

EPA Enforcement Will Focus On Climate Change and PFAS

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The Environmental Protection Agency (EPA) announced that climate change and PFAS will be a focus of investigation and enforcement in coming years. The oil and gas, chemical, and waste-related industries should take note. EPA's national enforcement and compliance initiatives (NECIs) for fiscal years 2024-2027,¹ announced on August 17, 2023, include climate change, PFAS, and coal ash contamination among six priority areas for enforcement. EPA will also continue to prioritize reducing air toxics in overburdened communities, increasing compliance with drinking water standards, and chemical accident risk reduction.

OVERVIEW OF THE NECIS

NECIs represent EPA's priority areas for enforcement. EPA establishes these national program priorities in order to focus resources on what EPA considers to be the most serious environmental violations. As we [previously discussed](#), in January 2023, EPA announced its proposed NECIs for fiscal years 2024–2027. Now, following consideration and review of public comment on the proposed NECIs, EPA has announced the six final NECIs for the next three years.

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—(4) reducing air toxics in overburdened communities; (5) increasing compliance with drinking water standards; and (6) chemical accident risk reduction—are existing areas of focus from the prior cycle. EPA did not establish a standalone NECI to promote environmental justice. However, EPA 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 FY2023: 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.

We provide an overview of each of the FY 2024-2027 NECIs below.

1. Mitigating Climate Change: EPA says it selected this 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 EPA says it will focus enforcement authorities on what the Agency 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 (HFCs). 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.”⁴⁴

2. **Addressing Exposure to PFAS:** EPA’s announced key goals for this NECI are to achieve site characterization, control ongoing releases, ensure compliance with permits and other agreement to address PFAS contamination, and address imminent and substantial endangerments to communities as they arise. EPA acknowledges that the regulatory framework for PFAS is continuing to develop across environmental statutes. EPA 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 EPA finalizes regulations to designate PFOA and PFOS as hazardous substances under CERCLA, EPA 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. EPA says that it does not intend to pursue enforcement action against entities “where equitable factors do not support CERCLA responsibility.” EPA specifically calls out farmers, water utilities, airports, and local fire departments as examples of such entities.⁴⁵
3. **Protecting Communities from Coal Ash Contamination:** EPA did not initially slot this initiative as a top-six initiative when it proposed NECI in January 2023. However, EPA did request public comment on whether it should add a NECI focused on coal combustion residuals (“CCR”), also known as coal ash, that contain contaminations like mercury, cadmium, chromium, and arsenic. After further review, EPA concluded that noncompliance with CCR requirements under the Resource Conservation and Recovery Act are widespread and that utilities are often noncompliant with performance standards and monitoring and testing requirements. Thus, EPA says it will focus resources on increased investigations and enforcement at coal ash facilities, as well as remediating contaminated water. EPA plans to pay special attention to facilities located near environmental justice communities.
4. **Reducing Air Toxics in Overburdened Communities:** This initiative started in FY2020 as “Creating Cleaner Air for Communities.” EPA 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.
5. **Increasing Compliance with Drinking Water Standards:** EPA decided to continue this initiative, which began in FY 2020, in the 2024-2027 cycle. EPA 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.
6. **Chemical Accident Risk Reduction:** EPA will also be carrying this existing 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. EPA will direct its resources toward inspections and addressing noncompliance at facilities using anhydrous ammonia and hydrogen fluoride. These substances are typically used as refrigerant or agriculture fertilizer and in the petrochemical manufacturing facility, respectively.

REACTIONS FROM THE REGULATED COMMUNITY

Some members of the regulated community are expressing concerns with EPA’s new NECI. While EPA identified existing New Source Performance Standards at oil and gas facilities, landfill methane, and the American Innovation and Manufacturing Act (AIM Act) as areas of focus for the climate change priority, members of the oil and gas community have expressed concern that its industry as a whole may be an enforcement target, with EPA’s ultimate target being well beyond EPA’s limited programs directly regulating greenhouse gas emissions. A utility industry group similarly asserted that CCR issues are site-specific and involve technical issues that are not fit for a nationwide compliance initiative. CCR is, notably, primarily combustion waste from coal-fired, greenhouse-gas emitting power plants. Others are critical of the new PFAS NECI. Representatives of the chemical industry is concerned that 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.

KEY TAKEAWAYS

- EPA's latest NECLs include a new focus on addressing climate change, exposure to PFAS, and coal ash contamination.
- While EPA 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.

For more information on the impacts of the NECLs on your business, please contact Jonathan D. Brightbill (Partner, Government Investigations, Enforcement, and Compliance/Environmental Litigation), Madalyn Feiger (Associate, Environmental), or your Winston relationship attorney.

^[1] Memorandum from David M. Uhlmann to EPA Regional Administrators (August 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* (August 17, 2023), available at: <https://www.epa.gov/newsreleases/epa-announces-federal-enforcement-priorities-protect-communities-pollution>.

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

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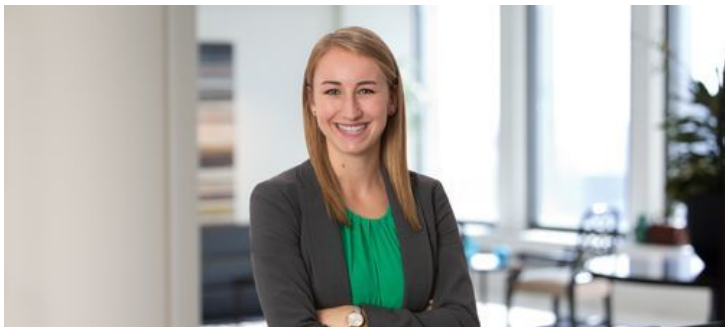
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