

EPA to Increase Clean Water Act Enforcement Activities

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On October 15, U.S. Environmental Protection Agency (EPA) Administrator Lisa P. Jackson described the agency's plan to increase enforcement efforts under the Clean Water Act. In testimony before the U.S. House Committee on Transportation and Infrastructure, Ms. Jackson indicated that current enforcement initiatives fall short of the Obama administration's expectations for the clean water enforcement program.

Specifically, Ms. Jackson referred to an "unacceptably high" level of National Pollutant Discharge Elimination System (NPDES) permittee noncompliance and an "unacceptably low" level of enforcement activity, resulting from what she described as uneven enforcement initiatives among the states. Ms. Jackson noted that some states impose at least minimum penalties while others impose no penalties for the same types of violations. Ms. Jackson stated that in response, the EPA will increase federal enforcement efforts and support efforts to expand and harmonize state enforcement. The statements come on the heels of an earlier announcement regarding the Administrator's plan to expand the EPA's enforcement staff.

Ms. Jackson announced EPA's new Clean Water Enforcement Action Plan. The plan involves three steps to strengthen state and federal clean water enforcement:

- **Step 1:** EPA will develop a more innovative approach for targeting enforcement to the most serious violations and most significant sources. Ms. Jackson stated that factories and large waste water treatment plants will be the focus for this first step, along with concentrated animal feeding operations and contaminated stormwater flows.
- **Step 2:** EPA will strengthen oversight of state permitting and enforcement programs. The agency plans to clearly articulate acceptable standards for state clean water enforcement programs.
- **Step 3:** EPA will continue to take immediate steps to improve transparency and accountability to the public. The agency plans to develop technology to make it easier for the public to access information. Also, Ms. Jackson indicated that she is directing staff to develop a proposed rule requiring electronic reporting, to replace the current paper system.

Ms. Jackson's comments signal several changes. First, recent water enforcement efforts have focused heavily on modifying municipal water and sewage treatment systems. Ms. Jackson, while noting that such systems will continue to be an important focus, also indicated that there will be a growing emphasis on contaminated stormwater run-off from industrial facilities and construction sites. Even before the

change in Administration, the EPA has, within the last 24 months, brought significant enforcement actions related to construction site run-off. These actions have resulted in major retail chains and national homebuilders reaching settlements in which they agreed to pay substantial fines and subject themselves to significant consent decrees with respect to future new construction activity. We expect that EPA's Clean Water Act Enforcement Plan will expand this enforcement initiative, both at the state and federal level.

In addition, the Administrator's initiative to convert to electronic data filing, while having the potential to reduce administrative burdens on the regulated community, will also likely result in greater public access to discharge data, in turn making facilities more vulnerable to local community pressures and citizen suits. To avoid such actions, facility managers and those overseeing significant construction programs should review their water discharge performance, especially their controls and performance during storm activity, when facility run-off presents special monitoring and control challenges. In addition, all permitted entities should anticipate more active EPA involvement in the permitting and compliance processes.

Morgan Lewis can assist with such matters. Our Environmental attorneys include a former Assistant Attorney General for the Justice Department's Environment and Natural Resources Division, the Justice Department division responsible for bringing on EPA's behalf all federal court enforcement actions, as well as many other former agency alumni and other attorneys with experience in responding to agency enforcement actions.

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