

(Almost) Three Years of Cooperative Federalism: State-Federal Implementation Update:

By Nathan E. Vassar

When the current administration announced in early 2017 its priority of “cooperative federalism,” the term was unfamiliar and implementation details were limited. In the nearly two-and-a-half years since that time, utilities and communities across Texas, and across the nation have seen its meaning as well as some of its implications.

From an enforcement perspective, states with delegation authority under the national NPDES program have continued their practice in a business-as-usual fashion, but without as much of a federal oversight as before. In this context, it is reasonable to interpret cooperative federalism to mean that the federal government will step back substantially on its enforcement efforts and defer almost entirely to state enforcement regimes. Although federal Administrative Orders and Consent Decrees have not disappeared entirely, trends show a drop in enforcement cases, although political pressure in the new Congress is seeking to change that pattern. While a couple communities across the Lone Star State are in the process of implementing federal orders in place since the Obama Administration, other utilities facing the EPA’s most significant enforcement tool are carry-overs before the current Administration took office.

On the permitting and regulatory standards front, some states have asked – and received – more of a hands-off approach from the federal government, and EPA has made clear its desire to defer to state-developed science and data. In addition, EPA has issued guidance and notices in recent months to urge restraint before taking a top-down “we know better” position, and also to emphasize the need for faster turnaround on regulatory decisions. This angle matches with the lean management principles that the agency has backed during the Trump Administration, although staffing levels at EPA (combined with Regional reorganization) have limited its ability to turn around decisions/approvals on EPA’s time frame goals.

At its core, cooperative federalism is a bottom-up philosophy that affords utilities across the country an opportunity to engage and advocate on compliance-related matters and other regulatory issues of concern. Over its history, WEAT members and the organization itself have been able advocates for individual permit decisions, enforcement counterproposals, and regulatory updates that impact our industry. With the current cooperative federalism approach in place, the time may be right for more members to raise issues of concern with EPA Region 6, in coordination with TCEQ, depending upon the issue at play. Although slow to develop in many parts of the country, the Integrated Planning framework is one by which utilities can present a holistic set of compliance priorities and timelines to federal/state regulators, and seek flexibility in permitting mandates, as well as compliance deadlines.

Other tools available include compliance audits, which can identify (voluntarily) certain violations and afford protection to utilities who report pursuant to the audit and take corrective actions, thereby avoiding the hassle, expense, and burden of a formal enforcement action. The current federal approach has, in many ways, began to reward those proactive utilities when they confront compliance challenges head-on, rather than seeking penalties and mandating a one-size-fits-all corrective action. WEAT members should continue to pay attention to the ways in which the current climate can provide opportunities to advance the common goals of compliance, and without an unnecessarily prescriptive approach.

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