

**Hogan
Lovells**

Environmental Enforcement

ELI Western Environmental Bootcamp

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May 3, 2024



Enforcement Statutes

- **Key Federal Environmental Statutes**

- CAA, CWA, RCRA, CERCLA, TSCA, FIFRA, ESA, MBTA, OPA
Lacey Act

- **Related or Parallel State Statutes**

- Some federal laws require States to develop rules and give both EPA and States authority to enforce (separately or jointly)
- States can also enforce their own laws separately

- **General Criminal Statutes**

- Mail or wire fraud, money laundering, false statements, obstruction of justice, conspiracy, manslaughter, etc.

- **Corporate Reporting Statutes**

- SEC disclosures (material environmental liabilities, government enforcement, climate change, conflict minerals), Sarbanes-Oxley

Types of Enforcement

- **Administrative**

- Non-judicial action taken by agency
- Limited monetary penalties, no injunctive relief except compliance orders and permit suspension/revocation under certain statutes

- **Civil Judicial**

- Complaint filed by Government or citizens (under certain statutes)
- Toxic tort claims sometimes brought instead or in addition to typical enforcement actions
- High monetary penalties, injunctive relief, attorney's fees

- **Criminal**

- Monetary penalties, restitution, incarceration, debarment
- Can be in parallel with civil enforcement

Enforcement Agencies

- **Local**

- Police, Health Department, Fire Department, City/County/Regional Environmental Agencies

- **State (California example)**

- Police, DTSC, Water Boards, CalRecycle, CDFG, BCDC, Coastal Commission, CARB, CDPR, CalFire

- **Federal**

- EPA, FBI, ICE, OSHA, Forest Service, Coast Guard, NOAA, NMFS, FWS, BIA, BLM, BOR

Legal Enforcers

- **Citizen's Groups**
- **City or District Attorney**
- **State Agency Staff/Attorney**
- **State Attorney General**
- **U.S. Department of Justice**
 - Main Justice (ENRD)
 - U.S. Attorney's Offices

EPA National Enforcement and Compliance Initiatives 2024-27

- **Mitigating Climate Change (new)**
 - Use EPA’s criminal and civil enforcement authorities to address three separate and 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)
- **Addressing Exposure to PFAS (new)**
 - While the regulatory framework for PFAS continues to develop across multiple statutes, EPA has already taken a number of enforcement actions to ensure compliance with existing statutes, including action to address an imminent and substantial endangerment to communities. EPA will increase those efforts, particularly where necessary to protect drinking water supplies, as part of this new initiative. .
- **Protecting Communities from Coal Ash Contamination (new)**
 - This NECI focuses on conducting investigations, particularly at coal ash facilities impacting vulnerable or overburdened communities; taking enforcement action at coal ash facilities that are violating the law; and protecting and cleaning up contaminated groundwater, surface water, and drinking water resources.

EPA National Enforcement and Compliance Initiatives 2024-27

- **Reducing Air Toxics in Overburdened Communities (modified)**
 - Enforcement focused on exceedances of the National Ambient Air Quality Standards for ozone and hazardous air pollutants (HAPs). Modified initiative will focus on enforcement at facilities in overburdened communities selected by each Region that are facing high levels of toxic air pollution from HAPs
- **Increasing Compliance with Drinking Water Standards (continued)**
 - EPA will ramp up its field presence, pursue strategic enforcement to reduce noncompliance, and offer more compliance assistance to prevent and address public health risks associated with violations of Safe Drinking Water Act at community water systems.
- **Chemical Accident Risk Reduction (continued)**
 - This initiative seeks to reduce risks to human health and the environment by decreasing the likelihood of chemical accidents by focusing enforcement and compliance resources on facilities nationwide that make, use, and store extremely hazardous substances.

EPA Strategic Plan 2022-2026

“The Plan renews commitment to EPA's three principles— follow the science, follow the law, and be transparent, while adding a fourth foundational principle: advance justice and equity.”

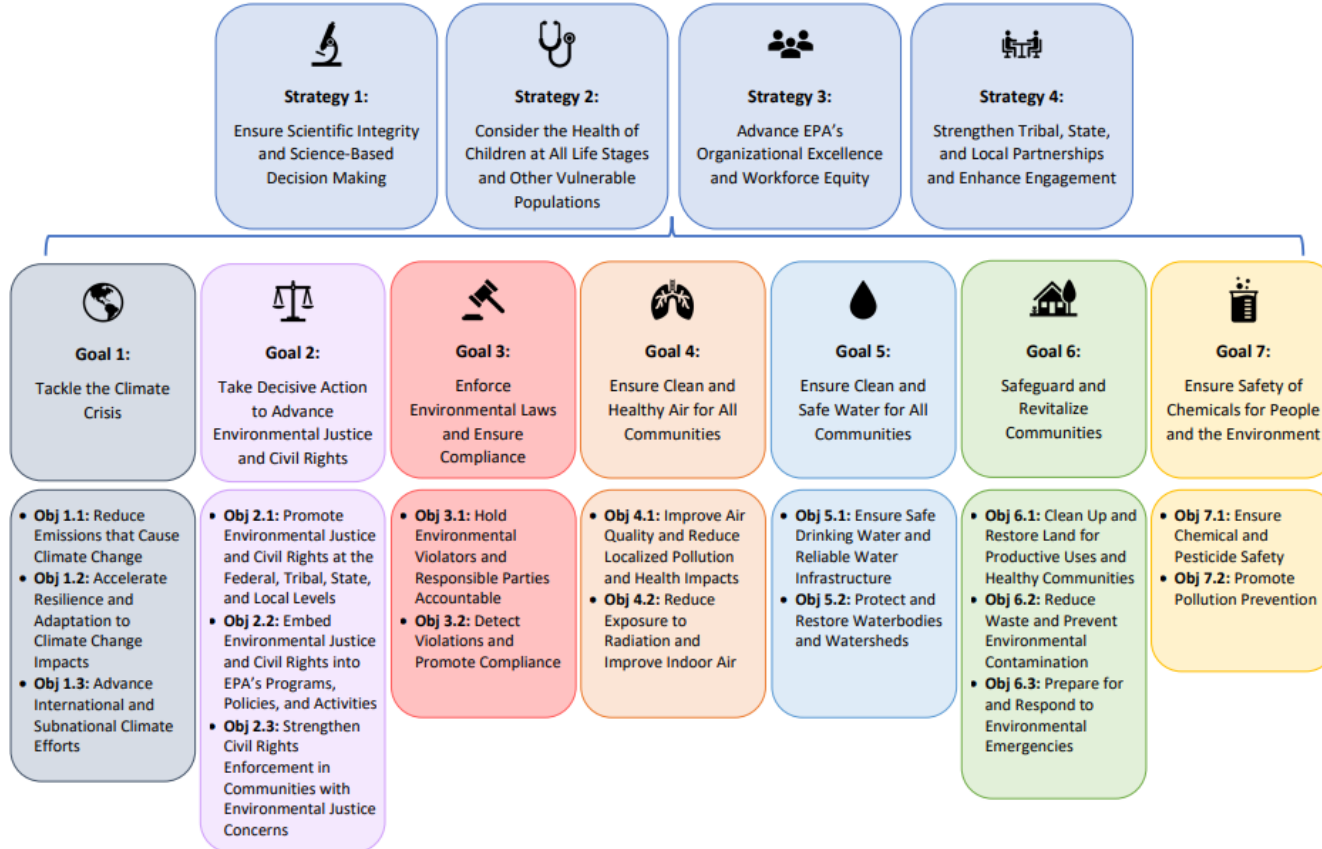
“For the first time, EPA’s Plan includes a strategic goal focused exclusively on addressing climate”

- Includes seven strategic goals, focused first on climate, environmental justice, and enforcement. Additional goals focused on air, water, land, and chemicals.
- Focus on scientific integrity, marginalized communities, drinking water, children’s health, and state and tribal partnerships.

FY 2022-2026 EPA Strategic Plan Framework

Mission: To Protect Human Health and the Environment

Principles: Follow the Science, Follow the Law, Be Transparent, Advance Justice and Equity



2023 EPA Enforcement Statistics

- **EPA Fiscal Year 2023**

- Fines

- Admin/Civil = ↑ \$ 176 M (varies significantly year to year based on large cases)

- Criminal = ↑ \$ 450M

- Pollution Control Equipment = ↓ \$3.8 B (slight increase from last year)

- Supplemental Environmental Projects = ↑ \$13 M (large increase from last year)

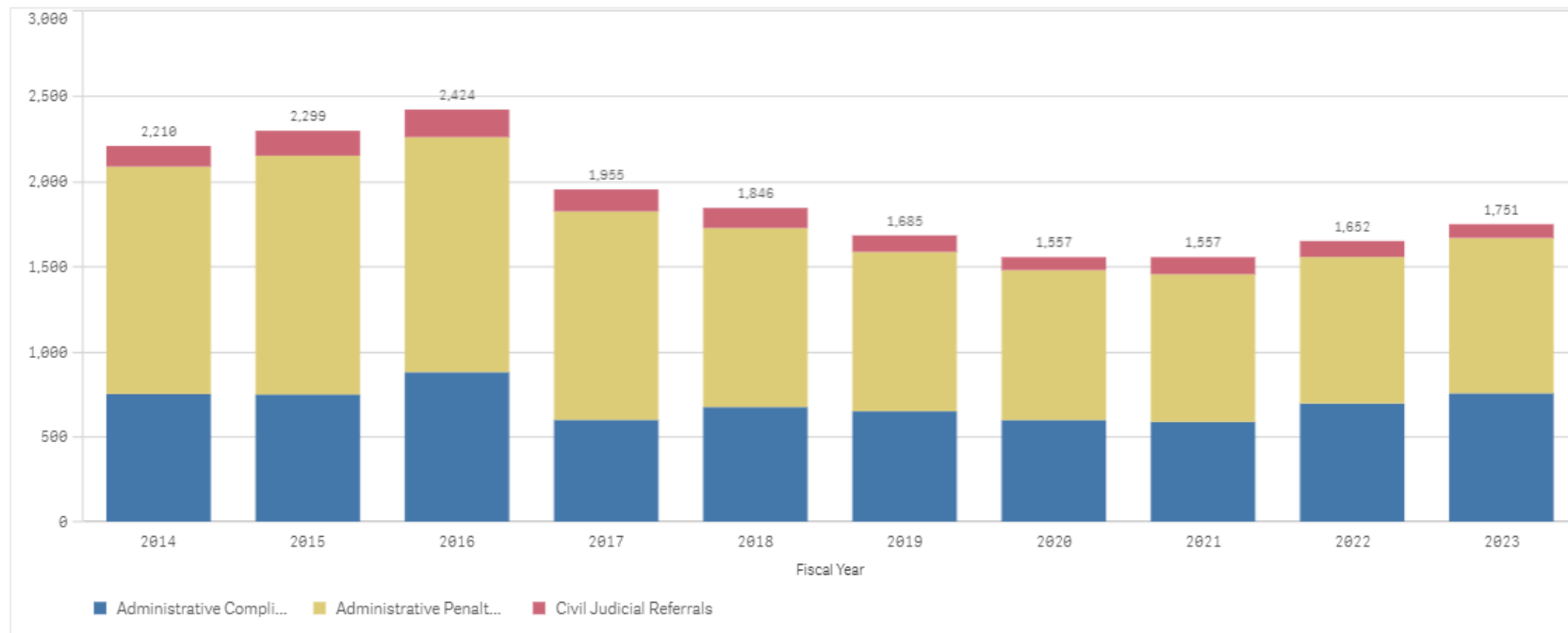
- Admin/Civil Enforcement Cases Initiated = ↑ 1,751 (1,600 in 2021)

- Criminal Investigations Opened ≈ ↑ 199 (significantly lower than high of 338 in 2007, 50% in EJ communities)

- Federal Inspections = ↑ 7,700 (60% of inspections in EJ communities)

EPA Civil Enforcement Trends

Total Civil Enforcement Case Initiations FY 2014 – FY 2023

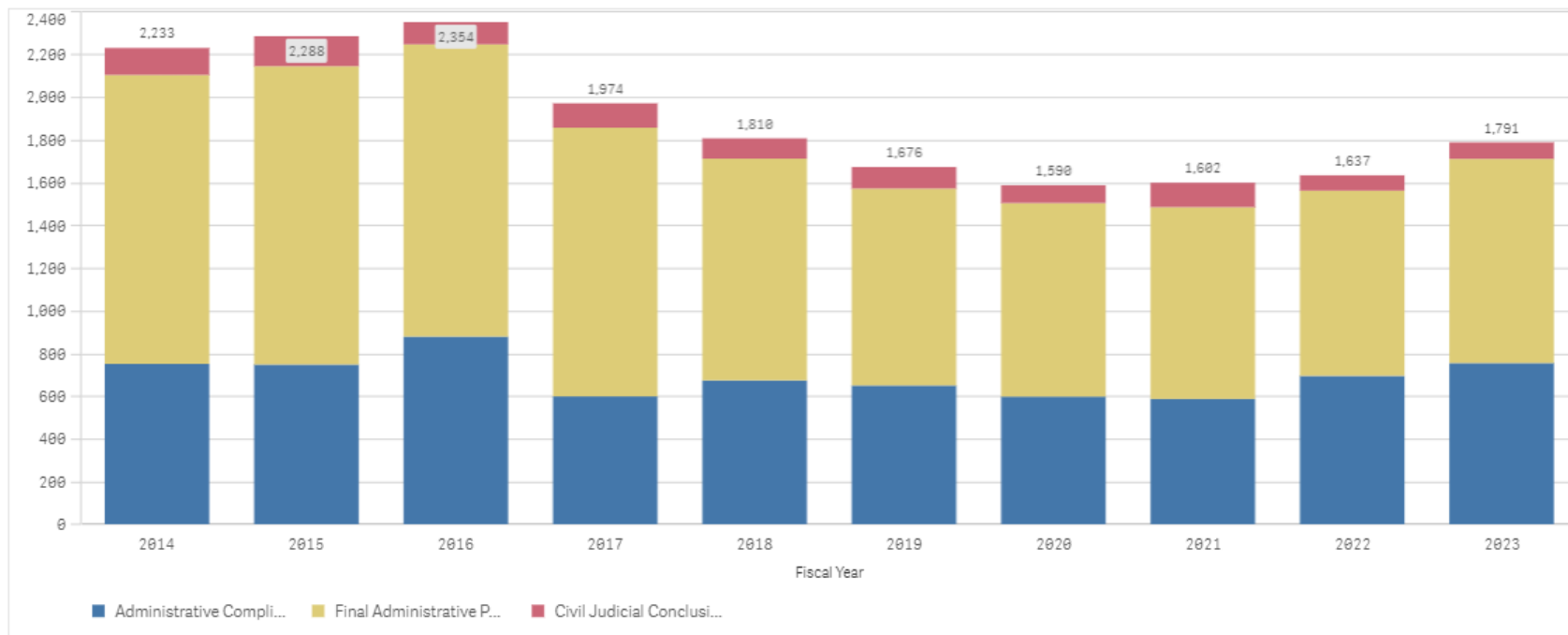


Footnotes:

1. Initiations include the number of administrative actions and the referrals made to DOJ for civil judicial actions.
2. Total initiations include CERCLA cases.

EPA Civil Enforcement Trends

Total Civil Enforcement Case Conclusions FY 2014 – FY 2023

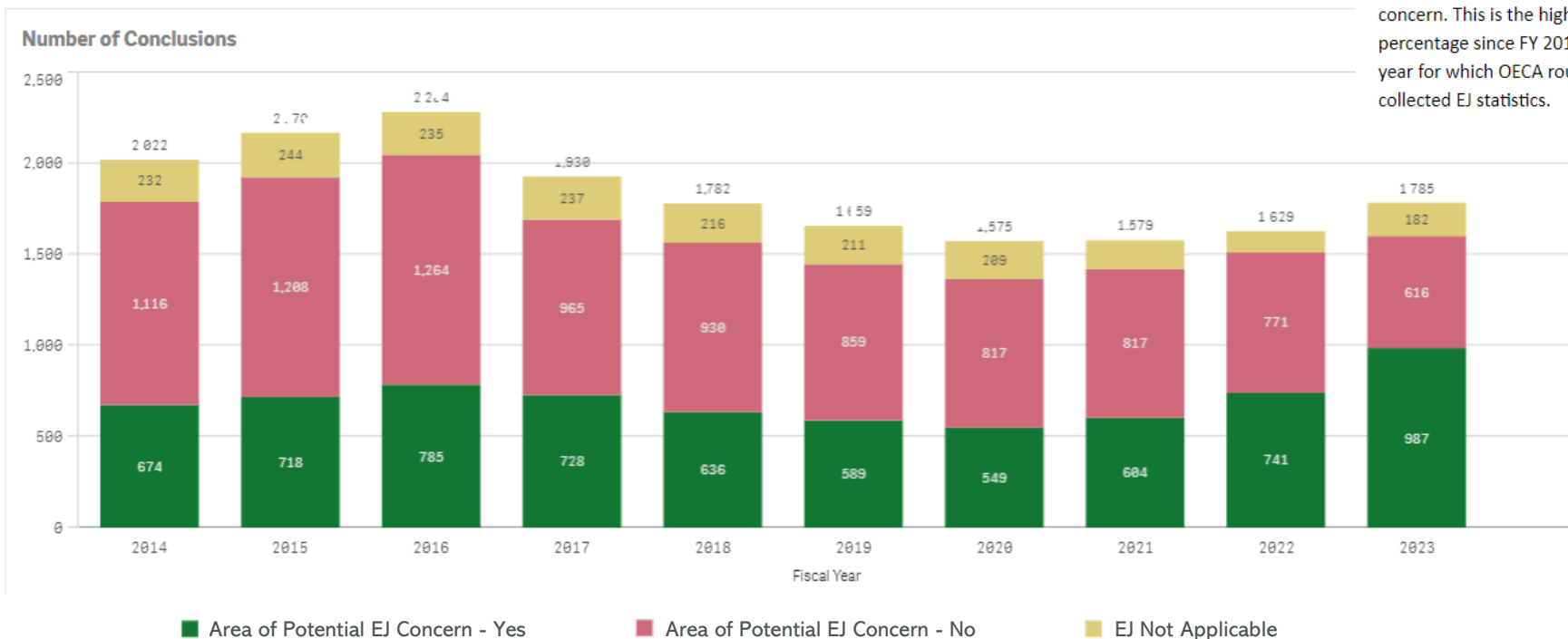


Footnotes:

1. Conclusions include the number of administrative and judicial enforcement actions concluded, as well as CERCLA cases.

EPA Civil Enforcement Trends

Total Civil Enforcement Case Conclusions in *Areas of Potential Environmental Justice Concern*
FY 2014 – FY 2023

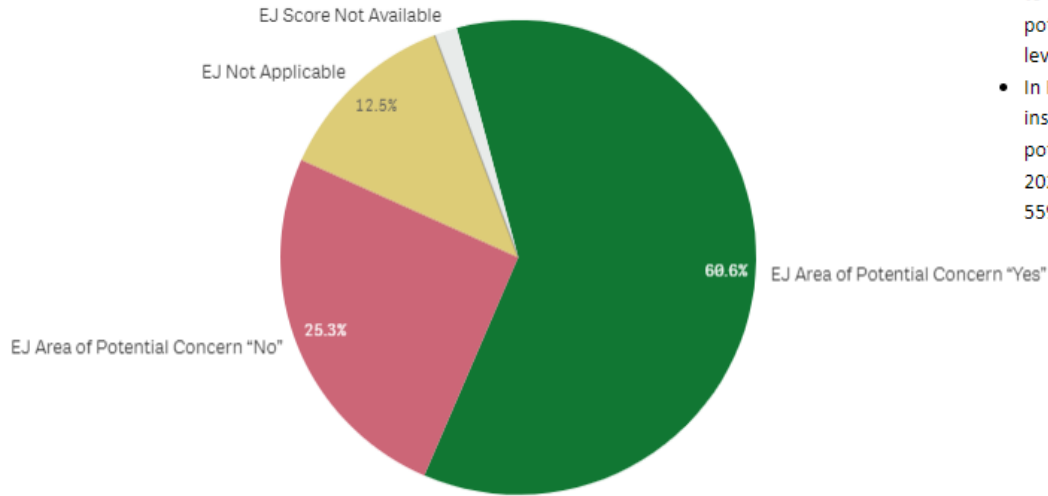


Highlights:

- In FY 2023 55% of cases addressed facilities in areas of potential EJ concern. This is the highest percentage since FY 2014, the first year for which OECA routinely collected EJ statistics.

EPA Environmental Justice Inspections

Percentage of FY 2023 Federal Inspections in Areas of Potential EJ Concern and not in Areas of Potential EJ Concern



Highlights:

- The *FY 2022 -2026 EPA Strategic Plan* sets forth a goal to increase the percentage of inspections in areas of potential environmental justice (EJ) concern from past levels of approximately 30%.
- In FY 2023, EPA performed nearly 61% of its inspections at facilities affecting communities with potential EJ concerns significantly exceeding its FY 2023 target of 50% and exceeding its 5-year goal of 55%.

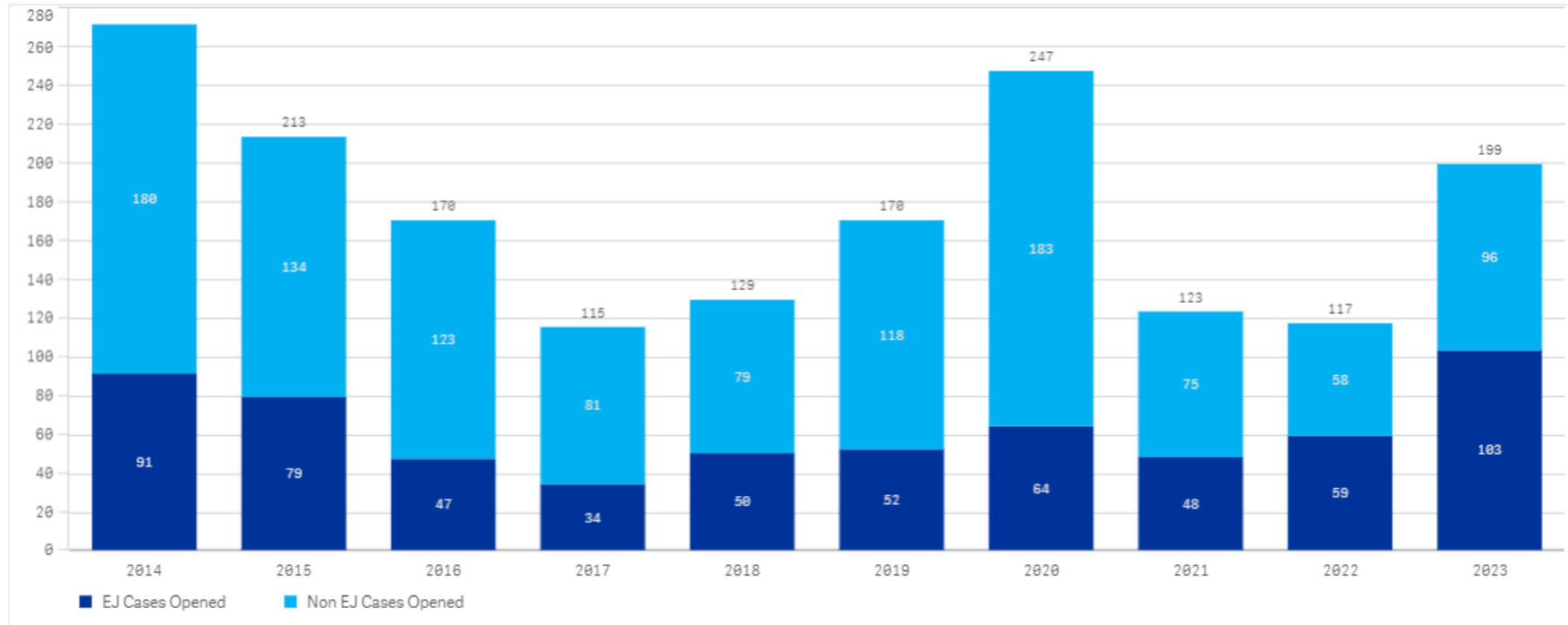
Footnotes:

1. An inspection is determined to have been performed in an area with potential EJ concerns either based on the [EJScreen](#) value or on the results of a more detailed manual review performed.
2. "EJ Not Applicable" are exempt because there is no specific locational impact data (e.g. imports).
3. "EJ Score Not Available" are missing facility information.

EPA Criminal Enforcement Trends

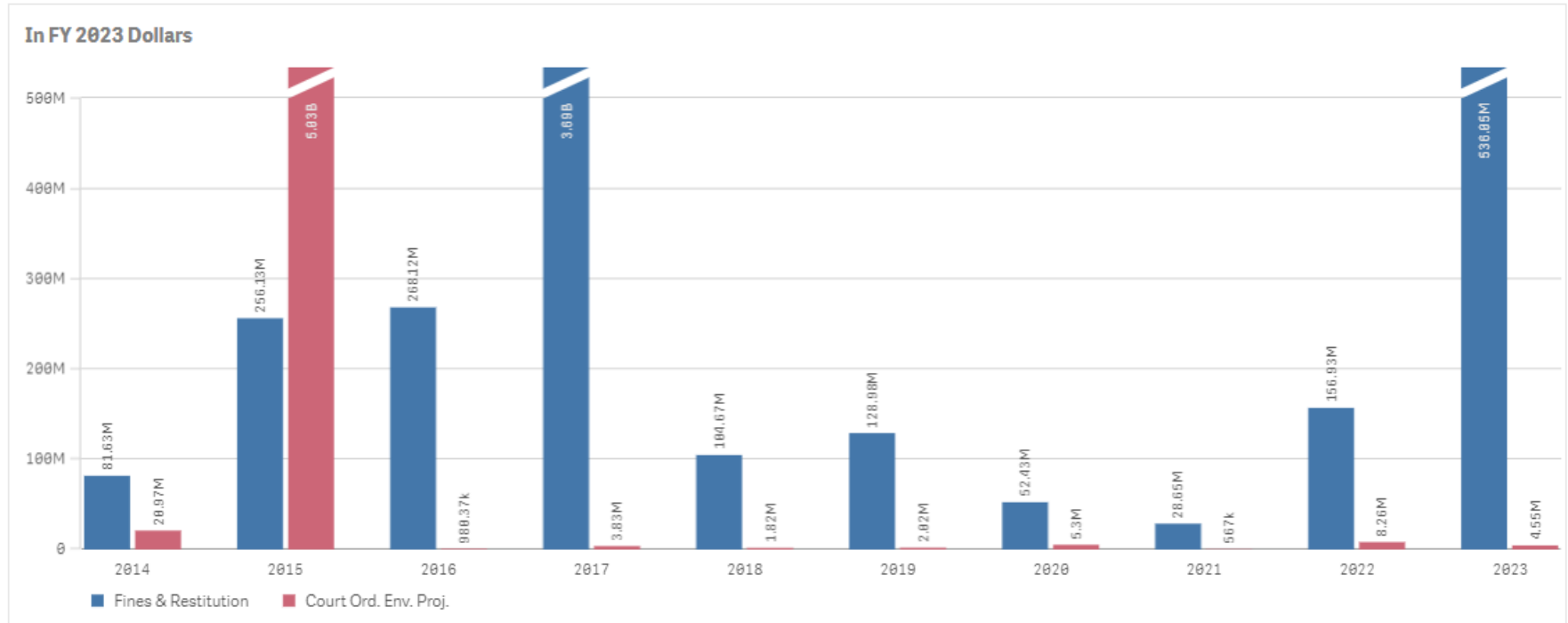
Criminal Enforcement: Environmental Crime Cases Opened Including EJ Cases

FY 2014 – FY 2023



EPA Criminal Enforcement Trends

Criminal Enforcement: Value of Fines and Restitution and Court Ordered Environmental Projects FY 2014 – FY 2023



New EPA Strategic Civil-Criminal Enforcement Policy




ASSISTANT ADMINISTRATOR FOR ENFORCEMENT AND COMPLIANCE ASSURANCE

WASHINGTON, D.C. 20460

April 17, 2024

MEMORANDUM

SUBJECT: Strategic Civil-Criminal Enforcement Policy

FROM: David M. Uhlmann 

TO: Regional Counsels and Deputies
Enforcement and Compliance Assurance Division Directors and Deputies
OECA Office Directors and Deputies
OCEFT Special Agents in Charge and Assistant Special Agents in Charge

- Mandates coordination throughout an investigation between separate EPA administrative, civil and criminal enforcement sections to determine whether the matter should be pursued as administrative, or civil or criminal or both.
- Key to the decision making will be whether an investigation, civil or criminal, has identified “equities” that push the case in one direction or another.
- For the first time sets public goal to have a “clear direction in the first year about how the action will be handled” to enable judicial cases to be filed, charged, or concluded within two to three years.
- Creates nation-wide case tracking system

Federal Priorities: Climate Crisis & Environmental Justice

THE WHITE HOUSE

Administration Priorities COVID-19 Briefing Room Español MENU

BRIEFING ROOM

Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis

JANUARY 20, 2021 • PRESIDENTIAL ACTIONS

THE WHITE HOUSE

BRIEFING ROOM

Executive Order on Tackling the Climate Crisis at Home and Abroad

JANUARY 27, 2021 • PRESIDENTIAL ACTIONS

THE WHITE HOUSE

BRIEFING ROOM

Executive Order on Climate-Related Financial Risk

MAY 20, 2021 • PRESIDENTIAL ACTIONS

THE WHITE HOUSE

BRIEFING ROOM

Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government

JANUARY 20, 2021 • PRESIDENTIAL ACTIONS

Federal Priorities: Climate Crisis & Environmental Justice

*“This Strategic Plan is bold and unprecedented in its commitment to advancing **environmental justice** and civil rights, and tackling **climate change**”*

-Administrator Regan’s Message in FY 2022-2026 EPA Strategic Plan

*“I want to conclude by highlighting two top Administration priorities with a critical nexus to effective criminal and civil enforcement: tackling the **climate crisis** and promoting **environmental justice**. Remember, at its core, enforcement seeks to ensure that certain public values are achieved, and that public goods—indeed, the public’s health—are protected. Nowhere is that more true than for enforcement efforts that mitigate climate impacts and strive to secure environmental justice.”*

*-ENRD AAG Kim December 14, 2021 Remarks at
ABA National Environmental Enforcement Conference*

EPA & DOJ EJ Enforcement Guidance

EPA Administrator's Directive (April 7, 2021)

- Assess and reduce impacts to overburdened communities from regulations
- Meaningful and frequent engagement with EJ communities affected by rulemakings, permitting and enforcement

EPA Civil Enforcement (April 30, 2021):

- EJ / Enforcement Steering Committee, Step in if State not Doing the Job
- Increase Community Access to Data & Information, Incorporate SEPs
- “Early Relief for Communities”

EPA Criminal Enforcement (June 21, 2021)

- Increased Facility Inspections in Overburdened Communities
- Outreach to Environmental Crime Victims with DOJ
- Seek Restitution for Environmental Harms

DOJ (May 5, 2022)

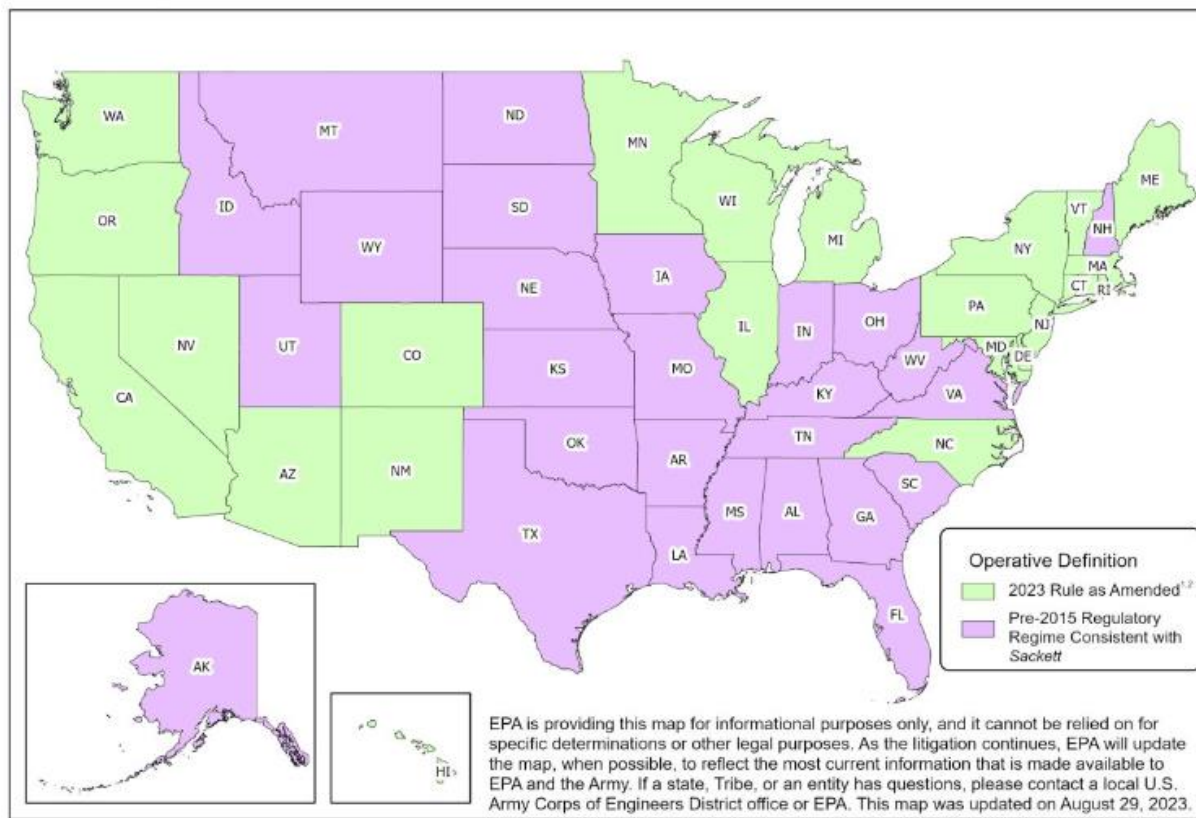
- Established an Office of Environmental Justice to coordinate among entire Department and issued EJ enforcement strategy.
- Focus on outreach to environmental crime victims, including use of hotline and social media, to document harm, restitution, and damages

Federal Regulatory Priorities

- **Review of every Trump Administration Action**
 - Jan. 20, 2021 EO requiring review of any agency regulation, order, guidance document, or policy that conflict with science or Biden's climate or environmental justice goals.
 - Nearly 200 rollbacks of Trump rules initiated with 153 complete or in progress as of April 2024
- **Recent key planned, proposed or final rulemakings include:**
 - Waters of the United States (Amended Rule issued August 2023 to comply with *Sackett v. EPA*; continued litigation results in different enforcement in different states)
 - SEC climate disclosure guidance
 - GHG emission limits for heavy duty trucks
 - Four new rules limiting pollution from coal and natural gas electric plants (covering carbon emissions under CAA, mercury and air toxics under CAA, coal ash under RCRA, and heavy metal emissions from wastewater under CWQ)
 - PFAS designated as hazardous substance under CERCLA; limits set for six PFOA compounds under CWA

Waters of the United States (WOTUS) Status

Operative Definition of "Waters of the United States"



Increase in Enforcement Resources

Biden's Proposed FY 2024 Budget Focuses on Climate Change and Environmental Justice

- Overall 19% increase in EPA's budget that would add 2,400 new FTEs to bring overall staffing to over 17,000 FTEs
- Specifically, an increase of \$22.6 M and 38.4 FTE above last year for inspections with a priority on overburdened and underserved communities.

Sources of Information

- Agency Inspections
- Permit Compliance Reporting
- Self-Disclosures
- Agency Information Requests
- Citizen Groups
- Disgruntled Employees
- Whistleblowers
- Anonymous Tips
- Publicly Available Data

Admin vs. Civil

- **Factors Influencing Enforcement Type**
 - Amount of potential penalties
 - Need for injunctive relief
 - Need for discovery
 - Need for a judicial decision
 - Potential for appeal

Civil vs. Criminal

- **Factors Influencing Enforcement Type***

- Intent of Violator – Knowing or Willful Violations
- Deception or Concealment (Lying, Cheating, Stealing)
- Actual / Potential Environmental Harm
- Chronic Non-Compliance
- Economic Gain from Action
- Danger to Public
- Impairment of Governmental Function
- Need for Deterrence

**See April 17, 2024 EPA Strategic Civil-Criminal Enforcement Policy Memo Appendix A for a detailed discussion of factors*

Parallel Proceedings

- **Strict federal guidelines for parallel proceedings**
(DOJ ENRD Direction 08-02 Parallel Proceedings Policy and 99-20 Global Settlement Policy)
 - Prevents criminal grand jury material from being shared with civil prosecutors and requires criminal and civil settlements to be negotiated separately.
 - But see *United States v. Stringer* (9th Cir. 2008)
- States may not have such strict guidelines regarding sharing of information between criminal and civil prosecutors.
- Criminal prosecutors may try to use civil discovery to obtain information
 - Individual defendants can assert Fifth Amendment in civil case but Gov. entitled to adverse inference for subject matters asserted at trial.
 - Civil case may be stayed pending outcome of criminal investigation
- Resolution of criminal case does not mean civil case will go away

Prosecutorial Discretion

- **Broad Discretion**

- Who to prosecute
- What kind and how many charges

- **Guidelines**

- EPA OECA The Exercise of Investigation Discretion (1/12/1994 Devaney Memo)
 - See Section IV. Case Selection Criteria
- Justice Manual Section 9-28.00
 - See Section III. Factors to Be Considered in Charging a Corporation
- Factors In Decisions On Criminal Prosecutions For Environmental Violations (7/1/1991 ENRD Policy)
- Statutory Sentencing Factors (18 U.S.C. § 3553)

Understand and Influence Prosecutorial Discretion

- Demonstrate “Good Corporate Citizenship” (concrete measures)
- Avoid Being Perceived by Government as “Bad Actor”
- Government “Perception” is Reality
- Credibility with Prosecutors is Key
- Accurate Response / Communication Is Essential to Avoid Obstruction Charges

Example: Citizen Suit NOI Letter



Tulane Environmental Law Clinic

157-045

November 20, 2013

Via Certified Mail (Return Receipt Requested)

United Bulk Terminals Davant, L.L.C.
14537 Highway 15
Davant, Louisiana 70040

Re: Notice of Violations and Intent to File Suit under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq.

To United Bulk Terminals Davant, L.L.C:

Gulf Restoration Network (GRN), Louisiana Environmental Action Network (LEAN), and the Sierra Club hereby provide U.S. United Bulk Terminal, LLC (United Bulk) with Notice of Violation and Intent to File Suit under the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 *et seq.*, also known as the Clean Water Act. This notice is provided pursuant to Section 505(b) of the Clean Water Act, 33 U.S.C. § 1365(b), which requires that 60 days prior to the initiation of civil action under Section 505(a) of the Clean Water Act, 33 U.S.C § 1365(a), a citizen must give notice of intent to sue and a description of the alleged violations. This waiting period gives the parties a reasonable time to resolve the matter cooperatively. GRN, LEAN and Sierra Club are open and amenable to discussions with United Bulk about resolving this matter outside of the judicial system. GRN, LEAN and Sierra Club's primary concern in this matter is the protection of the Mississippi River, adjacent wetlands and the surrounding communities. GRN, LEAN and Sierra Club understand that cooperative efforts can be more efficient than litigation.

- Your client has just received a Notice of Violation and Notice of Intent to Sue letter under the citizen suit provision of the Clean Water Act related to a company facility in Louisiana.
- The letter comes as a surprise to the client who has no idea that community groups are able to sue the company for environmental issues.
- What do you tell your client?
- How should you respond?

Example: Citizen Suit NOI Letter



*Gulf Restoration
Network, et al.*

vs.

*United Bulk
Terminals*

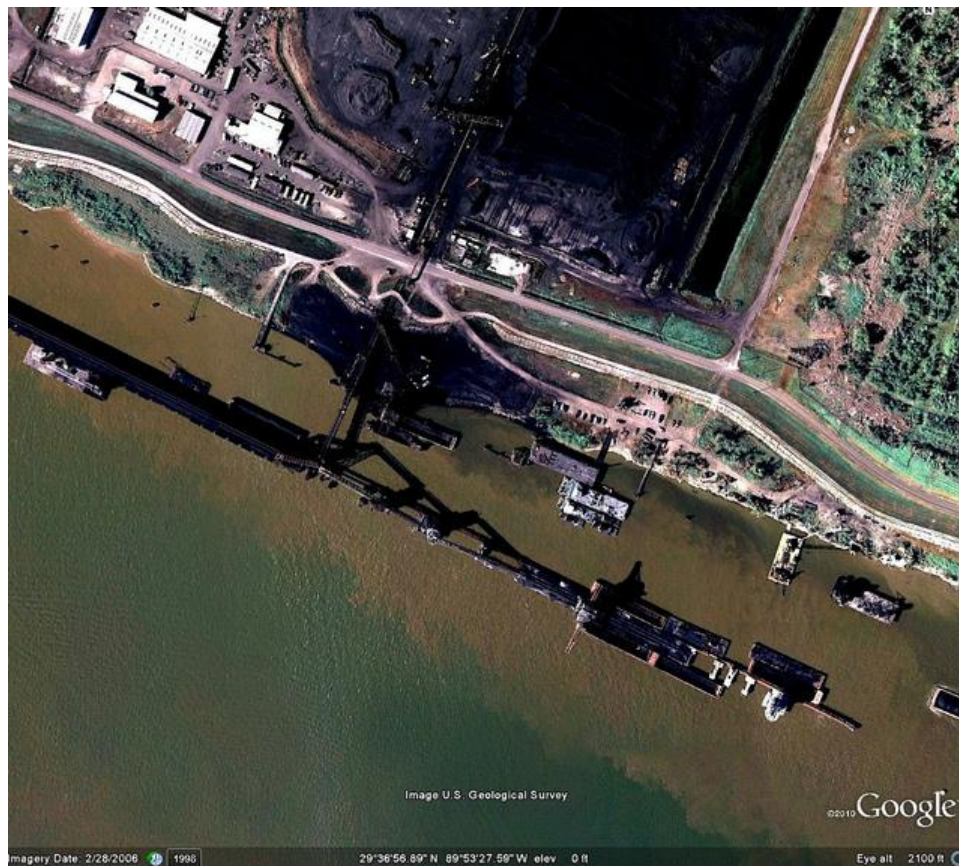
*Photo credit: Gulf
Restoration Network*

Example: Citizen Suit NOI Letter



*Photo credit: Gulf
Restoration Network*

Example: Citizen Suit NOI Letter



Background and Case Timeline

- Notice of Intent to Sue – November 20, 2013
- Violations based on aerial photographs collected since August 2012, and satellite photography from Google Earth
- Parties negotiate during 60 day notice period, and plaintiffs voluntarily delay filing complaint to allow for further negotiations
- State administrative order – January 23, 2014
- Complaint filed – March 18, 2014
- Consent Decree finalized – August 18, 2015

Settlement Components

- \$75,000 Supplemental Environmental Project focused on non-native plant removal and wetland restoration
- Attorneys fees and expert costs
- Injunctive relief
 - Replacement of aging equipment
 - Installation of pollution control equipment
 - New best management practices
 - Monitoring and reporting requirements

Defense Strategy Issues

- **Issues to Consider for Corporate Defendant**
 - Likely Civil or Criminal case
 - Current reporting requirements
 - Applicable Audit Policy for voluntary self-disclosures
 - Whether an internal investigation would be productive
 - Monetary Implications (fines, injunctive relief, attorney's fees, disruption of operations)
 - Other Concerns (company competitiveness, share price, reputation, agency relationship, precedent for future litigation)

Defense Strategy Issues Cont.

- **Consideration of Collateral Effects of Criminal Conviction**
 - Defendant can be collaterally estopped from challenging liability in related civil cases
 - Mandatory debarment from future federal contracts with CWA and CAA convictions
 - Discretionary debarment if contractor's responsibility is deemed compromised even if no criminal conviction
 - SEC disclosure requirements
 - Inability to obtain permits/licenses under state "bad actor" provisions

Potential Enforcement Defenses

- **Procedural / Constitutional**
 - Vagueness
 - Due Process / Fair Notice
 - Jurisdiction and Standing (for Citizen Suits)
 - Federal Preemption of State Law
- **Statutory**
 - Lack of Statutory Authority
 - Statute of Limitations
- **Regulatory**
 - Interpretation incorrect or based on guidance not regulation
- **Evidentiary**
 - Admissibility of data, hearsay, scientific experts (Daubert)
 - Can intent be proven in criminal case?

Preparing the Client

- Admin, Civil and/or Criminal Case
- Defense Goals
- Litigation Costs
- Reputational Costs
- Disclosures Requirements

Prevention is Best Defense

- Develop and implement compliance/audit plan
- Use good faith best efforts to comply
- Document all compliance efforts
- Maintain good relationships with regulators, employees, neighbors and even competitors
- Be prepared to respond quickly if receive notice of enforcement (from administrative notice of violation up through search warrant or grand jury subpoena)
- Measureable actions prior to an incident is the best way to show you are a good actor