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EPA's 2016 Enforcement Results: An Indicator for 2017?

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Special to the Legal

Enforcement efforts by the U.S. Environmental Protection Agency in the past year have been dominated by the agency's response to high-visibility cases along with its continuing focus on its identified enforcement priorities. In announcing its 2016 annual enforcement and compliance results for the fiscal year spanning from Oct. 1, 2015, to Sept. 30, 2016, the EPA highlighted certain high-impact cases as well as significant investments in pollution controls resulting from its enforcement efforts aimed at site remediation and curbing air emissions, water and stormwater pollution and chemical risks. In sum, the agency secured over \$13.7 billion in investments by private entities to control pollution. In the Superfund arena, responsible parties contributed over \$1 billion across the nation to remediate affected sites, resulting in a \$55 million return to the Superfund trust for future projects. The agency racked up \$6 billion between federal administrative, and civil judicial penalties, including \$775,000 in court-ordered environmental projects and \$207 million in criminal fines and



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restitution, and a total of 93 years of prison time for sentenced defendants in criminal environmental actions. Notably, the two owners of chemical company Freedom Industries were each sentenced to 30 days in prison and a \$20,000 fine for the 2014 Elk River spill that contaminated drinking water supplies serving 300,000 people in West Virginia. Finally, the agency acquired a total of \$31.6 million for communities to engage in environmentally friendly projects.

Also as a result of the EPA's enforcement endeavors this fiscal year one of the world's largest oil pipeline operators, Enbridge, is set to spend approximately \$110 million on implementing a series of monitoring measures to improve operations through nearly 2,000 miles of its pipeline system in the Great Lakes region. Enbridge is also paying \$62 million in penalties for prior oil spills in Michigan and Illinois in 2010. In addition, one of the largest fuel refiners,

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Tesoro Corp., and Par Hawaii Refining will pay \$403 million on equipment to reduce air pollution at six refineries and \$12 million on projects to improve public health in communities previously

impacted by emissions from its facilities. Additionally in 2016 there were more than 100 enforcement actions across the nation to require entities to protect the public from lead exposure, collectively resulting in more than \$1 million in penalties. The EPA's lead exposure mitigation efforts include a commitment by Sears to implement a comprehensive program to minimize lead dust from home renovation activities.

Due to the timing of the June settlement reached by the EPA and the California Air Resources Board with Volkswagen related to allegations that Volkswagen employed defeat devices to alter emissions testing results, the 2016 enforcement results do not include a \$14.7 billion investment intended to remedy these Clean Air Act violations. However, the results do include the landmark settlement with BP Exploration & Production Inc. stemming from the 2009 Deepwater Horizon blowout and spill which resulted in a \$20.8 billion settlement to resolve Clean Water Act violations.

In 2016 the EPA worked with local governments in Salt Lake County, Utah, Greenville, Mississippi, and the city of Rockford, Illinois, to cut discharges of raw sewage and polluted stormwater. The agency settled with Trader Joe's to resolve allegations of failure to repair leaks of R-22, a greenhouse gas used in refrigeration equipment which the EPA claims will set a high bar for the grocery store industry in managing coolant leaks. Another settlement with Southern Coal Corp. and its affiliates requires the companies to upgrade their coal mining operations at an estimated cost of \$5 million, to control water pollution and benefit communities across Appalachia. Finally, a settlement with Marathon Petroleum Co. resulted in \$319 million to install air pollution controls at refineries in five different states.

In total the agency's efforts produced commitments from companies to reduce releases of pollutants by an estimated

324 million pounds per year, cleanup of an estimated 174 million cubic yards of contaminated water, and 17 million of contaminated soil. The agency contends this year's results demonstrate continued progress in implementing its next generation compliance technologies (which focus on the use of enhanced monitoring, electronic reporting and innovative enforcement) and creative solutions in high-impact enforcement cases to reduce pollution, level the playing field for responsible companies and protect public health, including in communities disproportionately affected by pollution.

The EPA's 2016 enforcement results reflect its continuing commitment to enforcement priorities identified on a three-year cycle. On Oct. 1, 2016, the EPA indicated its intent to maintain four of its Enforcement Initiatives from the previous three-year cycle: ensuring energy extraction activities comply with environmental laws; reducing air pollution from the largest sources; and keeping raw sewage and contaminated wastewater out of the nation's waters. The EPA also added two initiatives for the 2017-2019 cycle; including reducing risks of accidental releases at industrial and chemical facilities under the Hazardous Chemicals Program, which would likely dovetail with rulemaking developments under its Risk Management Program; and keeping industrial pollutants out of the nation's waters under the agency's Clean Water Program. The EPA also intends to expand its focus on cutting hazardous air pollutants under its Air Program, while scaling back to base level on its efforts to reduce pollution from mineral processing operations under its Hazardous Chemicals Program.

While the EPA's prior year's enforcement efforts and identified national enforcement priorities are often a good indicator of the agency's continued enforcement efforts for the year ahead, there has been a fair amount

of speculation regarding the impact of the change of administration on the agency's activities. As a general matter, shifts in policies can impact the agency's enforcement efforts. As an example, the George W. Bush administration was widely viewed as softening the prior administration's enforcement efforts against coal-fired power plants. These efforts were reinvigorated under the Obama administration, while the EPA also continued prioritizing certain programs identified under the Bush administration—such as municipal discharges, concentrated animal feeding operations, and air permitting—and established additional areas of focus. Obama's EPA added industrial and food processing discharges into the priority list, and expanded its hazardous air pollution initiative. Thus, while enforcement initiatives may certainly shift as a result of administration changes, the areas and impacts of the changes have been variable, and sometimes not quite as pronounced as expected. One notable indicator of the agency's enforcement efforts is budgetary constraints under the Obama administration has been in a decline in the agency's budget from \$10.3 billion in fiscal year 2010 to approximately \$8.1 billion in fiscal year 2016. However, the Obama administration's EPA has sought to lessen the impact of a reduced budget through next generation compliance innovations, which are intended to allow for cost-effective compliance and enforcement measures using emerging information technologies. While these downward budget trends are expected to continue under the Trump administration, it is unclear whether the Trump administration's EPA will likewise seek to leverage next generation compliance and enforcement techniques as a means of lessening the impact of a shrinking budget.

Indeed, while President-elect Trump has backed away from his high profile proposal to eliminate the agency,

Trump's selection of Myron Ebell, a vocal opponent of the Clean Power Plan and noted climate change challenger, to lead the EPA transition team sends a clear signal that the incoming EPA administration would de-emphasize climate change-related initiatives. Trump's pick for EPA administrator, Oklahoma Attorney General Scott Pruitt, who described himself as a "leading advocate against EPA's activist agenda," likewise suggests that the agency will de-emphasize regulatory efforts. As Oklahoma attorney general, Pruitt challenged various EPA rulemakings, including the Clean Power Plan, Regional Haze Rule, the Cross State Air Pollution Rule and methane regulations governing oil and gas operations. Pruitt's background, along with Trump's stated intention to reinvigorate the use of coal and to allow for expanded oil and gas drilling on federal lands, has led to widespread consternation among environmental organizations. With this, however, Trump has also vowed to refocus the EPA on

ensuring clean air and safe drinking water for all Americans.

Where all this leads the EPA's 2017 enforcement agenda is unclear. Despite considerable speculation about the future of the EPA and its programs, the Trump team has said little about EPA's enforcement efforts or its approach to previously identified national enforcement priorities.

The agency's enforcement priorities and the manner in which they are pursued may depend in large part on whomever the Trump administration chooses to fill the EPA's various political appointee positions, including Regional Administrator posts and key Washington offices. Perhaps one of the most important positions from the enforcement standpoint is that of the assistant administrator for the EPA's Office of Enforcement and Compliance Assurance, a post currently held by Cynthia Giles. Giles has focused on three clear goals for her office: tough civil and criminal enforcement for violations that threaten communities and

the environment, including overburdened communities; use of next generation compliance strategies; and shared environmental goals among the EPA, states and tribes. Giles' likely successor and other important EPA officials have not been identified at this time, and at least for now, the Trump administration's likely approach to enforcement issues remains to be seen. •

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