

Client Alert

Tort Litigation & Environmental Practice Group

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Recent Settlement Under EPA's Energy Extraction Initiative Provides Insight For Future Enforcement in the Oil and Gas Industry

Given its patchwork of regulatory authority over operations in the oil and natural gas industry, the U.S. Environmental Protection Agency (EPA) has adopted a national enforcement initiative to focus its efforts. Through its Energy Extraction Enforcement Initiative, EPA has been steadily targeting the energy industry. A recent settlement provides further insight into EPA's approach under the Clean Air Act and highlights the type of "beyond compliance" requirements on which industry should focus.

Noble Energy, Inc. Settlementⁱ

On April 22, 2015, Noble Energy, Inc. agreed to a \$73 million settlement to resolve claims brought by EPA and the State of Colorado related to emissions of volatile organic compounds (VOCs). The financial costs of the settlement are significant for a Clean Air Act matter in the upstream sector.

EPA and Colorado alleged that the company's condensate storage tanks serving its operations in the Denver-Julesburg Basin emitted VOCs in violation of the Colorado Air Pollution Prevention and Control Act. These state requirements controlling VOC emissions were enforceable by EPA because the regulations had been incorporated into the Colorado State Implementation Plan.

According to EPA, "the settlement resolves claims that [the company] failed to adequately design, size, operate and maintain vapor control systems on its controlled condensate storage tanks." EPA also noted that the settlement addressed essentially all of the company's vapor control systems in the nonattainment area covering the Denver-Julesburg Basin.

Energy Extraction Enforcement Initiative, Next Generation Enforcement

This is the most recent enforcement case EPA has settled since January 2011 in connection with its Energy Extraction Enforcement Initiative. The stated goal of this initiative is to "address incidences of noncompliance from natural gas extraction and production activities that may cause or contribute to significant harm to public health and/or the environment."ⁱⁱ Consistent with this focus, EPA has ramped up its energy extraction

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inspections and evaluations from 361 in FY 2011 to 723 in FY 2014. During this same period, EPA claims that it concluded over 150 enforcement actions.ⁱⁱⁱ In light of the large number of inspections and evaluations, more enforcement actions are likely.

The settlement is also noteworthy because of its focus on the vapor control systems of condensate storage tanks. Moreover, EPA expects others in the industry to evaluate their vapor control systems and learn from Noble's anticipated public reports concerning the vapor control system engineering evaluations and modifications it agreed to conduct as part of the settlement. "These reports will give other companies the opportunity to learn and apply this information to emissions estimates and vapor control system designs," according to EPA.^{iv}

Another significant feature of the settlement is the required implementation of Next Generation monitoring technology. Indeed, a stated goal of EPA's Energy Extraction Enforcement Initiative is to "utilize innovative Next Generation technologies and techniques as appropriate to address non-compliance."^v Next Generation Compliance is EPA's integrated strategy to modernize its approach to compliance through five interconnected components: "design regulations and permits that are easier to implement; use and promote advanced emissions/pollutant detection technology; shift toward electronic reporting; expand transparency by making information more accessible to the public; and develop and use innovative enforcement approaches (e.g., data analytics and targeting) to achieve more widespread compliance."^{vi}

The settlement requires installation of "Next Generation pressure monitors with continuous data reporting on a cross-section of the tank systems to verify that storage tanks are not experiencing increased pressure readings indicative of tank over-pressurization that could cause VOC emissions."^{vii} This is consistent with the EPA enforcement office's recent memorandum directing enforcement staff to consider incorporation of Next Generation approaches in all civil settlements.^{viii}

EPA is expected to continue its focus on vapor control systems and Next Generation monitoring technology in the oil and gas extraction sector. Beyond enforcement, EPA is expected to propose new standards this summer to achieve both methane reductions and additional VOC reductions from oil and natural gas sources — together with use of the type of Next Generation controls included in the Noble settlement, including Next Generation pressure monitors with continuous data reporting.^{ix}

Intersection of Next Generation and Credible Evidence — An Issue for the Unwary

EPA has used Next Generation approaches in other Clean Air Act settlements, most notably in its Petroleum Refinery national enforcement initiative (e.g., fence line monitoring). Requiring companies to field test new technology enables EPA to advance new compliance monitoring methods for future regulations. However, when considering whether to adopt Next Generation monitoring technologies in a settlement, a settling company should be aware of a unique regulatory aspect of the Clean Air Act — the "credible evidence rule."^x The credible evidence rule allows any credible evidence, not simply specified reference method tests, to be used for certain compliance certifications and to potentially establish violations of Clean Air Act emissions standards. Thus, the advanced air emissions monitoring tools that EPA pursues in its settlements, and which it is encouraging other entities to adopt, may expose settling companies to future litigation based not on the compliance demonstration method of the applicable air rule, but rather on broader Next Generation technology. To potentially address this, it can be prudent to seek language in settlements to provide protection against the use of data generated from these alternative monitoring methods.

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."

ⁱ See Noble Energy Inc. Agrees to Make System Upgrades and Fund Projects to Reduce Air Pollution in Colorado, EPA News Release (Apr. 22, 2015) available at: <http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceec8525735900400c27/d555b20d0c44fadd85257e2f0044d4b8!OpenDocument> (Enforcement Release).

ⁱⁱ EPA, National Enforcement Initiative: Ensuring Energy Extraction Activities Comply with Environmental Laws, available at: <http://www2.epa.gov/enforcement/national-enforcement-initiative-ensuring-energy-extraction-activities-comply> (Enforcement Initiative).

ⁱⁱⁱ See *id.*

^{iv} Enforcement Release.

^v Enforcement Initiative.

^{vi} EPA, Next Generation Compliance, available at <http://www2.epa.gov/compliance/next-generation-compliance>.

^{vii} EPA, Noble Energy, Inc. Settlement, available at <http://www2.epa.gov/enforcement/noble-energy-inc-settlement>.

^{viii} See EPA, Next Generation Compliance: Memorandum on Next Gen in Civil Enforcement Settlements, available at <http://www2.epa.gov/compliance/next-generation-compliance-memorandum-next-gen-civil-enforcement-settlements>.

^{ix} See Fact Sheet: EPA's Strategy for Reducing Methane and Ozone-Forming Pollution From the Oil and Natural Gas Industry (Jan. 14, 2015) available at <http://www.epa.gov/airquality/oilandgas/pdfs/20150114fs.pdf>.

^x See 62 Fed. Reg. 8314 (Feb. 24, 1997) available at <http://www.gpo.gov/fdsys/pkg/FR-1997-02-24/pdf/97-4196.pdf>.