

What New EPA Enforcement Initiatives Mean For Industry

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The U.S. Environmental Protection Agency has announced that climate change and per- and polyfluoroalkyl substances will be major targets of investigation and enforcement in coming years.

The EPA's national enforcement and compliance initiatives, or NECIs, for fiscal years 2024 through 2027, were announced on Aug. 17. They include climate change, PFAS and coal ash contamination among six priority areas for enforcement.^[1]

The agency will also continue to prioritize reducing air toxics in overburdened communities, increasing compliance with drinking water standards, and chemical accident risk reduction.

The oil and gas, chemical, and waste-related industries are likely to be most affected by the NECIs over the next several years.

OVERVIEW OF THE NECIS

NECIs represent the EPA's priority areas for enforcement. The agency establishes these national program priorities in order to focus resources on what it considers to be the most serious environmental violations.

In January, the EPA announced its proposed NECIs for fiscal years 2024 through 2027. Now, following consideration and review of public comment on the proposed NECIs, the agency has announced the six final NECIs for the next three years.

The EPA is adding three new priority areas for the next enforcement cycle: (1) mitigating climate change; (2) addressing exposure to PFAS; and (3) protecting communities from coal ash contamination.

The three remaining NECIs — reducing air toxics in overburdened communities, increasing compliance with drinking water standards and chemical accident risk reduction — are existing areas of focus from the prior cycle.

The EPA did not establish a stand-alone NECI to promote environmental justice. However, the agency says that all the initiatives incorporate environmental justice considerations.^[2]

With the addition of the three new initiatives, three initiatives from the last cycle are returning to the core enforcement program at the end of fiscal year 2023: reducing toxic air emissions from hazardous waste facilities; stopping aftermarket defeat devices for vehicles and engines; and reducing significant noncompliance with the Clean Water Act's National Pollutant Discharge Elimination System permitting program.

Below, we review each of the fiscal year 2024-2027 NECI.

MITIGATING CLIMATE CHANGE

The EPA says it selected climate change as a new area of focus “because tackling the climate crisis is EPA’s top priority, and enforcement and compliance efforts that reduce greenhouse gas emissions will help limit the worst effects of climate change.”^[3]

The agency says it will focus enforcement authorities on what it names as three significant contributors to climate change: (1) methane emissions from oil and gas facilities; (2) methane emissions from landfills; and (3) the use, importation and production of hydrofluorocarbons.

The EPA claims to have “documented widespread noncompliance in all three of these areas, resulting in potentially tens of thousands of tons of unlawful emissions of greenhouse gases and other pollutants.”^[4]

ADDRESSING EXPOSURE TO PFAS

The EPA’s announced key goals for its PFAS NECI are to achieve site characterization, control ongoing releases, ensure compliance with permits and other agreements to address PFAS contamination, and address imminent and substantial endangerments to communities as they arise.

The agency acknowledges that the regulatory framework for PFAS is continuing to develop across environmental statutes. It says it will not only work to ensure compliance with existing statutes, but also expand activities under this NECI if additional PFAS regulations are finalized.

If the EPA finalizes regulations to designate perfluorooctanoic acid and perfluorooctanesulfonic acid as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA — also known as the Superfund law — the agency will direct its enforcement efforts toward major manufacturers and users of manufactured PFAS, federal facilities that are significant sources of PFAS, and other industrial parties.

The agency says that it does not intend to pursue enforcement action against entities “where equitable factors do not support CERCLA responsibility.” It specifically calls out farmers, water utilities, airports and local fire departments as examples of such entities.^[5]

PROTECTING COMMUNITIES FROM COAL ASH CONTAMINATION

The EPA did not initially slot coal combustion residuals, or CCR — also known as coal ash — as a top-six initiative when it proposed NECI in January. However, it did request public comment on whether it should add a NECI focused on coal ash that contains contaminations like mercury, cadmium, chromium and arsenic.

After further review, the agency concluded that noncompliance with CCR requirements under the Resource Conservation and Recovery Act is widespread, and that utilities are often noncompliant with performance standards and monitoring and testing requirements.

Thus, the EPA says it will focus resources on increased investigations and enforcement at coal ash facilities, as well as remediating contaminated water. It plans to pay special attention to facilities located near environmental justice communities.

REDUCING AIR TOXICS IN OVERBURDENED COMMUNITIES

The EPA's air toxics initiative started in fiscal year 2020 under the title "Creating Cleaner Air for Communities."

The agency has modified it for the next cycle to focus air enforcement action on communities that suffer from higher levels, or multiple sources, of hazardous air pollutants such as benzene, ethylene oxide and formaldehyde.

Each EPA region will select these overburdened communities, in partnership with states.

INCREASING COMPLIANCE WITH DRINKING WATER STANDARDS

The EPA decided to continue its drinking water initiative, which began in fiscal year 2020, in the 2024-2027 cycle.

The agency says that in this cycle, it will increase its field presence, pursue strategic enforcement and increase compliance assistance efforts to address public health risks associated with regulated drinking water systems that are not meeting their obligations under the Safe Drinking Water Act.

CHEMICAL ACCIDENT RISK REDUCTION

The EPA will also be carrying its existing chemical accident risk reduction initiative into the 2024-2027 cycle. This initiative seeks to address the failure to properly implement risk management programs under Section 112(r) of the Clean Air Act at facilities handling extremely hazardous substances.

The agency will direct its resources toward inspections and addressing noncompliance at facilities using anhydrous ammonia and hydrogen fluoride. These substances are typically used as refrigerants or agriculture fertilizers and in petrochemical manufacturing facilities, respectively.

REACTIONS FROM THE REGULATED COMMUNITY

While the EPA identified existing new source performance standards at oil and gas facilities, landfill methane, and the American Innovation and Manufacturing Act as areas of focus for the climate change priority, some members of the regulated community have expressed concerns with the potential breadth of the agency's new climate change NECI.

The Utility Solid Waste Activities Group asserted in public comments earlier this year that CCR issues are site-specific and involve technical issues that are not fit for a nationwide compliance initiative.^[6] CCR is, notably, primarily combustion waste from coal-fired, greenhouse-gas emitting power plants.

Other comments are critical of the new PFAS NECI. The American Chemistry Council has expressed concern that the EPA may treat the large class of diverse PFAS substances equally, despite the gaps in scientific understanding of most PFAS substances, and vast differences between their potential toxicity and potential for bioaccumulation.

Thus, the ACC has called on the EPA to ensure that the agency only directs enforcement to those specific PFAS substances for which the agency has established, or is likely to establish, regulatory requirements.^[7]

Representatives of the waste and recycling industry, the National Waste and Recycling Association and the Solid Waste Association of North America, have asserted in comments that the EPA's PFAS enforcement effort should not focus on landfills and other waste facilities, but provide what it calls "contribution protection" from CERCLA liability for "passive receivers" of PFAS, including waste facilities.^[8]

KEY TAKEAWAYS

The EPA's latest NECI include a new focus on climate change, exposure to PFAS, and coal ash contamination.

While the agency names certain greenhouse gas-specific regulatory programs as a focus of its climate change initiative, it remains to be seen if a broader review of other environmental programs with the co-benefit of reducing greenhouse gases will result.

The oil and gas industry, chemical industry, and waste industries should anticipate increased investigation and enforcement activity.

[1] Memorandum from David M. Uhlmann to EPA Regional Administrators (Aug. 17, 2023), available at: <https://www.epa.gov/system/files/documents/2023-08/fy2024-27necis.pdf>.

[2] *Id.* at 1.

[3] *Id.* at 2.

[4] EPA, EPA Announces Federal Enforcement Priorities to Protect Communities from Pollution (Aug. 17, 2023), available at: <https://www.epa.gov/newsreleases/epa-announces-federal-enforcement-priorities-protect-communities-pollution>.

[5] Uhlmann, *supra* note 1, at 3.

[6] See Utility Solid Waste Activities Group, Comments on EPA's National Enforcement and Compliance Initiatives for Fiscal Years 2024–2027, 88 Fed. Reg. 2093 (Jan. 12, 2023) Docket ID No. EPA-HQ-OECA-2022-0981, available at <https://www.regulations.gov/docket/EPA-HQ-OECA-2022-0981/comments>.

[7] See American Chemistry Council, Public Comment on EPA's National Enforcement and Compliance Initiatives for Fiscal Years 2024–2027 (88 Federal Register 2093, Jan. 12, 2023), EPA-HQ-OECA-2022-0981, available at <https://www.regulations.gov/docket/EPA-HQ-OECA-2022-0981/comments>.

[8] See NWRA and SWANA, EPA's National Enforcement and Compliance Initiatives for Fiscal Years 2024–2027, Docket No. EPA-HQ-OECA-2022-0981, available at <https://www.regulations.gov/docket/EPA-HQ-OECA-2022-0981/comments>.

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