

The background of the slide is a photograph of wide, light-colored stone steps leading down. The steps are made of large, rectangular blocks. The ground between the steps is paved with smaller, darker stones. There are some fallen leaves and small plants growing in the crevices between the steps.

Vinson & Elkins

Navigating

Environmental
Enforcement in the
Biden Administration

March 10, 2021

Welcome and Introductions

Navigating Environmental Enforcement in the Biden Administration

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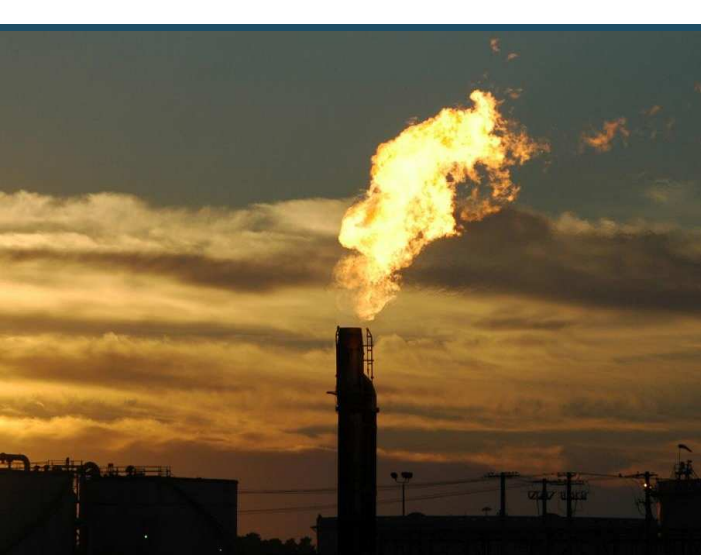
Agenda

1. Environmental enforcement priorities and results from the last administration
2. Process and timelines for setting new priorities
3. Predictions on new priorities and other changes in approach



1. Environmental enforcement priorities and results from the last administration

EPA's National Compliance Initiatives



**Creating cleaner
air for
communities**

**Stopping after
market defeat
devices**



**Reducing
hazardous air
emissions**

**Reducing
NPDES non-
compliance**



**Reducing
accidental
releases**

**Reducing
SDWA non-compliance**



DOJ/ENRD Directives

1. Enforcement principles and priorities

- Clean water, air, and land
- Violations of law not guidance

2. Limiting certain settlement practices, focus on penalties to the Treasury

- SEPs
- Third Party Payments



Civil Environmental Enforcement Case

Go to Court



Monetary Penalty

Injunctive Relief

Mitigation

Settle the Case



Monetary Penalty

Injunctive Relief

Mitigation

Third Party Payments

SEPs

Relationship Between EPA and DOJ

1. EPA investigates and can handle administratively – relief is typically only civil penalty; sometimes “recalls” or similar fixes
 - Rule of thumb, seven figures is likely to end up with DOJ
 - Anything approximately \$400,000 or over needs DOJ approval
2. EPA must refer cases to DOJ to achieve judicially imposed civil penalties, substantial post-settlement corrective actions or criminal sanctions

Practice tips:

- Who is participating in your settlement/enforcement discussions? If you hear “DOJ,” the matter is becoming much more serious as a civil matter
- Did you get a grand jury subpoena or a search warrant? Be afraid, be very afraid (criminal)

Federal Environmental Laws

EPA

Administrative Penalties



Orders to Achieve Compliance



DOJ

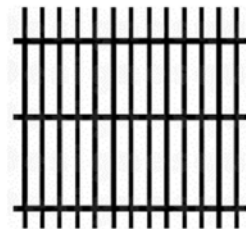
Civil Penalties



Injunctive Relief



Criminal Sanctions



Citizen Suits

Civil Penalties



Injunctive Relief



Attorney's Fees



2020 Enforcement Results

News Releases from Headquarters

EPA Announces FY 2020 Enforcement and Compliance Achievements

01/13/2021

Contact Information:

EPA Press Office (press@epa.gov)

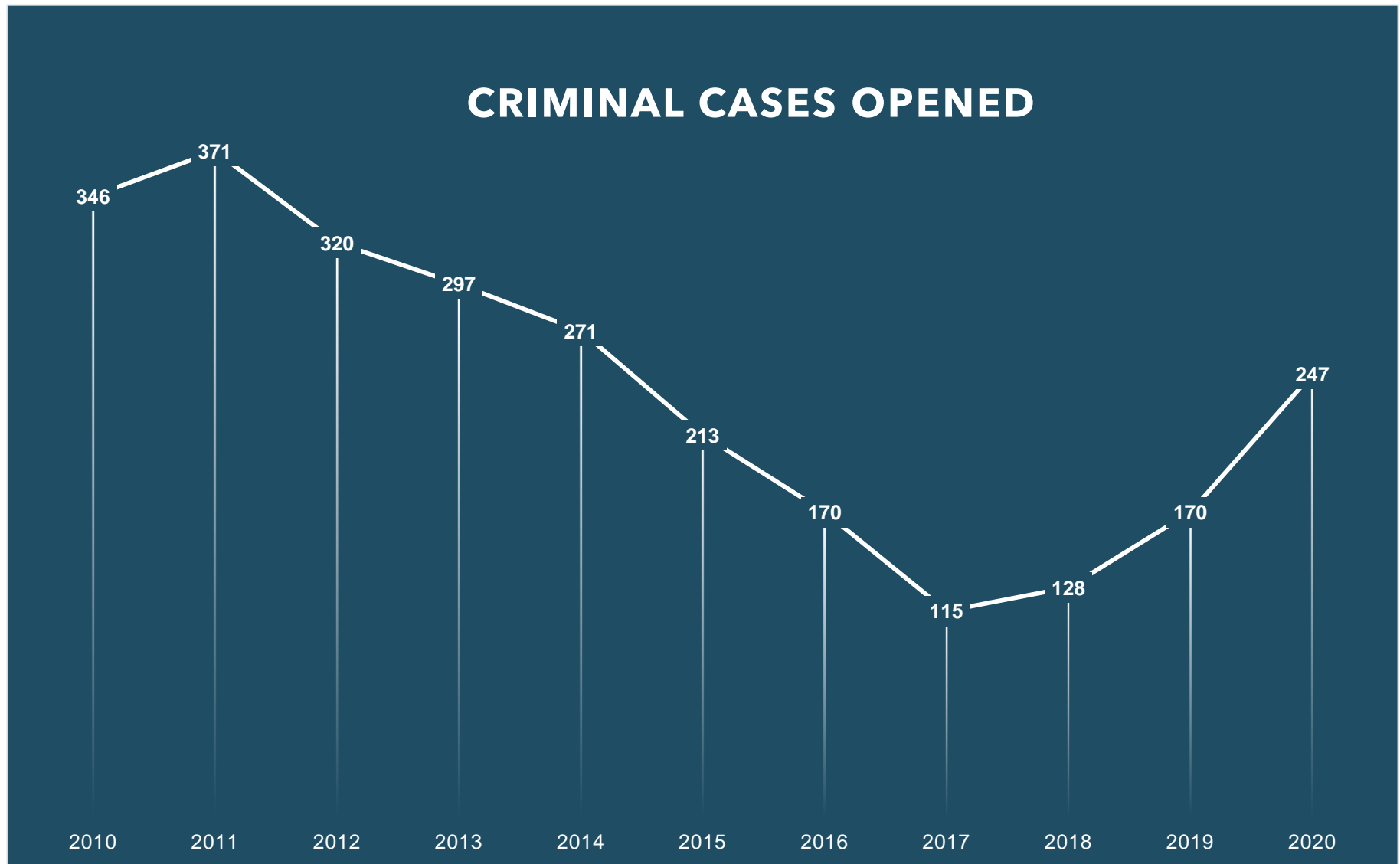
WASHINGTON (January 13, 2021) — In Fiscal Year (FY) 2020, the Environmental Protection Agency's (EPA) enforcement and compliance assurance program achieved tremendous results for the public and the environment, increasing the environmental benefits of its cases despite the COVID-19 public health emergency. EPA's Office of Enforcement and Compliance Assurance (OECA) achieved these results by adapting quickly and focusing resources on priority matters during a global pandemic.

"In FY 2020, EPA enforcement and compliance assurance staff demonstrated extraordinary resilience, creativity, and perseverance as they continued to assure compliance with environmental laws," said Assistant Administrator for Enforcement and Compliance Assurance Susan Bodine. "I am very proud of the work we accomplished this year."

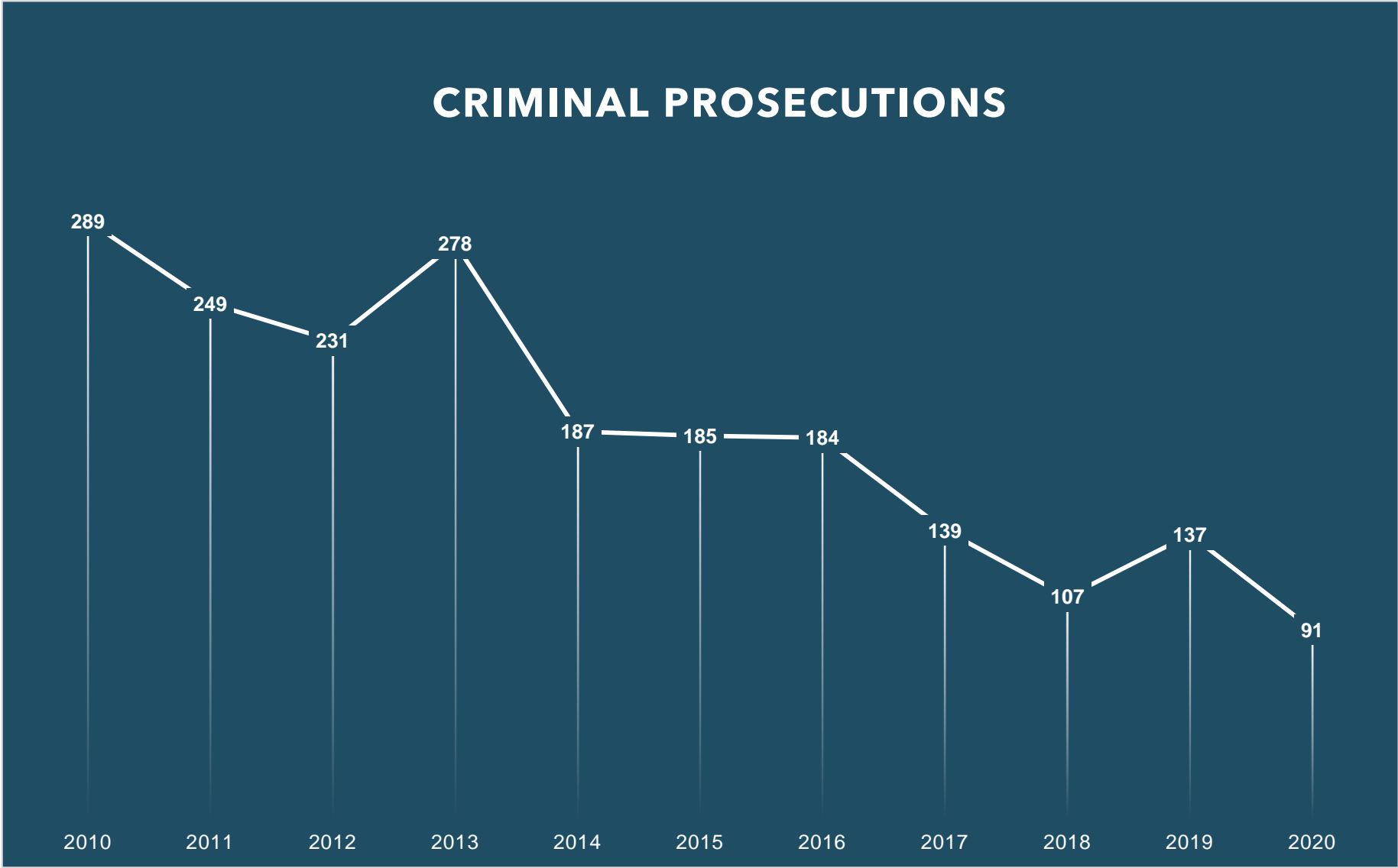
Highlights of EPA's FY 2020 enforcement and compliance achievements include:

- Commitments to reduce, treat, or eliminate over 426 million pounds of pollution, the most in a single year since 2015.
- Proper treatment, minimization, or disposal of 1.6 billion pounds of hazardous and non-hazardous waste, more than all but two of the past eight years.
- Clean up of 104 million cubic yards of contaminated soil and water, more than in FY 2019.
- Prevention of 18.2 million pounds of air pollutants by preventing, reducing, treating, or eliminating emissions from vehicle and engine air sources through resolution of 31 civil enforcement cases for tampering and aftermarket defeat devices—the most for any one year in the agency's history.
- 247 new criminal cases opened, 77 more than in FY 2019 and the most since 2014.
- Superfund response and cash-out settlements of over \$636 million for cleanup work, \$65 million more than FY 2019, as well as \$178.4 million for EPA's costs.

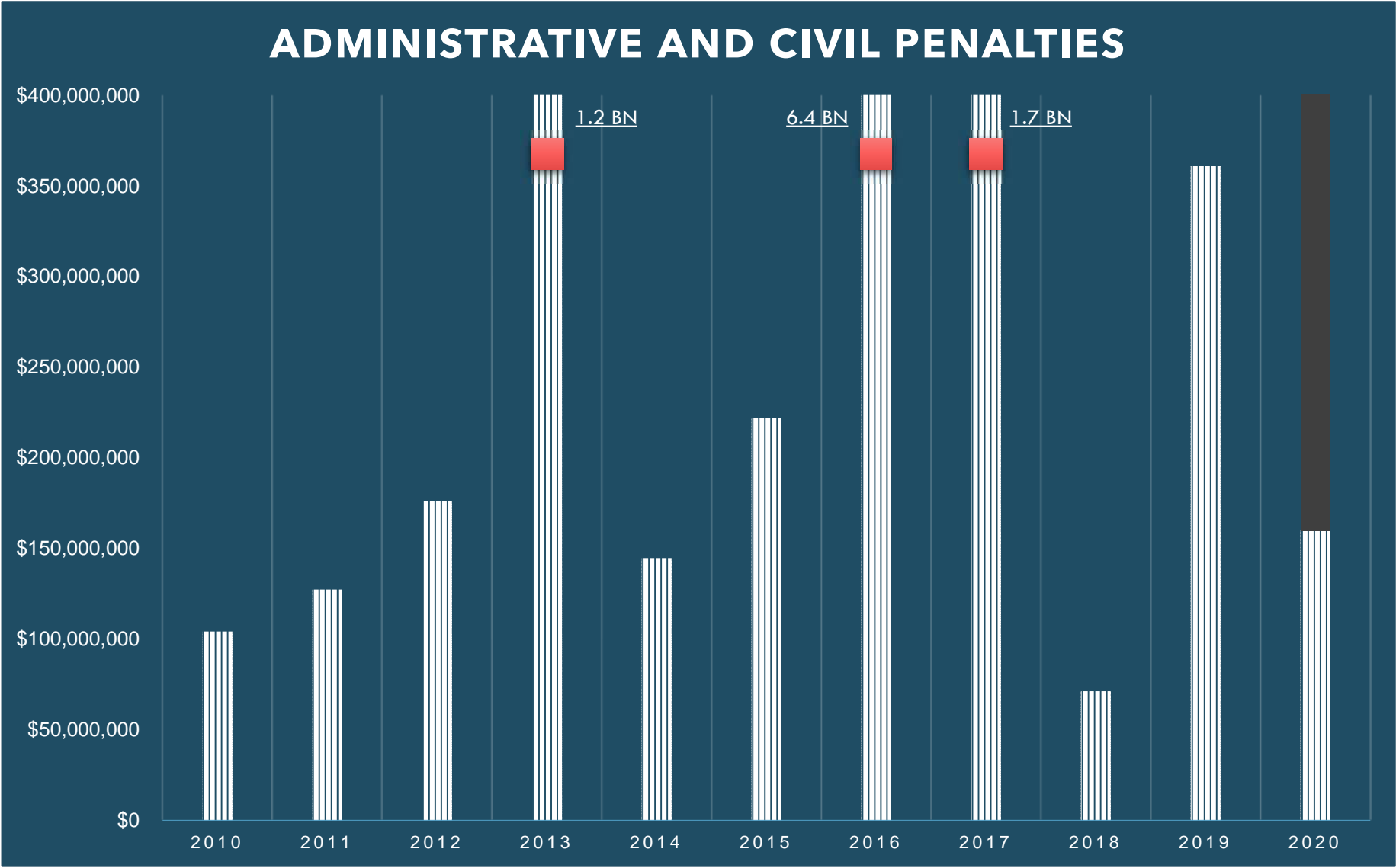
2020 Environmental Enforcement Results



2020 Environmental Enforcement Results



2020 Environmental Enforcement Results



2020 Environmental Enforcement Results

- Likely surge in environmental civil and criminal cases opened.
- Likely surge in enforcement and prosecutions.
- There are a few strategies EPA could raise statistics.

**WE
ARE
GOING
UP**



Other Agencies and Laws

- **“Sensitive Species” Acts (FWS)**
 - ESA/MBTA/Lacey Act
- **Vessel Pollution (USCG)**



CLE Check Question

2. Process and timelines for setting new priorities

Constants That Require No Adjustment:

- The Big Spill/Explosion/Cheat (Exxon Valdez/Refinery Fire/Pipeline Leak/Mass False Certification)
- Direct Violations of Traditional Statutes – Regular Violations of Water or Air Permit; Illegal Use/Import of Chemicals (TSCA)
- Superfund clean-ups at large or notorious sites (see EJ to follow)

Ones that will expressly change:

- Informally can begin moving now
- Formal restatements/public statements will likely wait until after Senate-confirmed leaders are in place at DOJ (AAG for ENRD) and EPA (AA for OECA)
- Potential “tug-of-war” between the two if they differ on the margins, plus DOJ addresses the non-pollution statutes (ESA/MBTA, illegal wood imports)

3. Predictions on new priorities and other changes in approach

Changes at the EPA

Do More of the Same

- We would at the least expect the EPA to continue focusing its resources using the current National Compliance Initiatives
 - Aftermarket defeat device enforcement will remain strong
 - Section 112(r) risk management program enforcement could increase
 - Air emission enforcement at industrial wastewater treatment systems and storage tanks could increase
- EPA enforcement could easily increase its enforcement metrics through what EPA staff pejoratively calls “bean counting”
 - More “small ball” cases?
 - Disconnect between noncompliance and remedies?
 - Impact on general deterrence?
- Possibly less deference to state enforcement

Do Different Things

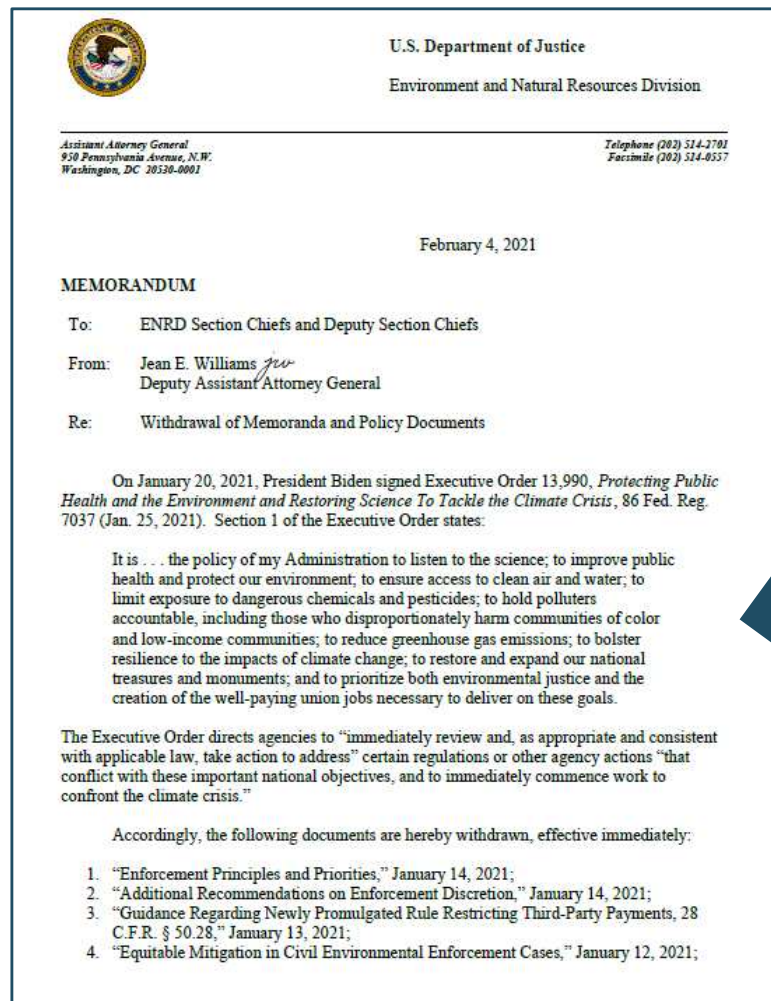
- Revert to Obama Administration targeting of oil and gas sector
- Climate enforcement (federal GHG reporting; federal vehicle and engine GHG standards; new source review GHG permitting; ozone depleting substances; renewable fuels standards; enforcement of emerging state GHG standards)
- Enforcement around emerging contaminants (e.g., PFAS/PFOA)
- Beyond compliance settlements
- National Compliance Initiative cycle runs through September 2023; interim changes?
- Would *not* expect to see: significant new NSR enforcement; significant new CSO/SSO enforcement

CLE Check Question

Changes at DOJ

DOJ

- Return to use of SEPs and Third-Party Payments in settlements
- New priorities



Settle the Case



Monetary Penalty

Injunctive Relief

Mitigation

Third Party Payments

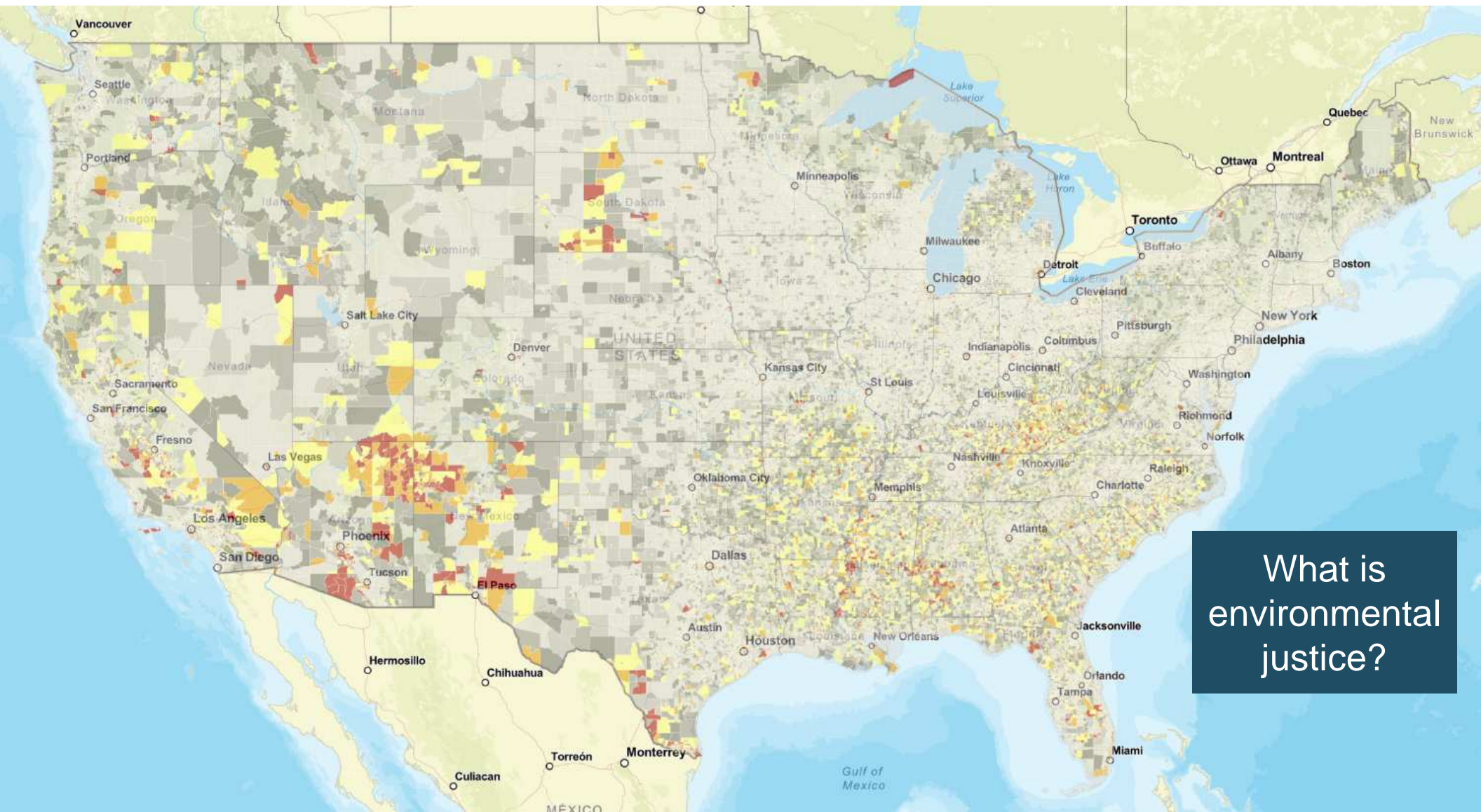
SEPs

DOJ

- Some priorities are constants
- Options to move the needle
 - Quick outcomes – this requires settlements and may require some fidelity to “comparable cases of the last four years”
 - Increased penalties/consent decree relief/SEPS – likely a longer haul because companies will push back more
- Either way – push will be at oil and gas and transportation (connection to climate); mobile source; physical locations (connection to EJ); and “emerging risks” (PFAS)
- Greater effort to make cases criminal

CLE Check Question

Environmental Justice



What is
environmental
justice?

Environmental Justice

What were the stated goals in the Obama administration?

1. A focus on improving health in overburdened communities
2. Working with partners to expand EPA impact
3. Demonstrating progress on EJ in the context of:

Lead Disparities



Drinking Water



Air Quality



Hazardous Waste



Environmental Justice

From campaign promises to Executive Orders

BATTLE for the SOUL of the NATION

ABOUT ▾ HOW TO VOTE **BIDEN HARRIS** VOLUNTEER ▾ SHOP **DONATE** →

THE BIDEN PLAN TO SECURE ENVIRONMENTAL JUSTICE AND EQUITABLE ECONOMIC OPPORTUNITY

The current COVID-19 pandemic reminds us how profoundly the energy and environmental policy decisions of the past have failed communities of color — allowing systemic shocks, persistent stressors, and pandemics to disproportionately impact communities of color and low-income communities.

Joe Biden is running for President to ensure that all Americans have a fair shot at getting ahead. That means rooting out the systemic racism in our laws, policies, institutions, and hearts. Any sound energy and environmental policy must advance public health and economic opportunity for all Americans, in rural, urban, and suburban communities, and recognize that communities of color and low-income communities have faced disproportionate harm from climate change and environmental contaminants for decades. It must also hold corporate polluters responsible for rampant pollution that creates the types of underlying conditions that are contributing to the disproportionate rates of illness, hospitalization, and death from COVID-19 among Black, Latino, and Native Americans. That means officials setting policy must be accountable to the people and communities they serve, not to polluters and corporations. Addressing environmental and climate justice is a core tenet of Biden's climate plan. Biden will:

BRIEFING ROOM

Executive Order on Tackling the Climate Crisis at Home and Abroad

JANUARY 27, 2021 • PRESIDENTIAL ACTIONS

The United States and the world face a profound climate crisis. We have a narrow moment to pursue action at home and abroad in order to avoid the most catastrophic impacts of that crisis and to seize the opportunity that tackling climate change presents. Domestic action must go hand in hand with United States international leadership, aimed at significantly enhancing global action. Together, we must listen to science and meet the moment.

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

PART I — PUTTING THE CLIMATE CRISIS AT THE CENTER OF UNITED STATES FOREIGN POLICY AND NATIONAL SECURITY

Section 101. Policy. United States international engagement to address climate change — which has become a climate crisis — is more necessary and urgent than ever. The scientific community has made clear that the scale and speed of necessary action is greater than previously believed. There is little time left to avoid setting the world on a dangerous, potentially catastrophic, climate trajectory. Responding to the climate crisis will require both significant short-term global reductions in greenhouse gas emissions and net-zero global emissions by mid-century or before.

It is the policy of my Administration that climate considerations shall be an essential element of United States foreign policy and national security. The United States will work with other countries and partners, both bilaterally and multilaterally, to put the world on a sustainable climate pathway. The United States will also move quickly to build resilience, both at home and abroad, against the impacts of climate change that are already manifest and will continue to intensify according to current trajectories.

Executive Order on Tackling the Climate Crisis at Home and Abroad

JANUARY 27, 2021 • PRESIDENTIAL ACTIONS

Section 222: Agency Responsibilities

1. Directs the EPA Administrator to:
 - “Strengthen enforcement of environmental violations” involving EJ
 - “Create a community notification program” for frontline and fenceline communities; and
 - Create a “Climate and Economic Justice Screening Tool”
2. Directs the Attorney General at the DOJ to:
 - Coordinate with EPA OECA to “develop a comprehensive environmental justice enforcement strategy, which shall seek to provide *timely remedies for systemic environmental violations and contaminations, and injury to natural resources*”; and
 - Coordinate EJ issues throughout the DOJ by creating an Office of Environmental Justice
 - Consider renaming the “Environment and Natural Resources Division” the “Environmental Justice and Natural Resources Division”

Environmental Justice

In the context of enforcement:

- Environmental violations involving EJ communities
- Facilities near low income/minority communities



Increased Risk

- Becoming enforcement targets
- Faster paced enforcement
- Faster and more expensive cleanups
- Harsher penalties
- Penalties involving EJ SEPs
- EJ community comment on consent decrees

Questions?

Vinson & Elkins Resources

Enforcement

- <https://www.velaw.com/insights/navigating-the-transition-key-environmental-enforcement-issues-to-watch-in-the-biden-administration/>
- <https://www.velaw.com/insights/biden-administration-doj-signals-shift-in-environmental-enforcement-revoking-prior-policies/>
- <https://www.velaw.com/insights/epa-announces-results-for-fy-2020-foreshadowing-increased-enforcement-under-the-biden-epa/>

Environmental Justice

- <https://www.velaw.com/insights/biden-administration-environmental-justice-focus-enforcement-impact/>

PFAS

- <https://www.velaw.com/insights/the-pfas-problem-and-the-transition-to-the-biden-administration/>
- <https://www.velaw.com/insights/pfas-and-the-transition-to-the-biden-administration-a-round-up-of-recent-pfas-activity/>

Air

- <https://www.velaw.com/insights/the-epas-clean-power-plan-is-only-mostly-dead/>
- <https://www.velaw.com/insights/still-up-in-the-air-the-future-of-methane-regulations-on-public-lands/>
- <https://www.velaw.com/insights/courts-and-election-mean-the-future-of-epas-methane-regulations-for-the-oil-and-gas-industry-is-still-up-in-the-air/>

THANK YOU

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