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IN THIS ISSUE...

Environmental Law

Featured Articles

Enforcement

Featured Articles

Climate Change Under the Existing Clean Air Act: Developments from 2008 and the Transition to a New Administration

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I. Introduction

The year 2008 and the transition to a new presidential administration brought significant developments in the effort to fight the most serious environmental issue in recent history: climate change. In regulatory actions, debate in the halls of Congress, litigation in the courts, and promises made on the campaign trail, the question of how to regulate greenhouse gas emissions and address the growing problems associated with climate change loomed large throughout 2008, and these questions remain open today.

During the final year of the Bush administration, the U.S. Environmental Protection Agency ("EPA") inserted itself into the environmental policy debate with contentious and legally questionable pronouncements and rules, including its defense of the first-ever denial of a California Clean Air Act ("CAA") waiver and its internally inconsistent advanced notice of proposed rulemaking ("ANPR") for greenhouse gas ("GHG") emissions. The new Obama administration, however, has changed course, with fresh interpretations being released and new rulemakings proceeding under a very different set of guiding principles. Comprehensive regulation of GHGs is coming, and there is a strong argument to be made that the first, or at least an interim, step should be regulation of GHGs under the existing CAA.[1]

II. Background on the Debate Over Regulating Climate Change Under the CAA

Much of the discussion over climate in 2008 centered on whether or not to regulate greenhouse gases under the existing CAA. The Bush administration consistently opposed such regulation, taking the view that comprehensive new legislation, specifically tailored to the issues surrounding climate change, was needed before any significant regulation of greenhouse gases could be undertaken.[2]

The new Congress and administration appear, however, to be taking the opposite view. Although emphasizing the need for new legislation, Democratic leaders in Congress, including Senate Environment and Public Works Committee Chairman Barbara Boxer (D-Calif.), have maintained that the existing statutory structure can be used to regulate greenhouse gases. Senator Boxer's committee held a hearing on September 23, 2008 regarding the potential to use the CAA to address climate change with an eye towards advising the incoming Obama administration.[3] In her opening remarks, Senator Boxer asserted that comprehensive new legislation is needed, "[b]ut in the meantime there is much that can and should be considered under the Clean Air Act. This law has a proven track record over the last 40 years. It has been very effective in reducing pollution and saving lives."[4]

A number of commentators have also suggested that while new legislation is needed, the existing statutes can be used in the meantime to make some progress. The Environmental Defense Fund, along with a coalition of businesses, released a set of principles for regulation of greenhouse gases under the CAA on December 2, 2008.[5] This report marks the first time a major environmental group has joined with industry to make recommendations for EPA's regulation of greenhouse gases.[6] The report suggested that although comprehensive climate change legislation is needed, existing law should be used to make "common sense progress today."[7] Another group of industry lawyers and consultants has opined that the incoming Obama administration establish a national ambient air quality standard ("NAAQS") for carbon dioxide emissions that would designate the entire country in attainment with the carbon dioxide standard and then ratchet down the standard over time, allowing industry and regulators flexibility in developing emissions-reducing measures.[8]

The ongoing economic crisis, however, has presented both obstacles and opportunities for progress on the issue of climate change. President Obama took office in January 2009 in the midst of this crisis, and he has faced the challenge of balancing a need for action on climate change against the economic realities of the nation. Rather than imposing broad regulation to combat global warming that would be likely to involve significant costs to the U.S. economy, Obama indicated during his campaign that his first priority would be the creation of what his campaign claimed would be "5 million" new "green jobs" through federal support for energy savings programs and conservation. These were expected to include advanced manufacturing and weatherization training, "smart" electrical grid technologies, green buildings and improved energy-efficiency for houses. Many of the proposals touted during the transition found their way into the final version of the American Recovery and Reinvestment Act of 2009, which provides a total of $40 billion in spending and $20 billion in tax incentives for energy programs, including smart-grid transmission, weatherization, and other grants and programs related to energy efficiency and conservation.[9] Through these government spending programs, the Obama administration hopes to stimulate the economy's recovery, while preparing the country's infrastructure for the inevitable reductions in greenhouse gas emissions that will be required in the future to combat global warming. Once the economy has had a chance to recover, Obama is expected to shift his

focus to more aggressive, longer-term efforts to reduce U.S. energy consumption and stimulate development of clean energy sources. In the meantime, however, interim efforts to regulate greenhouse gas emissions may be undertaken using the existing statutory framework.

III. Proposed Legislation Within the Existing Statutory Framework

Though much climate change legislation was introduced and debated in Congress during 2008, only two significant bills specifically addressed the existing CAA. Both bills were targeted at reversing the positions of the Bush administration, however, and so became moot with the convening of a new Congress and the inauguration of President Obama in January 2009.

A. S. 2555 - Reducing Global Warming Pollution From Vehicles Act of 2008

A bill sponsored by Senate Environment and Public Works Committee Chairman Barbara Boxer proposed to reverse EPA's rejection of California's green house gas emissions limits for vehicles. California's request for a waiver, which would have allowed it to pass fuel economy standards that are stricter than federal standards, was denied on December 19, 2007, hours after President Bush signed the Energy Independence and Security Act.[10] Senator Boxer's bill (S. 2555) was approved by the Committee on May 21, 2008 and placed on the legislative calendar on June 27, 2008.[11] No further action was taken on the bill before the end of the 110th Congress, however, likely due in large part to the expectation that then-President-elect Obama would reverse the Bush administration's denial of the waiver in short order after taking office. Indeed, President Obama directed EPA to reconsider the denial of the waiver on January 28, 2009,[12] shortly after his inauguration, and EPA subsequently announced plans to move forward on the issue with a hearing on March 6, 2009 and a period for submission of written comments.[13] A formal decision granting California's request for a waiver can be expected soon thereafter.

B. S. 1387 - National Greenhouse Gas Registry Act of 2007

On September 17, 2008, the Senate Environment and Public Works Committee approved a bill (S. 1387), sponsored by Sen. Amy Klobuchar (D-Minn.), that would define "greenhouse gases" and set other specific requirements and deadlines for a greenhouse gas emissions reporting system at EPA.[14] Sen. Klobuchar criticized EPA for missing a deadline set in the omnibus appropriations bill passed in December 2007 for proposing a rule requiring large sources of greenhouse gases to report their emissions, citing the agency's failure to act as the impetus for pushing her bill towards the end of the session.[15] The bill was placed on the legislative calendar on September 24, 2008.[16] Similar House legislation (H.R. 6877) was introduced on September 11, 2008 by Rep. Tammy Baldwin (D-Wisc.), and was referred to the House Committee on Energy and Commerce.[17] No further action, however, was taken on either bill before the end of the 110th Congress.

IV. Regulatory Action Under the Existing CAA

Two significant regulatory actions were taken by EPA during the past year under the CAA: the long-awaited Advance Notice of Proposed Rulemaking on GHGs, commenced in response to the Supreme Court's 2007 decision in *Massachusetts v. EPA*, and EPA's denial of California's CAA waiver request. Both actions were consistent with the Bush administration's reluctance to treat carbon dioxide as a pollutant under the CAA, and both were met with significant resistance from critics who claim the decisions were politically driven and inconsistent with the existing science and law. For practical purposes, however, the effects of both actions can be expected to be short-lived. The ANPR process will be completed, and any Final Rule issued, by the new Obama administration, and President Obama took steps within days of taking office to begin the process of granting California's request for a CAA waiver.

A. Advance Notice of Proposed Rulemaking: Regulating GHG Emissions Under the CAA

In perhaps its most significant regulatory move on climate change in 2008, EPA issued its ANPR on GHGs on July 11, 2008, in response to the Supreme Court's decision in *Massachusetts v. EPA*.[18] The ANPR sought comment from stakeholders on a wide range of issues, including which CAA provisions would be most appropriate for regulating GHGs, how regulation of GHG emissions under one section of the CAA would affect regulation under other sections, issues for Congress to consider for possible future legislation, scientific information relevant to an endangerment analysis of new motor vehicle GHG emissions, and potential regulatory approaches and technologies.[19]

This regulatory action was also significant for what it did not include. In issuing the ANPR, EPA deferred a regulatory decision on whether or not greenhouse gas emissions endanger public health and welfare and should be regulated under the CAA,[20] leading some commentators to opine that the document has no real significance, and merely represents "at most a kicking of the proverbial can."[21] Others maintain, however, that the ANPR is a significant step in the direction of developing a comprehensive regulatory structure to address greenhouse gas emissions and climate change.[22]

An additional interesting aspect of the ANPR is that while it includes exhaustive discussion regarding how to regulate

greenhouse gases under the existing CAA, it also includes commentary opposing that central premise. When the draft notice was presented to the Office of Management and Budget ("OMB") for review in June 2008, EPA was unable to reach an agreement with OMB or Cabinet agencies regarding the draft's contents.[23] Thus, when it was published, the notice was prefaced with comments from EPA Administrator Stephen Johnson, the secretaries of agriculture, energy, and commerce, the White House Council on Environmental Quality, and the Office of Management and Budget, all arguing that the CAA is not the appropriate vehicle for regulating greenhouse gases.[24] In explaining this unprecedented approach, Johnson noted that "[r]ather than attempt to forge a consensus on matters of great complexity, controversy, and active legislative debate, the Administrator has decided to publish the views of other agencies and to seek comment on the full range of issues that they raise."[25]

The comment period on the ANPR closed on November 28, 2008, though EPA will docket and consider late-filed comments.[26] The release date of the ANPR and 120-day comment period effectively ensured that these complex decisions would be taken up by the Obama administration. The wide range of issues addressed and extensive comments that the agency has received, however, will undoubtedly inform both future efforts to regulate greenhouse gases under the CAA as well as future legislation on climate change.

B. Denial of California's Request for Waiver for Greenhouse Gas Emissions Standards for Motor Vehicles

In December 2007, EPA announced that it would deny California's request for a waiver of CAA preemption for its greenhouse gas emission standards for new motor vehicles, and EPA's formal justification for the denial was released on February 29, 2008.[27] This denial was predicated on section 209(b)(1)(B) of the CAA, which states that "[n]o such waiver shall be granted if the Administrator finds that . . . such State does not need such State standards to meet compelling and extraordinary conditions." In reaching this decision, EPA explained that section 209(b) of the CAA was intended only to allow California to promulgate individual state emissions standards to combat local or regional pollution problems, not problems like climate change that are global in nature.[28] Furthermore, EPA concluded, the effects of climate change in California are not "compelling and extraordinary compared to the effects in the rest of the country."[29]

California, as well as fifteen other states who wish to adopt California's standards, have challenged the waiver denial in court. A petition was submitted to the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") on January 2, 2008, seeking review of the Agency's decision to deny the waiver.[30] In March 2008, EPA filed a motion before the D.C. Circuit seeking to consolidate California's challenge to the denial of the waiver with California's previous suit to compel the agency to make a decision on the waiver issue, filed in November 2007.[31] The Agency also requested dismissal of the case before the Ninth Circuit, arguing that the EPA Administrator's letter to California Gov. Arnold Schwarzenegger did not constitute "final agency action" that would be reviewable in court, and that the D.C. Circuit is the proper venue for consideration of the case.[32] The Ninth Circuit originally denied the motion without prejudice on April 10, 2008.[33] Then, upon reconsideration, the court granted the motion on July 25, 2008, ruling that the EPA Administrator's December 19, 2007 letter informing the state of his decision was not "a reviewable final action" under the CAA.[34] This decision effectively moved the battle over the denial of California's waiver request to the D.C. Circuit.

In June 2008, a federal district court denied a motion from the automobile industry to delay compliance with California's regulations in the event that the state won federal approval to enforce them.[35] The decision focused on a California Air Resources Board ("CARB") executive order, which provided that manufacturers will have 45 days from the CARB notification to demonstrate compliance with the standards once the legal barriers to enforcement of the standards are removed.[36] Industry challenged the order, arguing that it was an attempt to force manufacturers to make investments now to comply with regulations that may never be promulgated in the future.[37] The court, however, found no reason to alter the injunction against CARB, concluding that the order merely stated that California intends to enforce the standards as soon as the legal barriers to doing so are removed.[38]

These issues will soon become moot, with the Obama administration moving quickly to reverse the prior decision and grant the waiver request.

V. Significant Litigation Regarding GHG Emissions Under the CAA

None of the CAA litigation regarding GHGs in 2008 rose to the level of significance of the Supreme Court's landmark 2007 ruling in *Massachusetts v. EPA*. The EPA's Environmental Appeals Board ("EAB"), however, issued a decision *In re: Deseret Power Electric Cooperative* interpreting the Supreme Court's ruling in the context of the Prevention of Significant Deterioration ("PSD") permitting process, causing much debate over the question of whether Best Available Control Technology ("BACT") limits for carbon dioxide ("CO_2") should be imposed in new permits. The D.C. Circuit also heard arguments in a case brought to challenge EPA's "exceptional events rule," and considered whether or not emissions from reconstruction efforts following a natural disaster may be written off by states when reporting compliance with air quality standards.

A. *In re: Deseret Power Electric Cooperative*[39]

EPA's failure to adequately consider whether to impose a CO_2 BACT limit in a PSD permit for the construction of a new waste-coal-fired electric generating unit at Deseret's existing Bonanza Power Plant resulted in a decision to remand the permit to the agency by the Environmental Appeals Board on November 13, 2008. The EAB's decision hinged on the meaning of the statutory requirement that a PSD permit include a BACT emissions limit for "each pollutant subject to regulation under this Act."[40] EPA had contended that it was bound by a historical agency interpretation that carbon dioxide is not a "pollutant subject to regulation" because the CAA does not impose controls on carbon dioxide, but rather only monitoring and reporting under section 821. The EAB disagreed, finding that the documents that formed the basis of EPA's argument were not "sufficiently clear and consistent articulations of an Agency interpretation to constrain the authority [EPA] acknowledges it would otherwise have under the terms of the statute."[41]

EPA also argued, in the alternative, that any regulation under section 821 would not constitute regulation "under this Act," because section 821 is not part of the CAA. Despite ambiguities in the language of the statute, the Board concluded that this argument lacked merit based on its inconsistency with prior EPA statements and interpretations.[42]

Finding the EPA's arguments to be without merit, the Board remanded the permit for the EPA regional office to "reconsider whether or not to impose a CO_2 BACT limit in light of the Agency's discretion to interpret, consistent with the CAA, what constitutes a 'pollutant subject to regulation under this Act.'" However, the Board also noted in its Order that the national scope of the issue may warrant consideration of the issue on a national level, rather than through this specific permitting proceeding.[43]

On December 18, 2008, EPA issued an interpretation that did just that.[44] Administrator Johnson's memorandum set forth the procedural history of *Deseret*, as well as the Agency's arguments regarding the meaning of the statute, and concluded that the term "regulated pollutant" refers only to pollutants subject to a provision of the CAA or an EPA regulation that actually controls emissions of the pollutant.[45] This interpretation could have theoretically cleared the way for construction of dozens of new power plants without BACT emissions limits for carbon dioxide.[46] Newly-appointed EPA Administrator Lisa Jackson announced on February 17, 2009, however, that the agency will reconsider the memorandum, but not stay its effectiveness during the pendency of the reconsideration process.[47] Jackson also emphasized that the memo "does not bind States issuing permits under their own State Implementation Plans" and that "other PSD permitting authorities should not assume the memorandum is the final word on appropriate interpretation of Clean Air Act requirements."[48]

These issues remain unclear, however, as demonstrated in the recent EAB decision in *In re Northern Michigan University Ripley Heating Plant*. There, the EAB held that the Michigan Department of Environmental Quality must review the permit for a new combined boiler and power plant and determine whether or not greenhouse gas emissions should be regulated in the permit, citing its previous decision in *Deseret*.[49] According to the Natural Resources Defense Counsel, the Johnson memorandum did not play a role in the case because EPA did not raise it.[50]

B. *Natural Resources Defense Council v. EPA*

Environmentalists have also challenged what they see as a loophole in existing regulations relating to "exceptional events." Oral arguments were held on October 8, 2008 before the D.C. Circuit in *Natural Resources Defense Council ("NRDC") v. EPA*,[51] a case brought by NRDC to challenge an EPA rule that would allow states to list some man-made emissions as natural uncontrollable events and discount them when reporting compliance with air quality standards.[52] EPA published its "exceptional events rule" at 40 C.F.R. Parts 50 and 51 on March 22, 2007. The rule covers one-time exceptional events that include natural events as well as human-induced events, such as chemical spills, and would allow states to write off emissions from diesel vehicles, demolition, and reconstruction efforts following a natural disaster. NRDC argued that these types of emissions are predictable and controllable, and so should not qualify for this exception. EPA defended the rule, arguing that NRDC failed to raise objections to the definition of "natural event" during the comment period prior to publication of the final rule and that the rule is consistent with the CAA's criteria for determining natural events. NRDC also challenged language in the rule's preamble that describes examples of events that could qualify for the exceptional event waiver. Although the court questioned why a natural disaster clean-up would not be considered a human activity unlikely to recur, and thus fall within the statutory criteria, the judges did express concerns with an apparent drafting error in the rule's preamble. An opinion by the D.C. Circuit is expected in early 2009.

VI. Conclusions

Given the state of the world economy and the various challenges facing lawmakers and the new administration, the debate over how to regulate GHGs has become much more complex in the past year. These challenges, however,

may present an opportunity for the Obama administration to use the CAA to regulate GHGs as a stop-gap measure until comprehensive climate change legislation can be passed. Taking these steps would also give the United States greater credibility going into the international climate talks scheduled for late-2009 in Copenhagen, where a successor to the Kyoto Protocol, the current international agreement on climate change, will be negotiated.

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[1] Although the larger debate on climate change has touched on a number of existing environmental statutes and included proposals for many new ones, this article focuses only on those developments that relate to regulation of greenhouse gases under the existing CAA, including proposed new legislation that would support use of the CAA to regulate greenhouse gases, significant regulatory actions, as well as litigation over the past year.

[2] In an April 16, 2008 Rose Garden speech, President Bush reiterated his position that the existing environmental statutes—including the CAA, the Endangered Species Act, and the National Environmental Policy Act—were never intended to regulate greenhouse gases and are ill-suited to do so. *Bush Speech May Bolster Calls to Narrow Air Act's Climate Oversight*, InsideEPA.com, April 16, 2008.

[3] Steven Cook, *Senate Committee Report Intends to Guide Next President on Clean Air Act, Warming*, Daily Env't Rep. (BNA), Oct. 21, 2008. Recording of hearing and transcripts *available at* http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_id=6da87a8d-802a-23ad-4dc9-289c2f6b7e5a.

[4] Statement of Barbara Boxer, Full Committee hearing entitled "Regulation of Greenhouse Gases Under the Clean Air Ac, Tuesday, Sept. 23, 2008 *available at* http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Statement&Statement_ID=e6ece6bf-b061-469f-9d5b-396e18fba2c4.

[5] Steven Cook, *Businesses, Environmental Group Offer Principles for EPA Regulation of Emissions*, Daily Env't Rep. (BNA), Dec. 3, 2008. Full text of Principles for Regulating GHG Emissions Under the Clean Air Act, herein after "Principles," *available at* http://www.edf.org/pressrelease.cfm?ContentID=8884.

[6] *Id.*

[7] The coalition also emphasized the importance of grounding any regulation in science and good data, consulting with Congress, developing mechanisms for accountability, and developing a partnership with states and localities, as well as the public. *See* Cook, *supra* note 5.

[8] Dawn Reeves, *Industry Lawyers Detail CO2 NAAQS Strategy for Obama White House*, InsideEPA.com, Nov. 10, 2008.

[9] Lynn Garner, *Stimulus Provides $40 Billion in Spending, $20 Billion in Tax Credits for Energy Projects*, Daily Env't Rep. (BNA), Feb. 20, 2009.

[10] *Id.*

[11] Steven Cook, *Committee Adopts Bill to Reverse EPA on California Limits on Greenhouse Gases*, Daily Env't Rep. (BNA), May 22, 2008; *see generally S. 2555: Reducing Global Warming Pollution From Vehicles Act of 2008*, Govtrack.us *available at* http://www.govtrack.us/congress/bill.xpd?bill=s110-2555.

[12] Dean Scott and Carolyn Whetzel, *Obama Directs EPA to Review Waiver Ruling; Orders Action on Vehicle Efficiency Standards*, Daily Env't Rep. (BNA), Jan. 30, 2009.

[13] Steven D. Cook and Carolyn Whetzel, *EPA to Hold Hearing, Take Comment on Waiver for California Emissions Limits*, Daily Env't Rep. (BNA), Feb. 13, 2009.

[14] Steven Cook, *EPA Misses Deadline for Proposing Rule to Require Reporting of Industrial Emissions*, Daily Env't Rep. (BNA), Oct. 1, 2008.

[15] *Id.*

[16] *S. 1387: National Greenhouse Gas Registry Act of 2007*, Govtrack.us *available at* http://www.govtrack.us/congress/bill.xpd?bill=s110-1387.

[17] *H.R. 6877: Greenhouse Gas Registry Act*, Govtrack.us *available at* http://www.govtrack.us/congress/bill.xpd?bill=h110-6877.

[18] *See* Advance Notice of Proposed Rulemaking: Regulating Greenhouse Gas Emissions Under the Clean Air Act *available at* http://www.epa.gov/climatechange/anpr.html.

[19] Printable Fact Sheet, *available at* http://www.epa.gov/climatechange/anpr.html.

[20] Dean Scott, *EPA Requests Comments, Defers Decision on Whether Warming Imperils Public Health*, Daily Env't Rep. (BNA), July 14, 2008.

[21] *See* Roger Martella, James Cahan, and Chris Bell, *EPA's Greenhouse Gas proposal: A Blueprint for Federal Regulation*, Daily Env't Rep. (BNA), Oct. 24, 2008.

[22] *Id.*

[23] Scott, *supra* note 20.

[24] Steven Cook, *EPA Issues Advance Notice Seeking Comment on Regulating Emissions Under Clean Air Act*, Daily Env't Rep., July 31, 2008.

[25] *Id. See also* Full Text of ANPR, *available at* http://www.epa.gov/climatechange/anpr.html.

[26] Comment Period Extension Letter to John Engler of Nov. 14, 2008 *available at* http://www.epa.gov/climatechange/emissions/downloads/NAMletter.pdf.

[27] California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12156 (March 6, 2008).

[28] *Id.* at 12156-57.

[29] *Id.* at 12157.

[30] Carolyn Whetzel, *California, 15 Other States Seek Reversal of EPA's Decision to Deny Waiver Request*, Daily Env't Rep. (BNA), Jan. 3, 2008.

[31] *EPA Pushes Novel Bid to Allow Key Panel to Review GHG Waiver Case*, InsideEPA.com, April 1, 2008

[32] *Plaintiffs Aim to Set Precedent to Review EPA Rules Outside of D.C. Circuit*, InsideEPA.com, March 28, 2008.

[33] Steven Cook, *Ninth Circuit Rejects EPA Bid to Dismiss California Lawsuit on Greenhouse Gases*, Daily Env't Rep. (BNA), April 14, 2008.

[34] Carolyn Whetzel, *Ninth Circuit Rejects Administration's Bid for Review of Ruling on New Fuel Standards*, Daily Env't Rep. (BNA), Aug. 19, 2008.

[35] Carolyn Whetzel, *Court Denies Auto Industry Effort to Expand Injunction on California Rules*, Daily Env't Rep. (BNA), June 26, 2008. *See also Cent. Valley Chrysler-Jeep v. Goldstene*, 529 F.Supp.2d 1151 (E.D. Cal. 2007), aff'd on reh'g, 563 F.Supp.2d 1158 (E.D. Cal. 2008).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *In re: Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (Nov. 13, 2008).

[40] *Id.* at 6-7.

[41] *Id.* at 37.

[42] *Id.* at 63.

[43] *Id.* at 63-64.

[44] Steven Cook, *EPA Says Carbon Dioxide Emissions Not a Consideration for Permit Decisions*, Daily Env't Rep. (BNA), Dec. 19, 2008.

[45] Memorandum re: EPA's Interpretation of Regulations that Determine Pollutants Covered By Federal Prevention of Significant Deterioration (PSD) Permit Program, Dec. 18, 2008 *available at* http://www.epa.gov/nsr/documents/psd_interpretive_memo_12.18.08.pdf.

[46] Cook, *supra* note 44.

[47] Letter in response to amended petition for reconsideration, Feb. 17, 2009 *available at* http://pub.bna.com/ptcj/JacksonLetter_Memo_Reconsideration.pdf.

[48] *Id.*

[49] Steven D. Cook, *EPA Board Remands Boiler Permit Issued by Michigan for Carbon Dioxide Review*, Daily Env't Rep. (BNA), Feb. 24, 2008.

[50] *Id.*

[51] No. 07-1151.

[52] Andrew Childers, *Group Says EPA Definition of 'Natural' Event In Exceptional Event Rule Violates Air Act*, Daily Env't Rep. (BNA), Oct. 9, 2008.

Prepare for Tougher Environmental Enforcement

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The Obama administration has made it clear that it will pursue a program of vigorous environmental regulatory enforcement, coupled with an aggressive interpretation and expansion of environmental policies. One of the first acts of new U.S. Environmental Protection Agency (EPA) administrator Lisa Jackson was the distribution of an open letter to the agency's employees, in which she pledged efforts that would advance the administration's commitment to environmental protection as part of a dramatic change in the face of American environmentalism. The EPA's Office of Enforcement and Compliance Assurance (OCEA) is likely to expand its well established position by both participating in EPA's ongoing debates over expanded environmental policy, and by playing a significant role in driving that policy through its enforcement actions.

Critics frequently assert that business and industry benefited from lax environmental enforcement under the Bush administration. In fact, OECA's accomplishments during the Bush administration far exceeded those of the Clinton administration by many measures. Furthermore, many companies that were targets of OECA enforcement actions believe the Bush administration's OECA was the most stringent environmental enforcement office to date. In any event, it appears to be a certainty that the Obama administration will feel pressure to surpass the environmental enforcement successes of the Bush administration. Not surprisingly, many believe this desire will result in bringing more businesses and industries within OECA's crosshairs.

New Enforcement Approach

A prime example of how OECA has already influenced policy through its enforcement actions can be seen in the Clean Air Act's (CAA) New Source Review (NSR) program. Under the Clinton administration, EPA brought a significant number of major cases under the NSR program. These cases were inherited by the Bush administration and functioned as a substantial restriction on the ability of the EPA's policy apparatus to drastically change the NSR program. Because of the cases filed during the Clinton years, the United States took formal litigation positions on how the existing NSR program operated. As a result, the Bush administration was forced to initiate rulemaking proceedings to change the NSR program, thereby exposing those changes to litigation, and thwarting the Bush administration's attempt to substantially alter the NSR program. Without the litigation positions taken during the Clinton years, the Bush administration could have simply implemented reforms through case-by-case permits, guidance, and general implementation of the program over the course of eight years.

By contrast, the Obama administration's OECA will not be expected to impede the development of new policy, though it will likely continue to be used as a tool to advance OECA's vision of environmental policy, especially in areas where rulemaking procedures may delay the implementation of the administration's preferred policies. Furthermore, EPA officials in the new administration will almost certainly offer less resistance to OECA's use of enforcement actions to drive policy where it believes the program has not been sufficiently aggressive. This approach to policy development, however, exposes companies selected by OECA in its effort to advance such policies to significant additional risks which are often difficult to predict and prevent.

Direct and Indirect Costs

Companies targeted by OECA enforcement actions often face expenditures, including the direct and indirect costs of civil and criminal litigation, the costs to meet injunctive relief requirements, as well as commitments that effectively make it more difficult to comply with existing regulations. These expenditures place the target of environmental enforcement actions at a considerable disadvantage to competitors that are lucky enough not to be targeted by OECA, and thus, do not incur the costs of meeting such requirements.

The costs involved can be enormous. For example, the landmark 2007 consent decree between EPA and American Electric Power to settle an NSR action initiated in 1999, which the EPA called "unprecedented" and the biggest enforcement settlement in U.S. history, involved $15 million in civil penalties and $60 million in cleanup costs. However, the long-term cost of reducing emissions from the company's coal-fired power plants was estimated at more than $4.6 billion. There is reason to believe that a number of EPA enforcement officials consider this settlement to be a model for expanding the capital costs of environmental cleanup beyond immediate settlement penalties. The cost to any company could be substantial, particularly if future settlements include requirements to implement renewable energy or to develop carbon capture technologies.

Notably, a foundation already exists for stepped-up criminal enforcement actions. A decade ago, the landmark federal appeals court decision in *U.S. v. Hanousek,* 176 F.3d 1116 (9th Cir. 1999), rejected arguments that a criminal conviction should require "gross" or "criminal" negligence, concluding instead that the prosecution's demonstration of ordinary negligence was sufficient to uphold the conviction of a supervisor under the Clean Water Act. Subsequently,

the prosecutorial attitude toward companies and their officials has been that environmental "accidents" have preventable causes and that the failure to exercise "reasonable care" justifies criminal prosecution. Recently, OECA's track record demonstrates that it is concentrating on large companies and alleging criminal conduct that it has historically addressed in the civil context. This trend is very likely to continue or even grow under the Obama administration.

Proactive Audit Solution

Despite the current economic situation, these trends strongly indicate that companies would be very wise to prepare for stepped-up enforcement activity. As a result, companies need to continue to do their utmost to identify and correct their compliance concerns and to anticipate and prepare themselves scrupulously for inspections, information requests and the defense of enforcement actions. Two essential tools for accomplishing these objectives are: (1) to implement vigorous compliance auditing efforts; and (2) to maintain strong, defense-minded corporate compliance systems. These efforts can sharply reduce significant potential compliance, enforcement, and liability risks by identifying and eliminating potential compliance concerns prior to the next inspection. Further, by providing strong ammunition for contesting enforcement actions, a properly designed audit and compliance effort can help:

- Determine what potential compliance concerns may exist and allow a company to proactively address the problems before inspection, inquiry, enforcement or litigation occurs;
- Identify compliance concerns that may be eligible for a substantial reduction of or even immunity from potential federal or state penalties;
- Carefully self-evaluate compliance without creating a discoverable documentary road map for enforcers, activists or plaintiffs by taking advantage of available legal and audit privileges.

Without careful planning and input from experienced professionals, however, these efforts are fraught with risk. A company should begin its environmental audit effort by employing highly qualified internal and external environmental technical and legal experts to help design, administer, and fine-tune an audit program. The goal is to pursue an audit that reduces risk by beneficially uncovering and correcting overlooked compliance obligations without exposing the company to the greater legal risks that can easily arise from careless investigative, drafting, corrective, or disclosure efforts.

In addition to environmental audits, companies facing renewed enforcement scrutiny can benefit from corporate compliance programs – sometimes referred to as "environmental management systems" (EMS). EMS programs begin with a strong policy statement on environmental protection and follow through with a broad effort designed to ensure compliance and performance, to change cultures that do not support those goals, and to achieve continuous environmental improvement. Common EMS elements include the following:

- Preparation and maintenance of written plans, programs, and procedures for achieving those objectives and targets, including calendars and other tools to better ensure the timely completion of ongoing environmental regulatory responsibilities;
- Specific assignment of environmental responsibilities to different job descriptions and categories of personnel throughout the organization;
- Documented training of all employees with environmental responsibilities on environmental procedures, requirements, and objectives to ensure competency and understanding;
- Periodic internal and independent auditing to confirm the effectiveness of environmental management, compliance, and training efforts;
- Systems for tracking and ensuring the documented, adequate correction and prevention of any gaps in environmental compliance or performance;
- Programs of document control to help ensure that the right things are being performed and documented;
- Regular executive review and updating of the management system to ensure that it is serving its purpose effectively;
- Use of feedback from the review effort to reassess and revise the EMS elements by constantly updating policies, performance reviews, objectives, procedures, responsibilities, training, and audits - all in pursuit of a continuous environmental improvement cycle.

A systematic approach to compliance – the right people, policies and support tools – institutionalizes improvement and provides a better chance of succeeding and of earning regulatory favor than an informal or *ad hoc* approach. With careful planning, companies can even begin building effective defenses against potential claims and liabilities. Fundamentally, these efforts are intended: (1) to help keep environmental compliance and performance concerns from falling through the cracks; (2) to better demonstrate that the company is committed to compliance through real, documented, and measurable efforts; and (3) to help prove that any noncompliance occurred despite the company's best efforts (not as a result of carelessness or a lack of effort).

State and federal environmental policy virtually always recognize culpability and good faith efforts as factors that can help to prevent the commencement of enforcement actions or, at a minimum, lead to reduced civil penalties. With the assistance of experienced environmental governance and enforcement counsel, companies can better design, implement, and troubleshoot compliance policies that incorporate preparation, prevention, and defense objectives.

Potential Liability Risk

Unfortunately, both environmental audits and EMS can create or elevate many legal concerns – from issues uncovered by audits that can provide evidence of violations and a company's knowledge thereof, to the establishment of written policies, procedures, and statements about environmental duties that may become evidence to help establish a company's perceived duties or even to establish a predicate for individual criminal responsibility. These approaches can create such legal pitfalls as:

- Periodic environmental compliance audits, if not properly and promptly acted upon, can provide regulators evidence to support more serious charges against a company on the basis of knowledge, culpability, or an apparent financial motive for noncompliance;
- Senior managers who have responsibility for the provision of resources for environmental compliance, or who become aware of environmental problems through EMS mechanisms without promptly addressing them, may face personal criminal liability.

Since environmental laws are constantly changing, exposure to liability for businesses and industries shifts accordingly. As a result, EMS mechanisms and periodic environmental audits seem to be a virtual necessity to assure compliance for complex facilities and large organizations. Given the legal risks involved, however, companies should be careful to launch EMS and audit efforts with the input of legal professionals who are experienced in environmental auditing and corporate compliance programs. Receiving the right legal guidance in advance can help reduce the potential liability risks of uncovering and/or creating evidence of environmental violations. Experienced counsel can also help to identify the best strategies for correcting alleged violations, documenting solutions, working with the relevant agencies, and obtaining protections from federal and state agencies that offer opportunities for leniency or immunity from liability. All with the objective of furthering environmental protection while minimizing enforcement and other legal exposures.

Undoubtedly, regulated industries will begin to face more strict enforcement scrutiny in the coming years. This scrutiny will inevitably have a financial impact on most companies within these industries. For example, the American Petroleum Institute estimates that companies in the U.S. oil and natural gas industry alone have already invested more than $160 billion since 1990 toward improving environmental performance. With exposure to environmental enforcement activities already at record levels, the financial picture presented to regulated industries looks even more challenging. As a result, the coming era of increased attention to compliance issues warrants careful consideration and implementation of well-designed audits and corporate compliance programs as tools to assure compliance and to prepare defenses to environmental enforcement activity.

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Is Vapor Intrusion a "Next Big Thing" in Environmental Law

Article contributed by: Edward V. Walsh, III

Introduction

If, as predicted, the State of New York is the bellwether for the approach environmental regulators will take nationally on the increasingly prominent issue of "vapor intrusion," then there will be a lot of disgruntled property owners who

have completed what they thought were final environmental cleanups, only to find out otherwise. If the New York approach is an indication of things to come elsewhere, vapor intrusion (VI), the migration of contamination in a gaseous state into the indoor air environment from contaminated soil or groundwater, could be a "next big thing" in the environmental area. This is because the New York State Department of Environmental Conservation (NYSDEC) has confirmed that it has "reopened" for VI investigation 421 sites where it had made "final" remedial decisions, prior to 2003.[1] Many of the reopened sites were subsequently deemed by NYSDEC to require additional "mitigation." Litigation has resulted at one such site where, although groundwater contamination was known to have existed for nearly 2 decades, a vapor intrusion threat was discovered only during an assessment done in 2004. In ruling for the plaintiffs on a motion to dismiss the lawsuit as untimely, the court ruled that the case filing complied with the 3 year statute of limitations.[2]

Reopening closed sites presents new legal issues, including who is liable for a previously closed site that has since changed hands, but now must be revisited? Perhaps more daunting is the prospect of lawsuits based on alleged exposures. Many of the guidance documents issued by the various states have public notice requirements for VI sites, possibly providing a class action road map for the plaintiffs' bar. In the context of negligence law, one must consider whether the duty of care requires an assessment of the increasingly publicized VI threat at previously closed sites, even in the absence of government prodding. For many developers, particularly of Brownfield sites, who took on cleanup duties as "volunteers" and had nothing to do with the original pollution, the VI reopener is a real game changer in its potential to disrupt reasonable investment-backed expectations.

New York is not alone in addressing the VI issue. The United State Environmental Protection Agency (USEPA) issued draft guidance on VI in 2002,[3] and since that time a number of states have issued their own guidance. At present, at least 21 states have issued guidance on VI and more are expected to do so.[4] Because many of the regulatory guidance documents set screening levels for constituents of concern, mostly volatile organic compounds (VOCs), at very low thresholds, complex investigatory challenges, in addition to thorny legal questions, can arise. The regulators defend the low thresholds by arguing that they are more likely to reveal a VI problem, notwithstanding the flip side of this argument, that a "false positive" might also result. This can occur when screening levels are set so low that they detect background conditions, from sources such as paint, glue or adhesive vapors from indoor use, and not a true VI problem. Experts say that either a false negative or positive result may readily occur if the technical investigatory approach at a site is inadequate.

The silver lining, if there is one, is that mitigation of a VI problem is generally not overly expensive. The most common fix is to retrofit existing threatened structures with "radon-type" mitigation systems, essentially robust ventilation systems. The real costs are likely to be incurred in connection with the investigation of VI concerns in the first instance, in connection with lawsuits over responsibility for such costs where expended and/or in connection with "exposure" claims that may arise where a VI problem exists.

Nature of the Problem

VI as an exposure pathway should not be confused with the direct inhalation pathway already considered in most site closure programs. The direct inhalation pathway generally deals with higher concentrations of VOCs or other substances present in a "breathing zone," such as a construction excavation, and is more directed at acute conditions. In contrast, the VI exposure pathway generally addresses a more subtle, long term exposure threat to building occupants as a result of the off-gassing (evaporation) of chemicals from polluted soil or groundwater and infiltration of vapors at relatively low, usually imperceptible, concentrations. This "soil gas" can enter into a structure through cracks and seams in a floor slab, utility connections, sump pits and the like, by way of "advection," the movement of air due to differences in pressure. Because pressure is generally higher under a building than within it, "depressurization" can occur, resulting in vapors moving into a building from a contaminated sub-surface. In addition, because vapors can move laterally or vertically from a source of contamination to a structure, current USEPA guidance generally requires at least 100 feet of lateral/vertical separation from a known impacted area, in order to rule out a VI threat.[5]

There is, of course, no "typical" VI site. However a site impacted by chlorinated VOCs, such as perchloroethylene (PCE)(widely used in dry-cleaning), trichloroethene (TCE)(a common degreaser), or by gasoline and petroleum constituents (*e.g.*, benzene), is a prime candidate for VI impacts.[6] Because soil gas can migrate, as noted, VI problems can arise from an off-site source and greatly confuse whether some known impact at a site is actually the source/cause of a VI problem, a mere contributor, or entirely blameless. The widespread presence of VOCs in consumer products presents additional technical challenges in VI investigations because of background interference and the difficulty in isolating the real culprit.

Regulatory Guidance

As noted above, both the USEPA and nearly half of the states have issued regulatory guidance on VI. Many of the states essentially incorporate the USEPA guidance by reference while others, such as New York, have adopted their own

quite detailed VI standards. At present the various regulatory guidance documents are not considered enforceable rules or regulations. New York specifically disclaims that its guidance document constitutes an enforceable rule or regulation.[7] Nonetheless, such guidance can become binding when the regulator is holding other cards, such as the ability to void a previously issued no further action letter based on information that a threat to public health remains. Moreover, one should anticipate that current guidance will eventually be incorporated into binding regulations. In Illinois, for example, although a VI guidance document has yet to be issued, VI amendments have been proposed to Illinois' TACO (tiered approach to corrective action) regulation which applies to cleanups under the state's voluntary site remediation program, as well as to its mandatory leaking underground storage tank and RCRA closure programs.[8]

Like many environmental programs throughout the United States, there is a patchwork of approaches to the VI issue. At the federal level, the USEPA guidance calls for the sampling of various media (*e.g.*, soil gas, groundwater, etc.) and allows for the use of mathematical models, such as the "Johnson & Ettinger" model, to estimate vapor concentrations that may be expected in indoor air. Another guidance document, designed to distill an investigatory approach from the various state and federal guidelines issued to date, has been issued by the Interstate Technology & Regulatory Council (ITRC) and proposes a "multiple lines of evidence" approach to evaluating the potential for VI.[9] New York's 82 page guidance document covers sample collection, data evaluation and specifies in matrix format, "action levels" for various chemicals.[10] Illinois' draft regulation uses a catchall definition of "volatile chemicals," including elemental mercury, rather than a list of chemicals with "look up" concentrations. Under this draft regulation, Illinois will allow pathway exclusion, consideration of site specific factors, etc., and the use of the ". . . modified Johnson and Ettinger (J&E) model to develop remediation standards;. . . this modified J&E model used in TACO contains 18 equations and 56 parameters."[11] Clearly, under all or any of the various approaches, a solid technical understanding of the science and site specific variability of VI will be required.

Technical Challenges

At first blush it would appear relatively straightforward to determine whether indoor air is affected by VI by simply sampling it. For both legal and technical reasons this is usually not the best initial approach. The most obvious legal reason for not conducting such sampling is to avoid producing discoverable data that shows exposures to building occupants. Because indoor air sampling may not be required at all under some programs, particularly those allowing for the use of mathematical modeling, undertaking such sampling may be avoided altogether. Indeed, in order to avoid indoor sampling and the cost of substantial investigation, it may be cheaper to move directly to mitigation. Such mitigation may involve the installation of ventilation/pressurization systems, where VI concerns are a real potential at a site, not unlike the systems designed to vent radon gas infiltration.

The most prominent technical reason for not undertaking indoor air sampling is the ubiquitous presence of VOCs in consumer products, building materials, and even in ambient air. As such, the sampling of indoor air may simply reveal a background condition unrelated to sub-surface VI. For example, VOCs are present in paints, glues and adhesives, cleaners and solvents (*e.g.*, nail polish remover), among other items commonly used in residential and work environments. In addition, the literature suggests that in some areas of the country ambient air concentrations for a variety of chemicals exceed the screening levels established for the same chemicals under many of the guidance documents discussed above. Thus, where indoor air samples are ultimately taken, one must take care to account for and explain background interferences. One way to do this is to introduce "tracers" into the sub-surface at a suspect site. If the tracers are not detected in subsequent indoor air samples, the source of any VOCs detected is likely to be from a background condition, not the site's subsurface. Other factors may also need to be taken into account, such as when the sampling occurs, *e.g.*, during the heating season versus non-heating season, or when air conditioning and ventilation systems are operating, because such factors can make indoor air results confusing or unreliable.

For the above reasons, sampling in the first instance typically will focus on the sub-surface environment, and to protect against either false positives or negatives, will employ a multiple lines of evidence approach. Most of the guidance documents specify the type of sampling to be conducted, but if the results are ambiguous, additional sampling approaches should be considered. As the USEPA points out, each sampling approach has its pro and cons, including relative reliability, site disruption and, of course, cost.[12] New York's guidance specifies four types of sampling that can be conducted depending on site specific considerations, including: (1) subsurface vapor samples, both soil vapor (deeper) and sub-slab vapor samples (immediately below the floor slab); (2) crawl space air samples; (3) indoor air samples; and (4) outdoor air samples. New York's guidance also calls for sampling to be done during the heating season, unless the need for immediate sampling is indicated, ". . . because soil vapor intrusion is more likely to occur when a building's heating system is in operation and doors and windows are closed."[13] Other sampling strategies focus on groundwater and bulk soil sampling, including for use in mathematical models.

Whatever sampling strategy is adopted or required, VI investigations are rife with data quality considerations. This is particularly true given the very low screening thresholds and often relatively high background levels that can exist at a site. Equipment considerations can play a crucial role in sampling, from assuring that tubing used in soil vapor collection is clean and inert to establishing that canisters and other collection equipment are not leaking. By and large, VI sampling requires specialized expertise, because of the collection techniques employed, equipment used and the wide site-to-site variability in conditions encountered. The goal is an investigation that is fully reliable and defensible to the regulators, and perhaps to third parties should a site wind up in private litigation.

Legal Issues

Any number of legal issues can arise from the reopening of previously closed sites for VI investigations. In those instances where a property, previously closed, has since been sold, financial responsibility for investigation or mitigation of a VI problem will likely be determined by the sale contract between the parties. Most sale contracts include indemnity provisions covering breaches of representation, such as that the site complies with environmental law or is free of hazardous materials. Some contractual representations are limited to "known environmental conditions," providing specific indemnification for losses resulting from claims arising out of such conditions. But for how long do the representations survive? What are the dollar limits and after what thresholds? For representations based on "knowledge," can there be a breach at all where the government makes a "new" demand based on VI or where the underlying pollution was disclosed to a buyer, but VI was not on either party's radar screen? Does the indemnity apply at all in the absence of a "claim," *i.e.*, a lawsuit or some other coercive demand? Who bears the risk of a change in law creating new legal duties with respect to VI? Questions with respect to compliance with loan covenants and the availability of insurance coverage are likely to arise as well.

The VI threat may also change the attractiveness or utility of the monitored natural attenuation approach to groundwater cleanup. It is one thing to exclude an ingestion exposure pathway by demonstrating that no one will use the groundwater, but this approach does not necessarily address potential VI concerns. Such concerns may also make more compelling any claims for property value diminution, medical monitoring, and the like.

Conclusion

Time will bring clarity on whether VI will become one of the "next big things" in environmental law. In the meantime it seems a sure bet that some major headaches are in store. Some of the headaches can be avoided with a solid technical and legal approach in this relatively new area. Meanwhile, environmental practitioners should plan on adding vapor intrusion to the long list of issues to consider at any known or suspected pollution site, particularly in the purchase or sale of such a site.

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[1] Interstate Technology and Regulatory Council (ITRC) Survey, Oct. 2007.
[2] *Aiken v. General Electric Co.*, 2008 NY Slip Op 09527 (3d Dep't. 2008)
[3] USEPA Office of Solid Waste and Emergency Response (OWSER) Draft Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Groundwater and Soils (Subsurface Vapor Intrusion Guide), *available at* http://www.epa.gov/EPA-AIR/2002/November/Day-29/a30261.htm.
[4] *See* Brownfields Technology Primer: Vapor Intrusion Considerations for Redevelopment, *available at* http://www.brownfieldstsc.org/pdfs/BTSC%20Vapor%20Intrusion%20Considerations%20for%20Redevelopment%20EPA%20542-R-08-001.pdf. Table A lists the following states: Alaska, California, Colorado, Connecticut, Delaware, Idaho, Indiana, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Wisconsin.
[5] *See* USEPA Draft Guidance, *supra* note 3.
[6] Typically impacts by inorganic contaminants, such as metals, are not a VI concern with the exception of elemental mercury; USEPA's guidance lists 115 typical chemicals of concern in connection with VI. *See*, USEPA Draft Guidance, *supra* note 3, Table 1.
[7] New York State Department of Health, Response to Comments on Guidance for Evaluating Soil Vapor Intrusion in the State of New York, *available at* http://www.health.state.ny.us/environmental/indoors/vapor_intrusion/response_to_comments.htm.
[8] *See* In the Matter of Proposed Amendments to Tiered Approach to Corrective Action Objectives (35 IAC 742), Docket R09-009, before the Illinois Pollution Control Board.
[9] ITRC, Vapor Intrusion Pathway: A Practical Guideline (2007a). *See also* American Society for Testing Materials (ASTM) Standard E-2600-08, *available at* http://www.astm.org/Standards/E2600.htm.
[10] *See* Table 3-1.
[11] *See* TACO Amendments, *supra* note 8, 35 IAC 742.200.
[12] *See* Brownfields Technology Primer, *supra* note 4, at 13.
[13] *See* New York Guidance, *supra* note 7, at 12.

New NJDEP Regulations Require Public Outreach at Remediation Sites

Article contributed by: Norman W. Spindel and Alyson D. Powell

Introduction

Effective September 2, 2008, the New Jersey Department of Environmental Protection (NJDEP) adopted amendments to its Technical Requirements for Site Remediation (the Tech Regs)[1] compelling public notification of ongoing remedial action at sites subject to NJDEP oversight. Effective immediately for new cases, the Tech Regs create public notice obligations for parties responsible for conducting site investigation and/or cleanup.[2] Major provisions of the new rules include mandatory guidelines for identification of "sensitive populations," notice requirements to owners and residents of property within 200 feet of cleanup sites, as well as opportunities for direct community involvement in remediation matters. Each requirement mandates compliance by specified deadlines and establishes civil penalties for non-compliance.

Though somewhat lengthy, the new rules offer few surprises to persons who have followed the NJDEP rulemaking process. Section 1.4 of the Tech Regs is nearly identical to the proposed amendments published by NJDEP in August 2007 despite extensive comments from various segments of interested parties. While the mandate to provide public notice of remediation activities may pose an additional burden on the regulated community, the adoption of these regulations is far from unexpected. Rather, the new rules are the natural result of events and policy decisions that, over the years, have gradually re-shaped the way NJDEP oversees the site remediation process.[3] By formally adopting its public notice and outreach amendments - rather than relying on the regulated community's voluntary action - NJDEP demonstrates its intent to lead on the issue of providing an opportunity for public involvement in environmental issues that can potentially impact the community.

The New Rules: N.J.A.C. 7:26E-1.4

The primary goal of the new public notification and outreach amendments is to foster early communication among all parties affected by the site remediation process. By requiring dissemination of information and creating a mechanism by which the public can raise questions and concerns about a site, the new rules are intended to help responsible parties anticipate and address issues in a proactive and cost effective manner, while at the same time building community trust and support for their cleanup efforts. To achieve this goal, the amendments implement the following requirements.

Early Identification of Affected Individuals and Resources

Prior to beginning the remedial investigation phase of a multi-phase or a single phase remedial action at a site,[4] the party responsible for conducting the remedial action must make several determinations regarding the environs of the subject site. First, any and all affected sensitive receptors and resources located within 200 feet of the site boundaries must be identified. These populations and resources include residences, potable wells, schools (teaching grades K-12), child care facilities, public parks and playgrounds, surface waters, and Tier 1 well-head protection areas.[5] A responsible party can comply with this requirement by completing NJDEP's standard form "Sensitive Population and Resource Checklist."[6] In addition, the responsible party must determine whether the site is located in an Environmental Justice Petition neighborhood,[7] and/or an area where the majority of property owners and residents primarily speak a language other than English. Finally, the responsible party must generate a scaled map, in both hard copy and electronic form, identifying the site location as well as the specific location of each identified sensitive population and resource.[8]

The required information must be submitted, at least two weeks prior to commencing the remedial investigation or single-phase remediation, in both paper and electronic form (CD or disk) to the NJDEP case manager, NJDEP's Office of Community Relations ("OCR"),[9] the clerk of each municipality in which the contaminated site is located, and the designated local health official.[10] The information submitted will assist both the responsible party and NJDEP in ensuring that the design and implementation of any remedial actions taken at the site will take into consideration the unique characteristics of these receptors and resources.

Providing Notice to the Public

Once the initial determinations mentioned above are completed, parties responsible for remediation must undertake a program of providing notice of remedial activities to the surrounding community members. Any such notice must be provided at least two weeks prior to initiating remedial investigation field activities or a single phase remediation by either: (1) posting a sign; or (2) sending individual letters to potentially affected persons in the vicinity of the subject site.

1) Notification by Signage

The regulations specify that any sign must be at least two feet by three feet in size, be printed in a large enough font to be legible from the sidewalk or street, and must include the following wording:

"Environmental Investigation/Cleanup In Progress at this Site"	
"For Further Information Contact" [Remediator Name and Number] and	
	[NJDEP OCR Number]
	[NJDEP/EPA site ID number] or
	[NJDEP hotline 877-WARNDEP if ID not available]
"Posted On"	**[Posted Date]**

If English is not the predominant language spoken in the area within 200 feet of the subject site, the sign must be printed in the language commonly spoken in the area. NJDEP does not direct where the sign is to be placed as long as it is legible to the public. However, local building codes may impose additional restrictions on the size and location of the sign. Thus, a responsible party should consult the local code (or other municipal official) to determine whether there are additional local requirements for public signage.

Within two weeks of erecting the sign, the responsible party must photograph the sign and submit it along with specified site information notice to: (i) the NJDEP case manager;[11] (ii) NJDEP's Office of Community Relations (OCR); (iii) the clerk of each municipality in which the contaminated site is

located; and (iv) local health official(s). The site information notice includes: (i) the name and address of the site; (ii) the site tax blocks and lots; (iii) the NJDEP preferred ID number or EPA site ID number or, if neither of those are available, the NJDEP hotline number [877-WARNDEP (877-927-6330)];[12] (iv) a statement that contamination has been identified; (v) a brief, common language description of the type of contamination, the affected media and the actions being taken; (vi) contact information for the responsible party and the NJDEP OCR; and (vii) a statement warranting that the responsible party will provide copies of environmental reports to the municipality upon request.

Signs must be maintained in legible condition at all times, and must remain posted until the NJDEP issues a No Further Action and Covenant Not to Sue letter to the responsible party. The responsible party may remove the sign prior to this time, but must, prior to doing so, substitute letter notices.

2) Notification by Letter[13]

Letters must be sent, by registered mail or using the certificate of mailing service to: (i) owners of all properties within 200 feet of the subject site's boundaries; (ii) tenants of these properties; and (iii) the administrator of each school and child day care center identified on the Sensitive Population and Resource Checklist previously prepared and submitted to NJDEP.[14] Letters must include: (i) the name and address of the site; (ii) the tax blocks and lots; (iii) the NJDEP preferred ID number or the EPA site ID number or, if neither are available, the NJDEP hotline number [877-WARNDEP (877-927-6330)]; (iv) a statement that contamination has been identified; (v) a brief, common language description of the type of contamination, the affected media and the actions being taken; (vi) contact information for the responsible party and the NJDEP OCR; and (vii) a statement that the responsible party will provide copies of environmental reports to the municipality upon request, to all owners and residents of property located within 200 feet of the cleanup site boundary.

Property owners may be identified by contacting municipal authorities. Tenants of properties, however, may not be as easily identified. Property owners can provide this information, but may be hesitant to do so. If multi-tenanted properties have individual mailing addresses, the U.S. Postal Service may be of assistance in assuring that notices are delivered to property occupants.

A copy of the notice letter and a list of the notice recipients must be sent, both in paper and electronic form, to: (i) the NJDEP case manager; (iii) NJDEP's OCR; (iii) the clerk of each municipality in which the contaminated site is located; and (iv) the local health official(s).

Letters providing a status update on case must be resent every two years until the case is closed by issuance of a No Further Action letter.

3) Alternative Notification

If a responsible party determines that an alternative form of notification would better to achieve the objectives of NJDEP's public outreach program, an alternative plan can be submitted to the OCR for review and approval.

Special Situations

NJDEP has established additional requirements for those cases that potentially pose unique concerns to the public. As a result of a number of recent cases receiving considerable notoriety regarding the use of contaminated fill for site redevelopment,[15] NJDEP now imposes additional notice obligations upon a person proposing to import contaminated fill in quantities in excess of that needed for site remediation. Notices of the use of contaminated fill must be sent by letter to: (i) all owners and tenants of property within 200 feet of the site boundary; (ii) the assigned case manager; (iii) the mayor of each municipality where the site is located; (iv) the county solid waste coordinator; and (v) local health official(s). These notices must be sent via certified mail, and must include a description of the proposed use, the amount of fill material and its level of contamination, as well as a plan for mitigating the risks associated with the fill material.

Additional requirements also are imposed in cases involving offsite migration of contamination. In such cases, notice must be distributed by fact sheet to all owners and tenants of properties located within 200 feet of the subject properties boundaries. The fact sheet must include the site name and address, the site tax block(s) and lot(s), the NJDEP Preferred ID number or EPA site identification number, or the NJDEP hotline phone number. In addition, the fact sheet must describe*, inter alia*, the commercial or industrial history of the site, the type and extent of contamination, its sources, a list of online resources offering information about the contaminants, and the proposed mitigation plan. Initial fact sheets must be prepared and mailed within two weeks of the discovery of the offsite migration. Thereafter, within four weeks of discovery, the fact sheet must be published as display advertisements in local newspapers, and copies must be submitted to: (i) the NJDEP case manager; (ii) NJDEP's OCR; (iii) the clerk of each municipality in which the contaminated site is located; and (iv) local health official(s).

Public Outreach for Substantial Public Interest Sites

Under the new rules, NJDEP reserves the right to require parties to perform additional public outreach if a community demonstrates substantial interest in cleanup activities

(as evidenced by a petition signed by twenty-five persons residing or working within 200 feet of the site or by written request from a municipal official). Demonstrated community interest triggers additional responsibilities for the remediating party, including publicizing and hosting public information sessions or public meetings, publishing notice of basic site information in the local paper, or establishing a local information repository.

Conclusion

NJDEP's objective in establishing mandatory public notice requirements is to increase transparency in site remediation cases, and, through increased early public participation, promote efficiencies in these cases to reduce the ultimate cost of remediation. While this is a laudable objective, it is too early to comment on how best to comply with the regulations or evaluate whether the desired results will be achieved. The new regulations raise a number of issues to be considered in developing a public notice program. At sites where the responsible party is not the current owner or tenant with unfettered discretion to utilize the site, signage may not be a viable option. Even where signs may be used, the responsible party must decide where to locate the sign. When using letters, the responsible party must carefully consider how to describe the site conditions and activities. As for the benefits, undoubtedly, in a certain number of cases where the type and scope of issues would have attracted public awareness and potential involvement regardless of mandatory early notification, efficiencies in both the implementation and cost of remediation will be enhanced via the NJDEP's new rules. However, in many cases where the nature of the issues would not have otherwise prompted public involvement, these new requirements will impose additional costs on responsible parties and place greater demands on limited public resources.

It is too early to evaluate whether the benefits to the public resulting from notice will outweigh the added private and public burdens. Providing notice in all cases may unnecessarily alarm the public where none is warranted. Given the technical nature of remediation cases and NJDEP's technically complex requirements for investigation and remediation, involvement of the public may confuse, rather than enlighten, the intended beneficiaries of the new regulations. If in fact the intended public benefit of the regulations is not attained, the increased cost to responsible parties will ultimately be viewed by the regulated community as being unwarranted.

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[1] N.J.A.C. 7:26E-1.4

[2] The new rules provide a one year grace period for sites where a remedial investigation was initiated prior to September 2, 2008.

[3] The presence of thousands of sites in New Jersey subject to remedial action, the evolution of public participation in federal cleanup programs, the emergence of social justice concerns, and the notoriety of a number of cases where contaminated sites were deemed not to have been appropriately addressed have all contributed to a general trend toward increased public participation in the remediation process.

[4] The vast majority of remedial actions consist of phased activities consisting of a site investigation, one or more remedial investigation phases, and ultimately the remedial action addressing the contamination previously identified at the site. Thus, the public outreach requirements typically will not be required at the onset of the activities at the subject site.

[5] A list of well site protection areas is *available at* http://www.state.nj.us/dep/njgs/geodata/dgs02-2md.htm.

[6] The Sensitive Population and Resource Checklist is *available at* http://www.nj.gov/dep/srp/guidance/public_notification/checklist.pdf.

[7] Environmental Justice Petition neighborhoods are identified and *available at* http://www.nj.gov/dep/ej.

[8] To assist in the creation of sensitive population and resource maps, the NJDEP provides guidance and links to internet mapping programs on its website, *available at* http://www.state.nj.us/dep/GIS/newmapping.htm.

[9] OCR's address is as follows: Division of Remediation Support, New Jersey Department of Environmental Protection, 401 East State Street, 6th Floor, P.O. Box 413, Trenton, NJ 08625-0413, ATTN: Office of Community Relations.

[10] The regulations do not specify a deadline for submittal of information for cases that had already entered the remedial investigation phase prior to September 2, 2008. The NJDEP's Office of Community Relations has advised that submittal of this information for this class of existing cases is not required due to the belief that existing cases under NJDEP oversight would have already identified sensitive receptors and resources.

[11] If a case manager has not been assigned to the case, documentation of compliance with this requirement must be included in the Site Investigation or Remedial Action Report submitted to NJDEP.

[12] The NJDEP Preferred ID number is *available at* http://www.nj.gov/dep/srp/kcs-nj/.

[13] As in the instance of signs, if English is not the predominant language of the persons receiving letters, the letters must be written in the predominant language.

[14] For existing cases which do not prepare the checklist, sensitive populations and resources must be identified if the public notice is made by letter.

[15] See NJDEP, *DEP Orders Immediate Removal of PCB-Contaminated Concrete from Redevelopment Sites*, Press Release March 8, 2006, *available at* http://www.state.nj.us/dep/newsrel/2006/06_0013.htm.

Reading the Tea Leaves: Prospects for Climate Change Legislation

Article contributed by: Charles O. Verrill, Jr. and Scott Nance

In his address to Congress on February 24, 2009, President Barack Obama asked Congress to prepare two specific pieces of legislation. One was "legislation that places a market-based cap on carbon pollution and drives the production of more renewable energy in America."[1] In late January, Senator Barbara Boxer (D-CA) released a short statement entitled "Principles for Global Warming Legislation."[2] Senator Boxer is Chairman of the Environment & Public Works Committee of the Senate, which is likely to have primary jurisdiction over climate change legislation. Taken together, President Obama's remarks and the Committee's "Principles" provide strong clues as to the direction the Democratic members of the Committee are likely to take in drafting climate change legislation.

The first principle is that legislation will reduce emission levels, "guided by science." Rather than simply limiting the growth in U.S. emissions of greenhouse gases ("GHGs"), legislation will actively seek to reduce those emissions to below current levels. This in itself is not surprising; the Kyoto Protocol (which the United States signed but never ratified) also contemplates reductions in emissions levels. The reference to "guided by science" is a not-so-subtle jab at the Bush administration, which often ignored the work of its own scientists. However, it may be more significant than this. James Hansen of NASA, possibly the most prominent scientist working on climate change within the U.S. government, recently co-authored a paper arguing that, to preserve the climate in its current equilibrium, we will need to reduce the level of CO_2 in the atmosphere from the current 385 parts per million to 350 ppm or less.[3] To achieve this will require reductions in emissions significantly greater than have generally been contemplated.

The second principle calls for short and long term emissions targets. Again, this is not unexpected. It is likely that targets for reductions will be relatively modest at first, increasing over time. A major issue, of course, is the length of the overall time frame for reductions. The principles do not provide any light on this. Similarly, the third principle states that state and local governments should continue "pioneering efforts" to address climate change, without indicating what types of pioneering efforts the legislation would support.

The fourth principle states that legislation must "establish a transparent and accountable market-based system." This is clearly a reference to a cap-and-trade system. Under a cap-and-trade system, certain emitters of greenhouse gases (electricity generators, steel mills, etc.) would be required to provide allowances to cover their greenhouse gas emissions. Allowances could be sold by the government at auction or at a fixed price, distributed free of charge, or some combination. Parties can then buy, sell, and trade emissions among themselves.

Cap-and-trade has been by far the most discussed version of a system for limiting greenhouse gas emissions. The climate change bill introduced in the last Congress by Senator Boxer (S.3036)[4] would have established a cap-and-trade system. In his recent remarks, President Obama explicitly endorsed the cap-and-trade concept. While other proposals for addressing climate change have been put forward, including a carbon tax and carbon intensity standards for energy-intensive products, and while the European Union's experience with a cap-and-trade system has been less than wholly successfully, cap-and-trade is clearly the preferred approach within Congress and the Obama administration at this time.

The reference to a "market-based" system in the principles, combined with the reference to revenues from the carbon market in principle five, indicates that the Committee is envisaging a system under which all (or practically all) allowances will be sold. Significantly, President Obama used precisely the same phrase – "market based cap" – in describing the legislation he expected Congress to submit.

There have been proposals to allocate at least some allowances without charge to industrial energy consumers. These industries could use allowances to cover their own emissions, or sell them to partially offset the higher energy costs that a cap-and-trade system will inevitably impose. President Obama is previously on record as supporting a system where all allowances are sold at auction. While the principles do not explicitly reject this approach, it seems likely that the legislation will require most if not all allowances to be sold at auction.

Principle five lists a number of ways in which the revenue from the carbon market will be used, including "keep consumers whole." Because a cap-and-trade system will lead to higher energy prices, some economists had suggested that the proceeds from the auction of allowances be rebated to energy consumers to offset these higher prices. While principle five seems to contemplate the possibility of rebates, the identification of a number of other uses for auction revenues means that only a portion of the auction proceeds would be rebated. It is unclear how consumers will be made fully whole, as the amount rebated will probably be less than the overall increase in energy costs.

The final principle states that the legislation must "ensure a level global playing field" by encouraging other countries to reduce GHG emissions, and by penalizing them if they do not. This principle addresses the fact that, by increasing energy costs in the United States, climate change legislation will

almost certainly have a negative impact on the international competitiveness of American companies. A number of proposals have been made to apply allowance requirements to imports of energy-intensive products from countries like China and India that do not have climate change legislation. There are real concerns, however, that such a measure would violate the obligations of the United States under the General Agreement on Tariffs and Trade. Alternatives, such as the application of carbon intensity standards to energy-intensive products like cement and steel, whether produced domestically or imported, might avoid this problem, but are not mentioned in the principles.

A wild card in the legislative process is the Environmental Protection Agency. The Supreme Court has held that the EPA has authority to regulate greenhouse gas emissions, and the Obama administration has stated that EPA intends to exercise this authority. This raises the possibility that the EPA could begin a rulemaking on greenhouse gas emissions even as Congress is crafting climate change legislation. A major potential problem with the regulatory approach is that, while legislation can address the effects of climate change legislation on American competitiveness, an EPA regulation probably could not.

President Obama's address to Congress and the legislative principles released by Senator Boxer stake out the position that the United States will implement a cap-and-trade system; that allowances under the system will be sold at auction, and that the legislation will seek to give that system international reach. Of course, the legislation that actually comes out of Congress could be very different from what the principles indicate. Still, it is useful for industry to understand what kind of climate change legislation the Democrats on the Environment & Public Works Committee seem to be considering.

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[1] Remarks of President Barack Obama: Address to Joint Session of Congress (2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress/

[2] This document is currently *available at* http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=14dc734d-74c9-4fb3-8bf2-6d5d539226d1.

[3] J. Hansen et al., *Target Atmospheric CO2: Where Should Humanity Aim?*, *available at* http://www.columbia.edu/~jeh1/2008/TargetCO2_20080407.pdf.

[4] This bill was introduced in the Senate, but withdrawn after a motion for cloture failed to pass. The text of the bill is *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:S.3036.

Addressing Climate Change Through Land Use and Transportation Planning: California's SB 375 and SB 732 - A Legislative Trend?

Article contributed by: Christopher Garrett, Beth Collins-Burgard, Ryan Waterman and Amanda Klopf

California took another unprecedented step in regulating greenhouse gas (GHG) emissions on September 30, 2008, when Governor Arnold Schwarzenegger signed Senate Bill 375 (SB 375) — new legislation designed to reduce transportation-oriented GHG emissions.[1] In 2006, California enacted the Global Warming Solutions Act of 2006 (Assembly Bill 32 (AB 32)), which requires California to reduce its GHG emissions to 1990 levels no later than 2020. This reduction represents a 30 percent decrease from business as usual. SB 375 is California's next step toward achieving AB 32's goal. Vehicle emissions make up approximately 40 percent of California's GHG footprint. SB 375 seeks to reduce these transportation-oriented emissions by basing transportation planning on GHG emission reduction targets and creating land use incentives to change land use development to meet those targets.

This land use legislation, which is the first of its kind in the United States, has once again focused national attention on California and its efforts to address global climate change through innovative regulation.[2] According to Governor Schwarzenegger, SB 375 "creates a model that the rest of the country and world will use."[3] This prediction is underscored by President Barack Obama's November 18, 2008 announcement that he will follow California's lead and work to implement AB 32 targets nationally.[4] As in California, however, to reach these goals nationally, regulators likely will aim to make significant changes in land use and transportation planning strategies and SB 375 may serve as a starting point for any similar federal regulation.[5]

SB 375 is a complicated and important bill that, among other things:

- Creates a mechanism to set regional GHG emission targets throughout California that provide a first-in-the-US overarching statewide land use framework;
- Provides incentives for certain higher density transit-oriented projects that comply with the new land use framework by making them eligible for minimized California Environmental Quality Act (CEQA) review, ranging from complete CEQA exemption to more streamlined CEQA analyses; and
- Requires local governments to coordinate housing development and regional transportation planning and provide for the development of a balanced housing stock that includes affordable units, in part through density bonuses.

This article discusses SB 375's three major provisions: (1) regional transportation planning based on GHG emissions reduction targets, (2) CEQA incentives for qualified projects, and (3) affordable housing obligations and incentives.

Regional Transportation Planning Using GHG Reduction Targets

Existing law requires federally designated metropolitan planning organizations, such as the Southern California Association of Governments (SCAG) or the San Diego Association of Governments (SANDAG), to engage in transportation planning, including development of a Regional Transportation Plan. Under SB 375, the California Air Resources Board (ARB), in consultation with each metropolitan planning organization, must set GHG emission reduction targets for 2020 and 2035 for the automobile and light truck sector for each region. ARB must set these regional targets by September 30, 2010. The timeline below details various key dates leading up to adoption of regional targets. When setting these targets, ARB must take into account GHG reductions that will be achieved by new technology.

After the regional targets are determined, the metropolitan planning organizations will use them to create a Sustainable Communities Strategy (SCS) as part of a regional transportation plan, which will constitute a blueprint for development in the region.[6] The purpose of an SCS is to align regional transportation, housing, and land use plans to reduce the amount of vehicle miles traveled and thus attain the regional GHG reduction target. In fact, SANDAG in San Diego County will be one of the first metropolitan planning organizations to create an SCS as part of its Regional Transportation Plan update process in 2011.

Timeline	
Jan. 31, 2009:	**ARB appoints the Regional Targets Advisory Committee.**
June 1, 2009:	**Clean Air Act attainment area regions, which are required to adopt Regional Transportation Plans every five years, can elect to adopt the plan every four years by June 1, 2009.**
Sept. 20, 2009:	**The Regional Targets Advisory Committee recommends to ARB factors to be considered and methodologies to use to set GHGs.**
June 30, 2010:	**ARB releases draft GHG targets for each region.**
Sept. 30, 2010:	**ARB releases the GHG targets for each region for both 2020 and 2035. ARB updates these targets every eight years.**

Approximate Timeframe when Regional Transportation Plan Updates Will Include SCSs [7]	
2011:	**Fresno County, Kern County, Kings County, Madera County, Merced County, Tulare County, SANDAG, San Joaquin Council of Governments, Stanislaus County.**
2012:	**Association of Monterey Bay Area Governments (AMBAG), Sacramento Area Council of Governments (SACOG), Santa Barbara County, SCAG.**
2013:	**Butte County, Metropolitan Transportation Commission/Association of Bay Area Governments (ABAG), San Luis Obispo County, Shasta County.**

If a metropolitan planning organization determines that the SCS will be unable to achieve the GHG emissions reduction target established for the region by ARB (or if the metropolitan planning organization determines the SCS will meet the GHG targets, but ARB disagrees), the metropolitan planning organization must prepare an Alternative Planning Strategy (APS) to obtain the additional reductions necessary to achieve the target. The APS must show how the GHG emissions reduction target would be achieved through alternative development patterns, infrastructure, or additional transportation measures or policies.[8] Then the SCS (including any APS) will be returned to ARB for review and approval. It is ARB's role to accept or reject the metropolitan planning organization's determination that the SCS (and the APS, if necessary) will achieve ARB's GHG emissions reduction target for the region.

Is this the end of local land use control? Not quite. SB 375 explicitly preserves local governmental control over land use decisions: "nothing in a Sustainable Communities Strategy shall be interpreted as superseding the exercise of the land use authority of cities and counties within the region."[9] Accordingly, SB 375 does not regulate the use of land, nor are city or county land use plans required to conform with the regional transportation plan, including the SCS.[10] However, any inconsistency between city and county land use plans and an approved SCS, may have to be disclosed and analyzed during CEQA review for new projects. SB 375 specifically notes that a project's consistency with an APS need not be considered for CEQA purposes, but includes no such exemption for SCS consistency analysis.[11]

CEQA Exemptions for Transit Priority Projects

Some of SB 375's most intriguing features are its amendments to CEQA, which are designed to encourage developers to pursue projects that will help California reduce its GHG emissions. SB 375 offers developers various levels of relief from CEQA compliance, from complete relief to streamlined review. This section first outlines the actions ARB and

statewide metropolitan planning organizations need to take before this CEQA relief is formally available, and then discusses the requirements to be met to trigger such relief.

Formal SCS Approval Required Before CEQA Relief Available

Before CEQA relief will be available to any project, ARB and metropolitan planning organizations must complete the three-step process discussed above. First, ARB must set the regional GHG emission targets.[12] Second, each metropolitan planning organization must prepare a Regional Transportation Plan that includes an SCS that will achieve the regional GHG emissions target.[13] Finally, ARB must accept or reject the metropolitan planning organization's determination that its SCS will achieve the GHG reduction targets.[14] Once a SCS is formally approved, however, SB 375's CEQA relief provisions become available.

Complete CEQA Relief for Qualified Transit Priority Projects

As noted previously, limited and, in some cases, complete relief from CEQA review is available to qualified development projects. SB 375 introduces a number of new terms into the CEQA lexicon, but two of the most important are Transit Priority Projects and Sustainable Communities Projects. CEQA relief is available to certain Transit Priority Projects that meet specific criteria (discussed below), while complete exemption from CEQA is reserved for Transit Priority Projects that also are classified as Sustainable Communities Projects. This section addresses what attributes qualify a project as a Transit Priority Project and a Sustainable Communities Project under CEQA's new rules.

A Transit Priority Project must be consistent with the applicable SCS or APS drafted for the region by the metropolitan planning organization and approved by ARB. More specifically, a Transit Priority Project is defined as a project located close to mass transit resources which are included in the Regional Transportation Plan. It must be within one-half mile of a major transit stop or a "high-quality transit corridor" (defined as a corridor with fixed-route bus service every 15 minutes or less). The project must have at least 50 percent residential use, based on total building square footage. The project also must have a minimum net density of at least 20 dwelling units per acre. If a project qualifies as a Transit Priority Project, it qualifies for streamlined CEQA relief, which is discussed below.

To qualify for a complete CEQA exemption, however, a Transit Priority Project must further qualify as a Sustainable Communities Project. In order to be designated a Sustainable Communities Project, the legislative body must conduct a public hearing and find that the proposed Transit Priority Project satisfies three different areas of requirements. The project must satisfy eight environmental criteria, seven land use criteria, and must serve the community's affordable housing or open space needs.

Environmental Criteria

The environmental criteria are broad. The project must be adequately served by existing utilities. The site of the project cannot contain wetlands or riparian areas, and cannot have significant value as a wildlife habitat. The site is subject to a preliminary endangerment assessment prepared by a registered environmental assessor to determine the existence of any release of a hazardous substance and to determine the potential for exposure of future occupants to significant health hazards from any nearby property or activity. The CEQA rules regarding significant effects on historical resources still apply. The property cannot be unduly hazardous in regards to natural disasters. The land cannot be already developed as public open space such as playgrounds, ball fields, or swimming pools. The buildings within the Transit Priority Project also are required to be 15 percent more energy efficient than required by the California Code of Regulations.[15]

Land Use Criteria

The land use criteria are similarly detailed. Projects cannot be more than eight acres in total area, cannot include any single building that exceeds 75,000 square feet and cannot have more than 200 residential units. The project also cannot result in any net loss in the number of affordable housing units within the project area. The project must incorporate any applicable mitigation measure or performance standards or criteria set forth in prior environmental impact reports. The legislative body also must determine that the project does not conflict with nearby operating industrial uses. In addition, the project must be close to transit; this requirement is more stringent then the general Transit Priority Project proximity requirement because the project must be located within one-half mile of a rail transit station or a ferry terminal in a Regional Transportation Plan or within a quarter mile of a high-quality transit corridor included in the RTP.[16]

Affordable Housing and Open Space Needs

Finally, the project must satisfy one of three requirements. The developers must: (1) legally ensure that a portion of the project will either be sold to moderate income families or rented to low income families; (2) pay adequate in-lieu fees to result in the development of an equivalent number of low income housing; or (3) provide public open space equal to or greater than five acres per 1,000 residents of the project.[17]

If the legislative body finds that these requirements are met, the Transit Priority Project is declared to be a Sustainable

Communities Project and is exempt from CEQA. Even if a Transit Priority Project fails to meet all of these requirements, however, it still may qualify for limited CEQA relief.

Forms of Limited CEQA Relief

Projects that do not meet the Sustainable Communities Project standard are still eligible for some relief from CEQA. Qualified Transit Priority Projects are eligible for minimized and streamlined CEQA review. If a project does not qualify as a Transit Priority Project but meets other requirements, that project also may be eligible for streamlined CEQA review.

1. *Minimized CEQA Review for Certain Transit Priority Projects*

Transit Priority Projects that do not meet the Sustainable Communities Project requirements outlined previously can still qualify for CEQA incentives. If a Transit Priority Project incorporates all feasible mitigation measures, performance standards, or criteria set forth in prior applicable EIRs, the Transit Priority Project can be reviewed through one of two new types of environmental documents, a Sustainable Communities Environmental Assessment (which is a modified negative declaration or mitigated negative declaration), or a shorter, more limited EIR.[18]

a. *New CEQA Document: Sustainable Communities Environmental Assessment*

A Sustainable Communities Environmental Assessment requires an initial study that identifies all significant or potentially significant impacts of the project. Like a negative declaration or a mitigated negative declaration, the assessment must contain measures to avoid or mitigate all significant or potentially significant effects of the project. After the lead agency conducts a public hearing and makes a series of findings regarding the mitigation of the significant or potentially significant effects, it can approve the assessment. Unlike a negative declaration or a mitigated negative declaration, however, the lead agency's decision to review and approve a project with a Sustainable Communities Environmental Assessment is reviewed not with the more stringent "fair argument" standard, but under the "substantial evidence" standard, which is a standard of review that is generally deferential to the agency's action.[19]

b. *Shorter, More Limited EIR*

If the lead agency decides to review a Transit Priority Project with an EIR, the Transit Priority Project can be studied through a shorter EIR than that generally required under CEQA. First, the lead agency must prepare an initial study to identify all significant or potentially significant effects of the Transit Priority Project. The study must identify effects that have been adequately addressed and mitigated in prior applicable EIRs. Because a Transit Priority Project is consistent with the regional SCS (or APS), the EIR "need only to address the significant or potentially significant effects of the transit project on the environment" and is not required to analyze off-site alternatives to the project.[20] Otherwise, the EIR must comply with CEQA's requirements.[21]

2. *Streamlined CEQA Review for Certain Transit Priority Projects and Certain Other Largely Residential Projects*

Any Transit Priority Project that qualifies for a Sustainable Communities Environmental Assessment or a shorter, more limited EIR, as discussed previously, also qualifies for streamlined CEQA review. In addition, SB 375 provides streamlined CEQA review for certain qualified residential or mixed-use developments that do not otherwise qualify as Transit Priority Projects.

To qualify for streamlined CEQA review, a non-Transit Priority Project development must be at least 75 percent residential. The region must have an approved SCS, and the project must incorporate any mitigation measures from prior environmental documents. If these requirements are met, the development may qualify for streamlined CEQA review.[22]

If a Transit Priority Project or qualified mixed-use project is subject to streamlined CEQA review, then any findings or other determinations for an exemption, a negative declaration, a mitigated negative declaration, a Sustainable Communities Environmental Assessment, or an EIR are not required "to reference, describe or discuss: (1) growth inducing impacts; or (2) any project specific or cumulative impacts from cars and light-duty truck trips generated by the project on global warming or the regional transport network."[23] If the CEQA document is an EIR, it "shall not be required to reference, describe, or discuss a reduced residential density alternative to address the effects of car and light-duty truck trips generated by the project."[24]

Housing Development, Including Affordable Housing

SB 375 also includes amendments to the Government Code's housing requirements. The amendments are designed to coordinate regional housing needs with the Regional Transportation Plan. Planning and zoning laws require each city and/or county to prepare and adopt a general plan for its jurisdiction, which includes a housing element.[25] Local governments' housing elements now must allocate housing units consistent with the development pattern envisioned in the regional SCS.[26] Therefore, like the CEQA exemptions previously discussed, the housing amendments would not come into effect until ARB approves the metropolitan planning organization's SCS. After the SCS is adopted, local governments have 18 months to adopt a revision of the housing element.[27] Therefore, at the very latest each jurisdiction must adopt a new housing element by March of 2016.[28]

Even before the first SCS is approved, however, it is clear that SB 375's housing provisions will have a significant effect on local land use planning because SB 375 substantially strengthens the affordable housing obligations for cities and counties.

SB 375 requires aggressive action on the part of local governments to provide additional housing stock, including affordable housing. The Government Code previously allowed a local government housing program simply to identify sites that could be developed for housing. Under SB 375, however, if a local government's inventory of land suitable for residential development does not identify adequate sites for all household income levels, the sites must be re-zoned. The re-zoning must include minimum density and development standards.[29]

Under certain conditions, a local government's failure to re-zone can strip it of some of its planning power. SB 375 makes it mandatory for a local government to comply with the re-zoning requirement. If the local government fails to re-zone within the mandated time period,[30] it may "not disapprove a housing development project, planned unit development project, nor require a conditional use permit, planned unit development permit, or other locally imposed discretionary permit, or impose a condition that would render the project infeasible" if the project is in an area that must be re-zoned.[31] And if the government does not comply, any interested party can sue.[32] A reviewing court has the power to allow a qualified project to be built as if the appropriate zoning had taken place.

Furthermore, a local government can be compelled by the courts to complete the re-zoning required by SB 375. If a court finds that the re-zoning has not taken place, the court must issue an order or judgment "compelling the local government to complete the rezoning within 60 days or the earliest time consistent with public hearing notice requirements in existence at the time the action was filed."[33]

SB 732: SB 375's Companion Funding Bill

In addition to SB 375, Governor Schwarzenegger signed companion bill Senate Bill 732 (SB 732), which provides funds for financially challenged local governments to engage in more sophisticated land use planning.[34] The bill is intended to help fund agency coordination and to distribute funds in order to assist in developing and planning sustainable communities.

The bill establishes a Strategic Growth Council to coordinate activities and funding programs of member state agencies to meet AB 32's goals. The members of the Strategic Growth Council include the Secretary of the Resources Agency, the Secretary for Environmental Protection, the Secretary of Business, Transportation and Housing, the Secretary of California Health and Human Services, the Director of the Governor's Office of Planning and Research, and one member of the public to be appointed by the Governor.[35]

One of the Strategic Growth Council's assigned duties is to "provide, fund, and distribute data and information to local governments and regional agencies that will assist in developing and planning sustainable communities."[36] The Strategic Growth Council also is directed to "manage and award grants and loans to support the planning and development of sustainable communities."[37] To qualify for funding, the plan or project must be consistent with AB 32 and any applicable regional plan, such as an SCS or APS.[38] The Strategic Growth Council is directed to give additional consideration to funding projects that are proposed by an economically disadvantaged community.[39]

To fund the Strategic Growth Council's activities, SB 732 appropriates $500,000 from the Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal Protection Bond Act of 2006.

Looking Forward

SB 375 dramatically changes California's approach to land use planning by creating regional GHG targets that link land use to transportation planning. To achieve this end, SB 375 includes CEQA relief to create incentives that will lead to higher density, transit-oriented projects that are consistent with the local Sustainable Communities Strategy. Additionally, the housing provisions will ensure that new development provides housing for all income ranges. We expect to see further legislation in this area that further codifies the intentions of SB 375.[40] Latham & Watkins' Environment, Land and Resources Department attorneys will be tracking this process closely and are available to advise clients on the potential impacts of this new statute.

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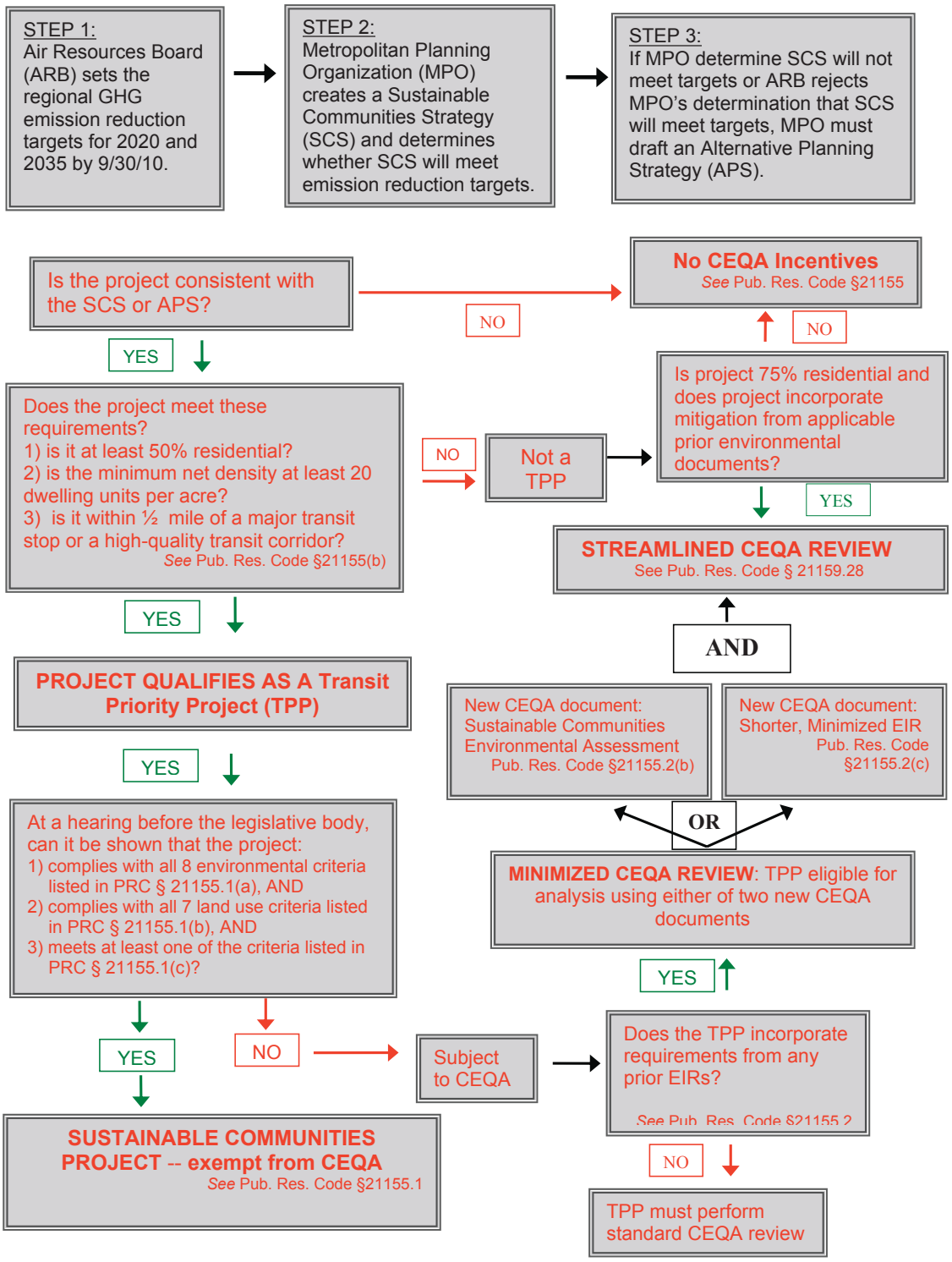
Exhibit A: SB 375 Eligibility For CEQA Incentives: (1) Potential CEQA exemptions, (2) Streamlined CEQA Review, and (3) Minimized CEQA Review

Note: This chart is for illustrative purposes only and should not be used without also referencing the text of the bill.



[1] 2008 Cal. Legis. Serv. Ch. 728 (S.B. 375). SB 375 amends sections 65080, 65400, 65583, 65584.01, 65584.02, 65584.04, 65587, and 65588 and adds sections 14522.1, 14522.2 and 65080.01 to the Government Code. SB 375 amends section 21061.3 and adds section 21159.28 and chapter 4.2 (commencing with section 21155) to Division 13 of the Public Resources Code.

[2] Cut the Sprawl, Cut the Warming, *The New York Times* (Oct. 7, 2008).

[3] Press Release, Office of the Governor of California, Governor Schwarzenegger Signs Sweeping Legislation to Reduce Greenhouse Gas Emissions through Land-Use (Sept. 30, 2008).

[4] Obama Affirms Climate Change Goals, *The New York Times* (Nov. 19, 2008).

[5] Climate Change Scoping Plan Appendices, California Air Resources Board, December 11, 2008, C80 ("It is important to emphasize the long-range benefits of land use and transportation strategies, especially in helping California reach its 2050 goal of 80 percent below 1990 levels. The benefits of integrated land use and transportation strategies accumulate over time as new development patterns become a larger and larger part of the overall regional picture. Population is estimated to increase by 13 percent between 2010 and 2020, but is projected to increase 52 percent by 2050. The impact of land use and transportation strategies may be modest by 2020, but if we begin now, the accumulation of benefits over the next 20, 30, 40 years can result in very significant benefits compared to business as usual.")

[6] Cal. Gov't Code § 65080(b)(2)(B). Metropolitan planning organizations and other regional transportation planning agencies must submit updated Regional Transportation Plans every four years. If the agency is located in an attainment area, that agency may submit every five years. The metropolitan planning organization must circulate a draft of the Sustainable Communities Strategy 55 days before adopting a final Regional Transportation Plan. ARB has 60 days to accept or reject the final Sustainable Communities Strategy included within the Regional Transportation Plan.

[7] The calculation of when Regional Transportation Plan updates will include an SCS is approximate and is based on the update cycle currently in place for each metropolitan planning organization. Thank you to the California Building Industry Association for summarizing the update cycles of statewide metropolitan planning organizations.

[8] Cal. Gov't Code § 65080(b)(2)(H).

[9] Cal. Gov't Code § 65080(b)(2)(J).

[10] Cal. Gov't Code § 65080 (b)(2)(J).

[11] Cal. Gov't Code § 65080 (b)(2)(H)(v).

[12] Cal. Gov't Code § 65080(b)(2)(A).

[13] Cal. Gov't Code § 65080(b)(2)(B).

[14] Cal. Gov't Code § 65080(b)(2)(I)(ii).

[15] Pub. Res. Code § 21155.1(a)(1)-(8).

[16] Pub. Res. Code § 21155.1(b)(1)-(7).

[17] Pub. Res. Code § 21155.1(c)(1)-(3).

[18] Pub. Res. Code § 21155.2(a).

[19] Pub. Res. Code § 21155.2(b).

[20] Pub. Res. Code § 21155.2(c)(2).

[21] Pub. Res. Code § 21155.2(c).

[22] Pub. Res. Code § 21159.28(a).

[23] Pub. Res. Code § 21159.28(a).

[24] Pub. Res. Code § 21159.28(b).

[25] The housing element must be reviewed "as frequently as appropriate," but not less than every eight years. Cal. Gov't Code § 65588. But, as this section discusses, all housing elements must be revised within 18 months of the first SCS.

[26] Cal. Gov't Code § 65584.04 (i)(1).

[27] Cal. Gov't Code § 65588(e)(7).

[28] With regard to timing, Governor Schwarzenegger noted in his signing message that although SB 375 is designed to synchronize updates of housing elements and Regional Transportation Plans, existing housing element deadlines and federal schedules could create conflicts, which could put a city at risk of losing access to federal and state housing funds. Governor Schwarzenegger urged the Legislature to address this problem in "clean up" legislation as soon as possible.

[29] Cal. Gov't Code § 65583(c)(1)(A).

[30] Cal. Gov't Code § 65583(c)(1)(A) provides that the re-zoning must take place either no later than three years after the adoption of the housing element, or 90 days after the receipt of comments from the Department of Housing and Community Development.

[31] Cal. Gov't Code § 65583(g)(1).

[32] Cal. Gov't Code § 65583(g)(3).

[33] Cal. Gov't Code § 65587(d)(1).

[34] 2008 Cal. Legis. Serv. Ch. 729 (S.B. 732).

[35] Pub. Res. Code § 75121(a) (allowing for appointment of six members to SCG: the Director of the Governor's Office of Planning and Research, the Secretary of the Resources Agency, the Secretary for Environmental Protection, the Secretary of Business, Transportation and Housing, the Secretary of California Health and Human Services, and one member of the public to be appointed by the Governor).

[36] Pub. Res. Code § 75125(c).

[37] Pub. Res. Code § 75125(d).

[38] Pub. Res. Code § 75126(b).

[39] Pub. Res. Code § 75129(d)(3).

[40] Governor Schwarzenegger suggested in his signing statement that the legislature expand the CEQA streamlining to other projects that are consistent with Sustainable Communities Strategies. See http://gov.ca.gov/pdf/press/SB375_Steinberg_Signing_Message.pdf.

Enforcement

Recent EPA Enforcement

Respondent	Description	Date
BP Products North America	Respondent has agreed to spend more than $161 million on pollution controls, enhanced maintenance and monitoring, and improved internal management practices to resolve alleged Clean Air Act (CAA) violations at its Texas City, Texas refinery.	02/19/09
The City of Council, Idaho	Respondent has agreed to pay an $11,000 civil penalty to settle alleged violations of the Clean Water Act (CWA) at the City's wastewater treatment plant.	02/11/09
Frontier Refining and Frontier El Dorado Refining	Respondents, two petroleum refiners, have agreed in separate settlements to spend more than $141 million on the installation of new air pollution controls at three refineries in Kansas and Wyoming. Respondents agreed to pay a civil penalty of $1.23 million and to spend approximately $127 million on pollution control upgrades to prevent additional violations of the Clean Air Act.	02/10/09
Patriot Coal Corp.	Respondent, one of the largest coal mining companies in the United States, has agreed to pay a $6.5 million civil penalty to settle alleged violations of Clean Water Act (CWA) permitting requirements. In addition, Respondent has agreed to implement extensive measures to prevent future violations and to perform environmental projects at an estimated cost of $6 million. This is the third largest penalty ever paid in a federal CWA case for discharge permit violations.	02/06/09
James E. Spain	Respondent, the former president of Crown Chemical Inc., was sentenced in U.S. District Court to pay a criminal fine of $30,000 and spend 12 months in home confinement, after pleading guilty to illegally dumping chemical wastes into the regional sewer system.	02/05/09
Craig Frame	Respondent, a developer located in Crouch, Idaho, has agreed to pay a $47,000 civil penalty to settle an enforcement action for alleged violations of the Clean Water Act (CWA).	02/05/09
A-Dec Inc.	Respondent agreed to pay $325,700 to resolve 116 alleged violations of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), for allegedly selling an unregistered pesticide.	02/03/09
Kentucky Utilities	Respondent, a coal-fired electric utility, has agreed to pay a $1.4 million civil penalty and spend $135 million on pollution controls to resolve alleged violations of the Clean Air Act (CAA) at its Generating Station in Mercer County, Kentucky. The settlement sets the most stringent limit for nitrogen oxide emissions ever imposed in a federal settlement with a coal-fired power plant.	02/03/09

Respondent	Description	Date
Braulio Vega Juan Vega	An EPA investigation into Clean Water Act (CWA) violations in Puerto Rico has led to prison sentences for two defendants convicted of engaging in a scheme that involved the dumping of raw sewage into the Jimenez Creek, a tributary of the Espirito Santo River. Juan Vega pleaded guilty and was sentenced to one year in prison and a fine of $10,000. Last December, Braulio Vega was sentenced to two years in prison and a fine of $35,000.	02/03/09
Jack Frost Fruit Company	Respondent has agreed to pay a $20,554 civil penalty to resolve alleged violations of EPA's Risk Management Program requirements after inspectors found respondent lacked a prevention program to protect the public and the environment from an off-site release of anhydrous ammonia. In addition, respondent agreed to spend at least $85,000 over the next year to implement two Supplemental Environmental Projects to reduce the risk of release of anhydrous ammonia from its facility.	02/03/09
BRC Rubber and Plastics, Inc.	Respondent has agreed to pay an $8,000 civil penalty to settle Clean Water Act (CWA) discharge violations at his concentrated animal feeding operation (CAFO) in Ontario, Oregon, after inspections documented animal wastes flowing from confinement pens into Jacobsen Gulch Creek, a tributary of the Snake River.	01/20/09
CMEX California Cement LLC	Respondent, CMEX California Cement LLC, agreed to pay a $2 million civil penalty and to meet new limits for air pollutants, including nitrogen oxides, sulfur dioxides and carbon monoxide to resolve alleged Clean Air Act (CAA) violations at its Victoriaville, CA, cement plant. This was the largest settlement yet in the EPA's ongoing cement kiln enforcement initiative.	01/15/09
Shell Chemical Yabucoa, Inc.	Respondent agreed to pay a $1,025,000 civil penalty and to spend at least $273,800 to enhance its pollution controls to remedy alleged violations of the Clean Water Act (CWA). Respondent allegedly discharged pollutants directly into the Santiago Creek and the Caribbean Sea at unpermitted locations.	01/12/09
Chemtrade Logistics; Chemtrade Refinery Services; and Marsulex	Respondents, three manufacturers of sulfuric acid, have agreed to spend at least $12 million on air pollution controls that are expected to eliminate more than 3,000 tons of harmful emissions annually from six production plants in Louisiana, Ohio, Oklahoma, Texas and Wyoming. Respondents also agreed to pay a $700,000 civil penalty under the Clean Air Act settlement.	01/12/09
OP-TECH Environmental Services, Inc.	Respondent agreed to pay $65,000 for alleged violations of the federal Toxic Substances Control Act (TSCA), which requires materials containing polychlorinated biphenyls (PCBs) to be listed properly in manifests. As part of the settlement, Respondent will engage in a $250,000 project to purchase and utilize special equipment to enhance its sampling for PCBs in loads of waste entering and leaving its facility.	01/12/09

Respondent	Description	Date
Explorer Pipeline Company	Respondent has agreed to pay a $3.3 million civil penalty to resolve an alleged violation of the Clean Water Act (CWA) stemming from a spill of over 6,500 barrels of jet fuel from its interstate pipeline into nearby Turkey Creek near Huntsville, Texas.	01/08/09
Citation Oil & Gas Corp.	Respondent agreed to invest $580,000 on new and upgraded spill prevention controls at its production fields in Johnson County, Wyoming, and pay a $280,000 civil penalty to resolve the alleged violations of the Clean Water Act (CWA). The agreement resolves a discharge of more than 25,000 gallons of crude oil and produced water as well as inadequacies in the company's Spill Prevention Control and Countermeasure (SPCC) plan, and oil pollution prevention requirement in the CWA.	01/08/09
John A. Porter	Respondent was issued a compliance order to resolve violations of the Clean Water Act (CWA), for allegedly excavating and placing fill material in the Sage Creek and adjacent wetlands without the proper permit.	01/07/09
Moo Town Dairy	Respondent, a concentrated animal feeding operation (CAFO), was issued an administrative complaint and proposed civil penalty of $157,000 to resolve an alleged violation of the Clean Water Act (CWA) for unauthorized discharges of pollutants to an unnamed creek.	12/30/08
ExxonMobil	Respondent agreed to pay $6.1 million in civil penalties for violating the terms of a 2005 court-approved Clean Air Act (CAA) agreement. The agreement penalizes Respondent for failing to comply with the 2005 settlement agreement, for its failure to monitor and control the sulfur content in certain fuel gas streams burned in refinery furnaces.	12/17/08
University of Guam	Respondent was fined $10,000 for alleged hazardous waste and other waste management violations.	12/04/08
Guam Waterworks Authority	Respondent was assessed $48,000 in penalties for failing to fully comply with a 2003 court order forcing it to make improvements to its drinking water system.	12/04/08
JWS Refrigeration Guam	Respondent, an equipment services company, was fined $53,481 for importing banned refrigerants in violation of the Clean Air Act (CAA). Respondent allegedly imported more than 25,000 kg of hydrochlorofluorocarbon 22, an ozone-depleting substance, from sources outside the United States, a violation of the stratospheric ozone protection regulations.	12/04/08
Japan Water Systems	Respondent was fined $26,000 for selling and distributing an unregistered water disinfectant, which lacked directions for use, precautionary statements, and other labeling requirements by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).	12/04/08
The Commonwealth Port Authority, Saipan Airport	Respondent was fined $32,500 to resolve hazardous waste treatment, storage, and used oil disposal violations at its Saipan International Airport facility.	12/04/08

Respondent	Description	Date
Concorde Garment	Respondent agreed to pay a $15,200 civil penalty to resolve violations involving improper storage and handling of discarded solvent-based paints, spent paint thinners and solvent-contaminated wastes at its facility in Saipan. In addition, Respondent agreed to spend $56,000 on an alternative environmental energy project that would provide an additional wind powered turbine power source at a local high school.	12/04/08
Pacific Marine	Respondent agreed to pay a $20,000 civil penalty to resolve used oil and hazardous waste violations at its power plant in Puerto Rico, Saipan. In addition, Respondent agreed to spend $68,000 for environmental projects that would focus on used oil management including storage and spill prevention.	12/04/08
Hecla Mining Company	Respondent, owner and operator of a mine and mill in Idaho's northern panhandle, has agreed to pay $85,000 and provide more than $17,000 in cash and emergency equipment to resolve alleged violations of the Clean Water Act (CWA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).	12/04/08
Nevada Onion	Respondent agreed to pay $56,320 to resolve violations of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), for allegedly misusing pesticides and failing to comply with federal pesticide labeling requirements at its agricultural facility in Yerinton, Nevada.	12/04/08
W.R. Grace	In the largest cash settlement ever made by a company to reimburse the federal government for the cost of investigation and cleanup of a Superfund site, Respondent agreed to pay $250 million to the EPA for asbestos contamination in Libby, Montana.	12/04/08
British Petroleum Exploration (Alaska), Inc.	Respondent pleaded guilty and was ordered to pay a $12 million criminal fine and $4 million in restitution to the state of Alaska for two pipeline leaks, one of which was the largest spill ever on the state's North Slope.	12/04/08
Massy Energy Company, Inc.	Respondent, Central Appalachia's largest coal producer, agreed to pay a $20 million civil penalty, the largest of its kind, for discharging pollution into loc al waterways. Respondent also agreed to take measures at its facilities to prevent an estimated 380 million pounds of sediment and other pollutants from entering the nation's waterways each year.	12/04/08
Centex Homes; KB Home; Pulte Homes; and Richmond American Homes	Respondents, four of the nation's top ten home builders, agreed to pay $4.3 million in civil penalties to resolve alleged violations of the Clean Water Act (CWA) for delays or failures to obtain proper storm water permits for numerous construction sites in 34 states and the District of Columbia.	12/04/08
Jenn Feng Industrial Company	Respondent, Jenn Feng Industrial Company, a Taiwanese Manufacturer, and three American corporations, agreed to pay $2 million, the largest civil penalty ever for violations of Clean Air Act (CAA) non-road engine regulations, to resolve violations from importing approximately 200,000 chainsaws that failed to meet federal air pollution requirements.	12/04/08

Respondent	Description	Date
American Electric Power	In the largest settlement with a stationary source in EPA history, Respondent, American Electric Power, a coal-fired electric utility company, agreed to install pollution controls that would reduce a record 1.6 billion pounds of air pollution. Respondent also agreed to pay a $15 million civil penalty for New Source Review violations of the Clean Air Act (CAA).	12/04/08
FMC Corp.; BAE Systems Land and Armaments LP	Respondents agreed to pay a $4.14 million for response costs incurred at the Naval Industrial Reserve Ordinance Plant, a superfund site in Fridley, Minnesota. According to the EPA, respondents dumped lubricants, waste oils, paint sludge and chlorinated hydrocarbon solvents from 1940 through 1969.	12/03/08
U.S. Navy Base Guam	Respondent, the U.S. Navy Base Guam, was issued a Finding of Violation for permit violations under the federal Clean Water Act (CWA), after EPA inspectors discovered violations including discharges from the Navy's Apra Harbor Wastewater Treatment Plant that exceeded water quality permit limits.	12/01/08
Ormet Primary Aluminum Corp.	Respondent agreed to provide an additional $3.4 million in financial assurance to guarantee its ability to continue monitoring groundwater controls at the site of its Ohio smelter, thereby amending a 1995 consent decree under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).	11/19/08

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