 - More readily available to many others too . . .

INNOVATIVE ENFORCEMENT

- EPA including new self-implementing practices or requirements in administrative orders and judicial consent decrees (e.g., data analytics, targeting, third party oversight)
- Example: require a settling party to carry out a custom-designed program of advanced monitoring techniques and electronic reporting that goes above and beyond the statutory and regulatory requirements on that facility

UNOFFICIAL ELEMENT: THE “GENERAL DUTY” CLAUSE

- Stationary sources with toxic, flammable, or extremely hazardous substances have a “**general duty**” to identify hazards, design/maintain safe facility, prevent releases, and minimize consequences – CAA Section 112(r).
- No specific regulatory standard required – if something bad has happened, must’ve failed; also applicable absent an incident – it’s an “eye of the beholder” violation.
- In traditional OSHA enforcement scenarios, EPA is joining the action with this tool – greater penalties.

ONE KEY TOOL – INFORMATION REQUESTS

- Not new but expanded use
- EPA budget constraints mean doing far less on-site inspections and far more use of information requests
- Authorities available under air, water, waste, etc. statutes
- Ability to pursue enforcement actions from their desks – significant time- and money-saver, very burdensome for regulated community

IT'S NOT JUST EPA . . .

- State enforcement is far more frequent than EPA enforcement in most parts of the country
- EPA's strategic plan includes making a concerted effort to push these Next Gen approaches out to the States
- EPA cites examples of States using a variety of similar techniques



THE TARGETS: EPA
ENFORCEMENT INITIATIVES
FOR FY2017-2019

EPA'S NATIONAL ENFORCEMENT INITIATIVES

- Every three years, U.S. EPA outlines its priorities and focus areas for federal enforcement activity
- EPA's proposal for FY 2017-2019 was published September 15, 2015
- Proposal announced EPA's clear intention to incorporate Next Gen compliance approaches into each of these initiatives
- Issued as final February 18th.

EPA'S CURRENT (FY 2014-2016) INITIATIVES

- Before looking at the new ones, EPA's current initiatives:
 - 1) Reducing air pollution from the largest sources
 - 2) Cutting hazardous air pollutants
 - 3) Ensuring energy extraction activities comply with environmental laws**
 - 4) Reducing pollution from mineral processing operations
 - 5) Keeping raw sewage and contaminated stormwater out of our nation's waters
 - 6) Preventing animal waste from contaminating surface and ground water

EPA'S FY 2017-2019 NATIONAL ENFORCEMENT INITIATIVES

- New and Renewed Initiatives Adopted February 2016, Effective October 2016:
 - 1) Reducing air pollution from the largest sources
 - 2) Cutting hazardous air pollutants (expanded)**
 - 3) Ensuring energy extraction activities comply with environmental laws**
 - 4) Reducing risks of accidental releases at industrial and chemical facilities (new)**
 - 5) Keeping raw sewage and contaminated stormwater out of our waters
 - 6) Preventing animal waste from contaminating surface and groundwater
 - 7) Keeping industrial pollutants out of the nation's waters (new)

NEW/EXPANDED NATIONAL ENFORCEMENT INITIATIVES

1) Protecting communities from exposure to **hazardous air emissions**

- EPA expanding the current initiative to add a focus on emissions from additional sources and industries:
 - Organic liquid **storage tanks** (leaks, control devices)
 - Hazardous waste air emissions (especially TSDs and LQGs)

NEW/EXPANDED NATIONAL ENFORCEMENT INITIATIVES

2) Keeping **industrial pollutants** out of the nation's **waters**

- Will focus on the top industrial sectors that contribute contaminants by discharge to waters:
 - Mining, chemical manufacturing, food processing, and primary metals manufacturing

NEW/EXPANDED NATIONAL ENFORCEMENT INITIATIVES

3) Reducing the risks and impacts of **industrial accidents and releases**

- EPA claims there are 150 catastrophic accidents a year
- Initiative would target the facilities and chemicals that pose the greatest risks

CONTINUED NATIONAL ENFORCEMENT INITIATIVES

- Reducing Air Pollution from the Largest Sources
- Ensuring Energy Extraction Activities Comply with Environmental Laws
- Keeping Raw Sewage and Contaminated Stormwater Out of the Nation's Waters
- Preventing Animal Waste from Contaminating Surface and Ground Water



HOW TO RESPOND:
IMPLICATIONS FOR YOUR
COMPLIANCE PROGRAM

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“NEXT GEN” IMPLICATIONS FOR COMPLIANCE PROGRAMS

- “Compliance” isn’t just **black letter law** compliance anymore
 - New tools see **actuals** where you may have legally relied on factors or work practices for compliance
 - An “inspection” may now be an algorithm on an **electronic hunt** for data inconsistencies
 - “General Duty” means the written rule is a **floor, not a ceiling**
 - On the back end, enforcement is used to impose more requirements than rules ever could: **compliance-plus** becomes the norm.

“NEXT GEN” IMPLICATIONS FOR COMPLIANCE PROGRAMS

- If “compliance” is no longer just about the “letter of the law,” what does your **audit protocol/checklist** look like?
- Know how the new inspection / information request regime is being implemented, tools they’re using – **replicate it** to the extent you can (?)
- Ask the **same hard questions** you anticipate the enforcers will be asking. Pretend you received that 114 request and ensure you have all of the answers ready.
- Ensure you’re able to **(a) answer the new compliance questions and (b) PROVE IT.**

“NEXT GENERATION” IMPLICATIONS FOR AUDITING

- Agency’s enhanced use of data suggests need for vigorous QA/QC of your facility’s/company’s **environmental paper trail** – scrutinize and update
- “General Duty” angle requires **fresh eyes**, a lot more sophisticated “what if?” and “why?” analysis
- Practical tip: through audits or otherwise, **drill** for inspections the way you drill for other difficult events – are you really ready?

“NEXT GENERATION” IMPLICATIONS FOR AUDITING

- Now imagine you do this kind of “**enhanced**” audit. What are the **evidentiary risks**?
 - With audit against black letter law, we’ve developed techniques to not make **inappropriate admissions**
 - But trying to cover the outer edge of what *might* be required – does even asking these question **imply duty**? does discussing a possible improvement **imply a gap**? how do you **write it up**?
- Makes **privilege protections** against the production and evidentiary use of audit materials even more important – discuss with your counsel how to maintain privilege

“NEXT GEN” IMPLICATIONS FOR COMPLIANCE PROGRAMS

- What about **audit disclosure**?
 - Many states and EPA provide potential penalty relief if you “find, fix, and disclose”
 - If you find an arguable “outer edge”/“general duty” issue, how would you decide whether or not to disclose? And what would the disclosure look like?
- How do these issues impact **other scenarios**?
 - Transactional due diligence as buyer, seller, lender?
 - Compliance counseling – how do you make recommendations on stuff like this?

CONCLUSIONS

- EPA's Next Gen initiative and its new tools and priorities promise a significant change in method and substance
- Advanced monitoring and public awareness are key components; expanded general duty and info requests may be as significant as the official Next Gen elements
- Demands a reimagining of how compliance programs work, reconsideration of privilege protections, rethinking of audit disclosure approaches, and application of new caution in many business scenarios

THANK YOU



IF YOU'D LIKE MATERIALS ON NEXT GEN OR NATIONAL ENFORCEMENT INITIATIVES OR A COPY OF MY FORTHCOMING ARTICLE ON "NEXT GEN AUDITING," PLEASE DROP A CARD OR SHOOT ME AN EMAIL.

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