

Prepare Now for Even More Aggressive EPA Enforcement

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Companies should take note and be prepared to respond quickly to more—and more aggressive—EPA enforcement, on the heels of two new enforcement initiatives announced by David Uhlmann, the recently confirmed Assistant Administrator for the U.S. Environmental Protection Agency (EPA)'s Office of Enforcement and Compliance Assurance (OECA). Just a month following confirmation, Uhlmann has rolled out EPA's FY 2024-2027 [National Enforcement and Compliance Initiatives \(NECIs\)](#), highlighting six environmental priorities (climate change, PFAS exposure, coal ash, air toxics in overburdened communities, drinking water compliance, and chemical accident risk reduction), and the [Climate Enforcement and Compliance Strategy](#), which prioritizes climate change in all EPA enforcement and compliance efforts.

Uhlmann's confirmation and the finalization of the NECIs entrench

the **continued uptick** in the civil and criminal inspection and enforcement of environmental laws ushered in with the Biden Administration. Increased inspections will lead to increases in EPA's enforcement pipeline, setting up enforcement actions for many years to come. Cases referred for civil and criminal enforcement can take years to resolve and carry a level of political immunity from changes in Administration. Uhlmann's tenure, even if he remains only another year, may set in motion the most aggressive enforcement that industry has seen in many years, if ever—especially for Greenhouse Gas (GHG) emitters located in communities facing environmental justice (EJ) concerns.

Below, we project enforcement trends—administrative, civil, and criminal—and steps companies can take to prepare.

Enforcement Trends

Uhlmann, who tracked environmental enforcement cases as a law professor, has long been critical of **trending declines in environmental enforcement**. Now as EPA's chief enforcement officer, Uhlmann has an unfettered opportunity to reverse this trend. Uhlmann has begun implementing his commitments to filling enforcement jobs and pursuing aggressive enforcement against the regulated community. These new enforcement memoranda formalize those objectives and likely provide new momentum to Uhlmann's agenda.

Even before his confirmation, there were clear signals of an enforcement

sea-change following the Trump Administration. In the past several years, EPA regional offices have sent numerous information requests seeking broad and detailed information on issues related to Risk Management Programs, Benzene NESHAP compliance, and Ethylene Oxide, among others, as precursors to or in tandem with on-site inspections. Some facilities have endured multiple, repeat inspections, with each new information request probing deeper or into different compliance areas.

[According to its own enforcement data](#), EPA has increased both on-site inspections and off-site monitoring actions each year since 2020.

Administrative enforcement has yielded uncommonly high civil penalties, including a recent record-setting \$40 million settlement over allegations that BP's Whiting, Indiana refinery exceeded air and wastewater limits. See *United States et. al. v. BP Products North America*, 2:23-cv-166 (May 17, 2023). In another suit industry observers are watching closely, the U.S. Department of Justice (DOJ) has breathed new life into its Clean Air Act (CAA) Section 303 imminent and substantial endangerment (ISE) authority, using EPA's controversial Integrated Risk Information System (IRIS) risk values as the basis for enforcement. See *United States v. Denka Performance Elastomer, LLC et. al.*, 2:23-cv-00735 (Feb. 28, 2023). If successful, DOJ will set new legal precedent on ISE, as well as a new model for EPA enforcement.

Both climate change and EJ issues will continue to frame EPA's enforcement paradigm, regardless of the type of enforcement action (administrative, civil, or criminal), the type of environmental media (air,

water, waste), or region in the U.S. As we have earlier reported, both initiatives are Biden and Administrator Regan's priorities, but Uhlmann has now given more contours to how these will play out in enforcement.

Climate Change-related Enforcement

EPA's [Climate Enforcement and Compliance Strategy](#), which implements President Biden's Executive Order 14008 calling for a "whole of government" approach to tackling the climate crisis, directs all EPA enforcement and compliance programs "to address climate change, wherever appropriate, in every matter within their jurisdiction." The strategy signals the Agency's intent to double down on its first-ever NECI on climate change (targeting methane emissions from oil and gas facilities and landfills and illegal importation of hydrofluorocarbons (HFCs)). Practically speaking, companies will likely see these initiatives translated as follows:

EPA is likely to prioritize high-GHG emitters for information requests, inspections, and formal enforcement. Facilities with high GHG emissions should expect more enforcement scrutiny.

Enforcement demands will likely include higher penalties and GHG-related injunctive relief and mitigation measures not yet required by rule, such as flare gas reduction or recovery equipment. The enforcement dialogue has become more aggressive, and that will continue.

Climate change mitigation-related injunctive relief measures will also become components of non-CAA enforcement actions, e.g., storm-

water management enhancement as part of Clean Water Act (CWA) orders. Facilities should be attuned to EPA citing climate change as the motivation and driver underpinning enforcement against them.

Environmental Justice-related Enforcement

Further, EPA will continue to press its EJ goals and is under considerable pressure to make good on promises to do so. See Pamela King, [Supreme Court Ruling Entangles Biden's Environmental Justice Efforts](#), Greenwire (June 29, 2023). All six NECIs incorporate EJ considerations, and one specifically focuses on “reducing air toxics in overburdened communities.” The NECIs follow on a [series of OECA memoranda](#) urging regional offices to increase cleanup enforcement in overburdened communities under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA). The practical implications for companies can be expected to be felt as follows:

Companies in EJ communities are at particular risk for enforcement, especially those that are in industrial corridors perceived to have higher cancer rates – so-called “Cancer Alley,” for example, in Louisiana or any location that was part of Administrator Regan’s Journey to Justice tours. Facilities that are high GHG emitters *and* in EJ communities of concern still have greater enforcement risk. Enforcement demands may entail extra-regulatory community-facing injunctive relief (*i.e.*, fence-line monitoring, additional community engagement) or EJ-related mitigation projects, such as school relocation or other community projects—perhaps along the lines that

were outlined in [EPA's Letter of Concern to Louisiana](#). While that Letter was later retracted, its demands are a harbinger of likely future enforcement conversations and what EPA may believe should entail appropriate settlement relief.

Companies should expect more extensive consultation with local communities to evaluate remedy selection and implementation—even as these new “requirements” are not well-defined—prolonging settlement discussions and creating a de facto “community regulator” with imprimatur over enforcement settlement constructs and their ultimate resolution. Companies may well find themselves negotiating with not just one, but two parties.

Criminal Enforcement

As part of the increase in enforcement and aggressiveness, expect EPA to increase criminal enforcement, whose decades-long wane Uhlmann specifically criticized. Environmental statutes provide multiple avenues for EPA to fashion criminal cases, at times merely through their myriad certified reporting requirements. These include false reporting for illegal discharges of hazardous waste under RCRA, CAA emissions inventory and Title V deviation and reporting, and CWA-certified discharge reports, among others. Expect EPA to also leverage areas of success in prior criminal actions where it already has expertise and a track record —e.g., defeat devices for mobile sources and Benzene Waste Operations NESHAP (regulating benzene emissions from facility waste). Practical implications for companies may include the following:

Complex industrial facilities with multiple reporting obligations have increased risk of criminal enforcement – especially after large emissions events and incidents, and where there may be community shelters in place, injury, fatality, or alleged environmental harm. Companies may see more frequent threat of criminal referral during civil enforcement actions as a way to leverage high civil penalties and large injunctive relief - especially if EPA can point to vulnerabilities (for example, in non-compliance reporting).

To maximize impact and send a message to regulators, EPA may refer criminal cases that are not only focused on company activity, but also officer and director liability as well. (*Read B&D's [update from DOJ's Corporate Crime Advisory Group](#).*)

Suggested Actions

In light of this increased enforcement activity, the regulated community should consider taking the following measures to ensure compliance with applicable laws and to prepare to quickly and effectively react should their facilities become an enforcement target:

1. **Compliance Programs**—Ensure environmental compliance programs and related protocols are up to date and receive appropriate resources, especially for facilities that are high risk based on GHG emissions or located in overburdened communities.
2. **Corrective Actions**—Address all outstanding corrective actions and items on process safety management (PSM) and risk management plan (RMP) lists and any other corrective action recommended to address any EHS audit findings.
3. **Risk Assessment**—Conduct and review confidential risk-assessment

audits, potentially with the protection of attorney-client privilege, and pursue taking advantage of some state audit policies that provide immunities for enforcement and penalties.

4. **Environmental Justice**—Conduct specific EJ risk audits and develop proactive strategies for addressing EJ issues and enhancing community relationships and engagement.
5. **Employee Training**—Refresh employee training related to relevant industry-specific regulations and employee understanding of relevant company policies and procedures, including best practices for careful communications both internally and externally. (*Request B&D's crisis response materials*).
6. **Publicly-Available Information**—Know the publicly-available information about your facility, including its enforcement profile, and correct any emissions inventories and reporting errors—this often is where enforcement starts.
7. **Inspection Readiness**—Prepare now for potential surprise inspections of your facility, including criminal inspections that include FBI Agents and reviewing the internal process for responding to information requests (*Read B&D's tips for when responding to an EPA information request*.)
8. **Lessons-Learned**—Confirm “lessons-learned” are promptly incorporated into the compliance program and that otherwise, the compliance program is evaluated and updated regularly. (*Read B&D's additional tips on strengthening corporate compliance programs*.)
9. **Defense Strategy**—Line up your partners, including law firms and consultants, and develop in-house communication protocols for quick defensive pivots.
10. **Monitor Enforcement Developments**—Stay abreast of all enforcement developments, including the NECIs, which focus on the following six priorities: (1) climate change; (2) PFAS exposure; (3)

coal ash; (4) air toxics in overburdened communities; (5) drinking water compliance; and (6) chemical accident risk reduction.

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