Back to Basics – EPA Enforcement

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I have been an enforcement professional my whole career. First as a government enforcement attorney; and now (for almost 25 years) as an enforcement defense lawyer. Some of the things that once made me a proud government enforcement lawyer are now a source of frustration, but not just because I am on the other side. Administrator Pruitt foreshadows a Back to Basics agenda for the agency. Following are a few basics that I wish EPA would restore in its enforcement agenda.

In the 1990s the agencies (EPA/DOJ) imposed environmental management and pollution prevention obligations on defendants in consent decrees. Back in the day, I was one member of a team that earned EPA's Gold Medal for work on the first consent decree to impose an environmental management system on a defendant, United Technologies Corporation. Those obligations were designed to accelerate development of corporate compliance functions, to reduce pollution, and ostensibly drive toward less regulation. It was easy to press defendants for investment in these types of basic compliance tools. Those obligations, like internal auditing and compliance tracking systems, sparked a field of environmental services that continues to benefit the regulated community, with the help of environmental professionals and electronic tools.

Now in consent decrees, EPA/DOJ demand NextGen monitoring and Environmental Mitigation from defendants. These programs reflect two worthy policy objectives: (1) to increase self-policing and (2) to achieve environmental justice. Both stretch EPA's authorities to assure compliance with applicable requirements or enforceable regulations, however. The reasonable negotiation approaches once used in consent decree negotiations to encourage the regulated community to invest in basic compliance assurance and to design processes that reduce pollution are now tactics to obtain from each defendant more investment in well-intended but unrequired monitoring and environmental justice programs. It is very difficult to explain this to clients.

In another example, enforcement attorneys at EPA previously used their authority to address significant environmental impacts, to capture economic benefit from non-compliance, and to level the playing field--laudable goals. The outcomes achieved real improvements. EPA's enforcement achieved upgraded municipal sewage treatment systems, hazardous waste reduction, and air pollution control that steadily and measurably reduced national emissions. We were very proud of our work.

Today, agency lawyers struggle to articulate the environmental benefits of their cases. Despite the press release content, settlements result in environmental improvements on the margins. Reported reductions often reflect decreases in <u>allowable</u> emissions/discharges, not <u>actual</u> emissions reductions. Enforcement actions are often initiated based on an agency employee's refreshed interpretations of long-standing and well-understood rules. In other words, the basic enforcement discretion once used to refer cases with real environmental costs and select defendants with a real economic advantage over competitors, is now misapplied to pursue defendants who acted appropriately, who followed industry practice often with EPA's acknowledgment, and who relied upon historic understandings to comply. It is hard to explain this to clients, too.

Another basic that Administrator Pruitt might address concerns EPA's penalty policies. They are stale. Negotiators contort to apply them to current day facts and to increasingly complex regulatory requirements. Defendants cringe at the inflation factor automatically applied to penalty assessments.

When EPA first developed and deployed its penalty policies both the agency and the regulated community had reasonable frameworks and comprehensible factors to apply to devise a fair result. Although we disagreed, all parties understood the reasons, the matrices, and the adjustments. All parties worked within a common paradigm to achieve an acceptable result.

Now, EPA's penalty policies are unworkable. Initial proposals are often extreme and hard to unpack and, as a result, penalty negotiations begin under strained communication. In the course of each settlement discussion, defense lawyers inevitably urge EPA to consider that our clients are business people and business negotiations require rationale to succeed. Decision makers in the regulated community require clarity, value, and certainty to act. The basic construct once used to establish the logical basis for a civil penalty is broken and, absent a coherent approach, EPA's credibility with the regulated community is eroding.

Here are some simple truths: (1) Environmental enforcement works; (2) Deterrence and a level playing field are essential elements of a working regulatory scheme; and (3) Penalties are part of the bargain.

EPA's enforcement agenda has moved beyond these basics, and outgrown the basic tools of the trade, however. Settlements push individual defendants beyond the recognizable boundaries of compliance assurance to address legislative and social gaps. EPA summons its authorities against individual defendants to press updated interpretations of long-standing rules, in lieu of rulemaking negotiations with the larger relevant, regulated community. And, civil penalty negotiations are tethered to outdated policies. Perhaps Administrator Pruitt's Back to Basics agenda could start with a review of current enforcement case selection criteria and settlement policies. Bringing a few old basics back to the enforcement agenda could be a refreshing new twist.

About Krista McIntyre: *Krista McIntyre, a partner at Stoel Rives LLP, focuses her law practice on enforcement defense and permitting under the Clean Air Act (CAA), regularly defending clients in EPA and state enforcement actions involving alleged violations of CAA programs, such as the permitting requirements under new source review (NSR), prevention of significant deterioration (PSD), Title V, plus New Source Performance Standards (NSPS) and National Emissions Standards for Hazardous Air Pollutants (NESHAP). She currently serves as the Practice Group Leader for the Stoel Rives' environment, natural resources, and land use practices and is a member of the Firm's seven-person Executive Committee. She can be reached at 208.387.4239 or krista.mcintyre@stoel.com.*

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