

Miners To Feel EPA Heat, Holland & Hart's Johnson Says

By **Juan Carlos Rodriguez**

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Mining and mineral processing businesses in the West should prepare for administrative or civil actions stemming from a U.S. Environmental Protection Agency hazardous waste enforcement initiative, which thus far has been largely exploratory, Kelly Johnson, who leads Holland & Hart LLP's environmental practice, told Law360.

From her vantage point atop one of the nation's largest environment, energy, and natural resources practice groups, Johnson is uniquely positioned to assess the modern environmental law climate, especially in the western U.S. where many of the firm's clients are based. She said the EPA has been rattling the cages of various mining and mineral processing companies in order to suss out how strictly they are complying with regulations intended to implement the Bevill amendment, which was enacted in 1980 and exempted special wastes from regulation under Subtitle C of the Resource Conservation and Recovery Act.

"The EPA, about five years ago, started this mining and mineral processing enforcement initiative basically to see if operators were still following the same processes that they had set 25 years ago," Johnson said. "And that has generated a not-insignificant amount of work for us."

Thus far, Johnson said there haven't been a lot of formal actions, and that companies primarily have been dealing with information requests and inspections from EPA.

"It's been more laying the groundwork over the last five or six years," Johnson said. "But I think it's definitely going to lead to enforcement actions. I don't know whether they'll be civil or just be EPA administrative enforcement actions. But I do think they're coming, because enforcement actions generate revenues and change behaviors."

Johnson noted there is also plenty for oil and gas companies to keep track of on the enforcement front, especially refinery emissions, including from midstream operations like compressor stations for natural gas pipelines or other types of petroleum products.



Kelly Johnson

More recently, she said the EPA has focused on exploration and production activities, which are harder to keep track of because of their smaller size and more widely spread locations, but are a significant source of emissions.

Johnson noted the EPA's proposed new source standards to reduce methane emissions from the oil and gas sector, including by hydraulic fracture wells, as part of a broader effort to reduce methane emissions by up to 45 percent by 2025.

"There's a desire to control volatile organic compounds and nitrous oxide emissions to help combat ozone issues in the West, as well," Johnson said. "That is one of the EPA's enforcement priorities, although it's a new one that's just kind of starting up."

For oil and gas producers and miners, these EPA explorations will start with a request from the agency under Section 114 of the Clean Air Act, she said. The agency will request information about specific components of a process or specific emissions, which it will then analyze. If the EPA believes there's a violation of a state implementation plan, it will file an administrative or judicial enforcement action, she said.

The reason the agency seems to be ramping up its enforcement efforts is because it works, Johnson said.

"The idea behind all of the EPA's enforcement actions, I think, is that, yes, there is a monetary penalty companies will pay, but it's more a way of securing operational changes. And it's really effective," she said.

Drawing on her experience in the U.S. Department of Justice's Environment and Natural Resources Division, Johnson said many enforcement efforts in industries like coal, paper and refining were based on the idea that it's a way to effectuate procedural changes in an industry.

But she said that from a different viewpoint, the actions could be seen as forcing changes without going through the time and effort of a rulemaking under the Administrative Procedure Act.

"So instead of jumping through all the hoops to promulgate a new source performance standard or an existing source performance standard, do a series of enforcement actions where the first company sets forth what will be the technology, and that becomes the floor for the next company," she said.

Along with a new plan to curb greenhouse gas emissions from existing power plants, an expected new ozone standard, and issues surrounding the regulation of fine particulate matter, Johnson said states and industry are facing tough decisions.

"Many states are starting to grapple with the question of how, from an economic perspective, can they compete in not only the national but global market when they have one regulatory regime after another placed on businesses in their jurisdiction? And how do they reconcile all these different federal air requirements in their state implementation plans?" she said.

She said many state agencies — like their federal counterparts — are already strapped for resources, and probably don't have as many employees as they need to put a system in place to balance all these competing needs.

With all these new rules, it's a good time to be a Clean Air Act lawyer, she said.

“As these new rules come out, as EPA starts finalizing these new requirements, as state implementation plans start getting updated to reflect the new ambient air quality standard — it raises issues for which people are going to need to go to private law firms, because no one will have handled these issues previously,” Johnson said.

--Editing by John Quinn and Kelly Duncan.

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