

Prep For Enviro Scrutiny As Trump Policies Are Rolled Back

By **Jeffrey Corey and Michael Zody** (February 5, 2021, 6:52 PM EST)

On Feb. 4, the U.S. Department of Justice began the much-anticipated rollback of policies enacted during the Trump administration that were seen as undermining environmental enforcement efforts.

In an internal memorandum circulated to all section chiefs and deputy section chiefs of the DOJ's Environment and Natural Resources Division, Deputy Assistant Attorney General Jean Williams formally withdrew several Trump-era policies related to environmental enforcement. In announcing the change, Williams stated the policies were "inconsistent with longstanding Division policy and practice" and may impede "the full exercise of enforcement discretion in [the division's] cases."



Jeffrey Corey

The Williams memo formally withdraws a slew of policies enacted in the final days of the Trump administration, including instructions to DOJ attorneys that discouraged criminal enforcement and efforts to target parent companies whose subsidiaries commit environmental violations.[2]

Perhaps most notably, the Williams memo withdraws several policies that prohibited or restricted the use of supplemental environmental projects in settlements with private defendants and state and local governments.[3]

In many respects, the DOJ's action is not surprising. President Joe Biden repeatedly emphasized environmental issues during his campaign, and issued an executive order on his first day in office directing all federal agencies to take action to address the impacts of climate change.[4] Although the DOJ's moves were anticipated, they mark an important first step as the new administration begins to implement its environmental agenda.



Michael Zody

The Williams memorandum does not establish new policies; it simply withdraws Trump administration policies that were seen as impediments to enforcement. As such, the memorandum leaves a vacuum that undoubtedly will be filled in the near future by new leadership at DOJ and other agencies.

Given these developments, industry and other actors in the environmental sector would be wise to begin preparing now for heightened enforcement, including taking the steps outlined below.

Preparing for Increased Enforcement From a Full Range of Administrative Agencies

Although the Williams memorandum only governs DOJ environmental enforcement policies, it is a sign of things to come across the Biden administration. Industry should expect to see other agencies with jurisdiction over environmental issues to likewise adjust their enforcement policies, and generally be more active with respect to environmental enforcement.

The U.S. Environmental Protection Agency will, of course, be a central player in this effort. The EPA has authority to bring administrative enforcement actions, and has day-to-day oversight of major environmental regulatory programs, such as permitting regimes under the Clean Air Act and Clean

Water Act.

But the DOJ and the EPA are not the only actors in this space. For example, the Occupational Safety and Health Administration quickly issued detailed guidance on mitigating and preventing the spread of COVID-19 in workplaces on Jan. 29, 2021.

While the new guidance is not a formal rule, it implements existing obligations. Employers should do their best to adopt the recommendations — both to protect their employees and defend against potential citations in the heightened enforcement environment.

Likewise, new personnel at the U.S. Department of Labor's Mine Safety and Health Administration are expected to bring more aggressive enforcement actions, with an uptick in special investigations and potential agent liability. The MSHA is also expected to issue an emergency COVID-19 rule in the near future.

Engaging With Environmental Justice Communities and Addressing Their Concerns

Biden's first-day executive order also directed federal agencies to prioritize environmental justice and proactively engage with environmental justice organizations. Biden also ordered the creation of an interagency council on environmental justice and established offices at the DOJ and within the U.S. Department of Health and Human Services focused specifically on environmental justice concerns.

This wave of early action suggests that the Biden administration will more aggressively pursue environmental justice concerns than the past several administrations.

Industry would be wise to embrace these changes, as they may face increased enforcement risk if they fail to do so. Given that environmental justice initiatives will focus on poor, minority and other communities who are disproportionately impacted by pollution as a result of living near industrial facilities, the companies that oversee those facilities should proactively engage with those communities.

Among other actions, companies should have a local liaison who is trained to engage in productive discussions with these communities regarding issues of inequality and environmental impacts. And companies should be prepared to take measurable, quantifiable action to reduce human health risks to those communities.

Practical Steps That Industry Can Take Now to Mitigate Enforcement Risks

Given that the Biden administration appears intent on increasing environmental enforcement efforts (and is already taking steps to do so by withdrawing Trump-era policies), industrial actors should be motivated to invest now in compliance.

Even the most well-run facilities can experience permit exceedances and other violations that may result in costly environmental penalties. Moreover, employees may have been lulled into a sense of complacency to the relatively low levels of enforcement during the Trump administration.

To guard against enforcement-related risks, industrial actors should consider taking some or all the following actions.

Conducting Environmental Audits or Updating Existing Audits

Regular environmental audits can be a company's best way to avoid enforcement by allowing detection and correction of potential violations before they draw the attention of regulators. Moreover, the EPA and other administrative agencies typically will consider what (if any) existing audits or internal controls a company has in place when deciding to take enforcement action. Failing to conduct regular audits or relying on poorly designed audits will greatly increase the risk of being subject to enforcement.

Reevaluating and Improving Employee Training

In addition to regular compliance training, employees (especially key environmental management

personnel) should be prepared to engage more frequently with regulators. Their training should include updated instructions on how to respond to site visits or other forms of regulatory scrutiny. Companies should also have well-established internal reporting systems that encourage employees to report potential violations within the company, as opposed to letting employees feel they have no option but to report violations to the government.

Accelerating Permitting or Other Preenforcement Solutions

In cases where a facility knows it has ongoing compliance concerns, now is the time to proactively engage with relevant regulators to address those issues. For example, if a facility has questions regarding whether certain activities violate permit requirements, it may benefit from raising the issue with regulators and seeking modifications to relevant permitting standards. Companies that engage with regulators and proactively seek solutions to potential violations often insulate themselves from enforcement risk.

Jeffery C. Corey is a Parsons' shareholder whose practice focuses on environmental enforcement, internal investigations and white collar defense matters. Michael A. Zody is the chair of the Energy, Environmental and Natural Resources practice group. Mr. Zody's environmental practice spans the full range of environmental and natural resources litigation and covers state and local administrative proceedings, federal administrative proceedings and state and federal court actions.

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[1] The now-withdrawn last minute Trump policies include the following DOJ guidance documents: (1) "Enforcement Principles and Priorities," dated Jan. 14, 2021; (2) "Additional Recommendations on Enforcement Discretion," dated Jan. 14, 2021; and (3) "Equitable Mitigation in Civil Environmental Enforcement Cases," dated Jan. 12, 2021.

[2] The now-withdrawn Trump-era SEP policies include the following: (1) "Supplemental Environmental Projects ('SEPs') in Civil Settlements with Private Defendants," dated March 12, 2020, and (2) "Enforcement Principles and Priorities," dated March 12, 2018.

ABC Executive Order 13990, Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021).