

CALIFORNIA ENVIRONMENTAL REGULATORY LAWYERS DEFENDING BUSINESSES IN AGENCY ENFORCEMENT MATTERS

Each federal environmental law has enforcement provisions, backed by substantial penalties, which enable the government to bring administrative proceedings and civil and criminal enforcement actions. Thus, clients may find themselves negotiating with the government in the context of penalty assessments, compliance orders and cleanup orders, as well as actual litigation in court. When states have authority to administrate a program, typically an enforcement action will proceed under the state's jurisdiction, within the context of the administrative agency's adjudication process or in state court.

What is Regulatory Enforcement?

Regulatory enforcement pertains to business operations, as well as violation of laws prohibiting the release of hazardous substances. On the one hand, noncompliance with business operations requirements can be fixed, and compliance can be renewed. On the other hand, release of hazardous substances could result in contaminated property requiring remediation and the enforcement of cleanup standards. In either case, the lawyers at Bick Law work with the jurisdictional government agencies to negotiate the compliance, or the cleanup, and any associated penalties or offsets.

Some industries are required by the terms of a permit to operate to routinely monitor their own emissions or discharges and report these to the government. Failure to monitor, or report accurate information, are potential compliance violations that an agency, like EPA, may pursue in enforcement.

Role of EPA

Congress has granted EPA broad information-gathering authorities, which can be used when violations are suspected. Sometimes instead of, or in addition to, routine self-monitoring and self-reporting, agencies like EPA may seek targeted information from a company through self-testing and reporting. EPA may also examine operating logs and financial records to show when pollution control equipment was purchased or installed, how much and what type of fuel was used, etc.

EPA and state or tribal agencies may also conduct on-site inspections to determine compliance with federal environmental laws. Inspectors may check to ensure that proper permits are in order or procedures are followed to ensure that hazardous materials are correctly labeled and handled, or that emergency plans are in place.

Sometimes EPA may seek a more comprehensive and detailed assessment of a facility's compliance using its investigation authority. Such investigations may be warranted when an inspection or record review suggests the potential for systemic problems or serious violations. EPA may investigate or it may order a business to perform a site investigation including soil and groundwater sampling.

Increasingly, EPA is using technology like drones and remote sensing to identify difficult to reach sites with potential contamination or violations. For example, EPA uses drones to identify illegal filling of wetlands or discharges into waterways-to enforce the CWA.

Types of Regulatory Enforcement Actions

Most businesses, and more typical of our clients, are not "mid-night dumpers," as portrayed in movies. Instead, they are typically upstanding corporate citizens that must respond to an unintentional or accidental violation. In these circumstances, EPA recognizes that the violation can be settled before a trial or a hearing takes place. When settlement is not achieved, or is not possible, or when EPA deems the violation to be serious enough to send a message to deter other possible violators, the following types of enforcement actions may be pursued:

- **Formal Administrative Enforcement:** Government agencies, like EPA, can issue an administrative order to compel compliance with the agency's regulations. Agencies can also impose a monetary penalty for past infractions.
- **Formal Civil/Judicial Enforcement:** EPA, through the U.S. Department of Justice (DOJ), can initiate a civil lawsuit in federal district court compelling compliance and/or imposing a monetary penalty.
- **Criminal Enforcement:** The criminal provisions of environmental laws enable the EPA to investigate and refer to the DOJ for prosecution the most significant and egregious violations

of certain environmental laws. Criminal penalties can include the imprisonment of responsible individuals, substantial fines, and restitution. In many cases, criminal settlements include Supplemental Environmental Projects (SEPs). As part of a settlement, an alleged violator may voluntarily agree to undertake an environmentally beneficial project in exchange for mitigation of the penalty to be paid. The project must further EPA's goal of protecting and enhancing the public health and the environment. In addition to the SEP, the alleged violator must also return to compliance with the law.

- **Cleanup Enforcement:** At sites where there's been a release of hazardous substances into the environment, EPA may investigate potentially responsible parties and negotiate with them or order them to perform or pay for the cleanup of the site.
- **Citizen Suit Enforcement:** Federal environmental laws also provide for "citizen suits," which may be brought by private parties in the absence of proper government enforcement. Citizen suits have become extremely common under RCRA, the Clean Water Act, the Endangered Species Act and Proposition 65 in California.
- **Self-Reporting:** EPA's self-disclosure policy allows companies to mitigate penalties through self-reporting. The EPA Audit Policy (April 2000) 65 FR 19,618 (04/11/00), formally titled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," provides incentives for regulated entities to voluntarily discover and fix violations of federal environmental laws. The incentives include a reduction of 100% of the gravity-based portion of the penalties that could otherwise be assessed, and a recommendation for no criminal prosecution if all of the applicable conditions are met. In 2015, EPA modernized its self-disclosure method by creating a centralized web-based "eDisclosure" portal to receive and automatically process self-disclosed civil violations of environmental law. A regulated entity has 21 days from time of discovery to voluntarily self-disclose.

When selecting the proper regulatory enforcement action to take when there is noncompliance, EPA will look at the severity and the duration of the violation, the risk to human health and the environment, and the past compliance or cooperation history of the company. Serious violations that result from knowing or intentional or negligent actions may find their way into a grand jury and result in indictment of the company, its parent, or individuals in the company responsible or in the chain of command.

EPA wants its regulatory enforcement actions to have a deterrent effect and towards that end EPA will publicize such actions through press releases. Such negative media coverage is harmful to the company's brand's value. For that reason, most companies are forward-thinking and view avoiding regulatory enforcement actions as a value-added proposition. EPA wants companies to be aware of the monetary risks of noncompliance, as well as the brand impacts.

Bick Law has a wide range of experience representing clients in regulatory enforcement actions. As a result, we are familiar with the agencies and the individual regulators and their predilections when it comes to threats of enforcement and penalties. We have experience negotiating with these agencies and understand where there is room for negotiation and where we can anticipate they will hold the line based on agency guidelines or institutional history. Our lawyers also assist in developing compliance programs to ensure that all permits are secured and complied with, including recordkeeping and reporting.