

New EPA Policy Could Increase Criminal Enforcement

By Juan-Carlos Rodriguez

Law360 (May 6, 2024, 9:21 PM EDT) -- The U.S. Environmental Protection Agency has rolled out a new policy intended to foster communication and coordination between its civil and criminal enforcement offices, a move experts say could result in an increase in criminal investigations and cases.

Last month, David Uhlmann, who heads up the EPA's Office of Enforcement and Compliance Assurance, published the Strategic Civil-Criminal Enforcement Policy, which supersedes a 2019 version. According to the agency, the new policy intends to increase collaboration during the strategic planning process, improve case screening and management, promote information sharing between the offices and update training programs so that employees make better decisions about whether to pursue criminal, civil or administrative enforcement.

"A strong partnership between EPA's civil and criminal enforcement offices — characterized by joint strategic planning, rigorous case screening, and regular communication — will enable EPA to realize the full benefits of the environmental laws and promote greater fairness in enforcement," Uhlmann said in the policy.

Tim Webster, a partner at Sidley Austin LLP and co-leader of the firm's environmental practice, said the policy will give a bigger boost to the criminal enforcement program than the civil enforcement program.

"There's much more civil and administrative enforcement than there is criminal enforcement," Webster said. "And closer coordination is just going to provide more leads to the criminal side than vice versa. There'll be more new information flowing to the criminal side by far than there will the other way around. And I think this is intentional."

Under the new policy, the civil and criminal investigative offices must work together to develop and implement the EPA's national priorities, such as national enforcement and compliance Initiatives; the per- and polyfluoroalkyl substances, or PFAS, road map; and the agency's lead action plan.

The two offices will meet early in an annual regional strategic planning process to determine regional priorities, and the policy formalizes existing case screening meetings between civil and criminal enforcement managers about the national and regional priorities.

"A principal purpose of monthly civil-criminal enforcement meetings is to ensure that the civil and criminal enforcement programs consult regarding ... which cases will be investigated criminally, which will be referred to the [U.S.] Department of Justice for civil enforcement, and which will be handled as

administrative matters," the policy said. "In addition, civil and criminal enforcement managers should discuss whether parallel proceedings are appropriate as well as the timeline for any follow-up discussions."

Matthew Morrison, a partner at Pillsbury Winthrop Shaw Pittman LLP, also said the EPA could see an increase in criminal enforcement actions due to the new policy.

"The new policy establishes a coordination framework that seems likely to result in EPA's civil program referring the more egregious and knowing violations to EPA's criminal program, rather than keeping the case only in the civil docket and simply seeking a higher penalty or enhanced injunctive relief," Morrison said.

There are good reasons for the civil and criminal sides to work together more closely, said Shennie Patel, senior counsel at Crowell & Moring LLP. She said there are often cases in which the criminal side gets an enforcement referral, but the civil and administrative sides don't necessarily know about it, because the criminal side has different sensitivities to and standards for evidence and other case-related information.

"A lot of cases that open criminally probably shouldn't be criminal, and vice versa," Patel said. "I think this is a good way to get people at the table to actually talk about what's going on."

To that end, the policy contains an appendix that the offices can refer to when screening cases and determining whether they're best suited for administrative, civil or criminal enforcement.

The list of issues to consider includes: How significant is the violation? What type of culpability is involved? Does the target have a history of noncompliance? How sophisticated is the target? And does the violation involve a national or regional strategic priority?

Webster said the appendix will be useful not just to the civil and criminal offices.

"It is a useful Easter egg that helps us in the defense bar, helps the regulated community, and the public more generally to understand what some of those factors are," he said.

Another part of the policy says the offices' goal in screening and processing cases should be to gain a "clear direction" in the first year about how the action will be handled so that most judicial cases will be filed, charged or concluded within two to three years — and within 12 to 18 months for administrative matters.

That struck a nerve with Ranjani Prabhakar, Earthjustice's legislative director for Healthy Communities.

"Is their marker of effectiveness on this collaboration about getting through more of the volume of incoming matters, or is it that they want to make sure their enforcement and compliance measures are very thorough because of this collaboration?" Prabhakar said. "If there's a toss up between those two priorities, I think Earthjustice would want to see the latter."

The EPA's Uhlmann said that in order to help the civil and criminal offices coordinate more closely, the EPA will develop a national case tracking system as part of ongoing EPA data management modernization efforts.

"Until that process is complete, all civil and criminal enforcement offices shall utilize a tracking system that ensures non-criminally sensitive information can be entered by the civil and criminal enforcement programs in a manner that is secure and accessible to both programs," the policy said.

Pillsbury's Morrison said that while there are some well-intentioned changes and formalizations in the policy, there is at least one implementation hurdle. He said the civil and criminal sides have traditionally looked at enforcement and compliance issues differently, and that isn't likely to change.

"It's not that the criminal enforcement program can't adjust its lens toward the traditional NECI framework of significant noncompliance and impact to human health and environment, but theirs has been a different lens that looks for patterns of intentional or criminally negligent conduct," he said. "This difference in focus has always been a challenge and I think it will continue to be a challenge."

The U.S. Department of Justice declined to comment on the EPA's policy update.

--Editing by Kelly Duncan and Jay Jackson Jr.

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