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For more information,  
contact:

Ilana Saltzbart  
+1 202 626 3745  
[isaltzbart@kslaw.com](mailto:isaltzbart@kslaw.com)

Granta Nakayama  
+1 202 626 3733  
[gnakayama@kslaw.com](mailto:gnakayama@kslaw.com)

Michael R. Leslie  
+1 213 218 4013  
[mleslie@kslaw.com](mailto:mleslie@kslaw.com)

Suzanne Wilson  
+1 512 457 2070  
[swilson@kslaw.com](mailto:swilson@kslaw.com)

Peter Hsiao  
+1 213 443 4379  
[p hsiao@kslaw.com](mailto:p hsiao@kslaw.com)

Adam G. Sowatzka  
+1 404 572 3508  
[asowatzka@kslaw.com](mailto:asowatzka@kslaw.com)

Marcella Burke  
+1 713 751 3261  
[mburke@kslaw.com](mailto:mburke@kslaw.com)

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King & Spalding

Washington, D.C.  
1700 Pennsylvania Avenue,  
NW  
Washington, D.C. 20006-  
4707  
Tel: +1 202 737 0500

## U.S. EPA and CalEPA Launch Joint Effort to Strengthen Enforcement in Environmental Justice Communities

The new agreement will serve as a model for other  
EPA and State partnerships on Environmental Justice

In its latest Environmental Justice-related announcement, on September 10, 2021, the United States Environmental Protection Agency (“EPA”) formalized a Memorandum of Understanding (“MOU”) with the California Environmental Protection Agency (“Cal EPA”) to strengthen environmental enforcement in communities overburdened by pollution (“EJ Enforcement MOU”).<sup>1</sup> Importantly, the MOU seems to reflect a departure from the Trump EPA’s approach of cooperative federalism in enforcement activities, potentially signaling that the Office of Enforcement and Compliance Assurance (“OECA”) plans to rescind the July 11, 2019 policy addressing the role of EPA in state enforcement activities, which had the practical effect of sidelining much of EPA’s civil investigations and enforcement activities.<sup>2</sup>

While EPA describes this MOU as a “first-of-its-kind,” its press release states that EPA intends the MOU to serve as a model for other EPA/State partnerships on Environmental Justice (“EJ”). As a result, industry should expect more states to sign on to similar MOUs. Facilities operating in EJ areas can expect more inspections, including joint federal/state inspections, and enhanced enforcement activities. These activities are likely to dovetail with EPA’s national compliance initiatives, meaning an uptick in investigations and enforcement actions related to the Clean Air Act air toxics and accidental release prevention programs, among others. EPA may also package two of the Biden Administration policy initiatives – Environmental Justice and Climate Change – to leverage its federal enforcement tools to require companies to enhance facility infrastructure to address releases to air, water, and land from extreme weather events,



especially in light of reported environmental releases following Hurricane Ida and other recent storms.

### ELEMENTS OF THE EJ ENFORCEMENT MOU

The EJ Enforcement MOU provides a framework for collaborative activities related to inspections, compliance assistance, enforcement, communication, community engagement, and training in overburdened communities. Key features of the EJ Enforcement MOU include:

- Increasing joint inspections in overburdened communities and sharing or jointly developing metrics for determining pollution burdens;
- Coordinating appropriate enforcement responses, including joint judicial enforcement actions in overburdened communities; and
- Early engagement with overburdened communities to ensure that targeting and compliance-related activities are informed by the experiences of these communities.

### ENHANCED FEDERAL ENFORCEMENT IN EJ COMMUNITIES

The EJ Enforcement MOU provides better insight into how OECA intends to implement EJ concepts in the enforcement arena. In April, June, and July 2021, the OECA Acting Assistant Administrator issued a series of EJ-related policies in the context of civil and criminal enforcement as part of an “Environmental Justice Enforcement and Compliance Assurance Initiative.”<sup>3</sup> Collectively, these policies express EPA’s intention to leverage its enforcement authorities to help advance the protection of communities disproportionately impacted by pollution. But EPA has not issued prescriptive guidance outlining how it will do so.<sup>4</sup> The EJ Enforcement MOU begins to flesh out how OECA will leverage its enforcement authorities in cooperation with state partners to obtain tangible environmental benefits in overburdened communities.

### REGULATORY PROGRAMS LIKELY TO HAVE ENHANCED FEDERAL ENFORCEMENT OVERSIGHT

EPA likely will focus its EJ-related enforcement activities in programmatic areas already identified as warranting heightened federal oversight – EPA’s National Compliance Initiatives.<sup>5</sup> Facilities located in EJ communities that emit hazardous air pollutants (“HAP”) and/or volatile organic compounds (“VOCs”) should expect increased federal inspections and oversight. This includes companies engaged in energy extraction and related activities, refineries, and chemical and petrochemical manufacturing, among many other industrial operations. In addition, there has been a marked uptick in EPA enforcement of the Clean Air Act Risk Management Plan program and General Duty Clause requirements, both of which are designed to minimize accidental releases of chemicals at facilities, and to ensure that hazardous chemical substances are managed safely.

### COULD A CLIMATE ADAPTATION ENFORCEMENT INITIATIVE BE ON THE HORIZON?

In the wake of Hurricane Ida, facilities located in EJ communities nationwide could face novel enforcement inquiries related to the robustness of facility infrastructure to prevent releases to air, water, and land arising from extreme weather events. As part of its relief efforts following Hurricane Ida, EPA deployed state-of-the-art technology to identify and monitor such releases.<sup>6</sup> To date EPA has not leveraged its enforcement resources to address climate adaptation at facilities. But this could be the next front for EPA’s enforcement program because tackling the effects of climate change in overburdened communities brings together two Biden Administrative agendas: Climate Change and Environmental Justice. King & Spalding can assist companies in identifying potential risks for environmental releases from weather-related events.



King & Spalding has a deep bench of former federal and state environmental enforcement officials and routinely represents companies in environmental investigations, litigation, and enforcement actions initiated by EPA, the U.S. Department of Justice, state environmental agencies, and state attorneys general. King & Spalding also provides compliance counseling under all environmental statutes and is closely tracking the Biden Administration’s Environmental Justice and Climate Change initiatives.

**ABOUT KING & SPALDING**

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,200 lawyers in 22 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

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<sup>1</sup> The EJ Enforcement MOU is available at [https://www.kslaw.com/attachments/000/009/040/original/EPA\\_Cal\\_EPA\\_MOU\\_EJ\\_Enforcement.final.pdf?1631557831](https://www.kslaw.com/attachments/000/009/040/original/EPA_Cal_EPA_MOU_EJ_Enforcement.final.pdf?1631557831). EPA’s press release announcing the EJ Enforcement MOU is available at <https://www.epa.gov/newsreleases/us-epa-calepa-launch-joint-effort-strengthen-environmental-enforcement-communities>.

<sup>2</sup> See Memorandum from Susan P. Bodine, Asst. Admin., U.S. EPA Office of Enforcement and Compliance Assurance, Enhancing Effective Partnerships Between the EPA and the States in Civil Enforcement and Compliance Assurance Work (July 11, 2019) available at <https://www.epa.gov/sites/default/files/2019-07/documents/memoenhancingeffectivepartnerships.pdf>.

<sup>3</sup> See <https://www.epa.gov/enforcement/environmental-justice-enforcement-and-compliance-assurance-initiative>.

<sup>4</sup> For instance, in EPA’s April 30, 2021 guidance, “Strengthening Enforcement in Communities with Environmental Justice Concerns,” OECA articulated a series of steps it would explore to advance the agency’s EJ goals, including increased inspections of facilities in overburdened communities; resolving environmental noncompliance through remedies with tangible benefits for the community, including fence-line monitoring; and increasing engagement with communities about enforcement cases that most directly impact them. See Memorandum from Lawrence E. Starfield, Acting Asst. Admin., U.S. EPA Office of Enforcement and Compliance Assurance, Strengthening Enforcement in Communities with Environmental Justice Concerns (Apr. 30, 2021) available at <https://www.epa.gov/sites/default/files/2021-04/documents/strengtheningenforcementincommunitieswiththeconcerns.pdf>.

<sup>5</sup> See <https://www.epa.gov/enforcement/national-compliance-initiatives>.

<sup>6</sup> See <https://www.epa.gov/newsreleases/epa-expands-air-monitoring-efforts-communities-impacted-hurricane-ida>.