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Enforcement of Federal Pollution Control Laws

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Enforcement of Federal Pollution Control Laws

Congress has enacted an array of statutes designed to protect the environment and human health from the impacts of pollution. These laws allow the government, and sometimes private parties, to pursue enforcement actions against those who violate statutory requirements or prohibitions. Whether and how the statutes are enforced informs how well they achieve Congress's legislative goals. Federal pollution control statutes generally require regulated entities to apply for, obtain, and abide by permits to conduct certain activities involving potential discharges of pollutants to the environment. These laws also typically have robust recordkeeping and reporting requirements, which facilitate government oversight. The U.S. Environmental Protection Agency (EPA) monitors compliance pursuant to its civil inspection and criminal investigation authorities.

EPA and the U.S. Department of Justice (DOJ) typically conduct enforcement actions on behalf of the federal government. Many statutes also authorize "citizen suits"—lawsuits by nonfederal actors seeking injunctive relief or penalties with respect to alleged violations. Enforcement actions generally fall into one of three broad categories: administrative enforcement, civil judicial enforcement, and criminal enforcement.

Administrative enforcement refers to actions taken by EPA outside the court system. Such actions can include orders to take corrective action, withdrawal of permits, and imposition of penalties up to certain amounts. These actions require various degrees of process; some corrective action orders can be issued based on an agency determination that a violation has occurred, while permit withdrawals or money penalties typically follow a hearing where the accused has an opportunity to submit evidence to a neutral adjudicator. Administrative enforcement actions are subject to judicial review, allowing courts to determine whether agencies have acted within the scope of their statutory and constitutional authority. Exercising that power of review, the Supreme Court recently held that administrative hearings may violate the Seventh Amendment right to trial by jury, though the effect of that ruling on EPA's administrative enforcement actions remains unsettled.

Civil judicial enforcement refers to lawsuits against alleged violators filed in federal court by the federal government or by nonfederal actors, including state and local governments, private citizens, and advocacy groups. Plaintiffs must prove violations by a preponderance of the evidence, and consequences can include both monetary penalties and injunctive relief (often involving cleanup of polluted sites or actions to assure prospective compliance). Settlements of civil judicial actions can be private, out-of-court agreements or can be formalized in a consent decree enforceable by a court. Civil judicial enforcement cases initiated by nonfederal actors implicate an additional suite of legal considerations that arise under Article III of the Constitution, which limits federal court jurisdiction to cases or controversies. Unlike the federal government, citizen suit plaintiffs must demonstrate their "standing" to bring suit by showing that they have suffered a concrete and particularized injury in fact that is fairly traceable to the alleged violation and redressable by available remedies.

Criminal prosecution is generally reserved for violations committed with a particular degree of intent, or *mens rea*. Various environmental statutes criminalize violations committed negligently, knowingly, or willfully. Environmental laws prohibiting "knowing violation" of a permit or regulatory requirement have led courts to consider whether defendants must be aware only of their actions or also that their actions violate such requirements. The answer sometimes depends on the subject matter of the law; courts have found that certain "public welfare offenses" involving hazardous devices or substances can require a reduced showing of knowledge without offending due process, but courts have disagreed about whether the various environmental laws fall within this category. Corporations may be liable for environmental crimes based on the actions of their employees, and certain "responsible corporate officers" may be prosecuted for actions taken by subordinates. Applicable criminal penalties include jail time, criminal fines, and special conditions of probation.

The executive branch enjoys broad discretion in its enforcement of environmental laws, subject to certain constitutional constraints. Various policies govern EPA's and DOJ's exercise of that enforcement discretion, many of which vary widely across presidential administrations. Supplemental environmental projects, in which a judicial settlement involves a commitment to undertake a project benefiting the environment, have been a particular source of controversy in recent years. To alter the terms of environmental enforcement, Congress may amend underlying statutes to redefine violations, change who may enforce a statute, or change the penalties and remedies that may be imposed for statutory violations. Congress also may use its appropriations power to increase or decrease funding for enforcement activities or conduct oversight on changing enforcement policies and priorities across administrations.

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Introduction

Congress has enacted a number of statutes designed to safeguard the environment and human health by maintaining the integrity of the nation’s land, air, and water. Whether Congress’s goals for these laws are met depends in part on how the laws are enforced. Generally speaking, these statutes, referred to herein as “federal pollution control statutes,” prohibit certain types of releases of pollutants into the environment unless authorized by a permit.¹ Such permitting regimes can apply to various industrial, commercial, and personal activities that risk contaminating the environment or endangering human health. Discharge of wastewater from industrial activity, emission of airborne substances from smokestacks, and disposal of hazardous waste are just three examples of regulated activity that generally can be undertaken only pursuant to a permit issued under the relevant statutory authority.² Conducting such prohibited activities without a permit or in violation of the terms of a permit can give rise to a variety of enforcement actions under federal pollution control laws. Those laws typically provide that enforcement can be against “any person” in violation of the statute, where “person” is generally defined to include individuals, corporations, state and local governments, and the federal government.³ The government or, in some cases, private citizens can undertake enforcement.⁴ On the federal level, the U.S. Environmental Protection Agency (EPA) enforces most of the pollution control statutes, either alone or in conjunction with the U.S. Department of Justice (DOJ).⁵

This report provides an overview of what such enforcement entails. It begins with a brief discussion of how the government uncovers and investigates environmental violations. A fundamental difficulty for environmental enforcement is that environmental harm can be diffuse, hard to detect, and harder still to trace back to a single source. Given these challenges, many environmental laws require the regulated community to self-identify, obtain permits to operate, and monitor their own operations for compliance with statutory, regulatory, or permit requirements.⁶ Agency reviews of required reports, civil inspections, and criminal investigations complement this self-policing regime.⁷ In light of the critical role self-reporting plays in these regulatory regimes, several statutes have penalty provisions specifically targeting failure to maintain required records or falsifying reports.⁸

¹ See, e.g., Clean Water Act, 33 U.S.C. §§ 1251–1387; Clean Air Act, 42 U.S.C. §§ 7401–7671q. The various enforcement provisions of laws addressed in this report are listed in **Tables A1–A3**, *infra*.

² *Id.*; see also Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992. To varying degrees, jurisdictional limitations within the federal pollution control statutes mean that not all such polluting activities implicate federal statutory requirements. For example, the Clean Water Act prohibits certain discharges only to “waters of the United States” and certain publicly owned treatments works. See 33 U.S.C. § 1319. Discharges to other water bodies may nonetheless be subject to state or local regulation.

³ See, e.g., 33 U.S.C. § 1362(5). The federal government is typically a defendant in civil suits only when sued by a private citizen, because the government generally cannot criminally prosecute or sue itself; certain administrative remedies may nonetheless be available. See *infra* notes 47–48 and accompanying text; see also *infra* notes 137–139 and accompanying text.

⁴ See “Citizen Suits,” *infra*.

⁵ Certain statutes addressed herein are enforced by other agencies—often but not always in conjunction with EPA—such as the U.S. Coast Guard, for the Act to Prevent Pollution from Ships; the U.S. Department of Transportation and Federal Aviation Administration (FAA), for the Hazardous Materials Transportation Act; or the U.S. Army Corps of Engineers, for certain parts of the Clean Water Act.

⁶ See David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENV’T L. REV. 159, 197–98 (2014).

⁷ See “Identifying Violations,” *infra*.

⁸ See, e.g., 33 U.S.C. § 1319(c)(4); 42 U.S.C. § 6928(d)(3).

Selected Pollution Control Law Names and Acronyms⁹

Act to Prevent Pollution from Ships (APPS)
 Clean Air Act (CAA)
 Clean Water Act (CWA)
 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
 Emergency Planning and Community Right-to-Know Act (EPCRA)
 Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)
 Hazardous Materials Transportation Act (HMTA)
 Marine Protection, Research, and Sanctuaries Act (MPRSA)
 Resource Conservation and Recovery Act (RCRA)
 Safe Drinking Water Act (SDWA)
 Toxic Substances Control Act (TSCA)

This report then addresses the legal enforcement mechanisms available under the federal pollution control statutes: administrative actions, civil judicial suits by the government and by private citizens, and criminal prosecutions.

- **Administrative enforcement** refers to actions agencies take without going through the courts, which can result in penalties, permit withdrawals, or orders to do (or not do) certain things.¹⁰
- **Civil judicial enforcement** refers to DOJ filing lawsuits in federal court by DOJ on behalf of EPA to enforce statutory prohibitions or requirements or to compel compliance with administrative orders; such lawsuits can result in financial penalties or injunctive relief.¹¹ The federal government may pursue civil judicial enforcement actions under all the pollution control statutes, and several such laws also allow private citizens to initiate civil judicial enforcement actions.¹²
- **Criminal enforcement** is available under most pollution control statutes when offenses are committed with a certain degree of intent, exposing violators to criminal prosecution, fines, and potential prison time.¹³ While administrative and civil judicial enforcement generally can result from unwitting conduct or accidents, essentially resulting in a strict-liability regime,¹⁴ criminal penalties typically apply in cases where violations are committed with a specific mental state.¹⁵

Next, this report discusses the enforcement discretion that executive branch officials wield when undertaking enforcement action and the policies that EPA and DOJ have adopted to guide the

⁹ This list, presented in alphabetical order, includes statutes referenced in this report and does not encompass every potential federal statute governing pollution.

¹⁰ See “Administrative Enforcement,” *infra*.

¹¹ See “Civil Judicial Enforcement,” *infra*.

¹² *Id.*

¹³ See “Criminal Enforcement,” *infra*.

¹⁴ Pollution control laws typically define violations, and establish civil liability, without regard to the violator’s mental state. See, e.g., 7 U.S.C. §§ 136a, 136l (FIFRA); 15 U.S.C. §§ 2614, 2615(a)(1), 2689 (TSCA); 33 U.S.C. § 300h-2(a)–(c) (SDWA); *id.* §§ 1311(a), 1319(a)–(b) (CWA); *id.* §§ 1411(a)–(b), 1415(a) (MPRSA); 42 U.S.C. § 7413(a)–(b) (CAA); *id.* § 6928(a)(3), (g), (h)(2) (RCRA); *id.* § 11045(b)(1)–(3) (EPCRA); see also *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 608 (2009) (noting that “CERCLA imposes strict liability for environmental contamination”).

¹⁵ See “The *Mens Rea* Requirement,” *infra*.

exercise of that discretion. While Congress enacts the laws governing pollution control, the executive branch typically enjoys broad discretion with respect to when and how those laws are enforced.¹⁶ Limited resources may preclude universal enforcement, and both the executive branch and Congress, via its appropriations power, have a role to play in targeting enforcement efforts.¹⁷ The report concludes with several considerations for Congress, including options to address changing executive branch enforcement policies and priorities, the role of enforcement by nonfederal actors, the scope of available remedies and penalties, and the availability of administrative enforcement in light of recent Supreme Court jurisprudence.

The pollution control statutes discussed in this report are a subset of the broader class of federal environmental laws, which include wildlife protection measures such as the Endangered Species Act,¹⁸ natural resource and land-use measures such as the Outer Continental Shelf Lands Act,¹⁹ and procedural measures such as the National Environmental Policy Act.²⁰ This report focuses on the pollution statutes listed in **Table A-1**, **Table A-2**, and **Table A-3** as a framework for discussion, but many of the issues discussed herein may be applicable to the wider canon of federal environmental law.

Many pollution control laws authorize states to implement national standards pursuant to an EPA-approved state-law program that satisfy certain minimum federal requirements. Under this “cooperative federalism” approach,²¹ state environmental protection agencies often take the lead in issuing permits under federal pollution statutes, conducting inspections, and pursuing certain enforcement measures under federal and state law.²² These pollution control statutes afford states significant discretion in choosing how to structure and implement their programs, which can vary considerably. While state agencies can play an important role in certain states’ enforcement schemes, this report is limited in scope to enforcement of federal pollution control laws by the federal government or through citizen suits in federal court.

This report also focuses on affirmative enforcement actions taken in response to alleged violations of statutory or regulatory prohibitions or requirements. Some claims brought by private individuals in citizen suits may allege that EPA is failing to perform a statutorily mandated duty. Although this type of claim could fairly be characterized as a type of “enforcement,” such lawsuits raise a unique set of legal considerations and are beyond the scope of this report. Likewise, this report does not address remedial provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that apportion cleanup costs through a no-fault liability scheme but do not proscribe conduct.²³

¹⁶ *See infra*.

¹⁷ *Id.*

¹⁸ 16 U.S.C. §§ 1531–1544.

¹⁹ 43 U.S.C. §§ 1331–1356.

²⁰ 42 U.S.C. §§ 4321–4347.

²¹ *See* CRS Legal Sidebar LSB11309, *Cooperative Federalism and the Clean Air Act: EPA’s Good Neighbor Interstate Air Pollution Rule*, by Kate R. Bowers (2025) (describing role of cooperative federalism in environmental law).

²² *See* Memorandum from Lawrence E. Starfield, Acting Assistant Adm’r, Off. of Enf’t and Compliance Assurance (OECA), EPA, to Reg’l Adm’rs et al., *Effective Partnerships Between EPA and the States in Civil Enforcement and Compliance Assurance 1* (June 21, 2023), <https://www.epa.gov/system/files/documents/2023-06/effectivepartnershipsbetweenepaandthestatesincivilenforcementandcomplianceassurance062123.pdf> [<https://perma.cc/GKV4-GTU2>].

²³ For an overview of CERCLA’s remedial liability scheme, *see* CRS In Focus IF11790, *Liability Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)*, by Kate R. Bowers (2021).

Identifying Violations

Enforcement begins with identifying violations, which can consist of unpermitted or otherwise illegal pollution activity, pollution activity in violation of a permit, and recordkeeping violations, among other things. EPA compliance-monitoring activity includes on-site inspections and off-site review of data.²⁴ Civil inspections consist of site visits to evaluate compliance by means of observation, document review, interviews, and/or sampling activity.²⁵ Inspection results, record reviews, or civilian complaints indicating “serious, widespread, and/or continuing civil violations” may trigger more in-depth civil investigations that can include enforceable written information requests.²⁶

EPA also has a Criminal Investigation Division, whose law enforcement officers are authorized under federal law to carry firearms, serve and execute search and seizure warrants and other forms of legal process, and make arrests.²⁷ In conjunction with DOJ, any suspected criminal violation can be opened as a matter before a federal grand jury, authorizing issuance of subpoenas to compel documents and testimony.²⁸

EPA can also learn of violations by way of tips, whether from whistleblower employees or from the public.²⁹ Certain statutes allow for awards up to a maximum dollar amount to tipsters whose information results in successful enforcement actions,³⁰ while the Act to Prevent Pollution from Ships allows courts, in their discretion, to award whistleblowers up to half the amount of any civil or criminal penalty imposed as a result of their information.³¹

EPA’s audit policy establishes conditions under which voluntary self-disclosure of violations can result in civil penalty mitigation or a determination not to pursue a criminal case.³²

Types of Federal Enforcement

Federal environmental enforcement falls into three broad categories: administrative enforcement, civil judicial enforcement, and criminal enforcement.

²⁴ *Monitoring Compliance*, EPA (Mar. 17, 2026), <https://www.epa.gov/compliance/monitoring-compliance> [<https://perma.cc/4PNE-YGH7>].

²⁵ *Id.*

²⁶ *Id.*

²⁷ *See* 18 U.S.C. § 3063.

²⁸ *See* FED. R. CRIM. P. 6, 17.

²⁹ *See* EPA, *Report Environmental Violations*, ENF’T & COMPLIANCE HIST. ONLINE, <https://echo.epa.gov/report-environmental-violations> [<https://perma.cc/5UNF-869X>] (last visited Apr. 27, 2026).

³⁰ *See, e.g.*, 42 U.S.C. § 7413(f) (CAA) (“The Administrator may pay an award, not to exceed \$10,000, to any person who furnishes information or services which lead to a criminal conviction or a judicial or administrative civil penalty for any violation . . . under this section.”); 42 U.S.C. § 9609(d) (CERCLA) (authorizing \$10,000 award to “any individual who provides information leading to the arrest and conviction of any person for a violation subject to a criminal penalty under this chapter”).

³¹ *See* 33 U.S.C. § 1908(a) (“In the discretion of the Court, an amount equal to not more than ½ of such fine may be paid to the person giving information leading to conviction.”); *see also id.* § 1908(b)(2) (enforcing agencies may award up to half of civil penalties to person giving information leading to penalty assessments).

³² *See EPA’s Audit Policy*, EPA (Oct. 8, 2025), <https://www.epa.gov/compliance/epas-audit-policy> [<https://perma.cc/WLP5-UTFP>].

Administrative Enforcement

In administrative enforcement actions, agencies exercise statutory authority to determine whether violations have occurred and what statutorily authorized administrative remedies are appropriate to address those violations. Agencies typically make these determinations using procedures that are simpler and faster than civil litigation in federal court.³³ By case volume, the vast majority of EPA’s civil enforcement activity is administrative: the agency initiates more than 10 new administrative enforcement actions for every new civil judicial enforcement action.³⁴

EPA decides whether and how to exercise its administrative enforcement authority, but those it targets can seek judicial review.³⁵ Courts thus ensure that EPA acts within the bounds of its statutory and constitutional authority. Courts also play an essential role in enforcing compliance with EPA’s administrative directives: While EPA can issue administrative orders or assess penalties, the agency’s main recourse against noncompliant entities is to bring suit.³⁶

Types of Administrative Enforcement Action

Pollution control statutes authorize EPA to pursue three administrative enforcement responses to suspected violations.

First, most statutes allow EPA to issue administrative compliance orders that direct entities to take corrective actions necessary to cure alleged violations and remedy environmental harms, usually within a specified time frame.³⁷ This authority is often, though not always, predicated on a finding that the violation in question poses an “imminent and substantial endangerment” to public health or the environment.³⁸ If a party fails to comply with EPA’s administrative orders, it may be liable for civil penalties in a subsequent administrative or civil judicial enforcement action.³⁹

³³ See Todd S. Aagard, *Agencies, Courts, First Principles, and the Rule of Law*, 70 ADMIN. L. REV. 771, 786 (2018) (noting that “agencies are able to create processes that, through specialization and routinization, make decisions with greater speed and at lower cost than courts do”).

³⁴ See EPA, ENFORCEMENT AND COMPLIANCE ASSURANCE ANNUAL RESULTS FOR FISCAL YEAR 2024, at 168 (2024), <https://www.epa.gov/system/files/documents/2025-03/eoy2024.pdf> [<https://perma.cc/CKC4-3S9W>] (noting 60 new complaints in civil judicial enforcement actions, as compared with new 987 complaints seeking administrative penalties); EPA, ENFORCEMENT AND COMPLIANCE ASSURANCE ANNUAL RESULTS FOR FISCAL YEAR 2023, at 106 (2023), <https://www.epa.gov/system/files/documents/2025-03/eoy2023.pdf> [<https://perma.cc/32TS-SFSP>] (noting 79 new complaints in civil judicial enforcement actions, as compared with 912 complaints seeking administrative penalties). Some commentators have observed that the ratio of administrative to civil judicial enforcement actions has grown substantially in the first year of the second Trump Administration, though EPA’s most recent annual report does not include comparative data on newly filed actions. See ENV’T INTEGRITY PROJECT, DECLINING ENVIRONMENTAL ENFORCEMENT IN TRUMP’S SECOND TERM (2026), https://environmentalintegrity.org/wp-content/uploads/2026/02/EIP_Report_2025EnvironmentalEnforcement_2.5.26.pdf [<https://perma.cc/SHV5-9UHB>].

³⁵ See “Civil Judicial Enforcement,” *infra*.

³⁶ *Id.*

³⁷ See, e.g., 7 U.S.C. § 136k(a) (FIFRA); 33 U.S.C. § 1319(a)(3) (CWA); 42 U.S.C. § 6928(a)(1) (RCRA); *id.* § 7413(a)(1) (CAA), *id.* § 9606(a) (CERCLA), *id.* § 11045(a) (EPCRA).

³⁸ See, e.g., 42 U.S.C. § 9606(a) (authorizing “such orders as may be necessary to protect public health and welfare and the environment” when “an actual or threatened release of a hazardous substance” poses an “imminent and substantial endangerment”); *id.* § 6973 (authorizing similar orders to respond to an “imminent and substantial endangerment” related to solid or hazardous waste); *id.* § 7603 (authorizing similar orders to respond to an imminent and substantial endangerment related to air pollution); *id.* § 300i(a) (authorizing similar orders to respond to an “imminent and substantial endangerment” related to a contaminant that “is present in or is likely to enter a public water system”).

³⁹ See *infra* notes 41 and 129 and accompanying text.

Second, some statutes authorize EPA to withdraw certain permits from noncompliant permittees.⁴⁰

Third, most statutes authorize EPA to order payment of administrative penalties to punish and deter noncompliance, including, in some cases, noncompliance with EPA's own administrative compliance orders.⁴¹ These statutes set maximum penalty amounts, which are adjusted for inflation (see **Table A-1**).⁴² Current maximum penalties vary across statutes, but most are between \$20,000 and \$70,000 per violation.⁴³ EPA does not have to seek maximum penalties, however, and many statutes identify factors that EPA must consider when determining appropriate penalties in a given case.⁴⁴ These statutory penalty factors may include, for example, “the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, and economic benefit or savings (if any) resulting from the violation.”⁴⁵ Statutory penalties are often assessed for each day that a violation persists, but some statutes cap the aggregate penalties that EPA can collect through administrative action and require the agency to bring a civil judicial action to seek penalties that exceed those caps.⁴⁶

The federal government is generally subject to requirements under pollution control statutes, and EPA has statutory authority to issue administrative orders and assess administrative penalties against federal facilities that violate the CAA, RCRA, and SDWA.⁴⁷ EPA lacks that authority under the CWA, TSCA, FIFRA, and EPCRA.⁴⁸

Administrative Enforcement Procedures

The procedures that EPA must follow when bringing an administrative enforcement action generally depend on the administrative remedy that the agency pursues. For instance, several statutes authorize EPA to issue administrative compliance orders without first obtaining information from violators or the public, or proving to a neutral adjudicator that a violation has occurred. To illustrate, the CWA and CAA both authorize EPA to issue orders if the agency believes, based on “any information available to” the Administrator, that a violation has

⁴⁰ *E.g.*, 33 U.S.C. § 1415(f); 42 U.S.C. § 6928(a)(3).

⁴¹ *See, e.g.*, 7 U.S.C. § 136l(a)(1) (FIFRA); 15 U.S.C. §§ 2615(a)(2)(A), 2647(a) (TSCA); 33 U.S.C. §§ 1319(g)(2)(A)–(B), 1321(b)(6)(B)(i)–(ii) (CWA); 42 U.S.C. §§ 6928(a)(3), 6928(c), 6928(h)(2) (RCRA); *id.* §§ 7413(d)(1), 7524(c)(1) (CAA); *id.* § 9609(a) (CERCLA); *id.* § 11045(b)(1)–(2) (EPCRA).

⁴² Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 114-74, § 5, 104 Stat. 890, 891–92 (codified as amended at 28 U.S.C. § 2461 note).

⁴³ 40 C.F.R. § 19.4, tbl. 1 (2025).

⁴⁴ *E.g.*, 15 U.S.C. § 2615(a)(2)(A)–(B); 33 U.S.C. § 1319(g)(3); 42 U.S.C. §§ 7413(e), 9609(a)(3).

⁴⁵ 33 U.S.C. § 1319(g)(3).

⁴⁶ *See e.g.*, 33 U.S.C. § 1319(g)(1)–(2) (capping CWA administrative penalties); 42 U.S.C. § 300h-2(c)(1)–(2) (capping SDWA administrative penalties); *cf.* 42 U.S.C. § 7413(d)(1) (capping CAA administrative penalties at \$200,000, unless “the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount . . . is appropriate for administrative penalty action”); *accord id.* § 7524(c)(1).

⁴⁷ *Overview of the Enforcement Process for Federal Facilities*, EPA, (May 6, 2025), <https://www.epa.gov/enforcement/overview-enforcement-process-federal-facilities> [<https://perma.cc/4C9Q-Y6DQ>].

⁴⁸ *Id.*

occurred.⁴⁹ Similarly, RCRA authorizes EPA to issue orders if the Administrator “has reason to believe” that violations have occurred.⁵⁰

By contrast, when statutes authorize EPA to withdraw permits or order payment of monetary penalties, they typically require the agency to provide an opportunity for the accused to submit evidence at a hearing.⁵¹ Some of these statutes also require EPA to conduct its hearings in accordance with the Administrative Procedure Act’s (APA’s) rules for “formal adjudications.”⁵² Those rules require trial-like adversarial proceedings before agency heads or administrative law judges (ALJs), who weigh evidence, determine whether a violation occurred, and decide what remedy is warranted⁵³—powers that the Supreme Court has described as “functionally comparable” to those exercised by Article III judges presiding over bench trials.⁵⁴

EPA’s hearings are governed by the agency’s Consolidated Rules of Practice, which are codified at 40 C.F.R. Part 22.⁵⁵ These regulations establish procedures for the presentation of evidence, including the examination and cross-examination of witnesses.⁵⁶ They also designate ALJs as presiding officers for hearings that are subject to the APA’s “formal adjudication” procedures and regional judicial officers (RJOs) as the presiding officers for hearings that are not subject to those procedures.⁵⁷ RJOs and ALJs perform similar functions, but ALJs are subject to several APA-mandated limits designed to ensure their impartiality.⁵⁸ For instance, unlike RJOs,⁵⁹ ALJs cannot

⁴⁹ 33 U.S.C. § 1319(a)(3); 42 U.S.C. § 7413(a)(1); *see also* *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1241 (11th Cir. 2003) (holding that the CAA’s “language and structure, in addition to agency practice, make clear that [compliance orders under the CAA] are issued without any adjudication”).

⁵⁰ 7 U.S.C. § 136k; *see also* 42 U.S.C. §§ 6928(a)(1), 11045(a) (authorizing issuance of administrative orders without a hearing under RCRA and EPCRA, respectively). *But see* 42 U.S.C. § 6991e (requiring EPA to provide an opportunity for a hearing before issuing a compliance order addressing violations of RCRA’s requirements for underground storage tanks); *id.* § 9613(k)(2)(B) (requiring EPA, as the President’s designee, to seek public comment before ordering a remedial action under CERCLA to address releases of hazardous waste).

⁵¹ *E.g.*, 7 U.S.C. 136l(a)(3); 33 U.S.C. §§ 1319(g)(2)(A), 1321(b)(6)(B)(i), 1415(a), (f); 42 U.S.C. §§ 300g-3(g)(B), 300h-2(c)(3). *But see* 42 U.S.C. § 6925(d) (authorizing EPA to revoke certain permits under RCRA without holding a hearing).

⁵² *E.g.*, 15 U.S.C. § 2615(a)(2)(A); 33 U.S.C. §§ 1319(g)(2)(B), 1321(b)(6)(B)(ii), 42 U.S.C. §§ 300j-6(b)(3), 6928(b), 7413(d)(2), 7524(c)(1), 9609(a)(2), (5), 11045(b)(2), 14304(e). The APA establishes baseline procedural requirements that federal agencies must follow when taking various actions, including adjudication. 5 U.S.C. §§ 551(6)–(7), 554, 556–57. *See also* CRS Report R46930, *Informal Administrative Adjudication: An Overview*, by Ben Harrington and Daniel J. Sheffner (2021).

⁵³ 5 U.S.C. §§ 556(b)–(c), 557(b).

⁵⁴ *Butz v. Economou*, 438 U.S. 478, 481–82 (1978).

⁵⁵ For summaries and interpretations of the Consolidated Rules of Practice, *see* EPA, *GUIDE TO THE U.S. ENVIRONMENTAL PROTECTION AGENCY’S ENVIRONMENTAL APPEALS BOARD* (2025), <https://www.epa.gov/system/files/documents/2026-01/guide-to-the-eab-2025.pdf> [<https://perma.cc/C7EZ-JMHM>] [hereinafter *EAB GUIDE*]; Joseph F. Guida & Jean M. Flores, *From Here to a Penalty: Anatomy of EPA Civil Administrative Enforcement*, 43 *TEX. ENV’T. L.J.* 129 (2013); Joseph J. Lisa, *EPA Administrative Enforcement Actions: An Introduction to the Consolidated Rules of Practice*, 24 *TEMP. J. SCI. TECH. & ENV’T. L.* 1 (2005).

⁵⁶ 40 C.F.R. pt. 22, subpt. D.

⁵⁷ 40 C.F.R. §§ 22.3; 22.19; 22.22–22.24; *see also* EPA, *Regional Judicial Officers*, EPA ADMIN. ENFORCEMENT DOCKETS (Apr. 17, 2026), <https://yosemite.epa.gov/oa/rhc/epaadmin.nsf/e2d1f35fbb02bc3f8525753f006961b0/7c1126a0949e9ab28525764f006dbae4!OpenDocument> [<https://perma.cc/LCM5-GBWL>] (discussing the roles of ALJs and RJOs under the Consolidated Rules of Practice).

⁵⁸ 5 U.S.C. §§ 554(d)(1)–(2), 557(d), 7521; *see also* *Ramspeck v. Fed. Trial Exam’rs Conf.*, 345 U.S. 128, 130 (1953) (discussing the APA’s legislative history and describing the statute’s protections for ALJs as a congressional response to “complaint[s]” that early New Deal hearing examiners “were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations”).

⁵⁹ KENT BARNETT ET AL., *ADMIN. CONF. OF THE U.S., NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS*, (continued...)

perform investigative or prosecutorial functions, cannot report to an employee who does,⁶⁰ and can be removed from their role “only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.”⁶¹

Under the Consolidated Rules of Practice, EPA must establish liability by a “preponderance of the evidence,” the “most common” burden of proof “in the civil law.”⁶² To carry that burden in an administrative hearing, EPA must persuade the presiding ALJ or RJO “that a proposition is more likely true than not true.”⁶³

At least one pollution control law limits the time in which EPA can bring an administrative enforcement action,⁶⁴ but absent such a statute-specific limitation period, EPA’s authority to seek administrative penalties is subject to the general statute of limitations codified at 28 U.S.C. § 2462.⁶⁵ Under that law, “an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued.”⁶⁶

In the environmental enforcement context, courts have held that a claim accrues at the time of the violation, not when the government learns of that violation.⁶⁷ The impact of this timing rule depends, in part, on the nature of the violation at issue. Congress has defined some violations—illegal ocean dumping, for example—to recur each day that the violation persists.⁶⁸ For these types of “continuing” violations, EPA can seek administrative penalties based on any conduct that occurred within the past five years, even if the violative conduct began more than five years ago.⁶⁹ Conversely, courts have held that other violations—the failure to obtain a required CAA

SELECTION, OVERSIGHT, AND REMOVAL 1, 45–46 (2018), <https://www.acus.gov/document/non-alj-adjudicators-federal-agencies-status-selection-oversight-and-removal-final-report> [<https://perma.cc/VA6A-5972?type=image>].

⁶⁰ 5 U.S.C. § 554(d)(1)–(2).

⁶¹ 5 U.S.C. § 7521. The APA’s tenure protections for ALJs have been the subject of judicial scrutiny and courts are divided on whether those protections are constitutional. *Compare* *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1133–35 (9th Cir. 2021), *Rabadi v. DEA*, 122 F.4th 371, 374–77 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 2846 (2025), *Leachco, Inc. v. Consumer Prod. Safety Comm’n*, 103 F.4th 748, 764 (10th Cir. 2024), *cert. denied*, 145 S. Ct. 1047 (2025), and *Walmart, Inc. v. Chief Admin. L. Judge of Off. of Chief Admin. Hearing Officer*, 144 F.4th 1315, 1342–48 (11th Cir. 2025) (holding that removal protections are constitutional), *with* *Jarkesy v. SEC*, 34 F.4th 446, 464 (5th Cir. 2022), *aff’d on other grounds and remanded*, 603 U.S. 109 (2024), and *VHS Acquisition Subsidiary No. 7 v. NLRB.*, 759 F. Supp. 3d 88, 92–100 (D.D.C. 2024) (holding that removal protections are unconstitutional).

⁶² *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993).

⁶³ *United States v. Watkins*, 10 F.4th 1179, 1185 (11th Cir. 2021) (quoting *United States v. Deleveaux*, 205 F.3d 1292, 1296 n.3 (11th Cir. 2000)).

⁶⁴ 42 U.S.C. § 7413(d)(1) (limiting EPA’s administrative penalty authority under the CAA to actions where “the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a . . . longer period of violation is appropriate for administrative penalty action”).

⁶⁵ *See* *3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994) (holding that an administrative action seeking penalties is “an action, suit or proceeding” subject to 28 U.S.C. § 2462’s five-year limitations period).

⁶⁶ 28 U.S.C. § 2462. The same statute of limitations governs the civil judicial enforcement actions discussed later in this report. *See* *Coghlan v. Nat’l Transp. Safety Bd.*, 470 F.3d 1300, 1305 (11th Cir. 2006) (“Section 2462 encompasses not only judicial proceedings, but also administrative proceedings that fall within the scope of its language.”).

⁶⁷ *E.g.*, *3M Co.*, 17 F.3d at 1460–63; *accord* *United States v. Core Lab’ies, Inc.*, 759 F.2d 480, 482–84 (5th Cir. 1985); *see also* *Gabelli v. SEC*, 568 U.S. 442, 447–48 (2013) (The “‘standard rule’ is that a claim accrues” under 28 U.S.C. § 2462 “when the plaintiff has a complete and present cause of action.” (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007))).

⁶⁸ 33 U.S.C. §§ 1415(c), 1908(b).

⁶⁹ *See* *United States v. Midwest Generation, LLC*, 720 F.3d 644, 647 (7th Cir. 2013) (noting that “Congress sometimes writes regulatory statutes” so “that every day” of violation “is a fresh violation” of the statute).

construction permit, for example—occur at a discrete point in time.⁷⁰ Even if these violations are never corrected, EPA must act within five years of the date of violation if it wants to secure administrative penalties.⁷¹

Because 28 U.S.C. § 2462’s general limitations period applies only to actions seeking “fine[s], penal[ies], or forfeiture[s],” it does not limit injunctive remedies that require parties to take or refrain from taking certain actions but that entail no monetary penalty or asset forfeiture and are not punitive.⁷² Still, in litigation between private parties, courts typically withhold injunctive relief if monetary penalties for the same underlying conduct are time-barred. While the Supreme Court has never decided whether this rule—known as the *concurrent remedies doctrine*—applies to the government, it has held that “an action on behalf of the United States in its governmental capacity . . . is subject to no time limitation, in the absence of congressional enactment clearly imposing it.”⁷³ Heeding that admonition, circuit courts to consider the issue have held that the federal government is not subject to the concurrent remedies doctrine.⁷⁴ EPA thus generally appears to be free to seek injunctive remedies even when 28 U.S.C. § 2462 precludes monetary penalties.

Review of Administrative Enforcement Actions

The parties that EPA targets in administrative enforcement actions can challenge EPA’s authority to act against them. When, where, and how they may do so depends on the type of enforcement proceeding at issue, and, potentially, on the legal basis of their challenge.

Judicial Review of Administrative Compliance Orders Issued Without a Hearing

As noted above, several pollution control statutes authorize EPA to issue administrative compliance orders without providing an opportunity for a hearing. For decades, lower courts declined to review those orders unless and until EPA sued to enforce them.⁷⁵ In *Sackett v. EPA*, the Supreme Court rejected this approach, holding that recipients of EPA’s administrative compliance orders could challenge those orders immediately under the APA rather than waiting for EPA to bring suit.⁷⁶

⁷⁰ See, e.g., *United States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 284–85 (3d Cir. 2013) (holding that violations of 42 U.S.C. § 7454(a) are complete when owners of major source of air pollution commence construction or modification without a required permit in hand); accord *United States v. Luminant Generation Co., L.L.C.*, 905 F.3d 874, 884 (5th Cir. 2018), *reh’g en banc granted*, 929 F.3d 316 (5th Cir. 2019); *Midwest Generation, LLC*, 720 F.3d at 647; *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1015 (8th Cir. 2010); *Nat’l Parks & Conservation Ass’n v. Tenn. Valley Auth.*, 502 F.3d 1316, 1323 (11th Cir. 2007).

⁷¹ *EME Homer City Generation, L.P.*, 727 F.3d at 284–85; *Midwest Generation, LLC*, 720 F.3d at 648; *Otter Tail Power Co.*, 615 F.3d at 1018; *Nat’l Parks & Conservation Ass’n, Inc.*, 502 F.3d at 1323.

⁷² For a discussion of what constitutes a “penalty” within the meaning of 28 U.S.C. § 2462, see *Kokesh v. SEC*, 581 U.S. 455, 461–63 (2017).

⁷³ *E. I. Du Pont De Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924).

⁷⁴ *Luminant Generation Co.*, 905 F.3d at 886–87; *United States v. Telluride Co.*, 146 F.3d 1241, 1248–49 (10th Cir. 1998); *United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997).

⁷⁵ E.g., *Sackett v. EPA*, 622 F.3d 1139, 1143 (9th Cir. 2010), *rev’d and remanded*, 566 U.S. 120 (2012); *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995); *S. Ohio Coal Co. v. Off. of Surface Mining, Reclamation & Enf’t*, 20 F.3d 1418 (6th Cir. 1994); *S. Pines Assocs. by Goldmeier v. United States*, 912 F.2d 713 (4th Cir. 1990); *Hoffman Grp., Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990); *Ross Incineration Servs., Inc. v. Browner*, 118 F. Supp. 2d 837 (N.D. Ohio 2000); *Sharp Land Co. v. EPA*, 956 F. Supp. 691, 694 (M.D. La. 1996).

⁷⁶ *Sackett v. EPA*, 566 U.S. 120, 131 (2012).

Sackett concerned an EPA order requiring property owners to remedy alleged CWA violations by conducting site restoration work.⁷⁷ After receiving that order, the owners asked for an administrative hearing, but EPA denied their request.⁷⁸ The owners then brought suit under the APA.⁷⁹ The government argued that the suit was premature; the Supreme Court disagreed.⁸⁰

The APA authorizes judicial review of (1) “final agency action” for which (2) “there is no other adequate remedy in a court,” (3) so long as no other statute “preclude[s]” that review.⁸¹ According to the Court, the property owners’ suit satisfied each of those conditions. EPA’s order was “final agency action” because it both obliged the owners to restore their property and marked the “consummation” of [EPA’s] decisionmaking process,” which the agency demonstrated by denying the hearing request.⁸² There was “no other adequate remedy in court” because the property owners could not otherwise initiate suit themselves and because every day that they waited for EPA to sue, “they accrue[d], by the Government’s telling, an additional \$75,000 in potential liability” for noncompliance.⁸³ Finally, no other statute precluded judicial review because “[n]othing in the [CWA] expressly” said so and any implied preclusive effect was insufficient “to overcome the APA’s presumption of reviewability for all final agency action.”⁸⁴

Agency and Judicial Review of Administrative Orders Issued After a Hearing

When ALJs and RJOs issue orders *following* hearings, EPA’s Consolidated Rules of Practice allow aggrieved parties to seek review by the Environmental Appeals Board (EAB),⁸⁵ a tribunal of up to four EPA employees who are appointed by the EPA Administrator.⁸⁶ The EAB reviews matters “de novo,”⁸⁷ which means that “it makes an independent determination without deference” to the ALJs’ or RJOs’ “earlier analysis.”⁸⁸ Pending EAB review, ALJ and RJO orders are considered “interim” and have no binding effect.⁸⁹ The EAB can then adopt, modify, or set aside those interim orders,⁹⁰ and its decisions are final and reviewable in federal court.⁹¹

⁷⁷ *Id.* at 125.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 126–30.

⁸¹ 5 U.S.C. §§ 701(a)(1), 704. *See also* CRS Legal Sidebar LSB10558, *Judicial Review Under the Administrative Procedure Act (APA)*, by Jonathan M. Gaffney (2024).

⁸² *Sackett*, 566 U.S. at 126–27.

⁸³ *Id.* at 127–28.

⁸⁴ *Id.* at 128–31.

⁸⁵ 40 C.F.R. § 22.30.

⁸⁶ Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320 (Feb. 13, 1992); *see also* EAB GUIDE, *supra* note 55, at 2–3. No statute expressly authorizes the EAB, leading some scholars to question whether the EAB is lawful. *See* William Funk, *Is the Environmental Appeals Board Unconstitutional or Unlawful?*, 49 ENV’T L. 737 (2019).

⁸⁷ *De Novo*, BLACK’S LAW DICTIONARY (12th ed. 2024).

⁸⁸ EAB GUIDE, *supra* note 55, at 7.

⁸⁹ 40 C.F.R. § 22.27(c)(2), (d).

⁹⁰ *Id.* § 22.30(f).

⁹¹ *See, e.g.*, 42 U.S.C. § 11045(f)(1) (providing that “[a]ny person against whom a civil penalty is assessed under this section [of the EPCRA] may obtain review thereof in the appropriate district court of the United States”); *accord* 15 U.S.C. § 2615(a)(3) (TSCA); 33 U.S.C. § 1319(g)(8)(A)–(B) (CWA); 42 U.S.C. § 300h-2(c)(6) (SDWA).

Orders issued by ALJs and RJOs also become final if no one seeks EAB review within 45 days.⁹² In that case, EPA’s regulations state that the parties subject to the now-final order failed to exhaust their administrative remedies and thus “waive[d] [their] rights to judicial review.”⁹³ However, this regulatory exhaustion requirement appears to have never been litigated, and if it were, it is unclear if a court would give it controlling effect. Exhaustion of administrative remedies “is required” when “Congress specifically mandates” it,⁹⁴ but no statute mentions the EAB, let alone directs parties to seek EAB review before judicial review.⁹⁵ Absent a statutory mandate, the doctrine of administrative exhaustion is prudential, and its application is committed to “sound judicial discretion.”⁹⁶

Even when an implied administrative exhaustion requirement is “fairly discernible” in statute,⁹⁷ defendants in an enforcement action may still bypass agency proceedings and go directly to federal district court if they contest an agency’s constitutional authority to proceed at all.⁹⁸ Under these circumstances, the Supreme Court has held that the harm from being subjected to an unconstitutional agency proceeding is “a here-and-now injury” that cannot be remedied once the administrative proceeding is over and judicial review “kicks in.”⁹⁹ The Court has also stressed that when a litigant contests an agency’s “power generally” rather than “how that power was wielded” in a particular case, its claims are generally “collateral” to administrative proceedings¹⁰⁰ and “ill suited” to agency resolution.¹⁰¹ For these reasons, the Court has sometimes concluded that certain constitutional challenges to agency authority are “not the type of claim Congress intended to funnel through” generally applicable administrative proceedings.¹⁰²

Administrative Enforcement and the Seventh Amendment

In recent years, some litigants have argued that administrative enforcement proceedings violate the Seventh Amendment’s guarantee of trial by jury in “[s]uits at common law, where the value in controversy shall exceed twenty dollars.” The Supreme Court considered that claim in *SEC v. Jarkesy*, a case challenging the Securities and Exchange Commission’s (SEC’s) use of an in-agency tribunal to levy administrative penalties for violations of antifraud provisions in securities

⁹² 40 C.F.R. § 22.27(c).

⁹³ *Id.* § 22.27(d).

⁹⁴ *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (emphasis added).

⁹⁵ The statutory provisions that provide for judicial review of final EPA penalty orders, cited at note 91, *supra*, do not mention the EAB or intermediate administrative appellate review generally. *See also* William Funk, *Is the Environmental Appeals Board Unconstitutional or Unlawful*, 49 ENVTL. L. 737 (2019) (noting the absence of statutory authorization for the EAB).

⁹⁶ *McCarthy*, 503 U.S. at 144.

⁹⁷ *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994) (quoting *Block v. Cmty. Nutrition Inst.*, 476 U.S. 340, 351 (1984)).

⁹⁸ *E.g.*, *Axon Enter., Inc. v. FTC*, 598 U.S. 175 (2023); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

⁹⁹ *Axon Enter.*, 598 U.S. at 191 (quoting *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 212 (2020)).

¹⁰⁰ *Id.* at 193 (quoting *Free Enter. Fund*, 591 U.S. at 490).

¹⁰¹ *Id.* at 195 (quoting *Carr v. Saul*, 593 U.S. 83, 92 (2021)).

¹⁰² *See id.* at 184; *Free Enter. Fund*, 561 U.S. at 489–91 (allowing litigants to proceed first in district court with their claims that removal protections afforded to certain inferior officers were unconstitutional). *But see* *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 17 (2012); *Thunder Basin Coal Co. v. Reich*, 510 U.S. at 216 (requiring administrative exhaustion in cases where litigants raised both constitutional and nonconstitutional objections to agency action because the agencies might dispose of the cases and afford complete relief on nonconstitutional grounds).

laws.¹⁰³ There, the Court applied a two-part test to determine whether administrative proceedings were consistent with the Seventh Amendment.¹⁰⁴

Because the Seventh Amendment jury right attaches to “[s]uits at common law”—i.e., legal actions—the Court first asked whether SEC’s enforcement proceeding was “legal,” rather than “equitable,” in nature.¹⁰⁵ To parse the distinction between law and equity, the Court “consider[ed] the cause of action and the remedy” sought¹⁰⁶—though remedy was the “more important” consideration¹⁰⁷—and it asked whether the administrative proceeding was analogous to an action that would have been heard in an 18th-century English court of law.¹⁰⁸ If so, the jury right would be implicated. If the proceeding was instead analogous to one that would have been heard in an 18th-century English court of equity, the jury right would not be implicated.¹⁰⁹

While the historical distinction between law and equity is not always clear, the Court described monetary penalties designed to punish and deter wrongdoing as “the prototypical common law remedy.”¹¹⁰ On this basis alone, the Court concluded that SEC’s enforcement proceeding was legal, rather than equitable,¹¹¹ but the Court also stressed that the antifraud provisions in securities laws “bore a close relationship” to “common law fraud,”¹¹² further confirming the legal nature of SEC’s enforcement proceeding.

Having concluded that SEC’s proceeding “implicate[d] the Seventh Amendment,” the Court next asked whether the proceeding concerned “public,” rather than “private,” rights.¹¹³ If public rights were at stake, the Court explained, then Congress could assign the proceeding to “an agency tribunal without a jury, consistent with the Seventh Amendment.”¹¹⁴ While the Court has “not definitively explained” the distinction between public and private rights,¹¹⁵ its “precedents have recognized that the [public rights] doctrine covers matters ‘which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.’”¹¹⁶ These include matters concerning revenue collection, immigration, public lands, public benefits, and patents.¹¹⁷

That list is not exhaustive because Congress can create “new statutory public rights” and assign their adjudication to agencies,¹¹⁸ but the Court cautioned that this congressional power is limited. According to the Court, “[t]he public rights exception is, after all, an *exception*,” and practical

¹⁰³ SEC v. Jarkesy, 603 U.S. 109, 115 (2024).

¹⁰⁴ *Id.* at 121.

¹⁰⁵ *Id.* at 122.

¹⁰⁶ *Id.* at 123 (citing *Tull v. United States*, 481 U.S. 412, 417–18 (1987)).

¹⁰⁷ *Id.* at 123 (quoting *Tull*, 481 U.S. at 421).

¹⁰⁸ *Id.* at 122–23.

¹⁰⁹ *Id.* For background on the concept of equity and equitable relief, see Sam Bray, *A Student’s Guide to the Meanings of “Equity,”* REASON: VOLOKH CONSPIRACY (July 21, 2016, at 16:54 ET), <https://reason.com/volokh/2016/07/21/a-students-guide-to-the-meanin/> [<https://perma.cc/5DDQ-PZW6>].

¹¹⁰ *Jarkesy*, 603 U.S. at 123.

¹¹¹ *Id.* at 125.

¹¹² *Id.* at 126.

¹¹³ *Id.* at 127.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 131 (quoting *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 584 U.S. 325, 334 (2018)).

¹¹⁶ *Oil States*, 584 U.S. at 334 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)).

¹¹⁷ *Jarkesy*, 603 U.S. at 128–31.

¹¹⁸ See *id.* at 136–37 (quoting *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442 (1977)).

considerations “like increasing efficiency and reducing public costs are not enough to trigger” it.¹¹⁹ Rather, Congress can “bypass the protection of the Seventh Amendment” only when it creates statutory requirements with no common law antecedents. As an example, the Court cited the Occupational Safety and Health (OSH) Act, a law whose requirements “resembled a detailed building code” and were “unknown to the common law.”¹²⁰ The Court previously held that these characteristics placed the OSH Act within the public rights exception.¹²¹ By contrast, the Court held that securities fraud was “akin” to common law fraud and thus beyond Congress’s power to assign to agency tribunals.¹²²

It remains to be seen how *Jarkesy*’s two-step analysis will apply to administrative enforcement proceedings under pollution-control statutes, but a recent decision by the U.S. Court of Appeals for the Third Circuit suggests that at least some of those proceedings may concern public, rather than private, rights. In *Axalta Coating Systems v. FAA*, the Third Circuit held that the FAA’s proceedings to enforce the Hazardous Materials Transportation Act (HMTA) and impose monetary penalties fell within the public rights exception.¹²³ The court reasoned that the underlying violation rested on “technical prescription[s]” that, like the requirements in the OSH Act, brought no “common law soil with them.”¹²⁴ While the HMTA defined “knowing” violations by reference to two terms—“reasonable person” and “reasonable care”—with deep roots in the common law tort of negligence, the court concluded that those terms were “relevant only to the question whether the violating party knew of the violation” and thus did not control the public rights analysis.¹²⁵

Courts may conclude that other pollution control statutes with complex, highly technical regulatory requirements likewise fall within the public rights exception.¹²⁶ However, the law in this area is evolving, and the Supreme Court has called for “close attention to the basis for each asserted application of the [public rights] doctrine.”¹²⁷ For now, at least, *Jarkesy*’s impact on EPA’s enforcement authority remains unsettled.

Civil Judicial Enforcement

Every federal pollution control statute authorizes the federal government to sue alleged violators in federal court, where juries (or in some cases, judges) determine liability, and where judges

¹¹⁹ *Id.* at 140.

¹²⁰ *Id.*

¹²¹ *See id.* (discussing *Atlas Roofing*, 430 U.S. at 455).

¹²² *Id.* at 139.

¹²³ 144 F.4th 467, 471 (3d Cir. 2025).

¹²⁴ *Id.* at 476 (quoting *Jarkesy*, 603 U.S. at 137). The prescriptions at issue in *Axalta* governed hazardous substance “packagings for which retention of liquid is a basic function,” and required that those “packagings”

be capable of withstanding without leakage the greater of . . . [a]n internal pressure which produces a gauge pressure of not less than 75kPa (11 psig) for liquids in Packing Group III of Class 3 or Division 6.1; or 95 kPa (14 psig) for other liquids; or . . . [a] pressure related to the vapor pressure of the liquid to be conveyed, determined by one of [three specified methods].

Id. at 477 (alterations in original) (quoting 49 C.F.R. § 173.27(c)(2)).

¹²⁵ *Id.*

¹²⁶ *Cf.* *Tull v. United States*, 481 U.S. 412, 420 (1987) (analogizing an action to enforce CWA Section 404 to an “action in public nuisance” or “an action in debt” under the common law).

¹²⁷ *Jarkesy*, 603 at 131.

interpret the law, assess civil penalties, and craft injunctive relief.¹²⁸ These laws generally permit suits to enforce substantive statutory requirements or to compel compliance with the terms of EPA-issued administrative orders.¹²⁹

DOJ's Role

“Except as otherwise authorized by law,” the Attorney General and her designees have sole authority to “supervise all litigation to which the United States, an agency, or officer thereof is a party.”¹³⁰ Because no statute gives EPA independent litigating authority, EPA must refer cases to DOJ to bring a civil judicial enforcement action.¹³¹ EPA’s referrals typically go to DOJ’s Environment and Natural Resources Division (ENRD), which handles much of the department’s environmental enforcement caseload.¹³²

As a matter of policy, ENRD sues to enforce a statute only when asked to do so by the agency charged with administering that statute.¹³³ EPA’s referral is thus a precondition for civil judicial enforcement action under most pollution control laws. However, EPA’s referral alone does not guarantee a lawsuit. ENRD acts on most EPA referrals,¹³⁴ but DOJ’s Office of Legal Counsel (OLC), which issues legal opinions that are binding on the executive branch,¹³⁵ has long maintained that the Attorney General ultimately decides whether to bring litigation on behalf of the United States.¹³⁶

¹²⁸ See generally *Balt. & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935) (noting that, “in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court”); see also *Tull*, 481 U.S. at 425 (noting the “constitutional right to a jury trial to determine . . . liability on . . . legal claims”); *id.* at 427 (holding that Congress can, and typically does, assign civil penalty determinations to judges).

¹²⁹ See, e.g., 33 U.S.C. § 1319(d) (authorizing penalties in civil suits under the CWA against “any person who violates any order issued by the Administrator”); 42 U.S.C. § 7413 (authorizing civil actions against any person who violates “a requirement or prohibition of any . . . order . . . issued, or approved under” the CAA).

¹³⁰ 28 U.S.C. § 519; see also 28 U.S.C. § 516 (“Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.”).

¹³¹ When it was debating the 1977 Amendments to the Clean Air Act, Congress considered granting EPA authority to represent itself in civil litigation. S. REP. NO. 95-127, at 52 (1977). It “decided against such a transfer of representation authority primarily on the strength of the personal commitment” by the Attorney General to “remedy” perceived shortcomings in DOJ’s representation of EPA. *Id.* at 52–53. See also Memorandum of Understanding Between Department of Justice and Environmental Protection Agency, 42 Fed. Reg. 48942 (Sep. 26, 1977) (discussing the roles and responsibilities in cases that EPA refers to DOJ).

¹³² See 28 C.F.R. § 0.65 (2025) (DOJ regulations outlining ENRD’s responsibilities); see also U.S. Dep’t of Just., Just. Manual § 5-1.200 (2024) [hereinafter Just. Manual] (authorizing ENRD “to exercise the functions and responsibilities undertaken by the Attorney General in the Memorandum of Understanding dated June 15, 1977, between the Department and the EPA”).

¹³³ Just. Manual, *supra* note 132, § 5-12.111.B.

¹³⁴ See Memorandum from Jeffrey Bossert Clark, Assistant Att’y Gen., Env’t & Nat. Res. Div., to ENRD Section Chiefs & Deputy Section Chiefs, Enforcement Principles and Priorities n.17 (Jan. 14, 2021), <https://www.justice.gov/enrd/media/1412026/dl?inline> [<https://perma.cc/Y32K-XFEN>] (noting that ENRD returns referrals to EPA only “on occasion” after “thoroughly review[ing] such referrals”).

¹³⁵ 28 U.S.C. §§ 511–513; 28 C.F.R. § 0.25; Exec. Order No. 12146, §§ 1-401–1-402, 44 Fed. Reg. 42657 (July 18, 1979).

¹³⁶ See *The Att’y Gen.’s Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 48 (1982) (“[A]bsent clear legislative directives to the contrary, the Attorney General has full plenary authority over all litigation, civil and criminal, to which the United States, its agencies, or departments, are parties.”); see also *United States v. Sandstrom*, 22 F. Supp. 190, 191 (N.D. Okla. 1938) (holding that after a “case was referred to the Department of Justice,” the (continued...))

With exceptions not relevant here,¹³⁷ DOJ generally does not sue other federal agencies. This position reflects OLC’s long-held view that “lawsuits between two federal agencies are not generally justiciable” because agencies ultimately report to the President and “a lawsuit involving the same person as both plaintiff and defendant” lacks adversity necessary to trigger federal court jurisdiction.¹³⁸ OLC has also opined that intra-executive branch suits raise separation of powers concerns, since judicial resolution of agency disputes could constrain the President’s constitutional authority “to supervise his subordinates and resolve disputes among them.”¹³⁹ Thus, while federal agencies are generally subject to requirements in pollution control statutes, as a practical matter, they are generally not subject to civil judicial enforcement actions by the federal government.

Legal Standard, Burden of Proof, and Statute of Limitations

The legal standard, ultimate burden of proof, and statute of limitations in civil judicial enforcement actions mirror the standard, burden, and limitations period in administrative enforcement hearings: liability is generally strict,¹⁴⁰ negating the need to establish a defendant’s knowledge or intent; the parties must prove the elements of their case by a preponderance of the evidence; and suits for monetary penalties are subject to 28 U.S.C. § 2462’s five-year time-bar.¹⁴¹

Available Remedies

Pollution control statutes generally authorize the federal government to sue for monetary penalties. Under most of these statutes, the government can seek penalties for the first time in a civil judicial enforcement action,¹⁴² but under TSCA, FIFRA, and the Marine Protection, Research, and Sanctuaries Act, DOJ can sue only to compel payment of EPA-assessed administrative penalties.¹⁴³

Civil judicial penalties are capped at an inflation-adjusted, daily maximum amount and are assessed for each day that a violation persists.¹⁴⁴ These maximum daily penalties are equal to or higher than corresponding administrative penalties and are not subject to the aggregate limits that

referring agency “ceased to have any control over the same,” and the “Attorney General was not bound by the recommendation of the” referring agency).

¹³⁷ Exceptions to the general rule against interagency suit include suits involving independent agencies that are insulated from presidential control and suits where the government plaintiff is not the real party in interest. For examples of the former, see Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641 (2020); for an example of the latter, see *United States v. Interstate Com. Comm’n*, 337 U.S. 426 (1949).

¹³⁸ Auth. of Dep’t of Hous. & Urban Dev. to Initiate Enf’t Actions Under the Fair Hous. Act Against Other Exec. Branch Agencies, 18 Op. O.L.C. 101 (1994) (quoting Nuclear Regul. Comm’n’s Imposition of Civil Penalties on the Air Force, 13 Op. O.L.C. 131, 138 (1989)).

¹³⁹ INS Rev. of Final Order in Emp. Sanctions Cases, 13 Op. O.L.C. 370, 371 (1989).

¹⁴⁰ See sources cited *supra* note 14.

¹⁴¹ See *Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772, 778 (7th Cir. 2016) (noting that “unless the governing statute . . . specifies a higher burden, or the Constitution demands a higher burden because of the nature of the individual interests at stake, proof by a preponderance of the evidence will suffice” in federal civil cases).

¹⁴² See 33 U.S.C. § 1319(d) (CWA); 42 U.S.C. § 300h-2(a)–(b) (SDWA); *id.* § 6928(g) (RCRA); *id.* § 7413(b) (CAA); *id.* § 11045(b)(3) (EPCRA).

¹⁴³ See 7 U.S.C. § 136l(a)(1) (FIFRA); 15 U.S.C. § 2615(a)(4) (TSCA); 33 U.S.C. § 1415(a) (MPRSA).

¹⁴⁴ See, e.g., 33 U.S.C. § 1319(d) (CWA); 42 U.S.C. § 300h-2(a)–(b) (SDWA); *id.* § 6928(g) (RCRA); *id.* § 7413(b) (CAA); *id.* § 11045(b)(3) (EPCRA).

Congress set for some administrative penalties.¹⁴⁵ As with administrative penalties, many statutes provide factors for courts to consider when determining appropriate penalty amounts.¹⁴⁶

Monetary penalties aside, two statutes authorize suits for seizure of certain substances. Under FIFRA, the government can seek judicial permission to “seize[] for confiscation” a “pesticide or device” that is adulterated, misbranded, unregistered, mislabeled, or improperly marketed.¹⁴⁷ Similarly, TSCA authorizes suits “for seizure of an imminently hazardous chemical substance or mixture.”¹⁴⁸

Courts can also issue case-specific injunctive orders requiring parties to take or refrain from taking certain actions.¹⁴⁹ Injunctions can be preliminary or permanent. Preliminary injunctions remain in place while a suit is pending, generally to maintain the status quo during litigation.¹⁵⁰ Permanent injunctions are issued only after a final determination on the merits of a case.¹⁵¹

Some environmental statutes authorize injunctive relief,¹⁵² but even without such statute-specific authorization, federal courts can issue injunctions under the general equitable authority conferred by the Judiciary Act of 1789.¹⁵³ That authority allows courts to craft injunctive relief so long as that relief is consistent with “express and implied statutory limitation[s]”¹⁵⁴ and falls “within the broad boundaries of traditional equitable relief” available at the time of the founding.¹⁵⁵

To obtain an injunction, a plaintiff must demonstrate

- (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the

¹⁴⁵ Maximum penalty amounts are provided in the statutory sections cited in note 144, *supra*. For current, inflation-adjusted maximum penalties, *see* 40 C.F.R. § 19.4, tbl. 1.

¹⁴⁶ *See, e.g.*, 33 U.S.C. § 1319(d) (penalty considerations under the CWA); 42 U.S.C. § 7413(e) (penalty assessment criteria under the CAA); 49 U.S.C. § 5122(a) (penalty considerations under the HMTA). While civil liability does not turn on a defendant’s mental state, evidence of a defendant’s negligence or malign intent may be relevant to determining civil penalty amount. *E.g.*, 33 U.S.C. § 1319(g)(3). *See also* *United States v. Harford Sands, Inc.*, 575 F. Supp. 733, 735 (D. Md. 1983) (“While the defendant’s lack of knowledge . . . may affect its culpability and therefore the amount of a civil penalty which would be appropriate, those sections of the [CWA] which the defendant is charged with violating do not require that the violation be ‘willful’ or ‘knowing.’”); 33 U.S.C. § 1321(b)(7)(D) (providing for higher civil penalties when violations result from “gross negligence or willful misconduct”).

¹⁴⁷ 7 U.S.C. § 136k(b)–(c).

¹⁴⁸ 15 U.S.C. § 2606(a)–(b).

¹⁴⁹ CRS Report R46902, *Nationwide Injunctions: Law, History, and Proposals for Reform*, by Joanna R. Lampe (2021).

¹⁵⁰ *See* *Lackey v. Stinnie*, 604 U.S. 192, 200 (2025) (“The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.” (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981))).

¹⁵¹ As one scholar explained, the term “permanent injunction” is misleading because “[s]o-called ‘permanent injunctions’ may be explicitly time limited, as when they are phased out after a year or two. And even if an injunction is ostensibly permanent, the court may dissolve or modify it at any time.” Samuel Bray, *The Purpose of the Preliminary Injunction*, 78 VAND. L. REV. 809 (April 2025).

¹⁵² *See, e.g.*, 33 U.S.C. § 1319(b) (authorizing “civil action[s] for appropriate relief, including a permanent or temporary injunction”); *accord* 15 U.S.C. §§ 2616(a)(1)(A)–(D), 2622(d) (TSCA); 42 U.S.C. § 6928(a) (RCRA); *id.* § 7413(b) (CAA).

¹⁵³ *See* *Trump v. CASA, Inc.*, 606 U.S. 831, 841 (2025) (noting that the Judiciary Act of 1789 “is what authorizes the federal courts to issue equitable remedies” (quoting S. Bray & E. Sherwin, *Remedies* 442 (4th ed. 2024))).

¹⁵⁴ *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015); *see also* *Miller v. French*, 530 U.S. 327, 340 (2000) (holding that courts “should not construe a statute to displace courts’ traditional equitable authority absent the ‘clearest command,’ or an ‘inescapable inference’ to the contrary” (quoting *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979), and *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946))).

¹⁵⁵ *CASA, Inc.*, 606 U.S. at 846 (quoting *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 322 (1999)).

balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a[n] . . . injunction.¹⁵⁶

The Supreme Court has stressed that injunctions are “extraordinary” relief and are not “granted as a matter of course.”¹⁵⁷ Even so, the Court has noted that “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.”¹⁵⁸ While this does not create a “presumption” in favor of injunctive relief in environmental cases, it does mean that “the balance of harms will usually favor the issuance of an injunction to protect the environment.”¹⁵⁹

Commonly sought injunctions in environmental cases include orders requiring defendants to clean up polluted sites or take actions to ensure prospective compliance with statutory obligations or administrative orders.¹⁶⁰

Court-issued injunctions are enforceable through contempt orders.¹⁶¹ Parties held in contempt may be subject to fines or imprisonment.¹⁶²

Settlement Agreements and Consent Decrees

If the parties in a civil judicial enforcement action agree to terms, they can voluntarily resolve their dispute through settlement. EPA has a say in whether to settle cases,¹⁶³ but as with the decision to bring suit, OLC maintains that ultimate settlement authority rests with DOJ.¹⁶⁴

Broadly speaking, settlements may take one of two forms. First, litigants can memorialize their agreement in an out-of-court settlement. When this happens, the parties often stipulate to voluntary dismissal of the underlying enforcement action, and the court lacks continuing

¹⁵⁶ *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–57 (2010). A plaintiff that seeks a preliminary injunction before liability is resolved must also show that it is likely to succeed on the merits of its claim. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

¹⁵⁷ *Id.* at 165.

¹⁵⁸ *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

¹⁵⁹ *Id.*

¹⁶⁰ *See, e.g., Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996) (holding that a “plain reading” of RCRA’s remedial scheme authorizes courts to issue “a mandatory injunction, i.e., one that orders a responsible party to ‘take action’ by attending to the cleanup and proper disposal of toxic waste, or a prohibitory injunction, i.e., one that ‘restrains’ a responsible party from further violating RCRA”); *Interfaith Cmty. Org. v. Honeywell Int’l, Inc.*, 399 F.3d 248, 264 (3d Cir. 2005) (affirming a district court’s entry of permanent injunction under RCRA requiring the defendant to excavate and dispose of contaminated waste); *U.S. Pub. Int. Rsch. Grp. v. Atl. Salmon of Maine, LLC*, 339 F.3d 23 (1st Cir. 2003) (affirming a district court’s entry of permanent injunction requiring operational changes at a commercial fish farm to ensure prospective compliance with the CWA); *United States v. Deaton*, 332 F.3d 698, 713 (4th Cir. 2003) (affirming district court’s injunctive order requiring defendant to take remedial action to restore wetlands filled in violation of the CWA); *EPA v. Env’t Waste Control, Inc.*, 917 F.2d 327, 331–32 (7th Cir. 1990) (affirming district court’s injunction requiring defendants to permanently close a landfill to address RCRA violations); *Gordon-Darby Holdings, Inc. v. N.H. Dep’t of Safety, Comm’r*, No. 25-CV-508-LM-AJ, 2026 WL 207187, at *19 (D.N.H. Jan. 27, 2026) (granting a motion for preliminary injunction and ordering a state agency “to take all steps necessary to resume and ensure the continued implementation and enforcement of” the state’s “vehicle inspection and maintenance program” as required under the CAA).

¹⁶¹ 11A WRIGHT & MILLER’S FEDERAL PRACTICE & PROCEDURE § 2960 (3d. ed. 1998). *See also* *Nken v. Holder*, 556 U.S. 418, 428 (2009) (noting that an injunction “directs the conduct of a party . . . with the backing of [the court’s] full coercive powers”).

¹⁶² *See* 18 U.S.C. § 401 (authorizing courts to punish “contempt of [their] authority”).

¹⁶³ *See* Memorandum of Understanding Between Department of Justice and Environmental Protection Agency, 42 Fed. Reg. 48943 (Sep. 26, 1977) (“The settlement of any case in which [DOJ] represents [EPA] . . . shall require consultation with and concurrence of both the [EPA] Administrator and the Attorney General.”).

¹⁶⁴ *The Att’y Gen.’s Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 59–60 (1982).

jurisdiction to compel compliance with the terms of the settlement agreement.¹⁶⁵ A party seeking to enforce those terms would have to bring a separate suit akin to a breach of contract action, with the settlement agreement serving as the underlying contract.

Alternatively, settling parties can ask the court to incorporate their settlement terms in an order called a consent decree.¹⁶⁶ If the court agrees to do so, the resulting consent decree “is subject to the rules generally applicable to other judgments and decrees.”¹⁶⁷ Thus, as with other judgments, consent decrees can be modified or vacated only with leave of the court;¹⁶⁸ courts retain jurisdiction to monitor compliance with, and enforce, consent decrees;¹⁶⁹ and courts can hold noncompliant parties in contempt.¹⁷⁰ Parties to a consent decree can ask the court to enforce its terms, but a consent decree is generally “not enforceable directly or in collateral proceedings by those who are not parties to it.”¹⁷¹

DOJ will seek entry of a consent decree in “an action to enjoin discharges of pollutants” only after “persons (natural or corporate) who are not named as parties to the action” have a 30-day opportunity to comment on the proposed decree.¹⁷² After DOJ considers those comments, which it must also file with the court, the department either withdraws the proposed decree or asks that the court enter it.¹⁷³

Before entering a consent decree, a court must determine for itself if the parties’ proposed terms are “reasonable,” “faithful to the . . . objectives” of the statute that gave rise to the suit, “and fair (both procedurally and substantively).”¹⁷⁴ Because this inquiry is “guided by the general principle that settlements are encouraged,” courts generally defer to the parties’ proposed terms.¹⁷⁵ That deference is heightened “in very complex and technical regulatory contexts,” where “the

¹⁶⁵ See FED. R. CIV. P. 41(a)(1)(A)(ii) (allowing plaintiffs to voluntarily dismiss an action without a court order by filing “a stipulation of dismissal signed by all parties who have appeared”); see also *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380–82 (1994) (holding that courts have no inherent authority to enforce settlements terms that are not included in a court order).

¹⁶⁶ *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 378 (1992); see also *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Hum. Res.*, 532 U.S. 598, 604–05 (2001) (noting that a court-ordered consent decree, like a “judgment on the merits,” creates a “judicially sanctioned change in the legal relationship of the parties”).

¹⁶⁷ *Rufo*, 502 U.S. at 378.

¹⁶⁸ If a party to a consent decree wants a court to modify or repeal that decree, it must file a motion under Federal Rule of Civil Procedure 60(b), which allows courts to “relieve a party or its legal representative from a final judgment, order, or proceeding” if the order “has been satisfied, released, or discharged,” is “based on an earlier judgment that has been reversed or vacated,” is “no longer equitable,” or for “any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(5)–(6); see also *Rufo*, 502 U.S. at 378 (holding that consent decrees are subject to Rule 60(b)).

¹⁶⁹ *Beckett v. Air Line Pilots Ass’n*, 995 F.2d 280, 282 (D.C. Cir. 1993) (noting “the well-established principle that a trial court retains jurisdiction to enforce its consent decrees”).

¹⁷⁰ See *Spallone v. United States*, 493 U.S. 265, 276 (1990) (“In selecting a means to enforce the consent judgment, the District Court was entitled to rely on the axiom that ‘courts have inherent power to enforce compliance with their lawful orders through civil contempt.’” (quoting *Shillitani v. United States*, 384 U.S. 364, 370 (1966))).

¹⁷¹ *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975).

¹⁷² 28 C.F.R. § 50.7(a)–(b).

¹⁷³ *Id.* § 50.7(b); see also Just. Manual, *supra* note 132, § 5-12.620.B.

¹⁷⁴ *City of Bangor v. Citizens Commc’ns Co.*, 532 F.3d 70, 93 (1st Cir. 2008) (quoting *United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1084 (1st Cir. 1994)); accord *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999); *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990). To assess reasonableness and fairness, courts consider “the basic legality of the decree,” “whether the terms of the decree, including its enforcement mechanism, are clear,” “whether the consent decree reflects a resolution of the actual claims in the complaint,” and “whether the consent decree is tainted by improper collusion or corruption of some kind.” *SEC v. Citigroup Glob. Mkts., Inc.*, 752 F.3d 285, 295 (2d Cir. 2014).

¹⁷⁵ *North Carolina*, 180 F.3d at 581.

settlement has been advanced for entry as a decree by a government actor committed to the protection of the public interest and specially trained and oriented in the field,”¹⁷⁶ so courts are particularly unlikely to reject proposed consent decrees in government-led environmental enforcement actions. That said, a court presented with a proposed consent decree “is not merely a rubber stamp,”¹⁷⁷ and judges sometimes refuse to enter decrees proposed by the government.¹⁷⁸

Citizen Suits

Most of the federal pollution control statutes include citizen suit provisions that authorize nonfederal parties to act as private attorneys general by suing other private parties or government actors to address alleged violations of a statute. At the federal level, citizen suit provisions originated in the Clean Air Act Amendments of 1970 and were intended as a way to (1) supplement enforcement in light of agencies’ limited resources to assure compliance and (2) encourage the executive branch to take action where appropriate.¹⁷⁹ While citizen suits can take several forms, this report focuses on the use of citizen suits as private enforcement actions, that is, to address violations of pollution control requirements.¹⁸⁰

Most major federal environmental statutes include a citizen suit provision, but some do not. **Table A-2** lists the citizen suit provisions in major federal pollution control statutes.

Elements of Citizen Suits

While the exact wording of citizen suit provisions varies from statute to statute, many provisions share a common formulation.

Plaintiffs and defendants. In general, citizen suit provisions allow suits by “any citizen” or “any person,” which is defined to include state and local governments.¹⁸¹ Plaintiffs may file lawsuits

¹⁷⁶ *United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 280 (1st Cir. 2000).

¹⁷⁷ *Citigroup Glob. Mkts.*, 752 F.3d at 293.

¹⁷⁸ *See, e.g.*, *EEOC v. Int’l Ass’n of Bridge, Structural & Ornamental Ironworkers Loc. 580*, No. 25-44-CV, 2026 WL 392327, at *5 (2d Cir. Feb. 12, 2026) (affirming district court’s refusal to enter proposed consent decree).

¹⁷⁹ S. REP. NO. 91-1196, at 36–39 (1970) (“Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings.”); *see also* STAFF OF S. COMM. ON PUBLIC WORKS, 93RD CONG., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, at 214 (Comm. Print 1974) (letter from Nixon Administration to Sen. Jennings Randolph, Chair, Senate Committee on Public Works); *Natural Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 727–30 (D.C. Cir. 1974) (reproducing comments on the Senate floor by Sen. Muskie and Sen. Hart and statement by Ramsey Clark). For further discussion of the legislative history of federal citizen suit provisions, *see* Robert D. Snook, *Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce*, 20 W. NEW ENG. L. REV. 311, 316–20 (1998). For a discussion of the state-law origins of citizen suit provisions, *see* James R. May, *The Availability of State Environmental Citizen Suits*, 18 NAT. RES. & ENV’T 53, 55 (2004); Scott W. Stern, *Standing for Everyone: Sierra Club v. Morton, Supreme Court Deliberations, and a Solution to the Problem of Environmental Standing*, 30 FORDHAM ENV’T L. REV. 21, 88–97 (2019); Susan George, William J. Snape, III, & Rina Rodriguez, *The Public in Action: Using State Citizen Suit Statutes to Protect Biodiversity*, 6 U. BALT. J. ENV’T L. 1, 17–25 (1997).

¹⁸⁰ As noted in the Introduction, discussion of the legal issues arising in so-called “mandatory duty” suits—where a citizen sues a federal agency for failure to take a required action under one of the applicable laws—is beyond the scope of this report.

¹⁸¹ *See, e.g.*, 42 U.S.C. § 7602(e) (CAA); 33 U.S.C. §§ 1362(5), 1365(g) (CWA); 42 U.S.C. § 9659 (CERCLA); 15 U.S.C. § 2619 (TSCA).

against “any person,” which includes the federal government and other governmental entities to the extent permitted by the Eleventh Amendment.¹⁸²

Violations. Citizen suits generally may allege that a defendant has violated a statute or enumerated sections of a statute, as well as a regulation, a permit, order, or limitation issued thereunder.¹⁸³ This includes allegations that a federal facility violated pollution-control standards.¹⁸⁴

Notice and timing requirements. Many statutes limit the availability of citizen suits by requiring that putative plaintiffs first notify defendants and EPA of their intent at least a specified length of time before filing a lawsuit, thereby giving the alleged violator an opportunity to come into compliance with the statute and EPA an opportunity to take action.¹⁸⁵ For example, the CWA citizen suit provision requires that plaintiffs provide at least 60 days’ notice of the alleged violation to the EPA Administrator, the state in which the alleged violation occurred, and the alleged violator(s) before filing a suit alleging violations of the statute.¹⁸⁶

Government involvement. Several mechanisms provide for additional notification to the federal government and an opportunity for government involvement in litigation. First, citizen suit provisions generally bar private enforcement actions if EPA or a state has undertaken and is “diligently prosecuting” a civil or criminal action to address the same violations.¹⁸⁷ In such cases, however, a citizen plaintiff may intervene in the federal or state enforcement action.¹⁸⁸ Second, EPA generally may intervene as a matter of right in citizen suits.¹⁸⁹ Third, in addition to the notice requirements described above, plaintiffs must also notify the federal government after filing a complaint and after finalizing a proposed consent decree.¹⁹⁰ The court may not *enter* (i.e., approve) a consent decree any earlier than 45 days after EPA and DOJ are notified; during that window, the United States may comment on or object to the proposed consent decree.¹⁹¹

¹⁸² *E.g.*, 42 U.S.C. § 7604(a)(1) (CAA); 33 U.S.C. § 1365(a)(1) (CWA); 42 U.S.C. § 9659(a)(1) (CERCLA); 15 U.S.C. § 2619(a)(1) (TSCA). The Eleventh Amendment bars federal courts from construing their judicial power to allow suits against states by citizens of another state or by foreign states or their citizens or subjects. U.S. CONST. amend. XI; Libr. of Cong., *Overview of Eleventh Amendment, Suits Against States*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt11-1/ALDE_00013675/ (last visited Apr. 27, 2026).

¹⁸³ *See, e.g.*, 42 U.S.C. § 7604(a)(1) (CAA), (a)(3); 33 U.S.C. § 1365(a)(1) (CWA); 42 U.S.C. § 9659(a)(1) (CERCLA); 15 U.S.C. § 2619(a)(1) (TSCA).

¹⁸⁴ In its report accompanying the CAA amendments that added the citizen suit provision, the Senate Committee on Public Works noted that authorizing citizen suits against the government was important because federal facilities “generate considerable air pollution” and “have been notoriously laggard in abating pollution and in requesting appropriations to develop control measures.” S. REP. NO. 91-1196, at 37 (1970).

¹⁸⁵ *See, e.g.*, 42 U.S.C. § 7604(b); 33 U.S.C. § 1365(b); 42 U.S.C. § 9659(d); 15 U.S.C. § 2619(b)(1); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1986); S. REP. NO. 91-1196, at 37 (1970). Some citizen suit provisions impose more restrictive timing requirements. A citizen suit to challenge the adequacy of a CERCLA cleanup may not be filed until after a cleanup is completed, and persons may not challenge a removal action at a site where a longer-term remedial action is planned. 42 U.S.C. § 9613(h).

¹⁸⁶ 33 U.S.C. § 1365(b)(1). For citizen suits alleging violations of Sections 306 (relating to National Standards of Performance) or 307(a) (relating to standards for discharges of toxic pollutants), plaintiffs must still provide notice but may file a lawsuit immediately after doing so. *Id.* § 1365(b).

¹⁸⁷ *E.g.*, 42 U.S.C. § 7604(b)(1)(B); 33 U.S.C. § 1365(b)(1)(B); 42 U.S.C. § 9659(d)(2); 15 U.S.C. § 2619(b)(1)(B).

¹⁸⁸ *E.g.*, 42 U.S.C. § 7604(b)(1)(B); 33 U.S.C. § 1365(b)(1)(B); 15 U.S.C. § 2619(b)(1)(B). The CERCLA citizen suit provision does not have a comparable mechanism for citizen plaintiff intervention. 42 U.S.C. § 9659.

¹⁸⁹ *E.g.*, 42 U.S.C. § 7604(c)(2); 33 U.S.C. § 1365(c)(2); 42 U.S.C. § 9659(g); 15 U.S.C. § 2619(c)(1).

¹⁹⁰ *E.g.*, 42 U.S.C. § 7604(c)(3); 33 U.S.C. § 1365(c)(3).

¹⁹¹ *Id.*

Remedies. Depending on the statute at issue, litigants who are successful may obtain injunctive relief, recover litigation costs, and (in more limited instances) secure civil penalties to be paid to the U.S. Treasury.¹⁹² Citizen suits are intended to redress harm to the environment, rather than to individuals, resulting from statutory violations.¹⁹³ Plaintiffs may be able to pursue state-law tort to vindicate private interests and address personal injury, property damage, or economic loss.¹⁹⁴ Citizen suit provisions expressly preserve rights and remedies under other laws, including state tort laws.¹⁹⁵

Article III Limitations on Citizen Suits

The Supreme Court has recognized various restraints on the availability of citizen suits under Article III of the Constitution, which limits the scope of federal court jurisdiction to adjudicating “Cases” and “Controversies.”¹⁹⁶ The doctrine of *standing*, which generally refers to a litigant’s right to have a court rule upon the merits of particular claims for which that litigant seeks judicial relief, derives from this limitation.¹⁹⁷

While citizen suit provisions confer jurisdiction on federal courts to hear private enforcement claims, they do not confer standing on plaintiffs to bring suit.¹⁹⁸ Instead, litigants who wish to file a citizen suit must meet the basic Article III standing requirements by showing that (1) they have suffered an injury in fact that is (2) fairly traceable to the allegedly unlawful actions of the opposing party and (3) likely redressable by a favorable judicial decision.¹⁹⁹ In the environmental context, plaintiffs typically must demonstrate that they themselves have been harmed or anticipate harm as a result of the violation and that such harm could be addressed by a court order, such as an injunction directing the defendant to stop ongoing pollution. Additionally, courts have developed a set of “prudential” standing principles, including that a litigant may not assert the rights of third parties not before the court, seek redress for a generalized grievance, or assert an interest that does not fall within the zone of interests arguably protected or regulated by the statute or constitutional provision underlying the litigant’s claims.²⁰⁰ Article III also requires that “an actual controversy must exist not only at the time the complaint is filed, but through all stages

¹⁹² *E.g.*, 42 U.S.C. § 7604(a) (authorizing injunctive relief and civil penalty awards), (d) (allowing litigation costs); 33 U.S.C. § 1365(a) (authorizing injunctive relief and civil penalty awards), (d) (allowing litigation costs); 42 U.S.C. § 9659(c) (authorizing injunctive relief and civil penalty awards), (f) (allowing litigation costs); 15 U.S.C. § 2619(a)(1) authorizing courts to “restrain” relevant violations), (c)(2) (allowing litigation costs).

¹⁹³ *See* Barry Breen, *Citizen Suits for Natural Resource Damages: Closing a Gap in Federal Environmental Law*, 24 WAKE FOREST L. REV. 851, 870 (1989).

¹⁹⁴ *See* Mark Latham, Victor E. Schwartz, & Christopher E. Appel, *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 FORDHAM L. REV. 737, 750–758 (2011); Albert C. Lin, *The Unifying Role of Harm in Environmental Law*, 2006 WISC. L. REV. 897, 905–911 (2006).

¹⁹⁵ *E.g.*, 42 U.S.C. § 7604(e); 33 U.S.C. § 1365(c); 42 U.S.C. § 9659(h); 15 U.S.C. § 2619(c)(3); *see also* S. REP. NO. 91-1196, at 38 (1970).

¹⁹⁶ U.S. CONST. art. III, § 2.

¹⁹⁷ *See* Libr. of Cong., *Overview of Standing*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-1/ALDE_00012992/ (last visited Apr. 27, 2026).

¹⁹⁸ *See, e.g.*, *Middlesex Cnty. Sewerage Auth. v. Sea Clammers*, 453 U.S. 1, 16 (1981).

¹⁹⁹ *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021).

²⁰⁰ *Bennett v. Spear*, 520 U.S. 154, 162 (1997); *Allen v. Wright*, 468 U.S. 737, 750–51 (1984). The Court has said this zone-of-interests test is a prudential standing requirement that can be modified or abrogated by Congress. *See Bennett*, 520 U.S. at 164–165. For example, the Court held that ESA’s citizen suit provision expanded the zone of interests protected by the statute to economic as well as environmental interests, reasoning that the ESA’s provision that “any person may commence a civil suit” constituted “an authorization of remarkable breadth,” including in comparison to some other citizen suit provisions, and also noting that the provision’s purpose of encouraging private enforcement supported a conclusion of expanded standing. *Id.*

of the litigation.”²⁰¹ If the controversy existing at the time a lawsuit was filed is no longer “live” due to a change in the law or in the status of the parties involved, the case is considered moot, and federal courts must generally decline to hear (or continue to preside over) it.²⁰²

Initially, courts interpreted Article III requirements generously toward environmental plaintiffs, concluding that plaintiffs have satisfied the injury-in-fact requirement by alleging that challenged conduct threatened aesthetic harm, harm to their interest in observing or studying certain animals, or widespread harm shared by many others.²⁰³ While those harms are still recognized today, beginning in the 1980s, the Supreme Court took a more demanding approach to standing, particularly in citizen suits.²⁰⁴ The Court’s 1992 decision in *Lujan v. Defenders of Wildlife* articulated the current, more stringent standard for the “injury in fact” prong of Article III standing.²⁰⁵ In *Lujan*, the Court ruled that affidavits that an organization’s members intended to travel internationally to observe endangered species were insufficient to establish standing to challenge a policy excluding overseas projects from certain Endangered Species Act requirements.²⁰⁶ The affidavits included statements that the members had previously traveled to observe endangered species and expressed a general intent to do so in the future, but did not identify concrete plans or a specific time when the members intended to travel again.²⁰⁷ Explaining that it was “substantially more difficult” to establish standing if a plaintiff “is not himself the object of the government action or inaction he challenges,” the Court reasoned that the affiants’ intent to return to the development sites, without a description of concrete plans, could not support a finding of “actual or imminent” injury.²⁰⁸

Other cases have addressed Article III as it relates to the timing of violations alleged in citizen suits. In general, the Court has held that citizen suits may proceed only where there are continuing (rather than past) violations, but that the voluntary cessation of unlawful conduct *after* a lawsuit has been filed does not suffice to moot the case because, absent a showing to the contrary, the defendant could resume the unlawful conduct.²⁰⁹ Similarly, with respect to the redressability prong of the Article III standing test, the Court has ruled that civil money penalties and certain forms of injunctive relief do not establish redressability for past violations because any remedy for past violations amounts to “vindication of the rule of law” rather than remediation of plaintiffs’ own injuries.²¹⁰ The Court has further held that the injunctive relief sought by the plaintiffs—providing for inspection authority and compelling the production of compliance reports—would not remediate a past wrong, and the plaintiffs had not alleged an ongoing or

²⁰¹ *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 168 (2016) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013)).

²⁰² *Id.*; *Liner v. Jafco*, 375 U.S. 301, 306 n.3 (1964).

²⁰³ *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972); *United States v. Students Challenging Regul. Agency Procs. (SCRAP)*, 412 U.S. 669, 687–88 (1973); *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 n.4 (1986); see also Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 939–42 (1998).

²⁰⁴ See Cassandra Stubbs, *Is the Environmental Citizen Suit Dead? An Examination of the Erosion of Standards of Justiciability for Environmental Citizen Suits*, 26 N.Y.U. REV. L. & SOCIAL CHANGE 77, 82–83 (2001); Carlson, *supra* note 203, at 938.

²⁰⁵ 504 U.S. 555 (1992).

²⁰⁶ *Id.* at 563–64.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 564. A plurality of the Court also found that the plaintiffs had not satisfied the Article III redressability requirement. *Id.* at 571.

²⁰⁹ *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 56–63 (1987); *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 173–74, 189 (2000).

²¹⁰ *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 106 (1998).

imminent violation.²¹¹ By contrast, in the case of a continuing violation, civil money penalties may “afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct”—even though they are payable to the U.S. Treasury and not to plaintiffs—insomuch as they “encourage defendants to discontinue current violations and deter them from committing future ones.”²¹²

One example of recent litigation in the citizen suit arena focused on the traceability component of the Article III standing test and the degree to which plaintiffs must trace specific injuries (as opposed to injuries of a certain type) to alleged statutory violations.²¹³ In *Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corp.*, the district court found that the plaintiffs had standing and had established traceability for 3,651 days of permit violations at a Texas refinery, applying the requirement that the plaintiffs show that each alleged violation “(1) causes or contributes to the kinds of injuries they allege and (2) has a specific geographic or other causative nexus such that the violation could have affected their members.”²¹⁴ After a divided panel of the U.S. Court of Appeals for the Fifth Circuit, the full Fifth Circuit ordered rehearing *en banc*, vacated its earlier panel opinions, and, almost two years later, issued a short *per curiam* opinion affirming the district court’s ruling without addressing standing.²¹⁵ The Supreme Court declined to take up the case after the Fifth Circuit’s fractured holding, and the peculiar procedural history of the case means there is no precedential decision on the standing question in the Fifth Circuit.²¹⁶ As a result, there is still legal uncertainty regarding the traceability showing plaintiffs must make.²¹⁷

Additional Constitutional and Policy Considerations

Some critics of the citizen-suit model have expressed concerns that citizen suits may violate separation-of-powers principles and infringe on powers delegated to the executive branch in Article II of the Constitution by permitting private citizens to exercise an enforcement function vested solely in the executive branch.²¹⁸ Critics of citizen suits also assert that citizen suits allow

²¹¹ *Id.* at 108.

²¹² *Friends of the Earth*, 528 U.S. at 187–88.

²¹³ *Env’t Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 123 F.4th 309 (5th Cir. 2024) (mem.); 47 F.4th 408, 417, 419 (5th Cir. 2022).

²¹⁴ *Env’t Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 524 F. Supp. 3d 547, 555 (S.D. Tex. 2021).

²¹⁵ *Env’t Tex. Citizen Lobby, Inc.*, 47 F.4th 408; *Env’t Tex. Citizen Lobby, Inc.*, 123 F.4th 309.

²¹⁶ *ExxonMobil Corp. v. Env’t Tex. Citizen Lobby, Inc.*, No. 24-982, 145 S. Ct. 2845 (June 30, 2025) (mem.) (denying certiorari).

²¹⁷ On the same day that it denied the cert petition in *ExxonMobil Corp. v. Environment Texas Citizen Lobby*, the Supreme Court also declined to review the U.S. Court of Appeals for the Ninth Circuit’s holding in a different case that environmental plaintiffs could file a CWA citizen suit in federal court to enforce state law requirements that had been incorporated into Washington State’s Industrial Stormwater General Permit, and which were broader than federal requirements. *Port of Tacoma v. Puget Soundkeeper All.*, No. 24-350, 145 S. Ct. 2849 (June 30, 2025) (mem.). That case turned on the specific language of the CWA’s citizen suit provision, and its applicability to other statutes is unclear.

²¹⁸ See *Friends of the Earth*, 528 U.S. at 197 (Kennedy, J., concurring) (noting that “[d]ifficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States”); *id.* at 209 (Scalia, J., dissenting) (cautioning that “[b]y permitting citizens to pursue civil penalties payable to the Federal Treasury, the [CWA] . . . turns over to private citizens the function of enforcing the law,” empowering plaintiffs to “[act] as a self-appointed mini-EPA”); see also Brief of Richard Epstein and Jeremy Rabkin as Amici Curiae in Support of Plaintiff United States of America, *United States v. DTE Energy Co.*, No. 10-cv-13101, 2020 WL 10730046 (E.D. Mich. Dec. 30, 2020); Charles S. Abell, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution’s Separation of Powers Principle*, 81 VA. L. REV. 1957 (1995).

private litigants to dictate enforcement priorities without the oversight and accountability that accompany government enforcement and that citizen suits do not necessarily result in meaningful environmental improvement.²¹⁹

Advocates for citizen suits argue that such suits provide a necessary backstop where the government lacks the resources to fully enforce environmental laws, to buffer against varying levels of enforcement across administrations, or where regulated entities have undermined the full federal implementation of environmental statutes.²²⁰ They also argue that the statutory provisions authorizing citizen suits include various mechanisms authorizing the executive branch to “protect its policy and strategy choices,” whether by engaging in its own enforcement action and thus barring the availability of a citizen suit, intervening in a citizen suit or participating as an *amicus curiae*, or commenting on a proposed citizen suit consent decree.²²¹ According to some scholars, these limitations also ensure that the President retains control over the enforcement of federal laws consistent with the Take Care Clause.²²² To date, while some individual Supreme Court Justices have expressed concerns regarding the constitutionality of citizen suits, the Court as a whole has not indicated a willingness to consider these issues.²²³

Criminal Enforcement

Many environmental statutes authorize criminal penalties for certain violations, which can result in jail time for individuals, as well as potential criminal fines and restitution for both individuals and corporations.²²⁴ As a consequence, the government carries a heavier burden of proof in criminal cases than in administrative or civil judicial enforcement matters and must prove the defendant’s guilt beyond a reasonable doubt.²²⁵ Criminal prosecutors within DOJ, whether in the U.S. Attorneys’ Offices or ENRD, bring criminal cases under the pollution control laws on behalf of the federal government.²²⁶ A felony criminal case typically begins when prosecutors obtain an indictment from a grand jury upon a finding of probable cause that an offense has been

²¹⁹ *E.g.*, Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENV’T L. & POL’Y F. 39, 43, 49–50 (2001) (arguing that citizen suit litigation strategy may favor easier victories over those that would bring greater environmental benefit, and noting that the vast majority of CWA citizen suits are filed against private industry, even though municipal facilities cause more pollution).

²²⁰ James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits*, 10 WIDENER L. REV. 1, 5–10, 30 (2003); Adler, *supra* note 219, at 43.

²²¹ Jeffrey G. Miller & Brooke S. Dorner, *The Constitutionality of Citizen Suit Provisions in Federal Environmental Statutes*, 27 J. ENV’T L. & LITIG. 401, 454–55 (2012).

²²² Stephen M. Johnson, *Private Plaintiffs, Public Rights: Article II and Environmental Citizen Suits*, 49 KAN. L. REV. 383, 399–402 (2001). *See also* Miller & Dorner, *supra* note 221; Robin Kundis Craig, *Will Separation of Powers Challenges “Take Care” of Environmental Citizen Suits? Article II, Injury-in-Fact, Private “Enforcers,” and Lessons from Qui Tam Litigation*, 72 U. COLO. L. REV. 93, 171 (2001).

²²³ *See Friends of the Earth*, 528 U.S. at 197 (Kennedy, J., concurring); *id.* at 209 (Scalia, J., dissenting).

²²⁴ For a concise history of the development of federal environmental crimes, *see* Joshua Ozymy & Melissa Jarrell Ozymy, *The Politics of the Criminal Enforcement of the U.S. Clean Air Act*, 47 WM. & MARY ENV’T L. & POL’Y REV. 197, 201–03 (2022).

²²⁵ *In re Winship*, 397 U.S. 358, 364 (1970) (“Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

²²⁶ *See* Just. Manual, *supra* note 132, § 5-11.104.

committed.²²⁷ For misdemeanors, grand jury involvement is not required and prosecutors may commence a case by filing a charging document referred to as an *information*.²²⁸

A criminal violation consists of certain “elements,” meaning the different components of the offense that the government must prove.²²⁹ Such elements in an environmental crime can include an act (e.g., the defendant discharged a pollutant), a particular factual situation related to the statutory requirement (e.g., the discharge is from a “point source” or to the “ambient air” or in violation of a permit), a mental state (e.g., the defendant acted negligently, knowingly, or willfully), a jurisdictional fact (e.g., the discharge was to a “water of the United States”), or a result (e.g., a person was endangered).²³⁰

Types of Criminal Provisions in Environmental Laws

Much of the conduct that can result in civil penalties under the pollution statutes can give rise to criminal liability as well, though as a general matter criminal penalties are reserved for offenses committed with a certain degree of knowledge or intent.²³¹ Broadly, environmental crimes under the pollution statutes can arise from illegal discharges,²³² false recordkeeping,²³³ failure to make required reports,²³⁴ and tampering with equipment,²³⁵ among others.²³⁶ Examples of criminal pollution control law offenses and penalties can be found in **Table A-3**. The statutes vary structurally, but most include penalties for violating both statutory requirements and regulatory requirements promulgated pursuant to statutory authority.²³⁷ Some statutes also impose criminal

²²⁷ See FED. R. CRIM. P. 7; *Branzburg v. Hayes*, 408 U.S. 665, 687 (1972); see also CRS Infographic IG10084, *Proceedings in Federal Criminal Cases: From Initiation to Indictment*, by Cassandra J. Barnum (2025).

²²⁸ See Fed. R. Crim. P. 7, 58.

²²⁹ See 1 WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* § 1.2(c) (3d ed. 2025) (“The totality of these various items—conduct, mental fault, plus attendant circumstances and specified result when required by the definition of a crime—may be said to constitute the ‘elements’ of the crime.”).

²³⁰ See 33 U.S.C. § 1319(c) (CWA discharges in violation of a permit); 42 U.S.C. § 7413(c)(4) (CAA negligent release of hazardous substance resulting in endangerment).

²³¹ See “The *Mens Rea* Requirement,” *infra*; see also Joseph Brennan et. al., *Environmental Crimes*, 62 AM. CRIM. L. REV. 563, 566 n.15 (2025) (noting “overlapping civil, criminal, and administrative penalties” in FIFRA, TSCA, CWA, RCRA, and CERCLA). EPA policies have articulated factors for determining whether to pursue a violation criminally or civilly, including egregiousness, deceptive or misleading conduct, chronic noncompliance, and the need for immediate injunctive relief. See, e.g., Memorandum from David M. Uhlmann, Assistant Adm’r, OECA to EPA Reg’l Couns. & Deputies et al., Strategic Civil-Criminal Enforcement Policy, at 6 (Apr. 17, 2024), <https://www.epa.gov/system/files/documents/2024-04/strategic-civil-criminal-enforcement-policy-april-2024.pdf> [<https://perma.cc/UWP6-PBTZ>]; see also Just. Manual, *supra* note 132, § 5-11.1112 (noting parallel civil and criminal proceedings may be appropriate “when in the course of a civil case the government receives evidence of deliberate violations of the law meriting criminal prosecution or when a criminal investigation uncovers evidence of an on-going violation causing environmental contamination that should be stopped quickly through an injunctive action”).

²³² See, e.g., 33 U.S.C. § 1319(c) (CWA).

²³³ See, e.g., 42 U.S.C. § 7413(c)(2)(A) (CAA).

²³⁴ See, e.g., 42 U.S.C. § 9603(b) (CERCLA).

²³⁵ See, e.g., 42 U.S.C. § 7413(c)(2)(C) (CAA).

²³⁶ See **Table A-3**.

²³⁷ See, e.g., 42 U.S.C. § 7413(c)(1) (prohibiting knowing violation of various CAA statutory requirements, “including a requirement of any rule, order, waiver, or permit promulgated or approved under such sections or subchapters”). These requirements can be very specific, such as the work practice standard in CAA regulations requiring wetting of asbestos-containing materials during renovation, 40 C.F.R. § 61.145(c)(3), or very broad, such as the CAA imposition on owners or operators of stationary sources of a “general duty” to “identify hazards which may result from such releases using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur.” 42 U.S.C. § 7412(r)(1).

penalties for violating any condition of a permit issued pursuant to the pertinent regulatory regime.²³⁸ Certain offenses apply only to specific categories of people or employees,²³⁹ while others apply to any person or organization.²⁴⁰

Violations of any particular statute can be part of a course of conduct that implicates multiple laws.²⁴¹ Acts that violate more than one law can sometimes be charged under each law violated.²⁴²

Title 18 Criminal Offenses

Other offenses in the criminal code can overlap with environmental crimes, and prosecutors often charge defendants with violating environmental statutes as well as various, generally applicable prohibitions codified in Title 18 of the *U.S. Code*.²⁴³ For example, falsifying a required discharge monitoring report to conceal illegal discharges from regulatory agencies could constitute a violation of the CWA, which prohibits knowingly making “any false material statement, representation, or certification” in any document “filed or required to be maintained” under the act.²⁴⁴ An initial offense is punishable by two years’ imprisonment (or four for a subsequent offense).²⁴⁵ The same conduct could also potentially violate a number of prohibitions in Title 18,

²³⁸ See, e.g., 42 U.S.C. § 6928(d)(2)(B) (prohibiting treatment, storage, or disposal of hazardous waste “in knowing violation of any material condition or requirement of such permit”).

²³⁹ For example, the CAA regulations governing the handling of asbestos apply to “the owner or operator of a demolition or renovation activity.” 40 C.F.R. § 61.145(a). Only a person who meets that definition can be prosecuted for violating those regulations under 42 U.S.C. § 7413(c). See *United States v. Pearson*, 274 F.3d 1225, 1231 (9th Cir. 2001) (articulating “substantial control” test to determine whether a person constitutes an owner or operator as “ability to direct the manner in which work is performed and the authority to correct problems”). See also 7 U.S.C. § 1361(b)(1)(B) (under FIFRA, offense limited to “commercial” pesticide applicators or distributors); 42 U.S.C. § 9603(b) (under CERCLA, offense limited to “person in charge”).

²⁴⁰ See, e.g., 42 U.S.C. § 6928(d) (RCRA prohibitions apply to “any person”); 33 U.S.C. § 1319(c) (CWA prohibitions apply to “any person”). Enforcement of environmental crimes against corporations is subject to the Department-wide corporate enforcement policy adopted by DOJ in March 2026, which governs corporate prosecutions by all components of the Department (with certain exceptions for the Antitrust Division). See DOJ, CORPORATE ENFORCEMENT AND VOLUNTARY SELF-DISCLOSURE POLICY (2026), <https://www.justice.gov/dag/media/1430731/dl?inline> [<https://perma.cc/DJ28-HWY>]. That policy generally instructs prosecutors not to pursue criminal cases against corporations that have “voluntarily self-disclosed misconduct,” “fully cooperated with the Department’s investigation,” and “timely and appropriately remediated the misconduct,” unless certain “aggravating circumstances” exist. *Id.* at 2.

²⁴¹ See Joshua Ozyzy & Melissa Jarrell Ozyzy, *Exploring Charging and Sentencing Patterns in U.S. Clean Air Act Criminal Prosecutions*, 61 NAT. RES. J. 229, 235–37 (2021) (collecting data on cases charged under more than one environmental statute).

²⁴² Conduct can be charged as violating more than one law without being unconstitutionally multiplicitous as long as each crime requires proof of at least one unique element. See *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (“The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”).

²⁴³ See Ozyzy & Ozyzy, *supra* note 241, at 239, tbl. 2 (reporting that 21% of CAA cases from 1983 to 2019 include false statement charges; 18% include conspiracy charges). One example of a case implicating multiple categories of offenses was *United States v. Moss*, 872 F.3d 304, 305 (5th Cir. 2017) (“A fatal welding accident occurred on an offshore oil platform in the Gulf of Mexico in November 2012. Three years after that incident, the government indicted the owner and operator of the platform and several oil platform contractors, charging criminal violations of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331, et seq., and the Clean Water Act, 33 U.S.C. §§ 1251 et seq., as well as involuntary manslaughter. 18 U.S.C. § 1112.”).

²⁴⁴ 33 U.S.C. § 1319(c)(4).

²⁴⁵ *Id.*

including the general false statement statute and several obstruction-of-justice provisions, all of which carry higher penalties.²⁴⁶

The false report could also, if more than one person were involved, violate 18 U.S.C. § 371, which prohibits conspiracies to commit any offense against the United States, as well as conspiracies to “defraud the United States, or any agency thereof in any manner or for any purpose.”²⁴⁷ Courts have said the latter type of conspiracy includes conduct that interferes with or obstructs a lawful government function (a so-called “*Klein* conspiracy”).²⁴⁸ In a conspiracy charge, the government must prove that there was an agreement between at least two people to commit an offense against or defraud the United States and at least one “overt act” in furtherance of that agreement.²⁴⁹ There is no requirement, however, that the government prove the underlying substantive offense was completed to obtain a conviction for conspiracy.²⁵⁰

Generally applicable criminal provisions may facilitate enforcement of environmental laws that implicate more traditional criminal acts.²⁵¹ For example, fraudulent abuses of the renewable biofuel credit program may violate CAA regulations but also constitute wire fraud.²⁵²

The *Mens Rea* Requirement

In general, criminal penalties apply for offenses involving a culpable state of mind, or *mens rea*.²⁵³ Reflecting the “familiar proposition that ‘[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence,’” courts usually

²⁴⁶ See 18 U.S.C. §§ 1001 (false statements; five years’ imprisonment maximum), 1505 (obstruction of a pending proceeding, five years’ imprisonment maximum), 1512 (obstruction of an official proceeding, 20 years’ imprisonment maximum), 1519 (destruction, alteration, or falsification of records in federal investigations, 20 years’ imprisonment maximum).

²⁴⁷ 18 U.S.C. § 371.

²⁴⁸ See *United States v. Klein*, 247 F.2d 908 (2d Cir.1957) (articulating conspiracy to defraud by obstructing lawful government function principle); *United States v. Overholt*, 307 F.3d 1231, 1247 (10th Cir. 2002) (“One of the alleged objects of the conspiracy was ‘to defraud the United States by impeding, impairing, obstructing, and defeating the lawful function of the United States Environmental Protection Agency and the United States Department of Defense.’”).

²⁴⁹ See *United States v. Lewis*, 435 F. App’x 486, 488–89 (6th Cir. 2011) (“To convict Lewis of conspiracy to defraud under 18 U.S.C. § 371, the government was required to prove (1) that Lewis and VanSickle and Wolfe agreed to violate the False Statements Act and the Safe Water Drinking Act and to obstruct EPA’s enforcement of its regulations by rigging injection wells to falsify EPA tests, (2) that Lewis knowingly and intentionally entered the agreement, and (3) that Lewis, VanSickle, or Wolfe committed one or more overt acts ‘constituting actual participation in the conspiracy.’”).

²⁵⁰ LAFAVE, *supra* note 229, § 12.1(a) (“The agreement constitutes the act, while the intention to thereby achieve the objective is the mental state; it is not necessary that the objective have been realized.”).

²⁵¹ See David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 HARV. ENV’T L. REV. 159, 184 (2014) (noting “inclusion of Title 18 charges incorporates the traditional ‘badges of criminality’ that prosecutors emphasize when exercising discretion” and that “judges are more familiar with (and more receptive to) Title 18 charges”).

²⁵² See *United States v. Davanzo*, No. 2:15-CR-00141 (M.D. Fla. Oct. 1, 2015) (defendants engaged in fraudulent sale of renewable biofuel credits under EPA’s Renewable Fuel Standard program charged with wire fraud and money laundering).

²⁵³ See CRS Report R46836, *Mens Rea: An Overview of State-of-Mind Requirements for Federal Criminal Offenses*, by Michael A. Foster (2021); *Morissette v. United States*, 342 U.S. 246, 250–51 (1952) (in criminal case, “relation between some mental element and punishment for a harmful act is almost as instinctive as the child’s familiar exculpatory ‘But I didn’t mean to’”).

interpret laws without any explicit *mens rea* requirement to require that a person act with some degree of intent in order to incur criminal liability.²⁵⁴

Certain laws include *negligent* offenses, generally meaning that the offender acts without exercising the requisite degree of care.²⁵⁵ *Knowledge* is the most common mental state specified in environmental laws, and generally means awareness of the conduct at issue, that is, the conduct is not the result of mistake or accident.²⁵⁶ Other statutes impose criminal penalties where a person acts *willfully*, generally meaning the person is aware the conduct is illegal and acts with intent to break the law.²⁵⁷

Negligence

Negligence, a concept central to tort law, generally means the failure to exercise due care.²⁵⁸ Negligent conduct rarely gives rise to criminal liability, but certain federal laws do impose criminal penalties for negligent conduct, including the CWA and the CAA.²⁵⁹ Under these provisions, when a person fails to exercise the requisite due care, and illegal discharges or other pollution events result, criminal liability can arise even absent any intent to cause those events.²⁶⁰

The CWA authorizes criminal fines and up to one year of imprisonment for two categories of offenders: first, any person who “negligently violates” a series of statutory requirements or permit conditions,²⁶¹ and second, any person who “negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage,” or who makes such a negligent discharge in violation of permits or local requirements, and thereby causes the

²⁵⁴ *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)); *see also id.* at 438 (noting “generally disfavored status” of strict liability offenses and stating that “far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement”). Whether such a violation requires any intent element may depend on the court considering the particular case. *Compare United States v. Mast*, 938 F.3d 973, 977 (8th Cir. 2019) (“Because neither the statutory language nor the legislative history indicates an intent to dispense with a mental state requirement as an element of § 668dd(f)(2), courts may not treat the statute as setting out a strict liability offense; some mental state is required.”) *with United States v. Blow*, No. 2:25PO2, 2025 WL 1699832, at *6 (E.D. Va. June 17, 2025) (“Other courts have grappled with whether § 668dd(f)(2) includes a mental state element. This Court finds that the statute does not, meaning that the Government need not prove that Blow acted with a specific mental state to convict him of violating § 668dd(f)(2).”).

²⁵⁵ *See, e.g.*, 33 U.S.C. § 1319(c)(1); 42 U.S.C. § 7413(c)(4).

²⁵⁶ *See* Karen M. Hansen, “*Knowing*” *Environmental Crimes*, 16 WM. MITCHELL L. REV. 987 (1990) (noting most environmental statutes “target for criminal liability certain conduct that is engaged in ‘knowingly’” and citing FIFRA, TSCA, CWA, RCRA, CAA, CERCLA, and EPCRA).

²⁵⁷ *See, e.g.*, 42 U.S.C. § 300h-2(b)(2)(2).

²⁵⁸ *See Negligence*, BLACK’S LAW DICTIONARY (12th ed. 2024) (defining negligence as tort action grounded in “failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation”).

²⁵⁹ *See* 33 U.S.C. § 1319(c)(1) (negligent discharges to waters or treatment facilities); 42 U.S.C. § 7413(c)(4) (negligent endangerment by release of hazardous air pollutants). Though it does not invoke negligence by name, the Hazardous Materials Transportation Act imposes criminal penalties on any person who “knowingly” tampers with hazardous waste labels, packaging materials, or vehicles transporting hazardous waste, and states a person acts knowingly when “a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge[.]” 49 U.S.C. § 5124(b)(1)(B). Other examples of laws criminalizing negligent conduct include the Lacey Act, 16 U.S.C. § 3373(d)(2) (knowingly transacting in wildlife when in the exercise of due care one should know the wildlife had been illegally taken, possessed, transported, or sold), and the seaman’s manslaughter statute, 18 U.S.C. § 1115 (negligence by vessel captains or employees resulting in loss of life).

²⁶⁰ *See* Stacey P. Geis, *An Accident Waiting to Happen: Prosecuting Negligence-Based Environmental Crimes*, 59 U.S. ATT’YS BULL. 33 (July 2011).

²⁶¹ 33 U.S.C. § 1319(c)(1)(A).

facility to violate a permit condition.²⁶² The statute does not define “negligently,” but courts have generally interpreted this provision to employ an “ordinary negligence” standard—that is, factfinders must determine whether the defendant failed to “exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance.”²⁶³

The CAA authorizes criminal fines and up to a year of imprisonment for “[a]ny person who negligently releases into the ambient air” certain hazardous substances, “and who at the time negligently places another person in imminent danger of death or serious bodily injury.”²⁶⁴ Courts have not addressed in published opinions what “negligently” means in the context of this provision, but at least one court has given jury instructions defining the term as “failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstances.”²⁶⁵ Several cases charged under this provision have involved defendants disturbing, or causing the disturbance of, asbestos-containing materials in the course of renovation or demolition projects, resulting in the exposure of workers to inhalation of highly toxic asbestos fibers.²⁶⁶

Knowledge

Many environmental crimes require proof that the defendant acted “knowingly.”²⁶⁷ Courts have grappled with the question of what the government must prove to establish a “knowing” violation under a variety of environmental statutes.²⁶⁸ The Supreme Court has said that, “unless the text of the statute dictates a different result, the term ‘knowingly’ merely requires proof of knowledge of the facts that constitute the offense.”²⁶⁹ Courts generally disfavor so-called “mistake of law” defenses to “knowing” offenses, in recognition of the traditional principle that “ignorance of the law is no excuse.”²⁷⁰ In other words, not knowing about or misunderstanding a prohibition does not excuse violating it.

²⁶² *Id.* § 1319(c)(1)(B). Penalties for both negligent violations double for subsequent convictions. *Id.* § 1319(c)(1).

²⁶³ *United States v. Ortiz*, 427 F.3d 1278, 1283 (10th Cir. 2005) (interpreting Clean Water Act phrase “negligently violates” in 33 U.S.C. § 1319(c)(1)(A)); *see also* *United States v. Pruett*, 681 F.3d 232, 242 (5th Cir. 2012) (“[33 U.S.C.] § 1319(c)(1)(A) requires only proof of ordinary negligence,” that is, “failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation”); *United States v. Hanousek*, 176 F.3d 1116, 1120–21 (9th Cir. 1999) (same); *United States v. Maury*, 695 F.3d 227, 257–58 (3d Cir. 2012) (noting a “slowly expanding body of law from our sister circuits which indicates that simple or ordinary negligence may be the appropriate standard of mens rea under § 1319(c)(1)” and finding district court did not err in jury instructions to that effect).

²⁶⁴ 42 U.S.C. § 7413(c)(4). The penalty doubles for subsequent convictions. *Id.* One commentator has observed that the use of “negligently” in reference to both the release and the endangerment makes it “necessary to show that the alleged violator violated a duty to prevent the release and a duty to foresee that a release would endanger someone.” John Armstrong West, *Negligent Violations of the Environmental Laws: What Standard for Criminal Prosecution?*, 20 N. KY. L. REV. 167, 178 (1992).

²⁶⁵ Court’s Instructions to the Jury at 23, *United States v. Hylton*, No. 06-cr-299 (W.D. Okla. Aug. 20, 2007), Dkt. No. 62.

²⁶⁶ *See, e.g.,* *United States v. Miller*, No. 1:15-CR-00163 (D.D.C. Nov. 10, 2015); *United States v. Morales*, No. 2:21-CR-00199 (D. Nev. July 14, 2021); *United States v. Pilling*, No. 4:22-CR-00282 (D. Idaho Dec. 14, 2022).

²⁶⁷ The negligent and willful offenses discussed herein are the exceptions to this rule.

²⁶⁸ *See* *United States v. Atl. States Cast Iron Pipe Co.*, No. 03-852, 2007 WL 2282514, at *22–39 (D.N.J. Aug. 2, 2007) (reviewing cases), *aff’d sub nom.*, *United States v. Maury*, 695 F.3d 227 (3d Cir. 2012).

²⁶⁹ *Bryan v. United States*, 524 U.S. 184, 193 (1998).

²⁷⁰ *United States v. Int’l Mins. & Chem. Corp.*, 402 U.S. 558, 562 (1971); *see also* *United States v. Hansen*, 262 F.3d 1217, 1253 (11th Cir. 2001) (CERCLA requires proof defendant knew of the release, but not proof he knew of the requirement to report it).

Where a statutory violation is predicated on a legal requirement, the distinction between fact and law can blur. For example, where the CAA imposes penalties on “any person who knowingly violates any requirement” of the act, does that mean that the person has to be aware of the facts constituting the offense (for example, that they are causing the release of asbestos), or does the person also need to be aware that the CAA imposes certain requirements for how to handle asbestos and that the person’s conduct violates those requirements?²⁷¹ Where RCRA prohibits knowingly transporting hazardous waste to an unpermitted facility, does the defendant need to know that the facility is unpermitted, or just that he is transporting hazardous waste to that facility?²⁷² In this vein, the Court has recognized that in some statutes, it can be unclear “how far down the sentence the word ‘knowingly’ is intended to travel[.]”²⁷³

The Court has taken different approaches to this issue depending on context. For example, in a case of a law prohibiting use of food stamps “in any manner not authorized” by the statute or regulations, the Court held that “there is a legal element in the definition of the offense”²⁷⁴ and that to allow conviction without proof of knowledge that the stamps were being used in an unauthorized fashion “would be to criminalize a broad range of apparently innocent conduct.”²⁷⁵ The Court has viewed the matter differently, however, with respect to certain “public welfare offenses.”²⁷⁶ Such cases involve “dangerous or deleterious devices” or “obnoxious waste materials” where “the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.”²⁷⁷ On this basis, the Court affirmed the conviction of a defendant charged with shipping corrosive acids in violation of a law imposing criminal penalties for “knowingly violating” applicable regulations where he had shipped the acids without identifying them as the regulations required, irrespective of his knowledge of those regulations.²⁷⁸ In more recent decisions, the Court has also looked to statutory penalties to inform its analysis, with “severe penalties counsel[ing] in favor of a strong scienter requirement” and against application of the public welfare offense doctrine.²⁷⁹

Lower courts differ in how they have applied the public welfare doctrine to modern pollution statutes, with analyses varying from statute to statute. Courts have tended to agree that RCRA and CERCLA, which regulate hazardous waste, are public welfare statutes and do not require proof of

²⁷¹ 42 U.S.C. § 7413(c)(1); *see also* *United States v. Weintraub*, 273 F.3d 139, 146 (2d Cir. 2001) (holding that the phrase “knowingly violated” in the CAA “may plausibly be read to require either knowledge that the conduct in question violated the law or knowledge of the facts and circumstances that amount to a violation, without specific knowledge of the law”).

²⁷² 42 U.S.C. § 6928(d)(1).

²⁷³ *Liparota v. United States*, 471 U.S. 419, 424 n.7 (1985) (quoting *WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW* § 27 (1972)).

²⁷⁴ *Id.* at 426 n.9.

²⁷⁵ *Id.* at 426; *see also id.* at 426–27 (“Such a reading would also render criminal a nonrecipient of food stamps who ‘possessed’ stamps because he was mistakenly sent them through the mail due to administrative error, ‘altered’ them by tearing them up, and ‘transferred’ them by throwing them away.”).

²⁷⁶ *Morissette v. United States*, 342 U.S. 246, 255–56 (1952).

²⁷⁷ *United States v. Int’l Mins. & Chem. Corp.*, 402 U.S. 558, 565 (1971). By contrast, Court held in another case that gun ownership is sufficiently widespread and lawful so as not to trigger a presumption of awareness of regulation. *Staples v. United States*, 511 U.S. 600, 608 (1994).

²⁷⁸ *Int’l Mins. & Chem. Corp.*, 402 U.S. at 559. The law, since repealed, subjected anyone who “knowingly violated” Interstate Commerce Commission regulations to criminal penalties. *See* 18 U.S.C. § 834(f) (repealed 1979).

²⁷⁹ *Ruan v. United States*, 597 U.S. 450, 60 (2022); *accord United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994); *Rehaif v. United States*, 588 U.S. 225, 232 (2019).

the defendant's knowledge of legal requirements.²⁸⁰ The same is largely true with respect to the CAA,²⁸¹ but courts considering the CWA have diverged more widely with respect to whether it is a public welfare statute.²⁸² In some cases, courts have framed their analysis of a given law in terms of the substance at issue rather than the law more broadly; a court might determine that a reasonable person would be aware that asbestos is a heavily regulated substance, for example, irrespective of whether a violation of the CAA is categorically a public welfare offense.²⁸³

Regardless of whether a particular offense requires proof of the defendant's awareness of a legal requirement, courts generally recognize "mistake-of-fact" defenses to statutes with a "knowing" *mens rea* element. The mistake-of-fact defense allows a defendant to be acquitted if a jury finds he was genuinely mistaken about an element of the offense, such as a hypothetical "transporter

²⁸⁰ See, e.g., *United States v. Laughlin*, 10 F.3d 961, 965 (2d Cir. 1993) (observing, in prosecution for violation of RCRA, 42 U.S.C. § 6928(d)(2)(A), "When knowledge is an element of a statute intended to regulate hazardous or dangerous substances, the Supreme Court has determined that the knowledge element is satisfied upon a showing that a defendant was aware that he was performing the proscribed acts; knowledge of regulatory requirements is not necessary"); see also *United States v. Dean*, 969 F.2d 187, 192 (6th Cir. 1992); *United States v. Self*, 2 F.3d 1071, 1089–91 (10th Cir. 1993); *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 612 (5th Cir. 1991); *United States v. Dee*, 912 F.2d 741, 745 (4th Cir. 1990); *United States v. Hoflin*, 880 F.2d 1033, 1038 (9th Cir. 1989); *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1503 (11th Cir. 1986); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 50 (1st Cir. 1991). But see *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 669 (3d Cir. 1984) ("[I]n order to convict each defendant the jury must find that each knew that Johnson & Towers was required to have a permit, and knew that Johnson & Towers did not have a permit."). With respect to CERCLA, see, e.g., *Laughlin*, 10 F.3d at 966–967 ("In accordance with our interpretation of 'knowingly' in RCRA, discussed *supra*, we find that section 9603(a) does not demand knowledge of the regulatory requirements of CERCLA; it demands only that defendant be aware of his acts."); *United States v. Buckley*, 934 F.2d 84, 88 (6th Cir. 1991); *United States v. Greer*, 850 F.2d 1447, 1450–51 (11th Cir. 1988).

²⁸¹ Compare *United States v. Alghazouli*, 517 F.3d 1179, 1193 (9th Cir. 2008) ("[T]he CAA is a public welfare statute dealing with harmful substances."), *United States v. Ho*, 311 F.3d 589, 606 (5th Cir. 2002) ("knowingly" in CAA means knowledge of facts, not law, in part because "the CAA as a whole is a public welfare statute"), and *United States v. Buckley*, 934 F.2d 84, 88 (6th Cir. 1991) (applying *International Minerals* to CAA), with *United States v. Weintraub*, 273 F.3d 139, 151 (2d Cir. 2001) (applying *International Minerals* to asbestos offense under CAA, but limiting holding to asbestos cases and reserving judgment on whether CAA is more broadly a public welfare offense).

²⁸² Compare *United States v. Weitzenhoff*, 35 F.3d 1275, 1286 (9th Cir. 1993) ("The criminal provisions of the CWA are clearly designed to protect the public at large from the potentially dire consequences of water pollution and as such fall within the category of public welfare legislation. *International Minerals* rather than *Liparota* controls the case at hand.") (citation omitted), *United States v. Hopkins*, 53 F.3d 533, 538–39 (2d Cir. 1995) (applying "presumption of regulation" reasoning to the CWA); *United States v. Sinskey*, 119 F.3d 712, 716 (8th Cir. 1997) (holding that "knowingly violates" language in the CWA does not require knowledge that acts violate the CWA or a permit, in part because the CWA is a public welfare law), and *United States v. Wilson*, 133 F.3d 251, 263–264 (4th Cir. 1997) ("Even though the materials involved in this case, fill and native soil from a wetland, may not be inherently deleterious, the Clean Water Act is, as a general matter, largely concerned with pollutants that are inherently deleterious."), with *United States v. Ahmad*, 101 F.3d 386, 391 (5th Cir. 1996) (holding that illegal discharges under the CWA are not public welfare offenses because they are "felonies punishable by years in federal prison" and "dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct" (quoting *Staples*, 511 U.S. at 618)); see also *Hanousek v. United States*, 528 U.S. 1102 (2000) (mem) (Thomas, J., dissenting) ("Although provisions of the CWA regulate certain dangerous substances, this case illustrates that the CWA also imposes criminal liability for persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities. This fact strongly militates against concluding that the public welfare doctrine applies.").

²⁸³ See *Weintraub*, 273 F.3d at 149 ("Unlike the generic category of 'guns' in *Staples*, the category of 'asbestos' is easily sufficient to trigger an expectation of regulation in a reasonable person and to distinguish in his or her mind innocent from wrongful conduct."); *United States v. Rubenstein*, 403 F.3d 93 (2d Cir. 2005) (quoting favorably language from *Weintraub* that "no one can reasonably claim surprise that asbestos is regulated and that some form of liability is possible for violating those regulations" and rejecting argument from Hasidic defendants that their lack of knowledge was reasonable "by virtue of their insular lives"). This approach reflects the principle emphasized in *Liparota*, *Staples*, and *X-citement Video* that scienter requirements are of particular import where a statute could criminalize a subtype of "apparently innocent" conduct—like using a food stamp, owning a gun, or transporting explicit material.

who relied in good faith upon a recipient's fraudulent certificate²⁸⁴ or the defendant who argued he believed he was discharging water instead of gasoline.²⁸⁵

Willful Blindness

Courts typically allow prosecutors to prove the knowledge element of criminal offenses by demonstrating that the defendant was "willfully blind" to the operative facts.²⁸⁶ The Supreme Court has articulated the standard as consisting of two requirements: "(1) The defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact."²⁸⁷ Such a showing establishes a state of mind that "surpasses negligence and recklessness" because a willfully blind defendant "can almost be said to have actually known the critical facts."²⁸⁸

Willful blindness can be proved by circumstantial evidence, as in one RCRA case where the defendant, who was knowledgeable of hazardous waste disposal requirements, hired an inexperienced contractor to remove hazardous chemical waste.²⁸⁹ The court found "a jury could reasonably infer that [the defendant's] failure to make proper inquiry and to provide a proper manifest were tantamount to willful blindness to the ultimate destination and disposal of the waste."²⁹⁰

Certain environmental statutes specify that willful blindness constitutes knowledge. For example, the CAA and TSCA provide that, "in proving a defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to be shielded from relevant information."²⁹¹ RCRA includes nearly identical language with respect to its "knowing endangerment" offense.²⁹²

²⁸⁴ *United States v. Speech*, 968 F.2d 795, 796 (9th Cir. 1992) (citing *United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1504 (11th Cir.1986)).

²⁸⁵ *See Ahmad*, 101 F.3d at 393; *Wilson*, 133 F.3d at 262 ("Congress intended that the defendant have knowledge of each of the elements constituting the proscribed conduct even if he were unaware of their legal significance. This interpretation would not carry with it the corollary that the defendant's ignorance of his conduct's illegality provides him a defense, but would afford a defense for a mistake of fact."); *United States v. W. Indies Transp.*, 127 F.3d 299, 310 (3d Cir. 1997) ("The purpose of adding the word 'knowingly' is to insure that no one will be convicted for an act done because of mistake, accident, or other innocent reason").

²⁸⁶ *See, e.g., United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 52 (1st Cir. 1991) (approving of jury instruction that the element of knowledge in RCRA prosecution could be satisfied by proof of willful blindness).

²⁸⁷ *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011).

²⁸⁸ *Id.*; *see also United States v. Buckley*, 934 F.2d 84, 88 (6th Cir. 1991) (in CAA prosecution for asbestos violations, approving jury instruction that "the government could establish Buckley's knowledge by showing that Buckley closed his eyes to obvious facts or failed to investigate when aware of facts which demanded investigation"); *United States v. Hopkins*, 53 F.3d 533, 542 (2d Cir. 1995) (affirming use of willful blindness jury instruction where defendant "had studiously avoided confirming the tampering" and had told an employee responsible for sampling, "I know nothing, I hear nothing").

²⁸⁹ *United States v. Wasserson*, 418 F.3d 225, 238 (3d Cir. 2005).

²⁹⁰ *Id.*; *see also United States v. Hayes Int'l Corp.*, 786 F.2d 1499, 1504 (11th Cir. 1986) ("It is common knowledge that properly disposing of wastes is an expensive task, and if someone is willing to take away wastes at an unusual price or under unusual circumstances, then a juror can infer that the transporter knows the wastes are not being taken to a permit facility.").

²⁹¹ 42 U.S.C. § 7413(c)(5)(B); *see also* 15 U.S.C. § 2615 (incorporating CAA provisions into TSCA).

²⁹² 42 U.S.C. § 6928(f) ("[I]n proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information.").

Willfulness

Several criminal provisions of the pollution statutes use the term “willfully.” Examples include the SDWA prohibition on violating “any requirement of an applicable underground injection control program” (which, when “such violation is willful,” is subject to criminal penalties);²⁹³ the HMTA prohibition on “willfully or recklessly violating” the statute or any regulatory requirement thereunder;²⁹⁴ and the TSCA provision that any person who “knowingly and willfully” violates that law and thereby knowingly “places an individual in imminent danger of death or serious bodily injury” is subject to enhanced penalties.²⁹⁵

Crimes predicated on “willful” misconduct generally require prosecutors to prove not just that defendants knew of the factual underpinnings of the violation, but also that “the defendant acted with knowledge that his conduct was unlawful.”²⁹⁶ The government is not generally required to prove that the defendant knew the precise statutory or regulatory provision being violated; rather, it suffices for the government to prove that the defendant was generally aware his actions were illegal.²⁹⁷ The Supreme Court has held that certain “highly technical” statutes, such as particular tax offenses and financial crimes, “carv[e] out an exception to the traditional rule’ that ignorance of the law is no excuse and require that the defendant have knowledge of the law.”²⁹⁸ In such cases, the Court has required prosecutors to prove the defendant’s knowledge of particular statutory requirements.²⁹⁹

At least one court has declined to apply that “highly technical” exception to an environmental statute: in *United States v. Overholt*, the U.S. Court of Appeals for the Tenth Circuit held that a SDWA prohibition on willful violation of an underground injection control program requirement required the government to prove only that the defendant knew his conduct was unlawful—not that he knew the specific requirement being violated.³⁰⁰ The court found that, notwithstanding the complexity of environmental regulation, the general principles underlying the public welfare offense doctrine weighed against a heightened *mens rea* requirement. In that vein, the court wrote that “we strongly doubt that as the federal government has sought to protect the environment by imposing more and more restrictions on those handling dangerous chemicals, Congress has intended to reduce the burden on such persons to inform themselves of what the law requires.”³⁰¹

²⁹³ 42 U.S.C. § 300h-2(b)(2)(2).

²⁹⁴ 49 U.S.C. § 5124(a).

²⁹⁵ 15 U.S.C. § 2615(b)(2)(A). TSCA uses a “knowing *or* willful” standard for non-endangerment offenses. *Id.* § 2615(b)(1) (emphasis added).

²⁹⁶ *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994); *see also* 49 U.S.C. § 5124(c) (for purposes of the HMTA, “a person acts willfully when—(1) the person has knowledge of the facts giving rise to the violation; and (2) the person has knowledge that the conduct was unlawful.”).

²⁹⁷ *See* *Bryan v. United States*, 524 U.S. 184, 191 (1998).

²⁹⁸ *Id.* at 195 (quoting *Cheek v. United States*, 498 U.S. 192, 201 (1991)); *see also* *Ratzlaf*, 510 U.S. at 149.

²⁹⁹ *Cheek* held a “willful” criminal tax offense required proof the defendant knew the particular requirement being violated, 498 U.S. at 201; *Ratzlaf* dealt with a law prohibiting willfully structuring financial transactions to avoid reporting requirements, and held the law required proof that the defendant knew not only of the fact that he was structuring transactions to avoid reporting, but also of the specific law making such structuring illegal, 510 U.S. at 149.

³⁰⁰ *United States v. Overholt*, 307 F.3d 1231, 1246 (10th Cir. 2002).

³⁰¹ *Id.*

Corporate Intent

The *U.S. Code* generally, and various pollution control laws specifically, define “person” to include corporations.³⁰² Because corporations cannot have a “mental state” as such, courts have analyzed corporate *mens rea* by reference to *vicarious liability*—the principle that corporations can be responsible for the acts of their employees acting in the scope of their employment with the intent to benefit the corporation.³⁰³ This principle applies to knowledge as well as acts: where an employee acts knowingly, for example, that knowledge can be imputed to the corporation.³⁰⁴

In some cases, there might be no single employee within an organization who has knowledge of the full set of facts underlying the offense.³⁰⁵ Some courts have recognized a “collective knowledge” doctrine, allowing prosecutors to aggregate the knowledge of various employees and impute the totality of that knowledge to the organizational defendant.³⁰⁶ Other courts have been wary or critical of this approach.³⁰⁷

Responsible Corporate Officers

The “responsible corporate officer” (RCO) doctrine has allowed for certain corporate officers and employees to be convicted for offenses committed by other employees of the corporation under some circumstances. The doctrine derives from two Supreme Court cases arising under food and drug safety laws: *United States v. Dotterweich*³⁰⁸ and *United States v. Park*.³⁰⁹ These cases involved high-level corporate officers being convicted for strict liability drug and food safety offenses, respectively, without any proof the individual defendants knew of the violations. The Court’s rationale was that the defendants were in a position to prevent the violations by virtue of their corporate authority and that, in keeping with the public welfare offense doctrine, it was fair to assume that where statutes aim to protect the public from certain dangers, Congress intended to

³⁰² See 1 U.S.C. § 1 (“In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals[.]”); see also, e.g., 42 U.S.C. § 7602(e) (CAA); 33 U.S.C. § 1362(5) (CWA); 42 U.S.C. § 6903(15) (RCRA).

³⁰³ See, e.g., *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 42 (1st Cir. 1991); *United States v. Oceanic Illsabe Ltd.*, 889 F.3d 178, 195 (4th Cir. 2018); *United States v. Ionia Mgmt.*, 555 F.3d 303, 309 (2d Cir. 2009). The employee need not be solely motivated to benefit the corporation; some degree of intent is enough. See *Oceanic Illsabe*, 889 F.3d at 197 (“As long as the corporate agent intends, at least in part, to benefit his employer, the corporate entity can be criminally liable, even if the agent is also acting for his own benefit.”); *United States v. Agosto-Vega*, 617 F.3d 541, 553 (1st Cir. 2010).

³⁰⁴ See *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1118 (D.C. Cir. 2009) (“Because a corporation only acts and wills by virtue of its employees, the proscribed corporate intent depends on the wrongful intent of specific employees.”)

³⁰⁵ See David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C. DAVIS L. REV. 1235, 1280 (2016) (“Corporations compartmentalize knowledge and subdivide operational duties to promote corporate efficiency.”)

³⁰⁶ See *United States v. Bank of New England, N.A.*, 821 F.2d 844, 856 (1st Cir. 1984) (“[A] corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.” (quoting *United States v. T.I.M.E.–D.C., Inc.*, 381 F. Supp. 730, 738 (W.D. Va. 1974))).

³⁰⁷ See, e.g., *Philip Morris USA Inc.*, 566 F.3d at 1122 (“Like Defendants and other courts, we are dubious of the legal soundness of the “collective intent” theory.”); see also Mark Rush et al., *Corporate Responsibility: Who Could Be Subject to a Corporation’s Criminal Liability?*, 39 E. MIN. L. FOUND. § 10.04 (2018) (describing circuit split).

³⁰⁸ 320 U.S. 277 (1943).

³⁰⁹ 421 U.S. 658 (1975); see *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 51 (1st Cir. 1991) (“The seminal cases regarding the responsible corporate officer doctrine are” *Dotterweich* and *Park*).

burden those with the opportunity to prevent the hazard rather than “to throw the hazard on the innocent public who are wholly helpless.”³¹⁰ Such statutes allow for conviction, the Court held in *Park*, where the government proves “the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so.”³¹¹

Since *Dotterweich* and *Park*, the RCO doctrine has evolved primarily in the context of environmental enforcement actions.³¹² When Congress amended the Water Pollution Control Act (now known as the CWA) in 1972, it included a provision to the effect that, for purposes of the act’s criminal penalties provision, the word “person” included “any responsible corporate officer.”³¹³ In 1977, two years after *Park* was decided, Congress similarly amended the CAA to add “responsible corporate officer” to the act’s definition of “person” for purposes of criminal enforcement.³¹⁴ According to the Senate committee report accompanying that amendment, the provision was “based on a similar definition in the enforcement section of the Federal Water Pollution Control Act. The committee intends that criminal penalties be sought against those corporate officers under whose responsibility a violation has taken place, and not just those employees directly involved in the operation of the violating source.”³¹⁵

The application of the RCO doctrine in the environmental context is complicated by the fact that *Dotterweich* and *Park* dealt with strict liability FDCA offenses, while the modern pollution statutes have explicit scienter requirements. Courts have taken differing approaches to the questions of what mental state RCOs must have to be criminally liable for the acts of corporate employees and how that mental state can be proven. A number of courts have held that statutes with “knowing” *mens rea* standards require proof of actual knowledge or willful blindness on the part of any defendant and that juries may not infer knowledge solely on the basis of the RCO’s corporate position and responsibility.³¹⁶ The Third Circuit has suggested that such an inference

³¹⁰ *Dotterweich*, 320 U.S. at 285.

³¹¹ *Park*, 421 U.S. at 673–674.

³¹² See Katrice Bridges Copeland, *The Crime of Being in Charge: Executive Culpability and Collateral Consequences*, 51 AM. CRIM. L. REV. 799, 809 (2014) (“In the twenty years following the *Park* decision, the overwhelming majority of responsible corporate officer prosecutions were based on violations of environmental laws rather than the FDCA.”); Martin Petrin, *Circumscribing the “Prosecutor’s Ticket to Tag the Elite”- A Critique of the Responsible Corporate Officer Doctrine*, 84 TEMP. L. REV. 283, 290 (2012) (“The RCO doctrine’s most important field of application, however, has become liability under environmental statutes on both the federal and state level.”). The doctrine has been applied primarily in criminal matters but has been used in civil cases as well. See *Utah Physicians for a Healthy Env’t v. Diesel Power Gear LLC*, 374 F. Supp. 3d 1124, 1137 (D. Utah 2019) (“Although the Tenth Circuit has not spoken on this issue, a number of other courts have held responsible corporate officers can be held liable in CAA and Clean Water Act civil enforcement actions, despite the absence of specific language to that effect in the citizen enforcement provisions.”).

³¹³ Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816, 860 (codified at 33 U.S.C. § 1319(c)(6)).

³¹⁴ Clean Air Amendments Act of 1977, Pub. L. No. 95-95, § 111, 91 Stat. 685, 705 (codified at 42 U.S.C. § 7413(c)(6)).

³¹⁵ S. REP. NO. 95-127, at 51 (1977); see also *United States v. Hagerman*, 525 F. Supp. 2d 1058, 1067 (S.D. Ind. 2007) (prison exposure for RCOs incentivizes compliance with CWA self-reporting requirements to a greater degree than “fines and civil penalties as a cost of doing business”), *aff’d*, 301 F. App’x 552 (7th Cir. 2008), *modified*, 555 F.3d 553 (7th Cir. 2008).

³¹⁶ See, e.g., *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 51 (1st Cir. 1991) (vacating RCRA conviction of company president as RCO absent direct evidence of his knowledge where only government evidence of knowledge of illegal shipments was that he was a “hands on manager” of small firm and was aware shipments of the same type had happened in the past); *United States v. Iverson*, 162 F.3d 1015, 1026 (9th Cir. 1998) (“[T]he ‘responsible corporate officer’ instruction relieved the government only of having to prove that defendant personally (continued...)”).

might be appropriate “depending on the evidence.”³¹⁷ The Tenth Circuit went further, saying (albeit in dicta) that the requisite mental state under the CWA can be “imputed” to the RCO “by virtue of his position of responsibility.”³¹⁸ Even where courts have declined to allow knowledge to be entirely inferred from RCO status, they have generally clarified that RCO status, while not sufficient on its own, can be one piece of circumstantial evidence with which the government can prove knowledge.³¹⁹

Penalties

Potential consequences of a criminal conviction include incarceration, fines, probation, and the payment of restitution to victims. Statutory maximum prison sentences for environmental crimes range from 30 days to 20 years in prison.³²⁰ The severity of the maximum penalty often, but not always, correlates to the state of mind of the violator. For example, “negligent endangerment” under the CAA is punishable by a maximum of one year in prison for a first offense, while “knowing endangerment” is punishable by up to 10 years for a first offense.³²¹ In other statutes, the severity of the penalty can turn on the degree of danger created. TSCA, for instance, imposes a one-year maximum penalty for any knowing and willful violation, but the penalty increases to 15 years when the offender “knows at the time of the violation that the violation places an individual in imminent danger of death or serious bodily injury.”³²² Other statutes impose only misdemeanor penalties irrespective of the nature of the prohibition.³²³

discharged or caused the discharge of a pollutant. The government still had to prove that the discharges violated the [CWA] and that defendant knew that the discharges were pollutants.”); *United States v. Hansen*, 262 F.3d 1217, 1252 (11th Cir. 2001) (approving of RCRA instruction that “First, that the Defendant under consideration had a responsible relationship to the violation—that is, that it occurred under his area of authority and supervisory responsibility; Second, that the Defendant had the power or the capacity to prevent the violation; and Third, that the Defendant acted knowingly in failing to prevent, detect or correct the violation”); *United States v. White*, 766 F. Supp. 873, 895 (E.D. Wash. 1991) (RCO cannot be convicted under “should have known” standard where RCRA requires knowledge).

³¹⁷ *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir.1984).

³¹⁸ *United States v. Brittain*, 931 F.2d 1413, 1419 (10th Cir. 1991); *see also id.* (“Congress intended, with the Act, ‘to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters . . . [and that] the discharge of pollutants into the navigable waters be eliminated by 1985.’ 33 U.S.C. § 1251(a). We think that Congress perceived this objective to outweigh hardships suffered by ‘responsible corporate officers’ who are held criminally liable in spite of their lack of ‘consciousness of wrong-doing.’”)

³¹⁹ *See, e.g., MacDonald & Watson Waste Oil Co.*, 933 F.2d at 55 (RCO status alone not sufficient, but “knowledge may be inferred from circumstantial evidence, including position and responsibility of defendants such as corporate officers, as well as information provided to those defendants on prior occasions”); *United States v. Agosto-Vego*, 617 F.3d 541, 549–50 (1st Cir. 2010) (knowledge can be proved by circumstantial evidence, and jury could fairly conclude that sewage dumping at issue “not only took place, but that this activity could not have happened without the direction, knowledge and approval of a person who was an active participant in the day-to-day operations” of the company); *see also Joseph G. Block & Nancy A. Voisin, The Responsible Corporate Officer Doctrine—Can You Go to Jail for What You Don’t Know?*, 22 ENV’T. L. 1347, 1359–60 (1992) (“Direct evidence of criminal knowledge is not always available, however, and knowledge of environmental crimes, as with virtually all other crimes, can be proven by circumstantial evidence.”).

³²⁰ *See* 7 U.S.C. § 1361(b)(2) (30 days’ imprisonment maximum penalty for private applicator violating FIFRA); 42 U.S.C. § 300i-1 (20 years’ imprisonment maximum penalty for tampering with public water system under SDWA).

³²¹ 42 U.S.C. §§ 7413(c)(4), 7413(c)(5).

³²² *See* 15 U.S.C. §§ 2615(b)(1), 2615(b)(2)(A); *see also* 33 U.S.C. §§ 1319(c)(2), 1319(c)(3)(A) (under CWA, knowing violations carry 3-year maximum penalty for first offenders; knowing violations where offender “knows at that time that he thereby places another person in imminent danger of death or serious bodily injury” carry maximum penalty of 15 years’ imprisonment for first offenders).

³²³ FIFRA violations by private citizens, for example, are punishable by a maximum of one year in prison under 7 U.S.C. § 1361(b)(1)-(2); the only felony FIFRA offense is for government employees unlawfully disclosing trade secrets under § 1361(b)(3), which carries a maximum penalty of three years’ imprisonment.

The U.S. Sentencing Guidelines provide guidance to judges for imposing sentences in federal criminal cases.³²⁴ Subject to statutory maximums, judges have discretion in issuing sentences, but must ground their sentencing analysis in the Guidelines and additional statutory factors under Title 18.³²⁵ Those factors include, among others, the nature and circumstances of the offense, history and characteristics of the defendant, and the need for the sentence to provide deterrence and promote respect for law.³²⁶ In some cases, negotiations between the government and defendants can result in plea agreements that include particular sentencing recommendations.³²⁷

Pollution offenses by individuals generally fall under § 2Q1 of the Guidelines (“Offenses Involving the Environment”).³²⁸ Advisory sentencing guidelines ranges under these provisions can range from zero to six months to as high as the statutory maximum of 20 years for the most serious offenses.³²⁹ Certain sentencing enhancements specific to environmental crimes can result in higher sentences when the offense involves, for example, ongoing or repetitive release into the environment,³³⁰ substantial clean-up costs,³³¹ or substantial likelihood of death or serious bodily injury.³³² Other sentencing provisions in the guidelines may also come into play, such as adjustments accounting for a defendant’s role in the offense,³³³ obstruction of justice,³³⁴ or vulnerable victims.³³⁵

Criminal fines are generally governed by 18 U.S.C. § 3571, which imposes maximum fines for individuals and corporations based on the severity of the offense.³³⁶ Subject to those maximum amounts, judges may exercise discretion in imposing criminal fines, guided by the Sentencing Guidelines.³³⁷ Restitution to victims of environmental crimes is available when those crimes are charged in conjunction with Title 18 offenses; to qualify as a “victim” eligible for criminal

³²⁴ See CRS Report R41696, *How the Federal Sentencing Guidelines Work: An Overview*, by Charles Doyle (2015); CRS Infographic IG10092, *The Federal Sentencing Process*, by Dave S. Sidhu (2026).

³²⁵ See 18 U.S.C. §§ 3553 (Imposition of a sentence), 3572 (Imposition of a sentence of fine and related matters).

³²⁶ *Id.* § 3553(a).

³²⁷ See FED. R. CRIM. P. 11(c) (Plea Agreement Procedure).

³²⁸ Specific subchapters are U.S. SENT’G GUIDELINES MANUAL §§ 2Q1.1 (U.S. SENT’G COMM’N 2025) (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants); 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce); 2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification); and 2Q1.4 (Tampering or Attempted Tampering with a Public Water System; Threatening to Tamper with a Public Water System).

³²⁹ See, e.g., *id.* § 2Q1.3 (imposing base offense level 6 for offenses involving nonhazardous pollutants, corresponding to advisory sentencing range of 0-6 months for individuals with no prior criminal history); *id.* § 2Q1.4 (allowing for offense level of up to 36 for tampering with a public water system, corresponding to advisory guidelines sentencing range of 188–235 months for an individual with no prior criminal history).

³³⁰ *Id.* § 2Q1.2(b)(1)(A).

³³¹ *Id.* § 2Q1.2(b)(3).

³³² *Id.* § 2Q1.2(b)(2); see also *United States v. Thorn*, 317 F.3d 107, 119 (2d Cir. 2003) (enhancement applicable where asbestos abatement workers were “considerably more likely, as a result of Thorn’s Clean Air Act violations, to develop asbestos-related disease than if they had performed abatement under lawful conditions”).

³³³ U.S. SENT’G GUIDELINES MANUAL §§ 3B1.1, 3B1.2 (U.S. SENT’G COMM’N 2025).

³³⁴ *Id.* § 3C1.1.

³³⁵ *Id.* § 3A1.1.

³³⁶ Criminal fine amounts are standardized under this provision unless a subsequent law explicitly states otherwise. See 18 U.S.C. § 3571(e).

³³⁷ U.S. SENT’G GUIDELINES MANUAL § 5E1.2 (U.S. SENT’G COMM’N 2025).

restitution under federal law, a person much be “directly and proximately harmed” by the offense conduct.³³⁸

While the Guidelines contain detailed instructions for calculating corporate criminal fines associated with certain offenses, environmental crimes are not covered by those provisions.³³⁹ Instead, the Guidelines instruct courts to “determine an appropriate fine” for corporate environmental crimes by “applying the provisions of 18 U.S.C. § 3553 and 18 U.S.C. § 3572.”³⁴⁰ Such factors include the nature and seriousness of the offense, the corporation’s size, and measures taken to discipline individual employees and prevent recurrence.³⁴¹ Other potential penalties for corporations are periods of probation subject to compliance plans or corporate monitorships.³⁴² Federal law authorizes community service as a condition of probation in a criminal case,³⁴³ and the Guidelines specify that “[c]ommunity service may be ordered as a condition of probation where such community service is reasonably designed to repair the harm caused by the offense.”³⁴⁴ The Guidelines also recognize that “[a]n organization can perform community service only by employing its resources or paying its employees or others to do so.”³⁴⁵ Federal law authorizes the National Fish and Wildlife Foundation (NFWF), a congressionally established nonprofit conservation organization, to accept “community service payments” to fund environmental restoration projects.³⁴⁶

³³⁸ See 18 U.S.C. § 3663(a)(1)(A) (specifying offenses eligible for criminal restitution, including any “offense under this title”); *id.* § 3663(a)(2) (defining “victim”). To the extent an environmental crime has victims, the limitation of restitution to certain offenses incentivizes charging conspiracy to commit a substantive environmental offense under 18 U.S.C. § 371, when possible. (The HMTA, however, is a covered offense under 18 U.S.C. § 3663.) Restitution is also available as a negotiated component of a plea agreement. 18 U.S.C. § 3663(a)(3) (“The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.”).

³³⁹ See U.S. SENT’G GUIDELINES MANUAL § 8C2.1 (U.S. SENT’G COMM’N 2025).

³⁴⁰ *Id.* § 8C2.10. The factors listed in 18 U.S.C. § 3572 are:

- (1) the defendant’s income, earning capacity, and financial resources;
- (2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;
- (3) any pecuniary loss inflicted upon others as a result of the offense;
- (4) whether restitution is ordered or made and the amount of such restitution;
- (5) the need to deprive the defendant of illegally obtained gains from the offense;
- (6) the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence;
- (7) whether the defendant can pass on to consumers or other persons the expense of the fine; and
- (8) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

18 U.S.C. § 3572(a).

³⁴¹ *Id.*

³⁴² See Just. Manual, *supra* note 132, § 9-28.1700; Memorandum from the Env’t Crimes Section, DOJ, Monitor Selection Process (Mar. 2023), [https://www.justice.gov/enrd/page/file/1571166/dl?inline=\[https://perma.cc/CXJ2-TTHG\]](https://www.justice.gov/enrd/page/file/1571166/dl?inline=[https://perma.cc/CXJ2-TTHG]). The Corporate Enforcement Policy discussed at note 240, *supra*, may impact the availability of these options.

³⁴³ 18 U.S.C. § 3563(b)(12).

³⁴⁴ U.S. SENT’G GUIDELINES MANUAL § 8B1.3 (U.S. SENT’G COMM’N 2025).

³⁴⁵ *Id.* § 8B1.3 cmt. background.

³⁴⁶ See 16 U.S.C. § 3701 (establishment and purposes of Foundation); *id.* § 3073(c)(1)(K) (authorizing NFWF “to receive and administer restitution and community service payments, amounts for mitigation of impacts to natural (continued...)”).

Enforcement Discretion and Agency Policy

The Supreme Court has observed that, as a practical matter, agencies “cannot act against each technical violation” of the statutes that they implement.³⁴⁷ That statement applies with force in the pollution control context. EPA regulates 40 million public and private entities under a dozen statutes.³⁴⁸ Among those regulated entities, rates of noncompliance appear to be as high as 34% to 61% for select programs, according to one limited assessment.³⁴⁹ Pursuing every instance of suspected noncompliance would be, in the words of one former EPA enforcement official, an “impossible task.”³⁵⁰

EPA therefore “focuses” its efforts on what it deems to be “the most serious” violations.³⁵¹ In some cases, EPA may decline to bring an enforcement action. When the agency does elect to act, it must decide, with DOJ, whether a particular matter warrants administrative, civil judicial, or criminal enforcement, what claims or charges to bring, what penalties to seek, and whether to resolve an action through a settlement or plea agreement.

This power to decide whether and how to enforce legal requirements is called “enforcement discretion.”³⁵² According to the Supreme Court, enforcement discretion is vested in the President and his subordinates by Article II of the U.S. Constitution,³⁵³ particularly Article II, Section 3’s Take Care Clause,³⁵⁴ which requires the President to “take Care that the Laws be faithfully executed.”

Executive branch enforcement discretion is “broad” but “not unfettered.”³⁵⁵ This section outlines its general scope and limitations before discussing agency policies that guide the exercise of EPA’s and DOJ’s enforcement discretion.

resources, and other amounts arising from legal, regulatory, or administrative proceedings, subject to the condition that the amounts are received or administered for purposes that further the conservation and management of fish, wildlife, plants, and other natural resources”). Much like supplemental environmental projects, discussed *infra*, community service payments have been the subject of debate. See “Supplemental Environmental Projects,” *infra*.

³⁴⁷ Heckler v. Chaney, 470 U.S. 821, 831 (1985); see also Texas, 599 U.S. at 680 (noting that the executive branch “invariably lacks the resources to arrest and prosecute every violator of every law”).

³⁴⁸ OFF. OF INSPECTOR GEN., EPA, NO. 21-P-0132, RESOURCE CONSTRAINTS, LEADERSHIP DECISIONS, AND WORKFORCE CULTURE LED TO A DECLINE IN FEDERAL ENFORCEMENT 1 (2021), https://www.epa.gov/sites/default/files/2021-05/documents/_epaog_20210513-21-p-0132_0.pdf [<https://perma.cc/RTF9-92JT>].

³⁴⁹ CYNTHIA GILES, NEXT GENERATION COMPLIANCE: ENVIRONMENTAL REGULATION FOR THE MODERN ERA 53, tbl. 2.1 (2022) (citing EPA, EXPANDING THE USE OF OUTCOME MEASUREMENT FOR EPA’S OECA (2006)).

³⁵⁰ *Id.*

³⁵¹ National Enforcement and Compliance Initiatives, EPA (Mar. 9, 2026), <https://www.epa.gov/enforcement/national-enforcement-and-compliance-initiatives> [<https://perma.cc/ENS2-R2DY>].

³⁵² Courts often use the term “prosecutorial discretion” to refer to enforcement discretion in the administrative, civil judicial, and criminal contexts, even though “today ‘prosecutorial’ usually refers to criminal proceedings.” Citizens for Resp. & Ethics in Wash. v. FEC, 892 F.3d 434, 438 (D.C. Cir. 2018). To avoid confusion, this report uses the term *enforcement discretion* when referring to discretionary enforcement decisions in the administrative and civil contexts and *prosecutorial discretion* when referring only to discretionary enforcement decisions in the criminal context.

³⁵³ See United States v. Texas, 599 U.S. 670, 678 (2023) (“Under Article II, the Executive Branch possesses authority to decide ‘how to prioritize and how aggressively to pursue legal actions against defendants who violate the law.’” (quoting TransUnion LLC v. Ramirez, 594 U.S. 413, 429 (2021))).

³⁵⁴ United States v. Armstrong, 517 U.S. 456, 464 (1996).

³⁵⁵ United States v. Batchelder, 442 U.S. 114, 124–125 (1979).

Enforcement Discretion, Generally

Courts typically treat agencies' decisions about whether to initiate enforcement proceedings as "unreviewable."³⁵⁶ That hands-off approach rests, in part, on judgments about the relative competency of courts and agencies.³⁵⁷ The Supreme Court has noted that when an agency weighs whether to pursue an alleged violation, it "often" balances "a number of factors," including "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all."³⁵⁸ Lower courts have observed that agencies weigh similar considerations when choosing what type of enforcement action to pursue and how to vigorously to pursue it.³⁵⁹ According to the Supreme Court, agencies are "far better equipped than the courts to deal with the many variables involved" in these enforcement decisions,³⁶⁰ and courts are therefore "properly hesitant" to second-guess agencies' discretionary judgments.³⁶¹ That hesitancy may give way, however, when agencies exceed statutory or constitutional limits on enforcement discretion.

Limits on Enforcement Discretion

The APA generally provides for review of agency "action"—defined to include the "failure to act"³⁶²—but it exempts from review those actions that are "committed to agency discretion by law."³⁶³ While the Supreme Court has interpreted this exemption "quite narrowly,"³⁶⁴ the Court

³⁵⁶ *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). An agency's enforcement decisions are reviewable if they rest on statutory interpretations, not enforcement discretion. *See, e.g., Citizens for Resp. & Ethics in Wash.*, 892 F.3d at 441 n.11 (noting that statutory interpretation "is not committed to [an] agency's unreviewable discretion."); *accord Heckler*, 470 U.S. at 833, n.4. Still, courts will decline to review enforcement decisions if agencies cite both statutory interpretation and enforcement discretion as independent bases for their decisions. *See Citizens for Resp. & Ethics in Wash.*, 892 F.3d at 442 (invoking the "firmly-established principle" against "carving reviewable legal rulings out from the middle of non-reviewable actions").

³⁵⁷ *Heckler*, 470 U.S. at 831–32.

³⁵⁸ *Id.* at 831.

³⁵⁹ *See Axalta Coating Sys. LLC v. FAA*, 144 F.4th 467, 479 (3d Cir. 2025) (describing an official's choice of "which offense to charge, and therefore what penalty to seek" as a "routin[e]" exercise of executive discretion (quoting *Batchelder*, 442 U.S. at 126)); *Schering Corp. v. Heckler*, 779 F.2d 683, 687 (D.C. Cir. 1985) (holding that an agency's decision to settle rested on "precisely the sort of balancing of agency priorities and objectives, informed by judgments based on agency expertise, that, absent some 'law to apply,' should not be second-guessed by a court"); *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) ("Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding . . . what precise charge shall be made, or whether to dismiss a proceeding once brought.").

³⁶⁰ *Heckler*, 470 U.S. at 831.

³⁶¹ *Wayte v. United States*, 470 U.S. 598, 607 (1985); *see also Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."); *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 743 (D.C. Cir. 2016) (noting that "a district court should not reject a consent decree simply because it believes the government could have negotiated a more exacting decree, or because it believes the government failed to bring the proper charges" (quoting *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004) and *SEC v. Citigroup Global Mkts., Inc.*, 752 F.3d 285, 297 (2d Cir. 2014))).

³⁶² 5 U.S.C. § 551 (13).

³⁶³ *Heckler*, 470 U.S. at 831–32.

³⁶⁴ *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 17 (2020) (quoting *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 586 U.S. 9, 23 (2018)).

has long held that discretionary enforcement decisions “presumptively” fall within its scope.³⁶⁵ In the administrative and civil judicial contexts, that presumption “may be rebutted” if Congress limits “an agency’s exercise of enforcement power,” “either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.”³⁶⁶ When Congress does so clearly—for instance, by requiring that “violators must be pursued in every case” and providing “guidelines defining the limits of the agency’s discretion”³⁶⁷—then there is “law to apply,” and courts may review an agency’s exercise of administrative or civil judicial enforcement discretion to ensure consistency with statutory directives.³⁶⁸

In the criminal enforcement context, Congress’s authority to constrain prosecutorial discretion and courts’ willingness to review the exercise of prosecutorial discretion appear more limited. According to the Supreme Court, a prosecutor’s decision not to indict is committed to the executive branch’s “exclusive authority and absolute discretion.”³⁶⁹ The Court has also declared it “entirely clear that the refusal to prosecute cannot be the subject of judicial review.”³⁷⁰ Consistent with those views of prosecutorial discretion, some lower courts have concluded that, “as an incident of the constitutional separation of powers,” Congress cannot compel prosecutors to pursue particular cases.³⁷¹ No court appears to have struck down a law on this basis,³⁷² but several have cited separation-of-powers concerns when declining to read substantial limits on prosecutorial discretion into statutes and rules that arguably imposed such limits.³⁷³ These opinions suggest that Congress may lack authority to mandate prosecution in certain cases.³⁷⁴ Congress can, however, impose some procedural limits on the exercise of prosecutorial

³⁶⁵ *Heckler*, 470 U.S. at 832.

³⁶⁶ *Id.* at 833.

³⁶⁷ The D.C. Circuit has described the reviewability analysis this way: “if the statute in question does not give any indication that violators must be pursued in every case, or that one particular enforcement strategy must be chosen over another and if it provides no meaningful guidelines defining the limits of the agency’s discretion, then enforcement is committed to the agency’s discretion.” *Sierra Club v. Jackson*, 648 F.3d 848, 855 (D.C. Cir. 2011) (quoting *Ass’n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1033 (D.C. Cir. 2007)).

³⁶⁸ *Id.* at 834; *see, e.g., Cook v. FDA*, 733 F.3d 1, 6 (2013) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (holding that FDA’s nonenforcement decisions violated the Food Drug and Cosmetic Act (FDCA) because 21 U.S.C. § 381(a) “sets forth precisely when the agency must determine whether a drug offered for import appears to violate the FDCA, and what the agency must do with such a drug.”).

³⁶⁹ *United States v. Nixon*, 418 U.S. 683, 693 (1974).

³⁷⁰ *ICC v. Bhd. of Locomotive Eng’rs*, 482 U.S. 270, 283 (1987).

³⁷¹ *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (en banc); *see also In re Aiken County*, 725 F.3d 255, 262–66 (D.C. Cir. 2013) (Kavanaugh, J., was the sole judge to join this section of the opinion) (“In light of the President’s Article II prosecutorial discretion, Congress may not *mandate* that the President prosecute a certain kind of offense or offender.”). The DOJ has long espoused a similar view. *See, e.g., Prosecution for Contempt of Congress of an Exec. Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 126 (1984) (“[T]he decision not to prosecute an individual may not be controlled because it is fundamental to the Executive’s prerogative.”); *see also Zachary S. Price, Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 685 n.45 (2014) (collecting opinions by the DOJ’s OLC regarding the scope and reviewability of prosecutorial discretion).

³⁷² Courts have had few opportunities to do so. As the Supreme Court observed, “federal statutes that purport to require the Executive Branch to make arrests or bring prosecutions are rare—not surprisingly, given the Executive’s Article II authority to enforce federal law and the deeply rooted history of enforcement discretion in American law.” *United States v. Texas*, 599 U.S. 670, 684 (2023).

³⁷³ *See, e.g., Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 381–82 (2d Cir. 1973) (collecting cases); *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 742 (D.C. Cir. 2016) (noting that “settled principles counsel against interpreting statutes and rules in a manner that would impinge on the Executive’s constitutionally rooted primacy over criminal charging decisions”).

³⁷⁴ *See Texas*, 599 U.S. at 682 n.4 (noting that a statute “infringing on the Executive’s enforcement discretion, could . . . raise Article II issues”).

discretion,³⁷⁵ and it can use its appropriations power to prohibit prosecution of certain offenders.³⁷⁶

Statutes aside, the Constitution constrains enforcement discretion in the administrative, civil judicial, and criminal contexts. In particular, the Fifth Amendment’s Due Process Clause imposes three constitutional limits on whom the government can target and for what reasons. First, the clause prohibits government officials from engaging in “selective” enforcement based on “an unjustifiable standard such as race, religion, or other arbitrary classification.”³⁷⁷ Second, the clause prohibits “vindictive” enforcement that is intended to deter or punish the exercise of a statutory or constitutional right, such as the right to appeal a conviction.³⁷⁸ Third, the clause prohibits officials from seeking to punish individuals for exercising privileges that the government “had clearly told [them were] available”—a restriction embodied in the doctrine of “entrapment by estoppel.”³⁷⁹ The showing a defendant must make to establish a violation of one of these prohibitions varies; establishing selective or vindictive enforcement is particularly difficult because courts presume that federal officers rely on constitutionally permissible considerations when exercising enforcement authority.³⁸⁰

Programmatic Nonenforcement

While the Supreme Court has read the Take Care Clause to confer broad and generally unreviewable enforcement discretion, the Court has rejected as “entirely inadmissible” the claim that the President’s duty “to see the laws faithfully executed, implies a power to forbid their execution.”³⁸¹ Thus, the Court has suggested that “an extreme case of non-enforcement arguably could exceed the bounds of enforcement discretion.”³⁸²

³⁷⁵ See, e.g., 18 U.S.C. § 851 (requiring prosecutors to file a notice before seeking an enhanced penalty for drug offenses) *id.* § 3593(a) (requiring prosecutors to file notice of intent to seek the death penalty a “reasonable time” before trial or guilty plea). See also CRS Legal Sidebar LSB11326, *Federal Prosecutorial Discretion: A Brief Overview*, by Cassandra J. Barnum (2025).

³⁷⁶ See, e.g., Consolidated Appropriations Act, 2024, Pub. L. No. 118-42, § 531, 138 Stat. 25, 174 (2024) (prohibiting DOJ from expending appropriated funds to enforce federal drug laws when doing so would prevent states from implementing their own medical marijuana laws). See also CRS Legal Sidebar LSB10694, *Funding Limits on Federal Prosecutions of State-Legal Medical Marijuana*, by Joanna R. Lampe (2024).

³⁷⁷ *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

³⁷⁸ *United State v. Goodwin*, 457 U.S. 368, 372 (1982).

³⁷⁹ *United States v. Cox*, 906 F.3d 1170, 1190 (10th Cir. 2018) (quoting *Cox v. Louisiana*, 379 U.S. 559, 571 (1965)); accord *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 671–74 (1973); *Raley v. Ohio*, 360 U.S. 423, 437–39 (1959).

³⁸⁰ See *Armstrong*, 517 U.S. at 463 (1996) (“Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one.”); *United States v. Wilson*, 262 F.3d 305, 316 (4th Cir. 2001) (noting that to establish prosecutorial vindictiveness, a defendant must “carry the heavy burden of proving that the escape prosecution ‘could not be justified as a proper exercise of prosecutorial discretion.’” (quoting *Goodwin*, 457 U.S. at 380 n.12)). See also *Armstrong*, 517 U.S. at 464 (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14 (1926) (discussing the “presumption of regularity” accorded to federal enforcement officials)).

³⁸¹ *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 525 (1838). Some commentators have argued that the President’s categorical refusal to enforce certain laws undermines Congress’s primacy in policymaking and allows the President to suspend or dispense with statutory mandates—powers that English monarchs once claimed and that the founders deliberately withheld from the President. E.g., Price, *supra* note 371, at 689–96; Jack Goldsmith, *Trump’s Continuing Illegal Refusal to Enforce the TikTok Ban*, EXEC. FUNCTIONS (June 19, 2025), <https://www.execfunctions.org/p/trumps-continuing-illegal-refusal> [https://perma.cc/WB98-2W8P]; Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 804 (2013).

³⁸² *United States v. Texas*, 599 U.S. 670, 683 (2023).

While it has never applied this reasoning to resolve a case, the Court has stated that if government officials were to “consciously and expressly adopt[] a general policy” of nonenforcement, thereby “abdicat[ing]” their “statutory responsibilities,” then their nonenforcement action might be reviewable.³⁸³ The Court has also reviewed national programs that suspended enforcement of certain laws, reasoning that those programs entailed not only the (arguably) unreviewable exercise of enforcement discretion but also the eminently reviewable “provision of legal benefits or legal status.”³⁸⁴

Enforcement Policies

Both DOJ and EPA have adopted myriad policies to guide the exercise of enforcement discretion.³⁸⁵ Some of these policies prioritize or deprioritize enforcement of certain statutory requirements, while others establish processes and procedures to help officials consistently and rationally exercise their enforcement discretion.

Many of the enforcement policies in place today have remained largely unchanged for decades. For example, since the 1980s, EPA has used standardized formulas to calculate the economic benefits that violators realize through their noncompliance and has pursued administrative penalties designed to level the economic playing field for law-abiding citizens.³⁸⁶ Also since the 1980s, EPA has generally declined to offer “no action” assurances—promises of nonenforcement—outside the context of an administrative or civil judicial settlement.³⁸⁷ And both EPA and DOJ have long-standing guidance designed to facilitate timely negotiated settlements—for instance, by reducing penalties when violators agree to prompt corrective action and by initiating settlement discussions before filing lawsuits.³⁸⁸

Enforcement policies in other areas have undergone significant changes through the years, particularly during times of inter-party presidential transition. Examples are discussed below.

³⁸³ Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985) (quoting Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc)).

³⁸⁴ Texas, 599 U.S. at 683 (discussing Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 18 (2020)).

³⁸⁵ For a compendium of EPA enforcement policies, see *Enforcement Policy, Guidance & Publications*, EPA (Jan. 15, 2026), <https://www.epa.gov/enforcement/enforcement-policy-guidance-publications> [<https://perma.cc/SMG9-5NXXK>] (compendium of EPA enforcement policies). DOJ policies are collected in the *Justice Manual*. See Just. Manual, *supra* note 132.

³⁸⁶ EPA, EPA GEN. ENF’T POLICY #GM-21, POLICY ON CIVIL PENALTIES (1984), <https://www.epa.gov/sites/default/files/documents/epapolicy-civilpenalties021684.pdf> [<https://perma.cc/FZ2J-XUSB>]. Current models are available at *Penalty and Financial Models*, EPA (Apr. 10, 2026), <https://www.epa.gov/enforcement/penalty-and-financial-models> [<https://perma.cc/H3FH-TMNR>].

³⁸⁷ Memorandum from Cynthia Giles, Assistant Adm’r, OECA, EPA, to Assistant Adm’rs et al., EPA, Policy Against “No Action” Assurances: Addendum (Sep. 11, 2014), <https://www.epa.gov/sites/default/files/2021-05/documents/naa-addendum091114.pdf> [<https://perma.cc/U29G-N57Y>].

³⁸⁸ See *id.* at 6 (“EPA policy will be to provide specific incentives to settle, including . . . reducing the gravity component of the penalty for settlements in which the violator already has instituted expeditious remedies to the identified violations prior to the commencement of litigation.”); see also Exec. Order No. 12778, 56 Fed. Reg. 55,195 (Oct. 25, 1991) (“No litigation counsel shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes.”).

Strategic Enforcement Priorities

EPA’s enforcement priorities are shaped in part by the agency’s multiyear strategic plans,³⁸⁹ National Enforcement Compliance Initiatives (NECIs),³⁹⁰ and National Program Guidances (NPGs).³⁹¹ These documents translate high-level administration priorities into agency- and program-specific goals and set operational targets to achieve those goals.

To illustrate, when President Biden took office, he issued executive orders directing agencies to “make achieving environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities.”³⁹² EPA enshrined that directive in its strategic plan for FY2022 through FY2026, proclaiming that the agency would “center its mission on the integration of justice, equity, and civil rights across the nation’s environmental protection enterprise.”³⁹³ EPA then selected NECIs aimed at reducing disparities in pollution exposure by targeting violators in “vulnerable or overburdened communities” that faced greater “cumulative risks.”³⁹⁴ It also committed in its NPG to, among other things, “increase inspections in areas of [environmental justice] concern, from past levels of about 30%, to 50% in FY 2024, and 55% in FYs 2025 and 2026.”³⁹⁵

Because strategic plans, NECIs, and NPGs reflect the policy preferences of the presidential administrations in which they were developed, at least some of the enforcement initiatives enshrined in those documents may not survive presidential transitions.³⁹⁶ Biden Administration environmental justice policies are a case in point. Early in President Trump’s second term, EPA declared that it would no longer “incorporate considerations of environmental justice” in its enforcement decisions because those considerations were inconsistent with the President’s more recent executive orders.³⁹⁷ EPA has made similar reversals on Biden-era enforcement priorities targeting methane emissions from the oil and gas sector and coal ash storage at coal-fired power plants, citing the Trump Administration’s renewed emphasis on fossil fuel production and use.³⁹⁸

³⁸⁹ *E.g.*, EPA, FY 2022–2026 EPA STRATEGIC PLAN (2022), <https://www.epa.gov/system/files/documents/2022-03/fy-2022-2026-epa-strategic-plan.pdf> [<https://perma.cc/HZ9Z-G66A>] [hereinafter EPA STRATEGIC PLAN].

³⁹⁰ *E.g.*, Memorandum from David M. Uhlmann, Assistant Adm’r, OECA, EPA, to Reg’l Adm’rs et al. (Aug. 17, 2023), <https://www.epa.gov/system/files/documents/2023-08/fy2024-27necis.pdf> [<https://perma.cc/2W2K-Z3J3>] [hereinafter FY 2024–2027 NECI Memo].

³⁹¹ EPA, OECA NATIONAL PROGRAM GUIDANCE, FISCAL YEARS 2025–2026 (2024), <https://www.epa.gov/system/files/documents/2024-07/fy-2025-2026-oeca-npg.pdf> [<https://perma.cc/6U8D-5VA8>] [hereinafter NATIONAL PROGRAM GUIDANCE].

³⁹² Exec. Order No. 14008, Sec. 220, 86 Fed. Reg. 7,619, 7628 (Jan. 27, 2021); *accord* Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

³⁹³ EPA STRATEGIC PLAN, *supra* note 389, at 27.

³⁹⁴ FY 2024–2027 NECI Memo, *supra* note 390, at 4.

³⁹⁵ NATIONAL PROGRAM GUIDANCE, *supra* note 391, at 6–7.

³⁹⁶ *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-82, ENVIRONMENTAL PROTECTION: ACTION NEEDED TO ENSURE EPA’S ENFORCEMENT AND COMPLIANCE ACTIVITIES SUPPORT ITS STRATEGIC GOALS 16 (2020) (identifying changes in NECIs for FY2014 through FY2023).

³⁹⁷ Memorandum from Jeffrey A. Hall, Acting Assistant Adm’r, OECA, EPA to Reg’l Adm’rs, et al., Implementing National Enforcement and Compliance Initiatives Consistently with Executive Orders and Agency Priorities 2 (Mar. 15, 2025), <https://www.epa.gov/system/files/documents/2025-03/necimemo-20250312.pdf> [<https://perma.cc/G9N5-RK9N>]; *see also* GAO-21-82, *supra* note 396, at 11 (discussing EPA’s planning process).

³⁹⁸ *Id.* at 3.

Supplemental Environmental Projects

Recent Administrations have also disagreed over whether EPA and DOJ can settle enforcement actions based, in part, on a defendant’s commitment to fund supplemental environmental projects (SEPs).³⁹⁹ EPA defines a SEP as “an environmentally beneficial project or activity that is not required by law, but that a defendant agrees to undertake as part of the settlement of an enforcement action.”⁴⁰⁰ SEPs are included in addition to injunctive relief or penalties; because they go beyond what is required under federal, state, or local laws, they may provide benefits that go beyond compliance obligations.⁴⁰¹ While SEPs are not considered penalties and are not accepted in lieu of a penalty, EPA considers a violator’s commitment to perform a SEP as a relevant factor in calculating an appropriate penalty amount.⁴⁰²

SEPs were relatively commonplace in administrative and civil judicial settlements from the 1980s until the first Trump Administration.⁴⁰³ Proponents of SEPs argue that SEPs give parties more flexibility to resolve disputes, are particularly well suited to mitigate the general harm associated with statutory violations, and help to ensure that money expended as part of a settlement results in environmental improvements and addresses harms to communities that are affected by violations.⁴⁰⁴ Detractors have argued that SEPs allow agencies to impose regulatory requirements without engaging in rulemaking, enable EPA and DOJ to direct funds owed to the U.S. Treasury to benefit nongovernmental third parties without oversight, and fund projects that are not congressionally authorized. On this view, SEPs violate the Appropriations Clause of the

³⁹⁹ SEPs are distinct from the “community service payments” included in some criminal resolutions (as noted *supra* note 346); nonetheless, since both are sometimes characterized as “third-party payments,” and both can involve funding environmental remediation or restoration projects, some of the discussion herein can apply to both issues. See Michael J. Amato, *The Best and Worst Form of Environmental Enforcement: Third-Party Payments and Executive Settlement Policy*, 110 GEO. L.J. 1171, 1184–85 (2022).

⁴⁰⁰ Memorandum from Cynthia Giles, Assistant Adm’r, OECA, EPA to Reg’l Adm’rs, Issuance of the 2015 Update to the 1998 EPA Supplemental Environmental Projects Policy 1 (2025), <https://www.epa.gov/sites/default/files/2015-04/documents/sepupdatedpolicy15.pdf> [<https://perma.cc/B74B-2BVX>] [hereinafter EPA 2015 SEP POLICY].

⁴⁰¹ *Supplemental Environmental Projects (SEPs)*, EPA (Oct. 27, 2025), <https://www.epa.gov/enforcement/supplemental-environmental-projects-seps> [<https://perma.cc/Q8BE-QHTQ>]. Citizen suit settlements may also include SEPs. In the 1980s, DOJ objected to the inclusion of SEPs in some proposed citizen suit consent decrees in cases to which the United States was not a party, arguing that SEPs were penalties that must be paid to the U.S. Treasury. See, e.g., *Sierra Club, Inc. v. Elec. Ctrls. Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990); *Pa. Env’t Def. Found. v. Bellefonte Borough*, 718 F. Supp. 431, 436 (M.D. Pa. 1989). Courts rejected this argument and have upheld the use of SEPs in citizen suit settlements. *Id.* More recently, in 2020, DOJ objected to a settlement negotiated separately between the Sierra Club and DTE Energy Company and Detroit Edison Company in a federal enforcement action in which the Sierra Club had intervened. United States’ Response to Sierra Club’s Motion to Enter Agreement Between Sierra Club and DTE or, in the Alternative, Notice of That Agreement, *United States v. DTE Energy Co.*, No. 2:10-cv-13101, (E.D. Mich. July 8, 2020), Dkt. No. 279. The objection raised questions regarding the legality of SEPs in citizen suit settlements, but the court in that case approved the settlement without addressing those questions. Opinion and Order Granting Intervenor’s Motion for Voluntary Dismissal, *United States v. DTE Energy Co.*, No. 2:10-cv-13101 (E.D. Mich. Dec. 3, 2020), Dkt. No. 293.

⁴⁰² EPA 2015 SEP POLICY, *supra* note 400, at 21.

⁴⁰³ Daniel Alvarez, Hannah Perls, & Jonas Monast, *Clearing the Air on Supplemental Environmental Projects*, 54 ENV’T L. REP. 10382 (2024).

⁴⁰⁴ *Id.*; Patrice L. Simms, *Leveraging Supplemental Environmental Projects: Toward an Integrated Strategy for Empowering Environmental Justice Communities*, 47 ENV’T L. REP. 10511 (2017); Seema Kakade, *Remedial Payments in Agency Enforcement*, 44 HARV. ENV’T L. REV. 117, 122–23 (2020); Kenneth T. Kristl, *Making a Good Idea Even Better: Rethinking the Limits on Supplemental Environmental Projects*, 31 VT. L. REV. 217, 218 (2007).

Constitution and the general principle against agency augmentation of appropriations, as well as the Miscellaneous Receipts Act⁴⁰⁵ and the Antideficiency Act.⁴⁰⁶

Due in part to congressional concerns and opinions issued by the Government Accountability Office, EPA and DOJ have imposed various limitations on the use of SEPs intended to ensure that the projects remain within the government’s authority and do not run afoul of any statutory or constitutional requirements.⁴⁰⁷ Among other constraints, there must be a sufficient nexus, or relationship, between the violation and the proposed SEP; EPA may not manage or administer the project or funds for the project, other than to oversee project implementation to ensure compliance with the terms of a settlement; and a project may not be used to satisfy an agency’s statutory obligations, circumvent statutory prohibitions, or support activities performed on federal property, by EPA or another agency, or for which EPA receives a specific appropriation.⁴⁰⁸ Prior to the first Trump Administration, DOJ generally permitted the inclusion of SEPs in consent decrees where (1) the settlement was executed before an admission or finding of liability in favor of the United States, and (2) the United States did not retain post-settlement control over the disposition of funds or projects carried out under the settlement other than to ensure compliance with the settlement.⁴⁰⁹

DOJ’s approach to SEPs changed during the first Trump Administration, when a series of memoranda first imposed a general prohibition against settlement payments to third parties across DOJ and then barred the use of SEPs by ENRD.⁴¹⁰ During the Biden Administration, DOJ reversed course, restoring the ability to enter into settlement agreements with third-party

⁴⁰⁵ 31 U.S.C. § 3302 (generally requiring “public money” to be deposited to the U.S. Treasury).

⁴⁰⁶ 31 U.S.C. § 1341 (prohibiting, with some exceptions, government expenditure of funds not appropriated by Congress). *See also* Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. REV. 327, 351–57 (2009); Andrew P. Morriss, Bruce Yandle, & Andrew Dorchak, *Choosing How to Regulate*, 29 HARV. ENV’T L. REV. 179, 240–43 (2005); Paul James Larkin, *The Justice Department’s Third-Party Payment Practice, the Antideficiency Act, and Legal Ethics*, 17 FED. SOC’Y REV. 3, 30–31 (2016).

⁴⁰⁷ Decision of the Comptroller Gen., U.S. Gov’t Accountability Off. to Hon. John D. Dingell, Chairman, Subcomm. on Oversight & Investigations, H. Comm. on Energy & Com., B-247155, 1992 WL 726317 (Comp. Gen. July 7, 1992); Decision of the Comptroller Gen., U.S. Gov’t Accountability Off. to Hon. John D. Dingell, Chairman, Subcomm. on Oversight & Investigations, H. Comm. on Energy & Com., B-247155.2, 1993 WL 798227 (Comp. Gen. Mar. 1, 1993); Final EPA Supplemental Projects Policy Issued, 63 Fed. Reg. 24796 (May 5, 1998); EPA 2015 SEP POLICY, *supra* note 400.

⁴⁰⁸ EPA 2015 SEP POLICY, *supra* note 400, at 7–10.

⁴⁰⁹ *See* Applicability of the Gov’t Corp. Control Act & the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement, 30 Op. O.L.C. 111 (2006); Effect of 31 U.S.C. § 484 on the Settlement Authority of the Att’y Gen., 4B Op. O.L.C. 684 (1980).

⁴¹⁰ Memorandum from Jeff Sessions, Att’y Gen., to all Component Heads and U.S. Att’ys (June 5, 2017), <https://www.justice.gov/archives/opa/press-release/file/971826/dl> [<https://perma.cc/SY79-8W4L>] [hereinafter Sessions Memo]; Memorandum from Jeffrey Bossert Clark, Assistant Att’y Gen., to ENRD Deputy Assistant Att’y Gens. et al., Using Supplemental Environmental Projects (“SEPs”) in Settlements With State and Local Governments (Aug. 21, 2019), https://www.justice.gov/d9/2023-06/enrd_state_and_local_sep_memo_public_8_21_19.pdf [<https://perma.cc/HJD6-5GS9>]; Memorandum from Jeffrey Bossert Clark, Assistant Att’y Gen., to ENRD Deputy Assistant Att’y Gens. & Section Chiefs, Supplemental Environmental Projects (“SEPs”) in Civil Settlements with Private Defendants (Mar. 12, 2020), https://www.justice.gov/d9/2023-06/seps_public_final_signed_3.13.20.pdf [<https://perma.cc/F3UG-78DS>] [hereinafter Clark Memo]; Prohibition on Settlement Payments to Non-Governmental Third Parties, 85 Fed. Reg. 81409 (Dec. 16, 2020). The initial DOJ-wide prohibition on settlement payments included exceptions for payments that provide restitution to a victim “or that otherwise directly [remedy] the harm that is sought to be redressed, including, for example, harm to the environment” Sessions Memo, *supra*, at 1. The ENRD memorandum barring SEPs described EPA’s SEP policy as effectively creating a “conversion rate,” whereby SEPs could be used to mitigate direct penalties at a specific ratio. Clark Memo, *supra*, at 2. The memorandum concluded that SEPs therefore violated the Miscellaneous Receipts Act and that the guardrails imposed by previous EPA and DOJ policies were not sufficient to overcome that problem. Clark Memo, *supra*, at 7–8.

payments subject to specified guidelines and limitations and resuming the inclusion of SEPs in some consent decrees.⁴¹¹

The pendulum has swung back again during the second Trump Administration. On February 5, 2025, then-Attorney General Pam Bondi rescinded Biden-era guidance and stated that “[e]xcept in limited circumstances . . . settlements should not be used to require payments to non-governmental, third-party organizations that were neither victims nor parties to the lawsuits.”⁴¹² While EPA’s 2015 SEP Policy has not been formally rescinded, EPA announced in December 2025 that the agency was discontinuing the use of SEPs in its settlements until the issuance of additional guidance.⁴¹³

EPA’s pause on SEPs was one element of the agency’s broader “compliance first” approach to enforcement during the second Trump Administration.⁴¹⁴ That approach was detailed in a December 5, 2025, memorandum, which directs EPA’s Office of Enforcement and Compliance Assurance (OECA) and EPA regional offices to prioritize compliance assistance (including outreach, technical assistance, and training for the regulated community), requires open communication with regulated entities throughout the inspection and enforcement process, and provides for more frequent national-level review of enforcement-related decisions.⁴¹⁵ The memorandum also provides that injunctive relief specified in settlements and orders must avoid “expansive interpretations that could lead to unnecessary regulatory or litigation uncertainty or unwarranted burdens on responsible parties” and states that injunctive relief “outside clear regulatory or statutory requirements” (such as certain monitoring, auditing, and reporting requirements) “often raises nationally significant issues and should be sought only with approval from the OECA Assistant Administrator.”⁴¹⁶ While the memorandum does not direct EPA to decline to take enforcement action in particular types of cases, its requirements may result in reduced formal enforcement actions or in enforcement actions that seek more limited remedies.

Considerations for Congress

Whether and how EPA and DOJ enforce the pollution control statutes that Congress enacts has a significant impact on the extent to which those statutes fulfill the policy goals Congress expressed when enacting them. While enforcement is carried out by the executive branch, Congress thus has

⁴¹¹ Memorandum from Merrick Garland, Att’y Gen., to Heads of Dep’ts Components & U.S. Att’ys, Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties (May 5, 2022), <https://www.justice.gov/archives/ag/file/1217691-0/dl?inline> [<https://perma.cc/H5QL-9CV6>]; Guidelines and Limitations for Settlement Agreements Involving Payments to Non-Governmental Third Parties, 87 Fed. Reg. 27936 (May 10, 2022). Following DOJ’s policy change in 2022, EPA resumed the inclusion of SEPs in administrative settlements. For more information about the use of SEPs in administrative settlements and consent decrees in the Biden Administration, see Josh Van Eaton et al., *Environmental Enforcement Update: Supplemental Environmental Projects and Mitigation in the Second Trump Administration*, BEVERIDGE & DIAMOND (Dec. 18, 2024), <https://www.bdlaw.com/publications/environmental-enforcement-update-supplemental-environmental-projects-and-mitigation-in-the-second-trump-administration/>.

⁴¹² Memorandum from Pam Bondi, Att’y Gen. Pam Bondi, to All Dep’t Emps., Reinstating the Prohibition on Improper Third-Party Settlements (Feb. 5, 2025), <https://www.justice.gov/ag/media/1388536/dl?inline> [<https://perma.cc/CM8U-VDMK>].

⁴¹³ Memorandum from Craig J. Pritzlaff, Acting Assistant Adm’r, OECA, EPA, to OECA Off. Dirs. & Deputies, Reinforcing a “Compliance First” Orientation for Compliance Assurance and Civil Enforcement Activities 6 (Dec. 5, 2025), <https://www.epa.gov/system/files/documents/2025-12/reinforcing-a-compliance-first-orientation-for-compliance-assurance-and-civil-enforcement-activities.pdf> [<https://perma.cc/6797-5SKU>] [hereinafter Pritzlaff Memo].

⁴¹⁴ Pritzlaff Memo, *supra* note 413.

⁴¹⁵ *Id.* at 2–4.

⁴¹⁶ *Id.* at 5.

a significant interest in how that enforcement is undertaken. Congress may consider whether altering the scope of pollution control enforcement authorities would better effectuate those policy goals. Congress may also consider how agency funding levels relate to ongoing enforcement.

Changing Enforcement Policies and Priorities

Congress may alter the terms of environmental enforcement by amending the underlying statutes to define new violations, strike existing ones, or change who may enforce a statute. Once Congress authorizes a federal agency to enforce a statute, much of how that enforcement authority is wielded is left to the agency's discretion, as described above. Even so, Congress may influence EPA's exercise of enforcement discretion by directing the agency to take (or decline to take) certain actions or by shaping the overall structure, funding, and operations of the agency.

Changes in agency funding and staffing may affect enforcement capacity and priorities. The White House's budget request for FY2027 proposes a 52% decrease in EPA's budget from the FY2026 annual enacted appropriations.⁴¹⁷ For FY2026, Congress reduced EPA's appropriations compared to the previous year but provided significantly more funding (\$8.82 billion) than the President requested (\$4.16 billion).⁴¹⁸ A reduced budget could potentially result in EPA needing to limit its enforcement activities or prioritize enforcement of certain statutes over others. Similarly, if the agency directs resources into enforcement, it could have fewer resources available to implement other directives. Congress may adjust its annual appropriations to EPA to address agency enforcement capacity, and it may direct EPA to maintain, increase, or decrease its staffing levels to carry out certain activities.

Changes in executive branch enforcement policies and priorities may be of interest to Congress, and Congress may conduct oversight to obtain more information about how EPA is enforcing the various statutes it administers. Each year, EPA issues a report describing its enforcement and compliance assurance activities for the prior fiscal year; the agency released its annual enforcement results for FY2025 in March 2026.⁴¹⁹ That report showed that EPA issued 971 administrative compliance orders and 1,107 final administrative penalty orders, representing an increase over the previous year.⁴²⁰ At the same time, EPA and DOJ concluded 49 civil judicial cases, a decrease from prior years.⁴²¹ EPA opened 187 criminal investigations and DOJ charged 156 criminal defendants in FY2025, marking a decrease in investigations and an increase in defendants compared to the previous year.⁴²² Some analysis suggests that almost all civil cases

⁴¹⁷ EPA, U.S. ENVIRONMENTAL PROTECTION AGENCY FISCAL YEAR 2027 JUSTIFICATION OF APPROPRIATIONS ESTIMATES FOR THE COMMITTEE ON APPROPRIATIONS 1 (2026), <https://www.epa.gov/system/files/documents/2026-04/epa-fy27-congressional-justification.pdf> [<https://perma.cc/NL3J-JNPE>] [hereinafter EPA FY2027 JUSTIFICATION].

⁴¹⁸ *Compare* Commerce, Justice, Science; Energy and Water Development; and Interior and Environment Appropriations Act, 2026, Pub. L. No. 119-74, Div. C, tit. II, 140 Stat. 5, 126, with EPA, FY2026 EPA BUDGET IN BRIEF 3 (2025), <https://www.epa.gov/system/files/documents/2025-05/fy-2026-epa-bib.pdf> [<https://perma.cc/DUG7-RDX8>]; see also CRS In Focus IF13191, *U.S. Environmental Protection Agency FY2026 Appropriations*, by Angela C. Jones (2026).

⁴¹⁹ *OECA Annual Results Reports*, EPA (Mar. 9, 2026), <https://www.epa.gov/enforcement/office-enforcement-and-compliance-assurance-annual-results-reports> [<https://perma.cc/E6ED-YDWB>].

⁴²⁰ EPA, ENFORCEMENT AND COMPLIANCE ASSURANCE ANNUAL RESULTS REPORT, FISCAL YEAR 2025, at 27 (Feb. 26, 2026), <https://www.epa.gov/system/files/documents/2026-03/fy25-annual-report-enforcement-and-compliance.pdf> [<https://perma.cc/2W4X-M3D7>].

⁴²¹ *Id.*

⁴²² *Id.* at 34–35.

concluded in FY2025 were initiated under the Biden Administration, so it is unclear how the volume and balance of enforcement will continue to change in the Trump Administration.⁴²³

If Congress wanted EPA to prioritize enforcement of certain requirements or to prioritize civil judicial over administrative enforcement, it could amend statutes to constrain the agency's civil enforcement discretion.⁴²⁴ Congress employed this approach in the Labor-Management Reporting and Disclosure Act, which provides that, upon filing of an election complaint by a union member, “[t]he Secretary [of Labor] shall investigate such complaint and, if he finds probable cause to believe that a violation . . . has occurred . . . he shall . . . bring a civil action.”⁴²⁵ According to the Supreme Court, that text “supplied sufficient standards to rebut the presumption of unreviewability” and allowed courts to scrutinize agency decisions not to bring enforcement actions in particular cases.⁴²⁶

Enforcement by States and Citizens

Congress may wish to consider the role of state and citizen enforcement. EPA's December 2025 “compliance first” memorandum emphasizes “proper deference and support” to state agencies in compliance and enforcement activities and provides that enforcement by EPA “must be based on a clear federal interest.”⁴²⁷ In its FY2027 budget request, EPA indicated an intent to “continue returning the responsibility for funding local environmental compliance programs to state and local entities to advance cooperative federalism” and to focus its own compliance monitoring and enforcement resources “where [state] co-regulators do not have authority to act.”⁴²⁸ State-level resources for and interest in environmental enforcement may vary across jurisdictions.

Similarly, citizen suits may constitute an increased percentage of environmental enforcement actions when EPA's enforcement declines. To the extent DOJ continues to take enforcement action against violators but seeks to impose smaller penalties, such actions could nevertheless have the effect of blocking citizen suits in light of the bar on citizen suits where EPA or a state has initiated and is “diligently prosecuting” a civil or criminal action in court.⁴²⁹

Congress may expand or limit the availability of nonfederal enforcement of environmental laws, including by preempting state-law enforcement schemes or altering the mechanisms in federal statutes for state and citizen enforcement. One bill from the 118th Congress would have imposed lengthier notice requirements for CAA, CWA, and Endangered Species Act citizen suits; another, introduced in the 119th Congress, would repeal Section 304 of the CAA, which authorizes citizen suits under that statute.⁴³⁰

⁴²³ See Dawn Reeves, *EPA Claims Enforcement “Strongest” In Years But Critics Say Otherwise*, INSIDE EPA (Mar. 9, 2026), <https://insideepa.com/daily-news/epa-claims-enforcement-strongest-years-critics-say-otherwise>.

⁴²⁴ For the reasons noted earlier in this report, it is unlikely that Congress could compel DOJ to prosecute particular criminal violations of the law. See *supra* notes 369–376 and accompanying text.

⁴²⁵ 29 U.S.C. § 482(a)–(b).

⁴²⁶ *Heckler v. Chaney*, 470 U.S. 821, 833–34 (1985).

⁴²⁷ Pritzlaff Memo, *supra* note 413, at 3.

⁴²⁸ EPA FY2027 JUSTIFICATION, *supra* note 417, at 16–17.

⁴²⁹ Dawn Reeves, *Group Warns EPA Citizen Suit Plan Could Complicate Notification Mandates*, INSIDE EPA (Mar. 25, 2026), <https://insideepa.com/daily-news/group-warns-epa-citizen-suit-plan-could-complicate-notification-mandates>.

⁴³⁰ Fair and Timely Citizen Suits Act of 2024, S. 4307, 118th Cong. (2024); Fair Air Enforcement Act of 2025, S. 3049, 119th Cong. (2025).

Setting Penalties and Defining Remedies

In addition to expanding or limiting the scope of EPA's enforcement authority under a particular statute, Congress may define available remedies and adjust maximum and minimum penalty amounts. For example, while Congress sets maximum criminal penalties and may adjust them by amending relevant statutory provisions, both the executive branch (via charging decisions and plea negotiations) and courts (via sentencing decisions) ultimately determine what penalties apply. Congress at times has sought to limit this discretion on the part of the other branches by establishing mandatory minimum sentences for certain offenses.⁴³¹ To date, Congress has not done so for any environmental offense. Likewise, DOJ and EPA determine what civil judicial and administrative penalties to seek, and courts (where involved) determine the amount of civil penalties ultimately imposed, but Congress may also identify maximum or minimum civil or administrative penalties.

Congress may also alter the balance where laws allow for enforcement discretion with respect to whether to pursue civil penalties, criminal penalties, or both. For example, the CAA imposes civil penalties for violating an applicable implementation plan or permit and criminal penalties for "knowingly" doing so.⁴³² The law does not preclude the government from pursuing civil penalties even in the event of a knowing violation, allowing for what some could consider under-enforcement (where a criminal violator escapes with civil sanctions only) or over-enforcement (pursuing civil and criminal penalties for the same conduct). Congress has the option to remove this flexibility, if it chooses, by precluding the availability of civil penalties for knowing conduct or prohibiting imposition of civil and criminal penalties for the same conduct. Alternatively, Congress could extend the statute of limitations for civil actions in the event an alleged violator is acquitted of criminal charges.

At times, Congress has adjusted penalty provisions in response to executive branch enforcement policies. For example, in 2025, the National Highway Traffic Safety Administration (NHTSA), which promulgates and enforces motor vehicle fuel economy standards, issued an interpretive rule limiting the agency's enforcement of such standards.⁴³³ Following the NHTSA interpretive rule, Congress amended the Corporate Average Fuel Economy statute to set the civil penalty amount at zero for model years in which a manufacturer has not yet received a notification of noncompliance while leaving the statutory prohibitions and NHTSA's enforcement authority in place.⁴³⁴

Members have shown a particular interest in third-party settlement payments, including SEPs. In the 118th Congress, the House passed H.R. 788, the Stop Settlement Slush Funds Act of 2023, which would have prohibited the federal government from entering into or enforcing a settlement agreement that provides for a third-party payment.⁴³⁵ An identical bill was introduced in the Senate and referred to the Committee on the Judiciary but did not reach a vote.⁴³⁶ Both bills included an exception for payments that provide "restitution for or otherwise directly [remedy] actual harm (including to the environment) directly and proximately caused by the party making the payment" or that constitute payment for services rendered in connection with the case.⁴³⁷

⁴³¹ See, e.g., 18 U.S.C. § 1028A.

⁴³² 42 U.S.C. § 7413(b)(1), (c)(1).

⁴³³ Resetting the Corporate Average Fuel Economy Program, 90 Fed. Reg. 24518 (June 11, 2025).

⁴³⁴ Pub. L. No. 119-21, § 40006, 139 Stat. 72, 136 (2025).

⁴³⁵ H.R. 788, 118th Cong. (2023).

⁴³⁶ S. 225, 118th Cong. (2023).

⁴³⁷ H.R. 788, § 2(a), S. 225, § 2(a).

They also would have required agencies to provide annual reports to the Congressional Budget Office on settlements falling into either of those exceptions.⁴³⁸ It is possible at least some SEPs would be considered payments that remedy harm caused by the party making the payment and thus would have remained permissible had the bills become law.

Responding to *SEC v. Jarkesy*

SEC v. Jarkesy calls into question the constitutionality of administrative enforcement generally, and administrative penalty assessment in particular.⁴³⁹ *Jarkesy*'s impact on EPA's enforcement activity will depend in part on whether pollution control laws fall within the "public rights exception" to the Seventh Amendment guarantee of trial by jury.⁴⁴⁰ Because that exception is defined by reference to historical common-law causes of action, Congress cannot expand its scope by statute.⁴⁴¹ However, Congress could limit *Jarkesy*'s potential fallout by amending certain statutes to give EPA the option of seeking penalties through either administrative or civil judicial enforcement actions.

Most pollution control laws already give EPA this flexibility.⁴⁴² If courts conclude that administrative enforcement actions under those statutes violate the Seventh Amendment, then EPA would lose the choice of administrative forum but not the ability to pursue penalties in court. By contrast, FIFRA, TSCA, and the MPRSA only permit EPA to compel payment of previously assessed administrative penalties.⁴⁴³ If courts conclude that *Jarkesy* precludes administrative enforcement of those laws, then EPA could not pursue civil penalties at all. Congress could foreclose this outcome by authorizing EPA to pursue civil penalties through judicial enforcement actions under FIFRA, TSCA, and the MPRSA without first pursuing penalties in administrative proceedings.

⁴³⁸ *Id.*

⁴³⁹ 603 U.S. 109 (2024).

⁴⁴⁰ *Id.* at 121–23.

⁴⁴¹ *Id.*

⁴⁴² See 33 U.S.C. § 1319(d) (CWA); 42 U.S.C. § 300h-2(a)–(b) (SDWA); *id.* § 6928(g) (RCRA); *id.* § 7413(b) (CAA); *id.* § 11045(b)(3) (EPCRA).

⁴⁴³ See 7 U.S.C. § 136l(a)(5) (FIFRA); 15 U.S.C. § 2615(a)(4) (TSCA); 33 U.S.C. § 1415(a) (MPRSA).

Appendix. Selected Enforcement Provisions

**Selected Pollution Control Law Names
and Acronyms Referenced in Appendix Tables⁴⁴⁴**

Act to Prevent Pollution from Ships (APPS)
Clean Air Act (CAA)
Clean Water Act (CWA)
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
Emergency Planning and Community Right-to-Know Act (EPCRA)
Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)
Hazardous Materials Transportation Act (HMTA)
Marine Protection, Research, and Sanctuaries Act (MPRSA)
Resource Conservation and Recovery Act (RCRA)
Safe Drinking Water Act (SDWA)
Toxic Substances Control Act (TSCA)

⁴⁴⁴ This list, presented in alphabetical order, includes statutes referenced in this report and does not encompass every potential federal statute governing pollution.

Table A-1. Selected Civil Penalty Provisions in Federal Pollution Control Laws

Each law may have additional penalty provisions not noted herein.

Statute	Code Provision(s)	Nature of Offense(s)	Statutory Penalties ^a		
CAA	42 U.S.C. § 7413(b) (civil judicial), (d)(1) (administrative)	<p>§ 7413(b)(1), (d)(1)(A): “violation of, any requirement or prohibition of an applicable implementation plan or permit”</p> <p>§ 7413(b)(2), (d)(1)(B): violation of various CAA stationary source-related requirements, rules, orders, waivers or permits, or failure to pay fees</p> <p>§ 7413(b)(3), (d)(1)(C): attempt “to construct or modify a major stationary source” in certain areas</p>	Civil judicial: Up to \$25,000 per day of each violation	Administrative: Up to \$25,000 per day of violation, up to \$200,000, “except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount . . . is appropriate”	
	42 U.S.C. § 7524	§ 7524(a): Violations of various CAA mobile source-related requirements	Up to \$25,000 per violation (\$2,500 for people other than vehicle manufacturers or dealers in certain cases)		
CWA	33 U.S.C. § 1319(d) (civil judicial); (g) (administrative)	§ 1319(d), (g)(2)(A), (g)(2)(B): violation of various CWA provisions, permit conditions or limitations, requirements, or orders	Civil judicial: Up to \$25,000 per day of continuing violation	Administrative Class I: Up to \$10,000 per violation (maximum \$25,000)	Administrative Class II: Up to \$10,000 per day of continuing violation (maximum \$125,000)
RCRA	42 U.S.C. § 6928	<p>§ 6928(a): violation of any RCRA requirement (administrative penalty)</p> <p>§ 6928(c): violation of administrative compliance order (administrative penalty)</p> <p>§ 6928(g): violation of any RCRA requirement (civil judicial penalty)</p>	Up to \$25,000 per day of violation		
SDWA	42 U.S.C. § 300i-1	§ 300i-1(c): tampering or attempted tampering or threat of tampering with a public water system with intent to harm people	Up to \$1,000,000 for tampering, up to \$100,000 for attempts or threats		

Statute	Code Provision(s)	Nature of Offense(s)	Statutory Penalties ^a
	42 U.S.C. §§ 300h-2; 300g-3	§ 300h-2(b)(1): violation “of any requirement of an applicable underground injection control program” or related administrative order § 300g-3(b): violation of drinking water regulations § 300g-3(g)(3): violation of administrative compliance order	Up to \$25,000 per day of violation
CERCLA	42 U.S.C. § 9609(a) (administrative class I), (b) (administrative class II), (c) (civil judicial)	§ 9609(a)(1)(A), (b)(1), (c)(1): violation of the various CERCLA requirements “relating to notice” § 9609(a)(1)(B), (b)(2), (c)(2): violation of the various CERCLA requirements “relating to destruction of records” § 9609(a)(1)(C), (b)(3), (c)(3): violation of the various CERCLA requirements, regulations, or orders “relating to financial responsibility” § 9609(a)(1)(D), (b)(4), (c)(4): violation of the various CERCLA requirements “relating to settlement agreements” § 9609(a)(1)(E), (b)(5), (c)(5): “failure or refusal” “relating to violations of administrative orders, consent decrees, or agreements”	Administrative Class I: Up to \$25,000 per violation Administrative Class II/civil judicial: Up to \$25,000 per day of continuing violation for first offense; up to \$75,000 per day of continuing violation for subsequent offenses
TSCA	15 U.S.C. § 2615 15 U.S.C. § 2647	§ 2615(a): Violation of any TSCA provision in § 2416 or § 2689 § 2647(a)(1): failure by local education agency to conduct an inspection pursuant to TSCA regulations § 2647(a)(2): false reporting by local education agency regarding any inspection or statement pursuant to TSCA regulations § 2647(a)(3): failure by local education agency to develop a management plan pursuant to TSCA regulations § 2647(a)(4): any activity by local education agency prohibited by TSCA § 2647(a)(5): false statement by local education agency regarding a deferral request § 2647(g): failure to obtain TSCA accreditation by asbestos contractors in schools	Up to \$37,500 per day of continuing violation Up to \$5,000 per day of continuing violation
FIFRA	7 U.S.C. § 1361	§ 1361(a)(1): violation of various provisions of FIFRA by “any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor”	Up to \$5,000 for each violation

Statute	Code Provision(s)	Nature of Offense(s)	Statutory Penalties ^a
		§ 1361(a)(2): violation of various provisions of FIFRA by any private applicator or pest controller	Up to \$1,000 for each violation (\$500 for first offense by private applicator if offense only involves application of substance for pest control)
EPCRA	42 U.S.C. § 11045	§ 11045(a): noncompliance with emergency planning orders	Up to \$25,000 per day of violation or failure to comply
		§ 11045(b): violation of emergency notification requirement	Administrative Class I: Up to \$25,000 per violation Administrative Class II/civil judicial: Up to \$25,000 per day of continuing violation for first offense; up to \$75,000 per day of continuing violation for subsequent offenses
MPCRA	33 U.S.C. § 1414b	§ 1414b(d)(1): Ocean dumping by persons subject to compliance or enforcement agreements	\$600 per dry ton of material dumped, where weight is enhanced by 1% per year for each year after 1992
	33 U.S.C. § 1415	§ 1415(a): Violation of any statutory, regulatory, or permit requirement under this subchapter	Up to \$50,000 for each violation (up to \$125,000 for medical waste)

Source: CRS, based on statutes cited above.

a. Amounts specified in original legislation; for current penalty amounts as adjusted for inflation, see 40 C.F.R. § 19.4, Table I.

Table A-2. Selected Citizen Suit Provisions in Federal Pollution Control Laws

Statute	Code Provision	Citizen Suit Authority
APPS	33 U.S.C. § 1910	<p>“[A]ny person having an interest which is, or can be, adversely affected, may bring an action on his own behalf—</p> <p>(1) against any person alleged to be in violation of the provisions of this chapter, or regulations issued hereunder;</p> <p>(2) against the Secretary [of the department in which the Coast Guard is operating] where there is alleged a failure of the Secretary to perform any act or duty under this chapter which is not discretionary with the Secretary;</p> <p>(3) against the [EPA] Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary; or</p> <p>(4) against the Secretary of the Treasury where there is alleged a failure of the Secretary of the Treasury to take action under section 1908(e) of this title.”</p>
CAA	42 U.S.C. § 7604	<p>“[A]ny person may commence a civil action on his own behalf—</p> <p>(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the [EPA] Administrator or a State with respect to such a standard or limitation,</p> <p>(2) against the [EPA] Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or</p> <p>(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I (relating to significant deterioration of air quality) or part D of subchapter I (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.”</p>
CWA	33 U.S.C. § 1365	<p>“[A]ny citizen^a may commence a civil action on his own behalf—</p> <p>(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or</p> <p>(2) against the [EPA] Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.”</p>

Statute	Code Provision	Citizen Suit Authority
CERCLA	42 U.S.C. § 9659 ^b	<p>“[A]ny person may commence a civil action on his own behalf—</p> <p>(1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter (including any provision of an agreement under section 9620 of this title, relating to Federal facilities); or</p> <p>(2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the [Agency for Toxic Substances and Disease Registry]) where there is alleged a failure of the President or of such other officer to perform any act or duty under this chapter, including an act or duty under section 9620 of this title (relating to Federal facilities), which is not discretionary with the President or such other officer.”</p>
EPCRA	42 U.S.C. § 11046	<p>“[A]ny person may commence a civil action on his own behalf against the following:</p> <p>(A) An owner or operator of a facility for failure to do any of the following:</p> <ul style="list-style-type: none"> (i) Submit a followup emergency notice under section 11004(c) of this title. (ii) Submit a material safety data sheet or a list under section 11021(a) of this title. (iii) Complete and submit an inventory form under section 11022(a) of this title containing tier I information as described in section 11022(d)(1) of this title unless such requirement does not apply by reason of the second sentence of section 11022(a)(2) of this title. (iv) Complete and submit a toxic chemical release form under section 11023(a) of this title. <p>(B) The Administrator for failure to do any of the following:</p> <ul style="list-style-type: none"> (i) Publish inventory forms under section 11022(g) of this title. (ii) Respond to a petition to add or delete a chemical under section 11023(e)(1) of this title within 180 days after receipt of the petition. (iii) Publish a toxic chemical release form under 11023(g) of this title. (iv) Establish a computer database in accordance with section 11023(j) of this title. (v) Promulgate trade secret regulations under section 11042(c) of this title. (vi) Render a decision in response to a petition under section 11042(d) of this title within 9 months after receipt of the petition. <p>(C) The Administrator, a State Governor, or a State emergency response commission, for failure to provide a mechanism for public availability of information in accordance with section 11044(a) of this title.</p> <p>(D) A State Governor or a State emergency response commission for failure to respond to a request for tier II information under section 11022(e)(3) of this title within 120 days after the date of receipt of the request.”</p>

Statute	Code Provision	Citizen Suit Authority
RCRA	42 U.S.C. § 6972	<p>“[A]ny person may commence a civil action on his own behalf—</p> <p>(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or (B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or</p> <p>(2) against the [EPA] Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.”</p>
SDWA	42 U.S.C. § 300j-8	<p>“[A]ny person may commence a civil action on his own behalf—</p> <p>(1) against any person (including (A) the United States, and (B) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any requirement prescribed by or under this subchapter;</p> <p>(2) against the [EPA] Administrator where there is alleged a failure of the Administrator to perform any act or duty under this subchapter which is not discretionary with the Administrator; or</p> <p>(3) for the collection of a penalty by the United States Government (and associated costs and interest) against any Federal agency that fails, by the date that is 18 months after the effective date of a final order to pay a penalty assessed by the Administrator . . . to pay the penalty.”</p>
TSCA	15 U.S.C. § 2619	<p>“[A]ny person may commence a civil action—</p> <p>(1) against any person (including (A) the United States, and (B) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of this Act or any rule promulgated under section 4, 5, or 6, or title II or IV, or order issued under section 4 or 5 or title II or IV to restrain such violation, or</p> <p>(2) against the [EPA] Administrator to compel the Administrator to perform any act or duty under this Act which is not discretionary.”</p>

Source: CRS, based on the statutes cited above.

- a. The CWA defines *citizen* as “a person or persons having an interest which is or may be adversely affected.” 33 U.S.C. § 1365(g).
- b. In addition to the limitations within CERCLA’s citizen suit provision regarding venue, notice, and diligent prosecution, CERCLA’s timing of review provision bars citizen suits until after a cleanup is completed, and prohibits citizen suits to challenge a short-term removal action at a site where a longer-term remedial action is planned. 42 U.S.C. § 9613(h).

Table A-3. Selected Criminal Provisions of Federal Pollution Control Laws

Each law may contain additional penalty provisions not included herein.

Statute	Code Provision(s)	Nature of Offense(s)	Penalties ^a
APPS	33 U.S.C. § 1908	§ 1908(a): “knowingly violates the MARPOL Protocol, Annex IV to the Antarctic Protocol, or various APPS requirements or orders”	Up to 10 years’ imprisonment and fines under Title 18
CAA	42 U.S.C. § 7413	§ 7413(c)(1): knowing violation of various CAA requirements or orders	Up to five years’ imprisonment and fines under Title 18; penalties doubled for second offense
		§ 7413(c)(2)(A): knowing and materially false statement or omission, or failure to file or maintain required records	Up to two years’ imprisonment and fines under Title 18; penalties doubled for second offense
		§ 7413(c)(2)(B): knowing failure “to notify or report as required”	
		§ 7413(c)(2)(C): knowing falsification or tampering with, or failure to maintain, any required monitoring device	
		§ 7413(c)(3): knowing failure to pay fees	Up to one year’s imprisonment and fines under Title 18; penalties doubled for second offense
		§ 7413(c)(4): negligent release placing someone “in imminent danger of death or serious bodily injury”	
		§ 7413(c)(5): knowing release placing someone “in imminent danger of death or serious bodily injury”	Up to 15 years’ imprisonment and fines under Title 18 (up to \$1,000,000 for organizations); penalties doubled for second offense
CERCLA	42 U.S.C. § 9603	§ 9603(b): failure, by “person in charge” of certain vessels or facilities, to report release of a reportable quantity of a hazardous substance as soon as person is aware thereof, or knowing false statements within such a report	Up to three years’ imprisonment and fines under Title 18; up to five years’ imprisonment for second offense
		§ 9603(d): destruction or falsification of certain required records	
CWA	33 U.S.C. § 1319	§ 1319(c)(1)(A): negligent violation of various CWA requirements or permits § 1319(c)(1)(B): negligent introduction “into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance” a person knows “or reasonably should have known could cause personal injury or property damage,” other than pursuant to a permit, causing such treatment works to violate any effluent limitation or permit condition	Up to one year’s imprisonment and fine of up to \$25,000 per day of violation; penalties doubled for second offense

Statute	Code Provision(s)	Nature of Offense(s)	Penalties ^a
		§ 1319(c)(2)(A): knowing violation of various CWA requirements or permits	Up to three years' imprisonment and fine of up to \$50,000 per day of violation; penalties doubled for second offense
		§ 1319(c)(2)(B): knowing introduction "into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance" a person knows "or reasonably should have known could cause personal injury or property damage," other than pursuant to a permit, causing such treatment works to violate any effluent limitation or permit condition	
		§ 1319(c)(3)(A): knowing violation of various CWA requirements or permits knowingly placing "another person in imminent danger of death or serious bodily injury"	Up to 15 years' imprisonment and fines up to \$250,000 for individuals and \$1,000,000 for organizations; penalties doubled for second offense
		§ 1319(c)(4): knowing material false statements	Up to two years' imprisonment and fine of up to \$10,000 per day of violation; penalties doubled for second offense
EPCRA	42 U.S.C. § 11045	§ 11045(b)(4): knowing and willful failure to provide emergency notification of release of an extremely hazardous substance	Up to two years' imprisonment and fine up to \$25,000; five years' imprisonment for a second offense, fines doubled
FIFRA	7 U.S.C. § 136l	§ 136l(b)(1)(A): knowing violation of various FIFRA requirements and orders by any registrant, applicant for a registration, or producer	Up to one year's imprisonment and fine up to \$50,000
		§ 136l(b)(1)(B): knowing violation of various FIFRA requirements by commercial applicator of restricted use pesticide or by other person who distributes or sells pesticides or devices	Up to one year's imprisonment and fine up to \$25,000
		§ 136l(b)(2): knowing violation of various FIFRA requirements by private applicator or any other person not identified in (b)(1)	Up to 30 days' imprisonment and fine up to \$1,000
HMTA	49 U.S.C. § 5124	§ 5124(a): knowing violation of § 5104(b) or willful or reckless violation of other HMTA or related regulatory requirements	Up to five years' imprisonment and fines under Title 18; 10 years' imprisonment if a violation involves the release of a hazardous material that results in death or bodily injury
MPSRA	33 U.S.C. § 1415(b)	Violation of any statutory, regulatory, or permit requirement under this subchapter	Up to five years' imprisonment and fines under Title 18

Statute	Code Provision(s)	Nature of Offense(s)	Penalties ^a
RCRA	42 U.S.C. § 6928	§ 6928(d)(1): knowing transport of hazardous waste to unpermitted facility	Up to five years' imprisonment and fine of up to \$50,000 per day of violation; penalties doubled for second offense
		§ 6928(d)(2): knowing treatment, storage, or disposal of hazardous waste without a permit, or in knowing violation of a permit, regulation, or standard	
		§ 6928(d)(3): knowing omission of material information or material false statement in various records	
RCRA	42 U.S.C. § 6928	§ 6928(d)(4): knowing destruction/alteration of or failure to file/maintain required records in connection with handling of "hazardous waste or any used oil"	Up to 2 years + fine of up to \$50,000 per day of violation; penalties doubled for second offense
		§ 6928(d)(5): knowing transport of "hazardous waste or any used oil" without a manifest	
		§ 6928(d)(6): knowing export of "hazardous waste or any used oil" without consent of the receiving country or in violation of an international agreement	
		§ 6928(d)(7): knowing storage, treatment, transport, disposal, or other handling of used oil in knowing violation of any material condition or requirement of a permit or standard	
		§ 6928(e): knowing transport, treatment, storage, disposal, or export of hazardous waste or used oil in violation of (d)(1)-(7) knowing such activity "places another person in imminent danger of death or serious bodily injury"	
TSCA	15 U.S.C. § 2615	§ 2615(b)(1): knowing or willful violation of any provision of 15 U.S.C. §§ 2614 or 2689	Up to one year's imprisonment and fine up to \$50,000 per day of violation
		§ 2615(b)(2)(A): knowing and willful violation of any provision of 15 U.S.C. §§ 2614 or 2689 knowingly placing "another person in imminent danger of death or serious bodily injury"	

Source: CRS, based on the statutes cited above.

- a. In all cases, the applicable fine is the amount specified in the statute defining the offense or the amount applicable under 18 U.S.C. § 3571, whichever is greater. For a summary of criminal offense classifications, associated terms of imprisonment, and applicable fines, see CRS Infographic IG10074, *Sentencing Classification and Default Federal Criminal Fines by Authorized Prison Term*, by Peter G. Berris and Cassandra J. Barnum (2025).

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