

Federal Shift to Compliance Initiatives (and Away from Enforcement Initiatives?):

By Nathan E. Vassar

Every three years, the U.S. Environmental Protection Agency (“EPA”) releases its new National Enforcement Initiatives for the following three-year cycle. The initiatives represent points of emphasis for the agency and include subject matters of particular scrutiny over the relevant time period. For the water industry, EPA has included (and renewed) initiatives such as: “Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation’s Waters” and “Preventing Animal Waste from Contaminating Surface and Ground Water.” The current three-year cycle ends with the upcoming Fiscal Year. Recent developments, however, have indicated that a pivot may be coming for the next three-year cycle – one away from an enforcement-centric approach and to a focus on ongoing compliance initiatives.

Although references to water “enforcement” and “compliance” may appear as two sides of the same coin, a change in the agency’s philosophy on the triennial initiatives may result in long-petitioned relief for utilities in Texas and across the country. Rather than a strategy that measures successes by the injunctive relief dollars extracted from the regulated community, a compliance-first framework could emphasize improvements identified by self-audits, and utility-driven solutions that are tailored to particular compliance challenges. Instead of a heavy focus on referrals to the Department of Justice and EPA’s enforcement team, the rubric for compliance may include more analysis of compliance trends and overall water quality improvements.

The details of EPA’s updated approach are yet to come (likely in calendar year 2019), and while there is no guarantee that three-year initiatives will change overnight, the information is consistent with trends seen on the ground already under the current administration. EPA has emphasized the value of “cooperative federalism,” where federal and state environmental authorities coordinate more regularly in order to yield the best environmental outcome.

Furthermore, inspection protocols have changed in some instances, where inspectors may identify problem areas and recommend immediate fixes, rather than awaiting the submittal of a formal notice, while the violation is ongoing. Additionally, as discussed earlier this year, a compliance-based framework is in line with the EPA's "four corners" enforcement approach, where guidance and internal policies are no longer permitted to drive components of enforcement and settlement dialogues.

As the EPA develops its next focus areas for the upcoming fiscal years, utilities should continue tracking developments both at the federal and state levels in order to best position themselves for inquiries and compliance evaluations. Periodic self-audits and SOP updates can help stay ahead of the curve for both compliance and enforcement purposes.

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