

EPA's National Compliance Initiatives: Understanding EPA's Enforcement Priorities in FY2020–2023

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The EPA is continuing its longstanding practice of focusing its enforcement and compliance resources on select categories of serious noncompliance with environmental laws. The EPA now calls these select categories National Compliance Initiatives (“NCIs”), though historically they have also been called National Enforcement Initiatives (“NEIs”) or National Priorities.

This paper explains the transition from NEIs to NCIs as signaled in an August 2018 policy memorandum, summarizes the NCIs that were selected in June 2019 for the FY2020–2023 cycle, and corrects some misperceptions that are used occasionally to suggest that the EPA is less committed these days to vigorous enforcement and compliance assurance.

I. The Transition from NEIs to NCIs

In August 2018, Assistant Administrator Susan Bodine issued a memorandum that signaled the start of the selection process for the FY2020–2023 NCI cycle.² Right off the bat, the memorandum signaled two important concepts: (1) the need to increase the environmental law compliance rate; and (2) the need to reduce the average time from violation identification to a return to compliance.

This emphasis on a timely return to compliance was the driving principle behind renaming the enforcement priorities from NEIs to NCIs. More specifically, “enforcement actions” are but one tool that the EPA uses to correct noncompliance. Enforcement actions—ranging from criminal prosecutions for the most serious noncompliance to relatively modest administrative settlements for less serious noncompliance—are indisputably important tools that will continue to be used. But enforcement is not an *outcome*; it is but one of several *processes* that may be employed toward the actual goal of compliance. The name change from National *Enforcement* Initiatives to National *Compliance* Initiatives reflects this nuanced—but important—emphasis on compliance outcomes rather than enforcement processes.

The August 2018 memorandum also signaled three criteria by which NCIs would be selected for the FY2020–2023 cycle. The first criterion is to align the NCIs with the EPA’s Strategic Plan measures. Among these are: reducing the number of nonattainment areas; reducing the number of impaired waters; reducing public health threats posed by substandard drinking water; protecting populations vulnerable to hazardous air pollutants and chemical accidents; and reducing children’s exposure to lead. This criterion is sensible in that the whole of the EPA organization—including enforcement—will be aligned with commonly-understood strategic goals. The second criterion is to select NCIs where EPA expertise, legal authorities, or resources are needed to improve compliance. The third criterion is to focus on areas of widespread noncompliance. Though not every state or EPA region may have examples of noncompliance

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² See Memorandum from Susan Parker Bodine, Assistant Administrator for the Office of Enforcement and Compliance Assurance, Transition from National Enforcement Initiatives to National Compliance Initiatives (Aug. 21, 2018), available at <https://www.epa.gov/sites/production/files/2018-08/documents/transitionfromneitonci082118.pdf>.

under every NCI, the selected NCIs involve widespread enough noncompliance that it is necessary to ensure a national level playing field and consistency in compliance outcomes.

The August 2018 memorandum explicitly acknowledged that the EPA has a wide array of tools that it may employ in pursuit of the goal of compliance. These tools include criminal prosecutions for the most serious noncompliance, judicial civil enforcement for serious noncompliance, administrative enforcement, informal enforcement activities like on-the-spot correction of minor noncompliance discovered during an inspection, and compliance assistance that may avoid noncompliance in the first place. All of these tools are available to the EPA and it is important that the correct tool be selected given the facts and circumstances of actual or potential noncompliance. It would be imprudent to refer less serious noncompliance to the Department of Justice for judicial civil enforcement. It would be equally imprudent for the EPA simply to request that a violator voluntarily correct a very serious violation without any formal enforcement. The regulated community should not misunderstand this transition from NEIs to NCIs as signaling a softening in enforcement. In fact, the explicitness with which all the tools are evaluated makes it more routine for the EPA to ask whether a more vigorous tool may be more appropriate. The key—as it has always been—is for EPA enforcement personnel to select the most appropriate compliance tool for the facts and circumstances of a matter.

The August 2018 memorandum also signaled to states and tribes that they would be more involved in the selection of the FY2020–2023 NCIs. When National Priorities—and then NEIs—were first developed, the EPA consulted more fully with states and tribes. Over time, states and tribes believed that they were consulted less and that the EPA made more unilateral decisions on its priority areas. The disconnect between EPA decision-making and state involvement grew so pronounced that a compliance workgroup between the Environmental Council of the States (“ECOS”) and the EPA included recommendations for more state involvement in NCIs.³ These recommendations included: (1) emphasizing compliance assurance tools beyond enforcement; and (2) engaging earlier and more continuously with states in the NCI selection, development, and implementation processes. The FY2020–2023 cycle corrected this drift, consulted fully with states and tribes, and will cooperate with the states in implementing the NCIs.

Finally, the August 2018 memorandum increased the NCI cycle from three years to four years to more closely align with the EPA’s National Program Managers Guidance cycle.

II. Selection of the FY2020–2023 NCIs

In June 2019, Assistant Administrator Bodine announced the selection of six new, continued, or modified NCIs for the FY2020–2023 cycle.⁴

A. *Creating Cleaner Air for Communities by Reducing Excess Emissions of Harmful Pollutants*

The EPA has long focused its enforcement resources on excess emissions of air pollutants. This modified NCI includes elements of two previous NEIs, but focuses more explicitly on excess emissions of volatile organic compounds (“VOCs”) and hazardous air pollutants (“HAPs”). For VOCs, this NCI will focus on excess air pollution that has a substantial impact on air quality and that may adversely affect an area’s NAAQS attainment status or may

³ See Final Report of the ECOS-EPA Compliance Assurance Workgroup (Aug. 23, 2018), available at <https://www.ecos.org/wp-content/uploads/2018/09/Compliance-Assurance-Workgroup-Draft-1.0-August-23-2018-Final-1.pdf>.

⁴ See Memorandum from Susan Parker Bodine, Assistant Administrator for the Office of Enforcement and Compliance Assurance, FY2020–2023 National Compliance Initiatives (June 7, 2019), available at <https://www.epa.gov/sites/production/files/2019-06/documents/2020-2023ncimemo.pdf>.

adversely affect vulnerable populations. For HAPs, this NCI will focus on sources that have significant impacts on air quality and health.

This NCI describes the problem that warrants a focused effort to improve compliance as follows.

People living in non-attainment areas or in communities that are near sources of hazardous air pollutants (HAPs) may face significant risks to their health and environment. HAPs are pollutants that are known or suspected to cause cancer or other serious health effects. In some instances, small amounts of these chemicals inhaled or ingested can cause serious illness. There are over 180 chemicals that the EPA has identified as HAPs, including mercury, benzene, dioxin, and lead compounds. Furthermore, significant sources of volatile organic compounds (VOCs) contribute to non-attainment with the National Ambient Air Quality Standards (NAAQS) or may adversely affect the attainment status of an area. VOCs are a key component in the formation of ground-level ozone (a constituent of photochemical smog) and secondary organic aerosols, both of which may impact ecosystems and can cause adverse health effects like respiratory ailments. Many individual VOCs also are known to be harmful to human health.⁵

This NCI merges the previous HAP NEI with the essential aspects of the previous energy extraction NEI. It is crucial to recognize, however, that the energy extraction NEI has not been merged wholesale into this new NCI. The EPA has come to understand that the energy extraction NEI was viewed as targeting a specific industry (i.e., the exploration, production, transmission, and processing of fossil fuels), rather than a specific environmental problem (e.g., excess VOC emissions from a wide variety of industry sectors). While excess emissions may be more or less prevalent in particular industry sectors, it is not appropriate to target specific sectors. Accordingly, this new NCI recognizes (and targets) the potential impact on public health and welfare from excess VOC and HAP emissions without explicitly targeting a specific industry sector.

B. Stopping Aftermarket Defeat Devices for Vehicles and Engines

This new NCI was developed in response to emerging evidence of widespread tampering with and installation of defeat devices on motor vehicles and engines equipped with air pollution control systems. While the EPA's mobile source enforcement program has historically focused on original equipment manufacturer defeat devices, the Volkswagen cheating scandal produced at least two corollary developments. First, the EPA's Office of Transportation Air Quality and OECA's Air Enforcement Division quickly developed the technical and legal resources that were needed to evaluate, discover, and correct sophisticated, computer-based defeat devices and tampering. Second, once these energized resources began looking more intently at tampering and defeat devices, it quickly became apparent that non-OEMs were developing aftermarket defeat devices that encouraged tampering with motor vehicle and engine emission controls. The air quality implications of this conduct is significant. The use of a so-called "delete kit" under which the onboard diagnostic system of a vehicle or engine is tampered to allow for the removal of pollution controls like catalytic converters, exhaust gas recirculation equipment, and diesel particulate filters could result in an increase of air pollution by as much as a factor of 100.

This NCI describes the problem that warrants a focused effort to improve compliance as follows.

Mobile sources are a significant contributor to air pollution. The EPA, through its direct implementation authority, can play a critical role in addressing these important pollutant sources. Title II of the Clean Air Act (CAA) authorizes the EPA to set standards applicable to emissions from a variety of vehicles and engines. Required emission controls often include filters and catalysts installed in the vehicle's or engine's exhaust

⁵ <https://www.epa.gov/enforcement/national-compliance-initiative-creating-cleaner-air-communities-reducing-excess>.

system, as well as calibrations that manage fueling strategy and other operations in the engine itself. The CAA prohibits tampering with emissions controls, as well as manufacturing, selling, and installing aftermarket devices intended to defeat those controls. The EPA has found numerous companies and individuals that have manufactured and sold both hardware and software specifically designed to defeat required emissions controls on vehicles and engines used on public roads as well as on nonroad vehicles and engines. Illegally-modified vehicles and engines contribute substantial excess pollution that harms public health and impedes efforts by the EPA, tribes, states, and local agencies to plan for and attain air quality standards.⁶

Because most states do not have the authority directly to enforce the Clean Air Act's tampering and defeat device prohibitions—nor do many of them have the technical resources available to the EPA—it is important for the EPA to continue in a lead role. With that said, many states have consumer protection and fraud laws that can address various aspects of tampering and defeat devices, and the EPA is partnering more frequently with states to address this widespread noncompliance.

C. Reducing Hazardous Air Emissions at Hazardous Waste Facilities

This NCI continues the previous NEI in this area without significant alteration. The EPA continues to find that treatment, storage, and disposal facilities and large quantity generators of hazardous waste are not complying with RCRA and Clean Air Act requirements. This NCI describes the ongoing problem that warrants a focused effort to improve compliance as follows.

The Resource Conservation and Recovery Act (RCRA) requires effective control and monitoring of organic air emissions from treatment, storage, and disposal facilities and large quantity generators. Widespread air emission violations are associated with the improper management of hazardous waste. RCRA requires effective monitoring to identify and repair leaks from hazardous waste storage tanks, pipes, valves, and other equipment. Releases from hazardous waste facilities can include releases of constituents known or suspected to cause cancer or birth defects. In addition, leaks from these facilities can contribute to non-attainment with the NAAQS.⁷

D. Reducing Accidental Releases at Industrial and Chemical Facilities

This NCI continues the previous NEI in this area without significant alteration. Cases continue to abound where serious injuries and deaths occur as a result of a failure to follow Clean Air Act Section 112(r) risk management program requirements or that section's general duty clause. In some sectors, compliance assistance and training remains an important tool to ensure compliance and the reduction of risk to workers and the public. In others, sophisticated companies that are involved in processes with known risks are responsible for serious injuries or death from fire or explosions. The EPA will select the most appropriate compliance tool based on the facts and circumstances of each case, but remains committed to seeing that Section 112(r) is effectively and prudently enforced.

This NCI describes the ongoing problem that warrants a focused effort to improve compliance as follows.

Thousands of facilities nationwide, many of which are in environmental justice communities, make, use, and store extremely hazardous substances. Catastrophic accidents at these facilities—historically about 150 each year—can result in fatalities and serious injuries, evacuations, and other harm to human health and the environment. These facilities are regulated under Clean Air Act (CAA) Section 112(r) through the chemical

⁶ <https://www.epa.gov/enforcement/national-compliance-initiative-stopping-aftermarket-defeat-devices-vehicles-and-engines>.

⁷ <https://www.epa.gov/enforcement/national-compliance-initiative-reducing-hazardous-air-emissions-hazardous-waste>.

accident prevention regulations, also known as the Risk Management Program. The regulations apply to stationary sources that have a listed chemical in a process at or above an established threshold quantity. A broader statutory obligation under CAA § 112(r)(1), the General Duty Clause (GDC), applies to all stationary sources with regulated substances or other extremely hazardous substances, regardless of the quantity of chemical involved. The GDC requires facilities to identify hazards that may result from accidental releases by using appropriate hazard assessment techniques, designing and maintaining a safe facility, taking such steps as are necessary to prevent releases, and minimizing the consequences of those accidental releases that do occur. Facilities regulated under CAA § 112(r) are found in every state.⁸

E. Reducing Significant Noncompliance with National Pollutant Discharge Elimination System (NPDES) Permits

This NCI modifies the previous Keeping Industrial Pollutants Out of the Nation’s Waters NEI. This modification is important for at least two reasons. First, the NPDES e-Reporting system has for the first time given the EPA and the states access to timely electronic data from Discharge Monitoring Reports. These data allow agencies to more effectively target noncompliance, and perhaps more importantly, calculate significant noncompliance rates and evaluate how various enforcement strategies affect those rates. Second, the emphasis on significant noncompliance and its effect on water quality expands the universe of NPDES-permitted sources to be evaluated beyond industrial dischargers. Altogether, this NCI—combined with the e-Reporting program—holds great promise for “big data”-based compliance assurance strategies and associated improvements in water quality. Using these data-based approaches, the EPA has been able to establish a metric of reducing the baseline significant noncompliance rate of 29.4 percent by half by the end of FY2022.

This NCI describes the ongoing problem that warrants a focused effort to improve compliance as follows.

Compliance with NPDES permits is critical to protecting our nation’s waters. There are approximately 40,000 major and minor individually NPDES-permitted facilities in the country. Over 29 percent of these facilities are currently in significant noncompliance (SNC) with their permits. Violations range from failure to submit reports, which can mask serious deficiencies, to significant exceedances of effluent limits, which can cause harm to human health and the environment. In FY 2018, the approximately 11,000 permittees that had SNC-level effluent violations discharged almost four billion pounds of pollutants above their permitted limits.

F. Reducing Noncompliance with Drinking Water Standards at Community Water Systems

This is a new NCI that focuses on the quality of drinking water consumed from over 50,000 regulated drinking water systems in the United States. In FY2018, some 40 percent of community water systems violated at least one drinking water standard. This is a long-standing problem that is difficult to solve using only enforcement tools, particularly in Indian country and small, rural communities across the country. Capital and operating and maintenance expenses for drinking water systems and the challenges of retaining qualified operators at small systems for low pay contribute to the need for a holistic approach to improving the quality of drinking water. The goal of this NCI is to reduce the number of community water systems that are in noncompliance by 25 percent by the end of FY2022. An initial focus of this effort will be to work with the EPA’s Office of Water to increase capacity in states, tribes, and the EPA itself to address violations.

⁸ <https://www.epa.gov/enforcement/national-compliance-initiative-reducing-accidental-releases-industrial-and-chemical>.

III. “Mythbusting”—Correction of Misperceptions About the NCIs

A. *“The transition from NEIs to NCIs means that the EPA will prioritize compliance assistance over formal enforcement”*

There have been longstanding tensions between the proponents of “enforcement” and “compliance assistance.” Broadly speaking, the proponents of “enforcement” are geared toward formal and sometimes informal actions designed to correct noncompliance using criminal, civil, and administrative enforcement mechanisms. Also broadly speaking, the proponents of “compliance assistance” are geared toward instruction and outreach to the regulated community under the theory that everyone would comply with environmental regulations if they only understood the rules.

The fact is that the transition from NEI to NCI has almost nothing to do with this tension. The change from “enforcement” to “compliance” in the name of these initiatives has more to do with emphasizing the goal of compliance rather than the process of enforcement. This change also emphasizes the wide range of tools available to correct noncompliance, depending on the facts and circumstances of a case. These changes do not signal that compliance that should be corrected through the use of formal enforcement will now be corrected only through education and outreach.

B. *“Dropping the ‘Keeping Raw Sewage and Untreated Stormwater Out of Our Nation’s Waters’ NEI means the EPA does not care about raw sewage”*

Press accounts and some observers offered the comment that by dropping this longstanding NEI, the EPA was unconcerned about raw sewage entering the nation’s waters. To the contrary, the EPA has continued recently to resolve extremely important combined sewage overflow and sanitary sewer overflow cases against sources in New York, Texas, Louisiana, Mississippi, Ohio, Pennsylvania, and Indiana. The fact is that this enforcement priority has been a tremendous success, with actions taken at 97 percent of large combined sewer systems, 92 percent of large sanitary sewer systems, and 79 percent of Phase I municipal separate stormwater systems. Given this success and other competing priorities, the EPA determined that this effort no longer needed the sustained focus of an NCI. But that does not mean that enforcement against these sources will now stop. Instead, the EPA will return these cases to its “core enforcement” program, which means that cases will continue to be pursued, just not under the rubric of an NCI.

C. *“The EPA will no longer enforce the New Source Review program”*

Like the sewage and stormwater NEI, the “Reducing Air Pollution from the Largest Sources” NEI—along with regulatory developments and market changes—no longer presents a strong opportunity to significantly reduce air pollution. The success over the past twenty years in reducing air pollution from large sources is remarkable. The EPA describes these successes as follows.

The EPA and state regulatory approaches and enforcement efforts in the power sector have resulted in a 90 percent reduction in sulfur dioxide emissions and an 83 percent reduction in nitrogen oxide emissions since 1997, while gross generation has increased by 10 percent. The EPA has required controls or commenced investigations at 91 percent, 96 percent, and 90 percent of facilities in the glass, cement, and acid manufacturing sectors, respectively. Accordingly, the Agency believes that this NCI no longer presents a significant opportunity to affect nonattainment areas or vulnerable populations nationwide.⁹

⁹ <https://www.epa.gov/enforcement/national-compliance-initiative-reducing-air-pollution-largest-sources-update>.

At the same time, the EPA will continue to enforce the New Source Review program against major stationary sources as a part of its core enforcement program. EPA headquarters and every region have experts in NSR compliance in both enforcement and program offices, and noncompliance with this program will be pursued as indicated by the facts and circumstances of each situation.

IV. Conclusion

The FY2020–2023 National Compliance Initiatives single out important new priorities for enforcement and compliance assurance, continue earlier incomplete initiatives, and modify others to reflect changes in patterns of noncompliance and priorities. No one should mistake the substitution of the word “compliance” for “enforcement” to signal an unwillingness for the EPA to pursue formal enforcement as warranted by the facts and circumstances of a case. Neither should anyone assume that formal enforcement is the only (or best) tool to address all instances of noncompliance. The FY2020–2023 NCIs are designed to signal clear priorities for the next four years, signals that the regulated community and the private bar should not ignore.

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