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REPORT



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EDITOR'S NOTE: ACROSS THE POND

Victoria Prussen Spears

**EUROPEAN COURT OF HUMAN RIGHTS
RULES IN *KLIMASENIORINNEN* CASE, WITH
IMPLICATIONS FOR FUTURE CLIMATE TORT
LITIGATION**

James Brady-Banzet, Andreas Wildner,
Maurits Dolmans and Leonor Vulpe Albari

**OOPS! . . . I GRID IT AGAIN: [IN]COHERENCY IN
UK ENERGY TRANSITION AND SECURITY**

Miguel Colebrook and Iona Gilby

**ENVIRONMENTAL PROTECTION AGENCY
ISSUES NEW CIVIL AND CRIMINAL
ENVIRONMENTAL ENFORCEMENT POLICY**

Jonathan D. Brightbill and Emily N. Kath

**ORDER NO. 2023-A: FEDERAL ENERGY
REGULATORY COMMISSION INTERCONNECTION
REFORM IS FULL STEAM AHEAD**

Theodore J. Paradise, Kimberly B. Frank,
Chimera N. Thompson and Samantha J. DeLee

Pratt's Energy Law Report

VOLUME 24

NUMBER 7

July-August 2024

Editor's Note: Across the Pond

Victoria Prussen Spears

217

European Court of Human Rights Rules in *KlimaSeniorinnen* Case, with Implications for Future Climate Tort Litigation

James Brady-Banzet, Andreas Wildner, Maurits Dolmans and Leonor Vulpe Albari

219

Oops! . . . I Grid It Again: [In]Coherency in UK Energy Transition and Security

Miguel Colebrook and Iona Gilby

238

Environmental Protection Agency Issues New Civil and Criminal Environmental Enforcement Policy

Jonathan D. Brightbill and Emily N. Kath

248

Order No. 2023-A: Federal Energy Regulatory Commission Interconnection Reform is Full Steam Ahead

Theodore J. Paradise, Kimberly B. Frank, Chimera N. Thompson and Samantha J. DeLee

252

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Environmental Protection Agency Issues New Civil and Criminal Environmental Enforcement Policy

*By Jonathan D. Brightbill and Emily N. Kath**

The authors of this article discuss the new Strategic Civil-Criminal Enforcement Policy issued by the U.S. Environmental Protection Agency's Office of Enforcement and Compliance Assurance, which requires enhanced civil and criminal enforcement coordination, both on a case-by-case basis and through regular institutional measures.

The Assistant Administrator for U.S. Environmental Protection Agency's (EPA) Office of Enforcement and Compliance Assurance (OECA) has issued a new Strategic Civil-Criminal Enforcement Policy (the Policy).¹ The Policy requires enhanced civil and criminal enforcement coordination, both on a case-by-case basis and through regular institutional measures. EPA is now requiring civil and criminal coordination during the entire lifespan of a case. The Policy became effective immediately on April 17, 2024.

BACKGROUND

Davis Uhlmann was confirmed as Assistant Administrator for OECA on July 20, 2023. Prior to a career in academia, Uhlmann was a federal prosecutor at the U.S. Department of Justice. His new Policy is directed to EPA's Regional Counsels and Deputies, OECA's Division Directors and Deputies, and Special Agents and Assistant Special Agents. The Policy calls for greater coordination in the following ways:

- Developing and implementing EPA's national and regional priorities, including the National Enforcement and Compliance Initiatives (NECIs) and regional strategic plans;
- On enhanced case screening, to include discussion between criminal and civil enforcement of what enforcement option should be utilized, including whether parallel proceedings are appropriate, to continue throughout each enforcement action;
- Improving case management through information sharing (such as compliance histories and case developments); and

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¹ <https://www.epa.gov/system/files/documents/2024-04/strategic-civil-criminal-enforcement-policy-april-2024.pdf>.

- Updating training programs to promote the civil and criminal enforcement partnership, including to provide information on the requirements of the Policy, factors to consider in deciding whether to pursue criminal, civil, or administrative enforcement, and best practices for managing information sharing and parallel proceedings to prevent case delays.

The Policy mandates certain measures to achieve coordination in these areas:

NATIONAL AND REGIONAL PRIORITIES

The Policy reshapes EPA's NECI Steering Committees to confirm representation from both civil and criminal enforcement leaders when setting EPA priorities. EPA calls out certain initiatives, including its PFAS² Roadmap and Lead Action Plan, as requiring implementation by both civil and criminal enforcement programs. On the regional level, the Policy requires civil and criminal collaboration early in the annual regional strategic planning process to determine goals, objectives, roles, and outcomes.

CONSULTATION THROUGHOUT THE ENFORCEMENT PROCESS

The Policy formalizes a requirement for meetings on a monthly basis (at a minimum) among Regional and Headquarters civil and criminal enforcement programs. The Policy further provides that “[r]egions also must engage with the appropriate headquarters offices if matters involve a Nationally Significant Issue, or nationally significant issues at an ongoing clean-up or cost recovery action, or when there is a federal facility involved.” The meetings are meant to serve as a forum to provide case updates, discuss overall docket matters, emergency actions, strategic planning, compliance priorities, training, and community engagement. Participants include representatives from the regional civil enforcement program and criminal field office (specifically, participants from the Enforcement and Compliance Assurance Division, the Office of Regional Counsel, including Regional Criminal Enforcement Counsels, and the Special Agent in Charge or Assistant Special Agent in Charge). In addition to formal meetings, the Policy encourages frequent communication among civil and criminal programs.

The Policy implements a new case screening process to determine whether each case is most appropriate for administrative, civil, or criminal proceedings, and a requirement to continue coordination throughout the lifespan of a proceeding, regardless of whether it is a formal parallel proceeding. Under the new case screening process, regions can choose to screen all new matters with

² Per- and Polyfluoroalkyl Substances.

their criminal enforcement counterparts regardless of whether there are identified criminal enforcement equities.

While parallel proceedings were previously left to the discretion of the civil or criminal enforcement program, the Policy now requires that “where both enforcement programs open investigations and pursue possible enforcement of the same matter, both programs should follow the Parallel Proceedings Policy, including executing a parallel proceedings memo and abiding by its terms.” If consensus cannot be reached between civil and criminal enforcement programs, the Policy requires that the matter be elevated to the appropriate body within the Agency.

EPA's Policy also establishes a presumptive timeline for the development of cases. The goal is to have clear direction in the first year about how the action will be handled. EPA seeks to have most judicial cases, to the extent circumstances allow, filed, charged, or concluded within two to three years – and within 12 to 18 months for administrative matters.

CASE MANAGEMENT AND INFORMATION SHARING

As part of EPA's efforts to modernize its data management systems, the Policy identifies specific information to be tracked and shared among civil and criminal enforcement programs, including alleged violations, compliance histories, referral information, status updates, next steps, and statute of limitations/tolling dates. However, there are limitations to information sharing under the Policy. EPA continues to reiterate that the criminal enforcement program may not use civil enforcement tools to gather evidence for a criminal case. Likewise, the criminal enforcement program may not disclose grand jury material to civil enforcement personnel in the absence of a court order, nor can criminal investigators disclose case-specific sensitive information if doing so would compromise the integrity of the criminal investigation.

Notably, the Policy expressly provides that civil enforcement programs must alert criminal enforcement programs of civil cases that include criminal conduct. Conversely, criminal enforcement programs must alert civil enforcement programs of circumstances where civil enforcement may be appropriate, “particularly where actions or conditions may pose an imminent and substantial endangerment or other harm to public health or the environment that requires immediate relief.” This includes circumstances where the civil enforcement program might pursue an injunction or administrative order, or where an investigation establishes a violation of law but there is insufficient evidence of criminal mental state.

TRAINING TO STRENGTHEN THE CIVIL-CRIMINAL PARTNERSHIP

In addition to informal trainings discussed during the monthly meetings described above, the Policy implements formal training requirements to encourage the successful partnership between civil and criminal programs. Training topics include addressing the circumstances that warrant criminal versus civil responses; ensuring proficiency in managing parallel proceedings, including training on criminal discovery rules; and promoting heightened awareness about maintaining grand jury secrecy and the limitations on access to grand jury material.

KEY POLICY IMPLICATIONS

As an academic, Assistant Administrator Uhlmann studied and was critical of what he asserted was a bipartisan decline in the number of criminal environmental prosecutions from 2005 to 2018. EPA's new Policy appears to represent his desire to change that direction. The Policy became effective immediately, and EPA is likely to be revisiting its leading civil enforcement matters now to determine whether they involve potentially criminal conduct that warrants further investigation. The Policy specifically calls for enforcement officials to look out for cases with evidence of falsification of data, concealment of evidence, or other deceptive or misleading conduct as warranting criminal review. The Policy also highlights chronic non-compliance, or facilities with continued violations despite prior enforcement efforts, as those warranting further review for criminal conduct.

On its face, the Policy also suggests that greater criminal and civil coordination may lead to more opportunity to argue that a matter charged criminally may instead be more appropriately suited for civil enforcement. Nevertheless, overall context and history suggests that the Policy is primarily aimed at increasing the number of criminal prosecutions under the environmental laws.