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Enforcement

Practitioner Insights: How Pruitt Distinguishes Trump's EPA

The EPA may be the agency that best exemplifies the drastic change from the Obama administration to the Trump administration. Administrator Scott Pruitt has focused on advocating for the growth of the fossil fuel sector far more than regulating it, he is working to quickly roll back Obama-era regulations in the air and water sectors, and he's proposing deep budget cuts across the EPA that, if enacted, would dramatically alter its mission. Mr. Pruitt's agenda has been met with strong support from some industry sectors and stinging criticism from the environmental community and large segments of the public. It's hard to imagine a starker contrast between Administrator Pruitt and his predecessor, Gina McCarthy.

But the lesser reported story is that Mr. Pruitt is also attempting to distinguish his leadership from that of his predecessors in an affirmative way—through his stated “back-to-basics agenda.” That means promoting improved timelines on Superfund cleanups, initiating a “war on lead,” and maybe even expanding support for criminal enforcement, which has continued to shrink under his watch. Whether his back-to-basics approach is ultimately successful, or merely an effort at burnishing his reputation, remains an open question.

Criminal Enforcement: Small Silver Lining for Environmentalists? The conversation surrounding President Donald Trump's impact on environmental policy has largely been focused on his withdrawal from the Paris Climate Agreement (and dismissal of climate change as an environmental threat), an aggressive deregulatory agenda, and a “cooperative federalism” approach Mr. Pruitt is working to embed across the agency. While these are all central to the environmental conversation, they are not the only issues facing the agency.

EPA's stance on enforcement is a critical policy area that has received less attention, and Mr. Pruitt's approach in this area is beginning to take shape. Whereas civil enforcement is facing substantial cutbacks and increased political scrutiny, there may be a glimmer of hope for the criminal enforcement program during his tenure. This low-profile law enforcement group has demonstrated its value in recent years through exceptional case work and huge returns to the taxpayer (see: the Deepwater Horizon and Volkswagen emissions cheating prosecutions and combating fraud in the re-

newable fuel program among others). But in recent years, the EPA Criminal Investigation Division (CID) has also seen its ranks hollowed out due to budget cuts and a lack of reliable support from agency leadership. Add to this the consistent efforts of congressional elements to restrict the EPA, and one can understand why the past six years have seen a dramatic reduction in the number of criminal investigators and open cases at the agency.

Today there are about half as many active criminal investigations as there were one year into the Obama administration—a direct result of ongoing budget cuts as well as agency and congressional ambivalence toward criminal enforcement. For those engaged in breaking environmental laws and earning millions in ill-gotten gains while putting the public and environment at risk, this is a positive development. For those who believe in a level playing field for business, protecting the public and upholding the rule of law, this is a bad news story. The early signs from Mr. Pruitt and his team indicate they may change this trajectory, but it will take some months to determine if the rhetoric coming out of the administrator's team will translate into actual progress in the form of increased staffing and a renewed focus on criminal investigations.

Past Support for Criminal Enforcement at the EPA The legislative foundation for EPA's criminal program is the Pollution Prosecution Act of 1990 (“PPA”). During the 1980s, the first decade of the EPA's criminal program, it could best be described as scrappy but unstructured. The PPA set out to change that and as part of its requirements, the agency was mandated to build and maintain a cadre of 200 criminal investigators (“special agents”). It laid out a timeline to reach that goal, which the Clinton administration largely met.

By the time President George W. Bush took office, more than 200 special agents were housed within the agency's criminal program, and the staffing mandates of the PPA were satisfied. However, through normal attrition and retirements, special agent staffing numbers fell in the early years of the Bush EPA before a hiring push was initiated by the agency's political leadership in the final years of the administration. The Obama team was the beneficiary of the hiring surge, and as a result, they entered office with special agent staffing again above 200 and meeting the requirements of the PPA. During the Obama administration though, staffing numbers steadily dropped as a result of budget sequestration (automatic spending cuts), uneven support from EPA leadership, and hostility from a Republican Congress.

Outlook for Criminal Enforcement Under Pruitt When Mr. Pruitt took over as administrator, he inherited a highly skilled group of special agents and analysts that was getting smaller with each passing month due to normal attrition and a lack of backfill hiring by the agency. As a result, Mr. Pruitt was losing out on a crucial element needed to support his rule of law approach and back to basics agenda. In his first year on the job, he personally expressed support for the criminal enforcement program, but that backing has yet to translate into increased staffing.

Mr. Pruitt has demonstrated that when he personally prioritizes something, he will drive the bureaucracy to act. He pushed for and received a dramatic increase in staffing for his own protection detail over a matter of a few months. He has also taken tangible steps in the Superfund area to try to speed action. Where there's a will, there's a way.

Among the metrics to look for in gauging his actual commitment to criminal enforcement will be the number of special agents on board between now and the end of 2018, as well as the employment levels of the technical staff within the agency that support criminal investigations. Any successful criminal investigation requires not just capable investigators but also dedicated legal support (at the EPA and at the Department of Justice) as well as technical expertise. Much like the FBI relies on fingerprint technicians and forensic experts, environmental cases rely on chemists, analysts, environmental engineers, and dedicated legal professionals. This "three-legged stool" of investigator, technical support, and legal counsel is foundational to the success of any environmental investigation.

Where Will a Scott Pruitt EPA Focus its Criminal Lens?

Regardless of the resource picture, several areas probably will face continued or even enhanced scrutiny at the Pruitt EPA. Among those are the protection of water resources and identifying those cases where criminal conduct is present, often in the form of falsified water compliance data that can obscure violations. And, although the current political leadership at DOJ has been quiet on worker safety as a priority, cases where workplace deaths coincide with environmental misconduct are likely to remain a priority for career prosecutors and investigators.

In Mr. Pruitt's push for cooperative federalism, his team has also consistently said it will focus on "direct implementation programs" where the EPA maintains primacy in enforcement. Programs that fall into this

category include regulation of vehicle emissions (both with original equipment manufacturers as well as the aftermarket segment), the renewable fuel standard, and management of ozone depleting substances. Look for consistent attention on these areas, and in the case of the auto emissions space, perhaps even an accelerated enforcement tempo at the EPA and DOJ.

It's also important to note that when it comes to cooperative federalism, there is often no state counterpart for CID to partner with, as there is with the EPA's civil enforcement program. The EPA's criminal program is usually the only game in town when it comes to investigating allegations of complex environmental crime, and the leadership of the EPA probably understands that without a viable state partner, cooperative federalism isn't a viable strategy. That means a wholesale withdrawal from some specific areas of criminal enforcement is not practical (or even possible). The more likely outcome will be slight modifications on criminal priorities based on both resource levels and the emerging priorities of Mr. Pruitt's enforcement team.

Expect the Unexpected Finally, the Pruitt EPA also needs to focus on the unpleasant surprises that could await it. No one in the Obama administration predicted the Deepwater Horizon catastrophe, the Flint lead crisis, or the Volkswagen emissions cheating scandal. One of the realities any administration must understand is that large-scale, unexpected events will occur, and they need to be prepared ahead of time if they are going to be able to respond in a way that meets the public's expectations. In the case of the Trump administration, that burden is even higher in the environmental space as it faces a steep trust deficit on that issue from the American public.

If Mr. Pruitt is serious about rebuilding the staffing levels of the agency's criminal enforcement program and he follows through with adequate legal and technical support for the program, he will have taken a real step toward being ready for the next unexpected environmental crisis. He can also demonstrate that his "back to basics" and "rule of law" approaches are more than simply catchy phrases and can ultimately serve as part of a positive environmental legacy at the EPA. Time will tell.

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