

EPA's Fiscal Year 2014 Civil Enforcement Results Reveal Agency's Shifting Focus

Despite a decline in civil environmental enforcement results, EPA remains poised to continue pursuing high stakes enforcement cases in 2015.

On December 18, 2014, the US Environmental Protection Agency (EPA) released its annual enforcement and compliance results for Fiscal Year (FY) 2014.¹ The statistics reflect a continuing focus on what EPA considers to be larger, more complex, "risk-based enforcement cases" that are intended to drive industry compliance and achieve "significant environmental and health gains."² EPA brought fewer enforcement cases overall in FY 2014 than FY 2013 — a fact EPA attributes, in part, to the government shutdown and resource and staffing constraints from a smaller budget. Although the regulated community should expect EPA to pursue even fewer civil enforcement cases in FY 2015 and beyond because of continued budgetary shortfalls and evolving approaches to enforcement, including the Next Generation Compliance Initiative (NextGen), many of EPA's cases will likely involve higher stakes as EPA targets fewer violators but seeks a greater return on its investment of enforcement resources. In addition, states, tribes and citizen groups may attempt to fill any perceived gap in civil environmental enforcement by taking advantage of the increased availability of environmental and compliance information through NextGen.

Overview of EPA's FY 2014 Civil Enforcement Efforts

The Numbers

EPA's FY 2014 civil enforcement efforts include the following:

- Initiating 2,268 civil judicial and administrative cases, and concluding 2,275 matters, a 6.2 percent and an 8.6 percent decrease, respectively, from the 2,418 initiated cases and 2,489 concluded matters in FY 2013
- Conducting over 15,600 inspections and evaluations, and 487 civil investigations, a 13.3 percent decrease from the nearly 18,000 inspections and evaluations in FY 2013, and a 473 percent increase over the 103 civil investigations in FY 2013
- Requiring companies to invest over US\$9.7 billion in work and equipment to control and clean up contaminated sites, a 38.6 percent increase over the US\$7 billion in similar injunctive relief in FY 2013
- Recovering nearly US\$100 million in federal administrative and civil judicial penalties
- Obtaining commitments to reduce, treat or eliminate pollution by approximately 514 million pounds per year, including 6.7 million pounds of air toxics

- Obtaining commitments to treat, minimize, or properly dispose of approximately 711 million pounds of hazardous waste, a 26.3 percent increase over the 563 million pounds in FY 2013
- Reaching agreements for over US\$17 million in Supplemental Environmental Projects (SEPs)

Enforcement results varied across EPA regions.³ Among other trends, EPA apparently saw significant enforcement upticks in EPA Regions 4 (Southeast) and 5 (Midwest), while enforcement results in Regions 3 (Mid-Atlantic) and 9 (Far West) appeared less robust than in prior years.⁴

Looking Ahead to FY 2015

EPA's enforcement cases often require the expenditure of significant resources over multiple fiscal years. Consequently, matters may conclude after the end of the fiscal year in which EPA first brought them.⁵ Thus, in an effort to buttress its FY 2014 enforcement results, EPA referenced the resolution of several matters early in FY 2015. According to EPA, had the following matters, among others, concluded before October 1, 2014, the total value of injunctive relief performed by defendants would have increased by approximately US\$4.6 billion, EPA would have received commitments to reduce pollution by approximately 138 million more pounds, and FY 2014 would have had the second highest civil penalty recovery in the past five fiscal years. EPA's significant enforcement settlements in early FY 2015 include:

- A settlement with Hyundai-Kia related to their emissions testing, which resulted in a US\$100 million fine, the forfeiture of 4.75 million metric tons of CO₂ emissions credits, and the investment of more than US\$50 million in compliance measures
- A settlement with Alpha Natural Resources, which agreed to spend an estimated US\$200 million on wastewater treatment systems and system-wide upgrades to reduce discharges of pollution from coal mines in five states
- A settlement with Anadarko and Kerr-McGee, including US\$4.4 billion for the clean-up of contamination at numerous sites across the country, the largest recovery for an environmental clean-up in US history

Progress in Achieving the National Enforcement Initiatives (NEIs)

Every three years, EPA's Office of Enforcement and Compliance Assurance (OECA) identifies NEIs to address specific environmental problems, risks or patterns of noncompliance. From FY 2014–FY 2016, EPA is pursuing the following NEIs: Reducing Air Pollution from the Largest Sources, Cutting Hazardous Air Pollutants, Ensuring Energy Extraction Activities Comply with Environmental Laws, Reducing Pollution from Mineral Processing Operations, Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation's Waters, and Preventing Animal Waste from Contaminating Surface and Ground Water.⁶

EPA remains focused on the NEIs despite budgetary and staffing constraints and fewer "easy," high priority targets, including coal-fired electricity generators and major municipal sewer authorities. Although EPA continued to vigorously pursue the NEIs in FY 2014, EPA's progress on the NEIs appears mixed.

- Reducing Air Pollution NEI:⁷ In FY 2014, EPA obtained no SO₂ emissions reductions from acid, glass and cement facility NSR settlements, despite obtaining increases in NO_x reductions from such facilities. In addition, although it controlled⁸ 90 coal-fired electricity units and 5 acid facilities, EPA inspected no new cement, glass or acid facilities, and only investigated one coal-fired utility unit. Among its most notable cases in FY 2014, on July 16, 2014, EPA reached a settlement with Minnesota Power to cut emissions from its coal-fired power plants and to conduct mitigation projects

that promote renewable energy development. Minnesota Power was accused of violating New Source Review (NSR) provisions of the Clean Air Act (CAA) by unlawfully constructing major modifications at its plants without obtaining required permits and installing and operating the best available air pollution control technology. It agreed to pay a total of US\$1.4 million in penalties, and EPA estimates that the cost of the injunctive relief for emission controls will be more than US\$500 million.⁹

- Cutting Hazardous Air Pollutants NEI: In FY 2014, EPA evaluated 364 air toxic emitting facilities, a 40 percent drop from 601 evaluations in FY 2013 and the lowest total in the past four fiscal years. Enforcement actions, part of EPA's effort to reduce excess emissions and the emission of toxic air pollutants from leaks and flares, are pending against 114 facilities.¹⁰
- Energy Extraction NEI: In FY 2014, EPA conducted 723 energy extraction evaluations or inspections, an increase from 673 evaluations or inspections in FY 2013 and the second-largest total in the past four fiscal years.¹¹ On December 19, 2013, EPA reached a settlement with Chesapeake Appalachia, a subsidiary of the US's second largest natural gas producer. Chesapeake agreed to: pay a US\$3.2 million penalty, the largest ever obtained under the Clean Water Act's (CWA) provisions prohibiting the discharge of dredged and/or fill material into US waters without a CWA permit; spend approximately US\$6.5 million to restore 27 sites damaged by the discharges; and implement a comprehensive plan to comply with federal and state water protection laws at its natural gas extraction sites in West Virginia, many of which involve hydraulic fracturing operations.¹²
- Mineral Processing Operations NEI:¹³ This NEI focuses on eliminating risks to drinking water and other threats to communities and the environment from hazardous waste operations at phosphoric acid and other high risk mineral processing facilities. In FY 2014, EPA inspected four mineral processing facilities, the lowest total since it inspected five in FY 2011. EPA also reached a settlement with Titanium Metals Corp., one of the largest producers of titanium parts for jet engines, for the unauthorized manufacture and disposal of PCBs at its facility in Nevada. Titanium Metals agreed to pay a US\$13.75 million civil penalty — the largest ever imposed for a Toxic Substances Control Act violation at a single facility.¹⁴
- Raw Sewage NEI: In FY 2014, EPA addressed nineteen large combined sewer systems with untreated sewage overflows, an increase from twelve in FY 2013 and on par with FY 2011. There are related enforcement actions against eight systems. EPA also is pursuing enforcement actions against 82 systems with untreated sewage overflows.¹⁵ Among the most notable cases, the East Bay Municipal Utility District, Stege Sanitary District and several Bay Area cities agreed to spend approximately US\$1.5 billion to repair and upgrade a 1,500-mile-long sewer system that has been discharging raw and untreated sewage into San Francisco Bay, and paid US\$1.5 million in civil fines for past sewage discharges.¹⁶
- Animal Waste NEI: In FY 2014, EPA inspected 163 concentrated animal feeding operations (CAFOs), a significant decrease from 261 inspections in FY 2013 and 291 inspections in FY 2012. EPA concluded 26 enforcement actions for violations by CAFOs, the lowest amount in the past 7 fiscal years and a 63 percent drop from its peak of 79 enforcement actions in FY 2010 and FY 2011.¹⁷

Implications of the Data and Trends in EPA's Civil Enforcement Efforts

EPA's Explanation

EPA primarily attributes the FY 2014 results to two factors, in addition to the resolution of some matters early in FY 2015 and the absence of large settlements like *Deepwater Horizon*: (1) the government shutdown; and (2) resource constraints due to budget and staffing cuts.

During the shutdown from October 1 to October 16, 2013 — the third-longest in US history — nearly all of EPA's 16,205 employees were furloughed and only 1,069 essential staff remained on duty.¹⁸ The shutdown, the ramp-down preceding it, and the ramp-up once it ended inhibited EPA's ability to review permits and pre-treatment programs and conduct inspections, lowering the EPA's FY 2014 results.

More significantly, EPA continues to suffer from significant budget cuts. Its FY 2014 budget was US\$8.2 billion, an increase from the US\$7.9 billion during FY 2013, but a decrease from FY 2011 and FY 2012. In fact, the FY 2014 budget was 21 percent below the recent peak of US\$10.3 billion in FY 2010.¹⁹ Consequently, EPA has been forced to make drastic staffing cuts to its Full Time Equivalent (FTE) employee ceiling.²⁰ In FY 2011, the FTE ceiling was 17,494. In FY 2013, this number fell to 16,201, and in FY 2014 it fell to 15,521. With the US\$60 million cut in EPA's enacted budget because of the December 2014 omnibus spending bill (from US\$8.2 billion to US\$8.14 billion), EPA's FTE ceiling will shrink to the lowest levels since 1989 — approximately 15,000.²¹ With EPA continuing to lose staff through retirements and attrition, it will be hard-pressed to increase resources devoted to enforcement and may be forced to further narrow its enforcement focus.

Future Enforcement Trends and Conclusions

Based on the past five fiscal years, the regulated community should expect EPA to continue to scale back traditional enforcement efforts, focusing its resources on the violations with the most significant impacts on public health and the environment in order to maintain or augment its injunctive relief figures, penalty totals and other metrics. Indeed, there is no evidence that EPA will ramp-up its enforcement efforts in the near future. In FY 2014, EPA conducted about 15,600 inspections and evaluations — the lowest number in the past five years, below its target of 17,000, and over 25 percent below FY 2010 levels. EPA also initiated 2,268 civil judicial and administrative cases — below its target of 3,200, and about 250 fewer than in FY 2013, 750 fewer than in FY 2012, and 800 fewer than in FY 2011. EPA also does not anticipate an increase in civil environmental enforcement. EPA's FY 2014–FY 2018 Strategic Plan projects a 25 percent drop in inspections and evaluations, from approximately 105,000 between 2005–2009 to 79,000 between 2014–2018; and a 28 percent drop in initiated civil judicial and administrative enforcement cases, from 19,500 between 2005–2009 to 14,000 between 2014–2018.²²

Despite the overall drop in environmental enforcement, large entities with environmental exposure remain at significant risk of EPA enforcement because the EPA is taking advantage of NextGen to maximize compliance and enforcement efforts, remains fully committed to adjudicating the most significant violations, and is spending less time pursuing smaller violators. NextGen has five interconnected components: (1) design regulatory programs with built-in compliance; (2) use advanced emissions and pollutant detection technology; (3) require electronic reporting to improve accuracy, efficiency and transparency; (4) impose public reporting requirements; and (5) use innovative enforcement practices. Indeed, the deployment of advanced monitoring technology has allowed EPA to discover more information about emissions, discharges and other potential sources of violations,²³ and EPA Enforcement Chief Cynthia Giles recently stressed to the Enforcement Division that NextGen compliance tools should be incorporated wherever appropriate in civil judicial and administrative settlements as injunctive relief, mitigation or SEPs.²⁴ These next generation environmental enforcement tools include: (1) advanced

monitoring, including point source emission/discharge monitoring and ambient monitoring (e.g., fence-line monitoring of air pollution at the border of a facility); (2) independent third-party verification of a settling party's compliance with settlement obligations; (3) electronic reporting; and (4) public accountability through increased transparency of compliance data.

NextGen is increasing EPA's enforcement capacity because, despite the reduced need for in-person inspections by EPA, it (1) encourages entities to self-monitor; (2) facilitates enforcement actions by states and tribes, which are taking advantage of information sharing and the robust data monitoring; and (3) may facilitate more private enforcement actions by citizen groups against highly visible industries or political targets.²⁵ Citizen groups, many of which are highly experienced and well-funded, but which can be guided by local concerns or a single environmental issue, often do not exercise the same type of enforcement discretion as state and federal environmental regulators. Although there is no concrete evidence that the number of citizen suits increases depending on the level of EPA enforcement,²⁶ declining EPA enforcement and NextGen monitoring data appear to be setting the stage for citizen groups to take a more prominent role in environmental enforcement cases. Bolstered by recent successes, the number of citizen suits is on an upward trend.²⁷ And, for its part, EPA has made it clear that it will continue to vigorously enforce the country's environmental laws against what the EPA perceives to be the most significant threats to human health and the environment.

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Endnotes

- ¹ US Environmental Protection Agency (EPA), Enforcement Annual Results for Fiscal Year (FY) 2014, *available at* <http://www2.epa.gov/enforcement/enforcement-annual-results-fiscal-year-fy-2014> (last visited January 28, 2015).
- ² EPA, FY 2014 EPA Enforcement and Compliance Annual Results, <http://www2.epa.gov/sites/production/files/2014-12/documents/fy-2014-enforcement-annual-results-charts-12-12-14.pdf>.
- ³ EPA, Enforcement Annual Results in EPA Regions for FY 2014, *available at* <http://www2.epa.gov/enforcement/enforcement-annual-results-epa-regions-fiscal-year-fy-2014> (last visited January 28, 2015).
- ⁴ Regional enforcement results in FY 2014 were mixed, but the data from FY 2010–2013 does not establish that certain regions necessarily are more or less proactive in pursuing enforcement than others. *See generally* EPA, Enforcement Annual Results for FY 2010, FY 2011, FY 2012, and FY 2013, <http://www.epa.gov/compliance/enforcement/annual-results/eoy2010.pdf>; <http://www.epa.gov/compliance/enforcement/annual-results/eoy2011.pdf>; <http://www.epa.gov/compliance/enforcement/annual-results/eoy2012.pdf>; <http://www.epa.gov/compliance/enforcement/annual-results/eoy2013.pdf>.
- ⁵ The federal government's fiscal year ends on September 30.
- ⁶ EPA, National Enforcement Initiatives (NEI), *available at* <http://www2.epa.gov/enforcement/national-enforcement-initiatives> (last visited January 28, 2015); *see* EPA, Announcing EPA's Selection of National Enforcement Initiatives for FY 2014–2016, <http://www2.epa.gov/sites/production/files/2013-09/documents/2014-2016-nei-announcement.pdf>.
- ⁷ EPA, NEI: Reducing Air Pollution from the Largest Sources, *available at* <http://www2.epa.gov/enforcement/national-enforcement-initiative-reducing-air-pollution-largest-sources> (last visited January 28, 2015).
- ⁸ "Controlled" means: (1) NSR pollution control requirements were resolved by a settlement agreement or a final judgment in action brought by EPA in federal district court, or (2) significant NO_x and SO₂ emission controls already are in place. *Id.*
- ⁹ EPA, Minnesota Power Settlement (July 16, 2014), *available at* <http://www2.epa.gov/enforcement/minnesota-power-settlement>.
- ¹⁰ EPA, NEI: Cutting Hazardous Air Pollutants, *available at* <http://www2.epa.gov/enforcement/national-enforcement-initiative-cutting-hazardous-air-pollutants> (last visited January 28, 2015).
- ¹¹ EPA, NEI: Ensuring Energy Extraction Activities Comply with Environmental Laws, *available at* <http://www2.epa.gov/enforcement/national-enforcement-initiative-ensuring-energy-extraction-activities-comply> (last visited January 28, 2015).
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- ¹⁴ EPA, TIMET Settlement (May 14, 2014), *available at* <http://www2.epa.gov/enforcement/timet-settlement> (last visited January 28, 2015).
- ¹⁵ EPA, NEI: Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation's Waters, *available at* <http://www2.epa.gov/enforcement/national-enforcement-initiative-keeping-raw-sewage-and-contaminated-stormwater-out-our> (last visited January 28, 2015).
- ¹⁶ EPA, Historic Clean Water Act Settlement Will Prevent Millions of Gallons of Sewage Discharges Into San Francisco Bay (July 28, 2014), <http://yosemite.epa.gov/opa/admpress.nsf/2dd7f669225439b78525735900400c31/d07727f638dc519e85257d230068e750?OpenDocument>.

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- ¹⁷ EPA, NEI: Preventing Animal Waste from Contaminating Surface and Ground Water, *available at* <http://www2.epa.gov/enforcement/national-enforcement-initiative-preventing-animal-waste-contaminating-surface-and-ground> (last visited January 28, 2015).
- ¹⁸ Suzanne Goldenberg, *US shutdown hits Obama's climate agenda as EPA staff are sent home*, *The Guardian*, Oct. 2, 2013, <http://www.theguardian.com/environment/2013/oct/02/us-shutdown-obama-climate-epa>.
- ¹⁹ EPA, FY 2015 EPA Budget in Brief, at 11, http://www2.epa.gov/sites/production/files/2014-03/documents/fy15_bib.pdf. However, excluding the US\$2.356 billion in funds for the Clean Water and Drinking Water State Revolving Funds Program (SRFs), which provide funds for the construction of drinking water and wastewater treatment facilities, EPA's budget was approximately US\$6 billion. *See id.* at 83–84. In FY 2015, SRFs were projected to decrease to approximately US\$1.8 billion. *Id.* at 83.
- ²⁰ “Full Time Equivalent” means one employee working full time for a full year (52 weeks x 40 hours = 2,080 hours), or the equivalent number of hours worked by several part-time or temporary employees. *Id.* at 11. The decrease will occur even though the FY 2015 budget includes more funding for civil enforcement. *See* Robert Esworthy, *Federal Pollution Control Laws: How Are They Enforced?*, Congressional Research Service (Oct. 7, 2014), at 37, <https://www.fas.org/sgp/crs/misc/RL34384.pdf> (EPA received US\$173.57 million for enforcement in FY2014, and requested approximately US\$180.6 million in FY2015).
- ²¹ Charles S. Clark, *EPA's Budget Cut Shrinks Staff to Smallest Since 1989*, *Government Executive*, Dec. 22, 2014, <http://www.govexec.com/management/2014/12/epas-budget-cut-shrinks-staff-smallest-1989/101847>.
- ²² EPA, FY 2014–2018 EPA Strategic Plan, at 73–74, http://www2.epa.gov/sites/production/files/2014-09/documents/epa_strategic_plan_fy14-18.pdf. In addition, the Congressional Research Service has compiled data “show[ing] proportional relationships of the various types of enforcement actions . . . in a given year and by statute” for the last fifteen to twenty years, although it cautions that the data does not necessarily indicate specific annual or long-term enforcement trends. Esworthy, *Federal Pollution Control Laws: How Are They Enforced?*, at 47–52.
- ²³ Juan Carlos Rodriguez, *EPA's Cynthia Giles Says New Tech Is Fueling Enforcement*, *Law360* (Oct. 30, 2014, 4:00 P.M.), <http://www.law360.com/articles/591673/epa-s-cynthia-giles-says-new-tech-is-fueling-enforcement>.
- ²⁴ Cynthia Giles, Memorandum: Use of Next Generation Compliance Tools in Civil Enforcement Settlements (Jan. 7, 2015), <http://www2.epa.gov/sites/production/files/2015-01/documents/memo-nextgen-useinenfsettlements.pdf>. EPA's summary of settlements incorporating NextGen tools is available at <http://www2.epa.gov/sites/production/files/2015-01/documents/nextgen-enfsettlementhighlights.pdf>.
- ²⁵ Juan Carlos Rodriguez, *EPA To Give Public More Industry Pollution Data, Giles Says*, *Law360* (Oct. 31, 2014, 3:06 P.M.), http://www.law360.com/articles/591964/epa-to-give-public-more-industry-pollution-data-giles-says?article_related_content=1; *see also* Esworthy, *Federal Pollution Control Laws: How Are They Enforced?*, at 10–16 (detailing abilities of “key players” in environmental enforcement and compliance, including states, tribal governments, citizens and the regulated community); Karl Karg & Matt Thurlow, *Air & Climate Forecast: April 2014*, Latham & Watkins Webcast (April 22, 2014).
- ²⁶ *See generally* James R. May, *Now More than Ever: Trends in Environmental Citizen Suits*, 10 *Widener L. Rev.* 1, 39–41 (2003) (detailing trends in citizen enforcement suits; concluding that “[c]omparing raw numbers of citizen notices versus EPA referrals does not necessarily either evince a need for more citizen suits or predict government enforcement practices; and noting that in some years, even though EPA made fewer referrals to the Department of Justice to enforce environmental laws, “the overall number of citizen notices of intent to sue . . . remained about even”), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1334221.
- ²⁷ *See id.* at 4, 7–9, 30–32 (data indicated that there were at least 850 yearly citizen suit legal events, including judicial opinions, notices of intent to sue, complaints, and consent orders). More citizen enforcement cases have been brought under the CWA than under any other environmental statute. Karl S. Coplan, *Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law*, 25 *Colo. Nat. Resources, Energy & Env'tl. L. Rev.* 61, 67 (2014), *available at* <http://digitalcommons.pace.edu/lawfaculty/934>.