



Earth & Water Update

Welcome Lindene Patton - We are proud to announce Lindene Patton has joined Earth & Water Law, LLC as our newest Partner.

Patton is a proven leader with a broad range of experience at the intersection of law, science, technology, and finance. Her legal and advisory expertise encompasses an array of transactional and programmatic solutions for global clients in the compliance, risk management, financial assurance, and natural resource management sectors.

Her distinguished career includes serving as the former Group Head of Hazard Products for Corelogic, Chief Climate Product Officer for Zurich Insurance Group, Senior Vice President and Counsel for Zurich North America Specialties, and Associate General Counsel for Emcon.

Ms. Patton has served in many appointed capacities including as a member of the Executive Secretariat for the U.S. National Climate Assessment, the World Economic Forum, and the U.S. EPA Environmental Financial Advisory Board, among others. She currently serves on the Advisory Board for the Bloomberg BNA Environmental Due Diligence Guide, UC Santa Barbara Bren School of Environmental Science and Management and the National Institute for Building Science Council on Finance Insurance and Real Estate.

Earth & Water Group Compliance and Enforcement Newsletter

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Welcome to the summer edition of the Earth & Water Group Newsletter. Our goal is to identify the key issues and signature events that are driving the enforcement and compliance landscape so that organizations can prepare and position themselves for the challenges in this sector. The best defense is an informed offense. And this newsletter is designed to provide you with the latest developments and key takeaways for updating your company and its compliance program.

Learn more about E&W, and the perspective we bring, by visiting our firm at www.earthandwatergroup.com.

Trending

Additional Criminal Charges in Flint - On July 29th, Michigan Attorney General Bill Schuette charged six more state employees with negligence for their actions associated with Flint's lead contaminated drinking water. In announcing the charges, he said: "Some people failed to act, others minimized harm done and arrogantly chose to ignore data, some intentionally altered figures ... and covered up significant health risks." Three employees are from the Michigan Department of Environmental Quality and three from the Michigan Department of Health and Human Services.

This brings the total number of criminal charges to nine. Two MDEQ employees and one from the City of Flint were charged in April. Schuette has also filed a civil lawsuit against Veolia North America and Lockwood, Andrews & Newnam. ***The focus on water compliance is accelerating, not slowing down....***

EPA Enforcement to Continue Aggressive Posture according to EPA's top enforcement official - Cynthia Giles, the EPA's assistant administrator for the Office of Enforcement and Compliance Assurance, sat down with Juan Carlos Rodriguez of *Law360* and said 'despite the agency's tight budget, it is doing all it can to make sure companies know they're being monitored and will be held accountable for environmental violations. And she said the focus on tough enforcement; the Next Generation Compliance initiative, which aims to bring new technology to bear on pollution and compliance; and a commitment to environmental justice will remain pillars of the EPA's enforcement efforts in years to come.' "I think we've made a huge amount of progress on all three of those, and those are the three areas I would expect the enforcement office to continue to focus on in the coming years," Giles said. ***Don't look for an immediate sea change in enforcement and compliance priorities or approaches in 2017.***

Key Enforcement Cases:

Civil Enforcement

Volkswagen - Clean Air Act Settlement

In two related settlements, one with the United States and the State of California, and one with the U.S. Federal Trade Commission (FTC), German automaker Volkswagen AG and related entities have agreed to spend up to \$14.7 billion to settle allegations of cheating emissions tests and deceiving customers. Volkswagen will offer consumers a buyback and lease termination for nearly 500,000 model year 2009-2015 2.0 liter diesel vehicles sold or leased in the U.S., and spend up to \$10.03 billion to compensate consumers under the program. In addition, the companies will spend \$4.7 billion to mitigate the pollution from these cars and invest in green vehicle technology.

The settlements partially resolve allegations by the Environmental Protection Agency (EPA), as well as the California Attorney General's Office and the California Air Resources Board (CARB) under the Clean Air Act, California Health and Safety Code, and California's Unfair Competition Laws, relating to the vehicles' use of "defeat devices" to cheat emissions tests. The settlements also resolve claims by the FTC that Volkswagen violated the FTC Act through the deceptive and unfair advertising and sale of its "clean diesel" vehicles. The settlements do not resolve pending claims for civil penalties or any claims concerning 3.0 liter diesel vehicles. Nor do they address any potential criminal liability. ***Is this the end of the case? In a word, no. Look for future criminal charges or pleas and more broadly look for the EPA and CARB to continue their intense scrutiny of automakers' compliance in the emissions area.***

Consol Energy – CWA Settlement

Consol Energy Inc., CNX Coal Resources and Consol Pennsylvania Coal Co. LLC (Consol) have agreed to implement extensive water management and monitoring activities to prevent contaminated discharges of mining wastewater from mines impacting to the Ohio River and its tributaries. In a consent decree filed in federal court on July 28 in Pittsburgh, Pennsylvania, the company also agreed to continue to prevent certain discharges from the mines, conduct regular long-term-monitoring to ensure sufficient storage capacity to prevent future discharges, develop contingency plans should future discharges become likely and implement an environmental management system to ensure compliance with the Clean Water Act and other applicable environmental laws. In addition, Consol agreed to pay a \$3 million civil penalty for CWA violations. ***Takeaway: EPA continues to focus enforcement efforts on clean water act violations, particularly with a focus on extractive industries such as mining.***

Enbridge – CWA Settlement

EPA and DOJ announced a settlement in July with Enbridge Energy Limited Partnership and several related Enbridge companies to resolve claims stemming from 2010 oil spills in Marshall, Mich. and Romeoville, Ill. Enbridge agreed to spend at least \$110 million on a series of measures to prevent spills and improve operations across nearly 2,000 miles of its pipeline system in the Great Lakes region. Enbridge also agreed to pay civil penalties totaling \$62 million for CWA violations (\$61 million for discharging at least 20,082 barrels of oil in Marshall and \$1 million for discharging at least 6,427 barrels of oil in Romeoville). ***It may take a while, but the enforcement process moves forward – timely and meaningful engagement by responsible parties generally expedites this process.***

Criminal Enforcement

Gen-X and Southern Resources – Clean Air Act - Renewable Fuels Fraud

Thomas Davanzo and Robert Fedyna, both of Florida, pled guilty in District Court in Florida in June for their participation in a multi-party scheme to defraud bio-diesel buyers and U.S. taxpayers by fraudulently selling biodiesel credits and fraudulently claiming tax credits through the companies they operated. Both defendants purported to purchase renewable fuel, on which credits had been claimed and which was ineligible for additional credits. They then used a series of false transactions to “transform” the fuel back into feedstocks needed for the production of renewable fuels to be sold back to Gen-X and Southern Resources allowing credits to be claimed again. The defendants repeated this cycle of fraud multiple times. ***Takeaway: The beat goes on in the troubled RFS program. The schemes have gotten larger and more complex and are continuing while at the same time DOJ and EPA’s Criminal program continue to aggressively prosecute and investigate the ever larger conspiracies.***

XS-Platinum – Criminal Clean Water Act violations

Mining Operator JAMES SLADE, of Calgary, Canada, was sentenced in federal district court in Alaska to 12 months in prison for violating the federal Clean Water Act. Slade was convicted of two Clean Water Act crimes for discharging polluted wastewater into the Salmon River as a result of his operation of the Platinum Creek Mine located in western Alaska. Slade was ordered to serve a one-year term of supervision after he is released from prison. The court concluded he did not have the ability to pay a fine. Slade is one of a number of corporate managers of XS Platinum charged to date. ***Takeaway: Mining operations’ compliance with the Clean Water Act remains an area of heavy emphasis by DOJ.***

Sunland Pest Control – Criminal Violations of FIFRA (pesticide application)

In May, SUNLAND PEST CONTROL SERVICES, INC., (Sunland), GRENALE WILLIAMS, of South Bay, Florida, and CANARIE DEON CURRY, of Riviera Beach, Florida, were sentenced in the Southern District of Florida in connection with the illegal application of a pesticide that resulted in injuries to a minor child. Sunland was sentenced to five years of probation. Williams and Curry were sentenced to one year in prison. Sunland, Williams, and Curry, previously pled guilty for their involvement in the illegal application of sulfuryl fluoride (a pesticide), contrary to the label's safety requirements. Sunland also pled guilty to making false statements in connection with the investigation. ***Takeaway: EPA and DOJ are aggressively focusing on cases involving misapplication of pesticides – particularly those cases where injuries have taken place. Look for this focus to continue and result not just in enforcement but more intense regulatory scrutiny of pesticide operators and applicators at the state and federal level.***

Energy Resource Technology – Criminal Violation – Outer Continental Shelf Lands Act

ENERGY RESOURCE TECHNOLOGY GOM, LLC (ERT), was recently sentenced in the Eastern District of Louisiana to three years of probation and ordered to pay a \$4 million fine and \$200,000 community service payment. The company pled guilty to two felony counts of violating the Outer Continental Shelf Lands Act and two felony counts of violating the Clean Water Act related to conduct on its offshore oil production facilities in the Gulf of Mexico. During the period of probation, ERT, its subsidiaries, agents and affiliated business entity Talos Energy Offshore, LLC, and employees will be required to comply with a Safety and Environmental Compliance Plan. According to court documents, ERT knowingly and willfully failed to comply with the regulations for "hot work" on its offshore production platform – known as Ship Shoal 225. Specifically, contractors for ERT violated Title 30, Code of Federal Regulation, Section 250.113(c)(4), which mandates that welding and associated activities, also known as hot work, on offshore facilities shall not take place within 10 feet of a well-bay unless production in that area is shut off. ***Takeaway: The government-wide effort to address illegal and unsafe conduct in the offshore oil and gas industry continues. This focus can be most clearly seen in the Department of Interior's continued focus on identifying misconduct through its Bureau of Safety and Environmental Enforcement which was established in the wake of the Deepwater Horizon disaster.***

E&W News:

E&W Strategies Convenes Inaugural EHS Roundtable - E&W launched its EHS Roundtable series on June 9th in Washington, DC with its program, "From Worker Safety to VW and Flint: Enforcement Trends and Compliance Tips." EHS leaders from numerous sectors (manufacturing, water, transportation, infrastructure and legal) met to discuss a number of emerging issues in the context of effective compliance and enforcement.

Presentations and guided discussions were led by E&W Strategies President (and former Director of EPA's Criminal Division) Doug Parker; Kanwer Kahn, Vice President of EHS for Suez, N.A.; and Angie Grooms, Regulatory Specialist with ERM (and former EHS Director for Duke Energy).

The Roundtable covered the Federal government's current enforcement priorities, emerging trends in the environmental compliance space, and key strategies to position companies for this operating environment. Over the course of the morning, the 30+ attendees explored a number of pressing EHS compliance and enforcement related issues - including the water crisis in Flint, current and pending

enforcement actions against VW and other manufacturers, as well as the growing intersection of worker safety and environmental laws.

Focusing on proactive steps and shared success stories, attending EHS leaders discussed and took away with them several key points from the Roundtable that they could incorporate into their workplace programs:

- Culture is paramount: effective compliance is achieved through a balance of “carrots” and “sticks.”
- Set standard Business Unit (BU) expectations through the EHS Management System Policies & Guidance which will guide the BU’s to develop business-specific area focuses and create audits for compliance and adequacy.
- You need to be vigilant and transparent about the quality of your data: environmental compliance data (and analysis) is increasingly accessible to regulators and environmental groups, and regulated entities must ensure their data is complete and accurate.
- Consistency is the key: in expectations, implementation and accountability.
- You need to have an Executive Extended Staff or Steering Team. This works most effectively when you engage the right BU leaders. Include HR, Supply Chain, and legal in addition to BU operations.
- Regulators don’t expect perfection, but they do expect a good faith effort to comply with the law.
- The implementation of systems and processes must get buy-in and support from middle managers and then managers and employees. Set clear expectations, hold them accountable for the details and adherence to the process and audit to verify.
- Review the robustness your current legal requirements and resources. Best practice is to look at the universe of regulations (federal, state, and local). Identify what requirements are actionable for you.
- Mergers and acquisitions can be the biggest hiccups: the newly acquired facilities that have been run/managed by others who had a different focus, different processes, and different management systems. To overcome, quickly identify the governing EHS management system, processes and work with them.

The June 9 Roundtable was the first in a developing series being sponsored by E&W that will focus on key issues and trends in compliance and enforcement, along with helpful benchmarking elements of an effective EHS program.

National Cattlemen’s Beef Association - E&W Strategies President Doug Parker was a featured speaker at the National Cattlemen’s Beef Association 2016 Summer Business Meeting. Attendees included more than 600 cattlemen and women from the National Cattlemen’s Beef Association, the Cattlemen’s Beef Promotion and Research Board, the American National CattleWomen, and the National Cattlemen’s Foundation.

Parker talked about various enforcement and compliance trends that are affecting the beef cattle industry and ranchers in particular. He focused on the

E&W Joins
Alliance for the
Chesapeake Bay,
B4B.

“We at Earth & Water are very excited to join Businesses for the Bay. We could not think of a better way to support the continued restoration of the Chesapeake Bay by collaborating with other forward-thinking companies and communities.

For more information on the Alliance, please visit <http://businesses.allianceforthebay.org/member/earth-water-group/>

effect of EPA's national enforcement initiative for animal waste and surface water impacts. He also discussed the emergence and use of external environmental data that third party groups are increasingly utilizing to scrutinize industrial and agricultural operations.

Regulatory Watch

Midnight Regulations - At the end of every administration there's a rush to complete unfinished business and take actions that will continue to affect government policy after it leaves office. The George Washington University's Regulatory Studies Center recently issued a report investigating so-called 'midnight regulations' and, based on their quantitative models, predicts the likely number of 'economically significant' regulations (rules with an annual effect exceeding \$100 million) issued by the outgoing Obama administration will triple during its last months in office. Additional information and the report are available at: <https://regulatorystudies.columbian.gwu.edu/final-countdown-projecting-midnight-regulations>

Integrating Climate into NEPA – As part of the Obama administration's efforts to address climate change, the White House Council on Environmental Quality published its final guidance on how federal agencies should incorporate the effects of climate change into their environmental reviews conducted under the National Environmental Policy Act (NEPA). Under NEPA, federal agencies are required to identify and consider the environmental effects of their own actions or any private sector action in which they play a role, including major infrastructure and energy development projects. The guidance suggests agencies compare the direct and indirect greenhouse gas emissions and climate change effects of project alternatives even when the activity may represent a very small fraction of global emissions. Given the complexity of the task, agency's application of the guidance may be inconsistent and lead to project and permitting delays as they struggle to ensure their analyses and determinations are able to withstand judicial review. Additional information can be found at: <https://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/ghg-guidance>

Hill Watch

Legislative Update: Congress Amends TSCA - With bi-partisan support in both the House and Senate, Congress amended the Toxic Substances Control Act, the major federal statute governing chemicals in commerce. President Obama signed the amendments into law on June 22, 2016. The amendments require EPA to establish a risk-based process for evaluating existing chemicals with clear and enforceable deadlines; establish a new risk-based safety standard to determine whether a chemical use poses an "unreasonable risk"; establish a process for manufacturers to request EPA evaluate an existing chemical; requires EPA to determine if a significant new use "presents an unreasonable risk of injury to health or the environment", without consideration of costs or other non-risk factors; and increase transparency for chemical information. Additional information can be found at: <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/highlights-key-provisions-frank-r-lautenberg-chemical>

Capitol Hill Roundtable on P3s - E&W and the Reason Foundation sponsored a Capitol Hill roundtable on the role of public-private partnerships (P3s) in the water sector on July 6, 2016. Sen. James M. Inhofe, Chairman of the Senate Environment & Public Works Committee, hosted the lunch time event in the Committee's hearing room which drew 30+ congressional staff and water professionals.

The roundtable's facilitated discussion was co- led by Dr. Adrian Moore – VP of the Reason Foundation, and Brent Fewell, E&W Group Chairman, and focused on how P3s can (and do) help increase local investment, leverage more innovation and offer greater flexibility in addressing critical water infrastructure and facility needs, as well as financing innovative water technologies. Participants also discussed how S.2848 - - the Water Resources Development Act (WRDA) of 2016 - - and how WRDA can help to encourage private sector participation in new and developing water technologies (such as desalination, water reuse and water recycling) as well as helping to address other serious water resource challenges related to aging infrastructure and drought.

In addition to Moore and Fewell, roundtable discussion leaders included: Rich Anderson, Senior Advisor – U.S. Conference of Mayors; Tracy Mehan, Executive Director of Government Affairs – American Water Works Association; Michael Deane, Executive Director – National Association of Water Companies; Bill Simpson, Vice President of Government Affairs – National Rural Water Association. The E&W Group and Reason Foundation plan future roundtable discussions on P3s, the next being slated for mid-Fall 2016.

E&W Articles/Press Mentions

R. Benn and B. Fewell, *Comment on The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*. Environmental Law Institute, August 2016. <http://elr.info/news-analysis/46/10658/comment-permit-power-revisited-theory-and-practice-regulatory-permits-administrative-state>

D. Parker (press quote), *Former EPA Criminal Investigations Chief Faults 'Next Generation' Efforts*. InsideEPA, May 25, 2016. <http://insideepa.com/daily-news/former-epa-criminal-investigations-chief-faults-next-generation-efforts>

D. Parker (press quote), *Three Takeaways from VW's \$14.7B Emissions Cheating Deal*. Law360, June 2016. <http://www.law360.com/articles/811654/3-takeaways-from-vw-s-14-7b-emissions-cheating-deal>

B. Fewell, *More Lessons from Flint: Ignoring culture comes with a hefty price tag*. Water & Wastes Digest, July 2016. http://www.wwdmag.com/sites/wwdmag.com/files/7.16_P_Columnist.pdf

M. Curley, *Congress Should Incentivize Clean Water*. Huffington Post, June 2, 2016. http://www.huffingtonpost.com/michael-curley/congress-should-incentivize-clean-water_b_10261980.html

B. Fewell, *Top 10 Mistakes Made in EHS Compliance*. LinkedIn, June 2016. <https://www.linkedin.com/pulse/top-10-mistakes-i-see-ehs-programs-brent-fewell>

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