

EPA Enforcement – How to Be Ready in 2023

February 6, 2023

The U.S. Environmental Protection Agency's (EPA's) enforcement office started off the year with important announcements that change the federal environmental compliance landscape. Civil penalties prescribed by environmental statutes are going up again, as mandated by the Federal Civil Penalties Inflation Adjustment Act (FCPIA) Improvements Act of 2015. 88 Fed. Reg. 986 (Jan. 6, 2023). EPA plans to increase the percentage of inspections by as much as 25% in some areas, and the agency is updating its National Enforcement and Compliance Initiatives (NECIs). 88 Fed. Reg. 2093 (Jan. 12, 2023). The agency is asking for public comments on the NECIs, **due March 13, 2023**. Targeting Per- and Polyfluoroalkyl Substances (PFAS) contamination is among EPA's new priorities for enforcement.

Civil Penalty Inflation Adjustments

EPA adjusts civil monetary penalties by multiplying them by the cost-of-living adjustment multiplier. The percentage by which the Consumer Price Index as of October 2022 exceeded that of October 2021 is 1.07745, which results in the new penalty figures in Table 1.

Table 1. 2023 EPA Final Civil Penalty Increases

Environmental Statute

Penalties assessed on or after Jan. 6, 2023, for alleged violations after Nov. 2, 2015

15 U.S.C. § 2615 (a)(1) - Toxic Substances Control Act (TSCA)

\$46,989

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Practice Areas

Environment & Product Regulation
Environmental Compliance and Enforcement
Toxic Substances Control Act (TSCA)

15 U.S.C. § 2647(a) - TSCA (asbestos)

\$13,508

15 U.S.C. § 2647(g) - TSCA (asbestos/contractors)

\$11,162

7 U.S.C. § 136 (a)(1) - Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)

\$23,494

7 U.S.C. § 136 (a)(2) - FIFRA (private applicator)

\$2,221 - \$3,446

42 U.S.C. § 9604 (e)(5)(B) - Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

42 U.S.C. § 9606(b)(1) - CERCLA (abatement/ imminent and substantial endangerment)

42 U.S.C. § 9609(a)(1) - CERCLA (class I)

\$67,544

42 U.S.C. § 9609(b) - CERCLA (class II)

42 U.S.C. § 9609(c) - CERCLA (class III)

\$67,544 - \$202,635

Of note, companies also should expect a slight upward adjustment of baseline civil penalties if they are still in the process of negotiating penalties proposed between Jan. 12, 2022 and Jan. 6, 2023. Overall, EPA's 2022 enforcement statistics include reducing, treating, or eliminating 95 million pounds of pollutants and issuing orders that required companies to pay more than \$300 million in civil and criminal penalties and restitution.

EPA's New National Enforcement Initiative Proposal Includes PFAS

EPA's Office of Enforcement and Compliance Assurance (OECA) has committed to increase the percentage of annual on-site inspections in communities with potential environmental justice concerns from 30% to 55% by 2026. This commitment lines up with the expected changes in EPA NECIs, which are updated every four years. Their purpose is to focus agency resources and enforcement objectives. The current 2020-2023 cycle includes 1) "Creating Cleaner Air for Communities by Reducing Excess Emissions of Harmful Pollutants"; 2) "Stopping Aftermarket Defeat Devices for Vehicles and Engines"; 3) "Reducing Hazardous Air Emissions from Hazardous Waste Facilities"; 4) "Reducing Risks of Accidental Releases at Industrial and Chemical Facilities"; 5) "Reducing Significant Non-Compliance in the National Pollutant Discharge Elimination System"; and 6)

“Reducing Non-Compliance with Drinking Water Standards at Community Water Systems.” EPA is soliciting comments on whether these current initiatives should continue or be modified.

The agency also is inviting comments on two potential new NECLs – “Mitigating Climate Change” and “Addressing PFAS Contamination.” With regard to climate change, EPA is proposing to focus on noncompliance with the American Innovation and Manufacturing Act of 2020, with specific focus on hydrofluorocarbons, excess emissions, and noncompliance with other mobile source, fuels, and methane regulations. PFAS chemicals were developed in the 1940s primarily as non-stick coatings to protect goods and products from stains, water, and corrosion and also to act as flame retardants. To address PFAS, EPA is proposing to focus on commitments made in the 2021-2024 PFAS Strategic Roadmap, such as holding responsible parties accountable for remediation efforts under the agency’s CERCLA enforcement authority. Last September, EPA published a Notice of Proposed Rulemaking (NPRM) to designate PFOA and PFOS as CERCLA Hazardous Substances. 87 Fed. Reg. 54415 (Sept. 6, 2022). The 60-day public comment period ended in November, and a final rule is anticipated around mid-year. It is one of an increasing number of state and federal restrictions and requirements on these compounds, which include several TSCA Significant New Use Rules (SNURs) to restrict the manufacturing (including importation), processing, and use of many PFAS chemicals. More than 1,200 PFAS chemicals are listed on EPA’s industrial chemical TSCA Inventory, with about 600 PFAS chemicals reported as active in commerce. Casting uncertainty over the extent of the eventual scope of enforcement, several groups are pressing EPA to expand its scope of coverage. Beyond the intentional addition of PFAS, there are numerous ways in which the unintentional generation or presence of PFAS can occur. Wiley’s experience with PFAS includes conducting an internal PFAS investigation of a consumer brand company for the presence of these compounds in its products and representing the client in enforcement proceedings.

Two other potential, new focus areas that EPA is asking for comment on are entitled “Reducing Exposure to Lead” and “Addressing Coal Combustion Residuals.” Overall, comments should address how the new proposals meet EPA’s three criteria for enforcement priorities: 1) the need to address serious and widespread environmental issues and significant violations impacting human health and the environment, particularly in overburdened and vulnerable communities; 2) areas where federal enforcement can help ensure national consistency, promote a level playing field, and achieve compliance; and 3) alignment with the Agency’s Strategic Plan. 88 Fed. Reg. at 2094.

How to Make Sure That Your Company Is Prepared

EPA’s announcements highlight the importance of being prepared for an EPA inspection. As EPA shapes its future enforcement priorities in the next few months, consider whether any of the priorities align with where your company is located, the ways in which your company operates, or the products that you sell. Be sure to consider the added safeguard that attorney-client privilege can provide when conducting internal compliance checks. EPA’s voluntary disclosure policy is available to eliminate civil penalty exposure for companies that spot and correct environmental compliance problems before they are discovered by the authorities. Having an inspection manual, procedures, pre-planned routes, and sample files at the ready help make these events go more smoothly. To help foster general awareness within the company, see that your employee safety and

regulatory training is up-to-date and consider offering refresher training. Supplemental Environmental Projects (SEPs) are once again an option to consider during settlement negotiations in enforcement proceedings. Whenever a company receives an information request, notice of violation, or a stop sale orders, counsel should be notified immediately. If EPA's enforcement priorities are lining up with areas in which your company is operating, the rise in civil penalties make 2023 a good time to evaluate your preparedness, in a planned and careful way, to reduce the surprise factor and the risk of enforcement.