



# Environmental Alert

## Recent developments in environmental law

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### Enforcement priorities in the Obama EPA—is your business a target?

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Ever since the Obama administration proposed its \$10.5-billion budget for the U.S. Environmental Protection Agency (EPA), the largest in the agency's 39-year history, it has been clear that the Obama EPA will make environmental protection and enforcement a priority. In case there was any doubt, [EPA's 2010 budget](#) includes approximately \$600 million for the EPA's Enforcement and Compliance Assurance program, representing the highest enforcement budget ever and a \$32-million increase over EPA's FY 2009 enacted level.

#### EPA's enforcement priorities

According to EPA Administrator [Lisa P. Jackson's memorandum to EPA employees](#), issued earlier this year, the agency will give utmost attention to five specific priorities: (1) reducing greenhouse gas emissions; (2) improving air quality; (3) managing chemical risks; (4) cleaning up hazardous-waste sites; and (5) protecting America's water. Each of these priority areas, as well as recent developments or enforcement activities, is summarized below.

#### **Reducing greenhouse gas emissions.**

Moving quickly on this agency priority, on April 17, 2009, EPA issued a proposed finding that six specific greenhouse gases (GHGs) contribute to air pollution that may endanger public health or welfare (see [4/21/09 Alert](#)). This "endangerment finding" sets the stage for regulation of GHGs at the federal level and expands EPA's reach beyond CO<sub>2</sub>, the "pollutant" that was at issue in *Massachusetts v. EPA*, the Supreme Court's landmark decision that held CO<sub>2</sub> was an "air pollutant" subject to regulation by the Clean Air Act. 549 U.S. 497 (2007). The endangerment finding also furthers Administrator Jackson's focus on environmental justice issues and addressing environmental concerns in disproportionately affected communities.

Speaking recently at a conference on criminal environmental enforcement, Associate Attorney General Tom Perelli and Fred Burnside, director of EPA's Office of Criminal Enforcement, Forensics, and Training, said that the increased budget would allow the EPA and Department of Justice (DoJ) officials to focus on this new climate change priority. Ensuring that emitters comply with upcoming GHG regulations will likely be the first area of enforcement, according to Perelli. In advance of GHG regulation, all sources should assess and quantify their emissions to ensure that their facilities are prepared for the inevitable regulation of those emissions.

### **Improving air quality.**

The U.S. EPA's Office of Enforcement and Compliance Assurance has identified [enforcement of pre-construction permitting requirements under the Clean Air Act](#), commonly referred to as new source review (NSR), as an enforcement priority. EPA has stated that coal-fired power plants and oil refineries, as well as glass, acid, and cement manufacturers, will be targeted. The Obama administration has already filed complaints against a number of coal-fired power plants for allegedly failing to install the best available control technology (BACT) at their facilities, reviving a line of enforcement proceedings that began under the Clinton administration.

A brief summary of some of the other air-related enforcement actions taken by the EPA just this year include:

- A coal-fired power plant agreed to pay a \$1.4-million civil penalty and spend \$135 million on pollution controls to resolve Clean Air Act violations. In its press release, the EPA boasted that the settlement set the most stringent limit for nitrogen oxide emissions ever imposed in a federal settlement with such a facility.
- Two sulfuric acid manufacturers have agreed to pay a \$2-million civil penalty to settle Clean Air Act violations.
- Two petroleum refiners agreed to pay a civil penalty of \$1.23 million and spend approximately \$127 million in pollution control upgrades for alleged violations at three different refineries.
- The EPA filed an administrative complaint against a metal coating facility for alleged Clean Air Act violations for excessive emissions of hazardous air pollutants in years past, as detailed in the company's annual compliance report.

Observers expect the EPA to focus on toxic air emissions near schools and other sensitive areas. In March, the [EPA announced](#) that toxic air pollution around 62 schools in 22 states will be monitored by state and federal agencies. The EPA noted that local, state, and federal officials were "mobilizing" to determine where elevated levels of toxins pose a threat, so the EPA can take "swift action" to protect the air students breathe.

In addition, investigations by the EPA's Criminal Investigation Department are leading to prosecutions of Clean Air Act violations. Earlier this month, a fuel-storage company pleaded guilty to submitting a false annual report regarding the facility's compliance with the Clean Air Act. Emissions-control devices on the company's fuel trucks malfunctioned, resulting in the release of organic compounds that, when combined with sunlight, create ground-level ozone, a major component of smog. Sentencing is scheduled for August.

### **Managing chemical risks.**

In April, Administrator Jackson signed a final rule to reinstate the [Toxic Release Inventory \(TRI\) reporting requirements](#) that had been rolled back by the Bush administration in 2006. The EPA's action was in response to President Obama's signature of the 2009 Omnibus Appropriations Act, which mandated that prior TRI reporting requirements be reestablished.

Now, all reports for Persistent, Bioaccumulative, Toxic (PBT) chemicals must be submitted on the more-detailed Form R. To qualify for the abbreviated Form A, the annual reporting amount must have manufactured, processed, or otherwise used 500 pounds or less and less than 1 million pounds of the chemical during the reporting year. TRI reports for 2008 are due on July 1, 2009, and the new final rule applies to the July 1 reports. EPA has provided guidance regarding the new reporting requirements on their website at <http://www.epa.gov/tri/>.

### **Cleaning up hazardous-waste sites.**

Administrator Jackson recently announced [\\$600 million in new funding](#) through the American Recovery and Reinvestment Act of 2009 for the clean up of hazardous waste (Superfund) sites across the nation. According to the EPA, in most cases, the recovery act funding will accelerate the hazardous waste cleanup already underway at the sites and fund new clean-up projects. This injection of funds shows the EPA is serious about its priority to accelerate the pace of cleanup at contaminated sites.

Just recently, the CEO of a former aeronautics company was sentenced to one year and one day of imprisonment and ordered to pay \$105,816 for illegally storing more than 12 tons of hazardous waste at his company's facility. In a separate civil action brought under the Superfund statute, the United States is seeking to recover more than \$8 million in clean-up costs previously incurred by the EPA.

### **Protecting America's water.**

The EPA has announced that it will focus on restoring the nation's streams, rivers, lakes, bays, oceans, and aquifers. The [agency's 2010 budget](#) includes significant initiatives to strengthen the EPA's core research, enforcement, and regulatory capabilities. For example, approximately \$3.9 billion has been budgeted for the Clean Water State Revolving Fund and Drinking Water State Revolving Fund to support approximately 1,000 clean-water projects and 700 drinking-water projects and a new, \$475-million, multi-agency Great Lakes Initiative.

Enforcement activities will continue its focus on stormwater management and other wet-weather issues. The EPA will be critical of the lack of stormwater permit coverage, as well as any failure to implement an effective stormwater management program. In addition, spill prevention, control, and countermeasure plans (SPCC) will continue to be a focus.

In 2009, the EPA has already issued a number of fines to various industrial facilities for failing to adequately prepare and implement federally regulated oil spill prevention, control, and countermeasure (SPCC) plans. For example, the EPA has recently issued a number of SPCC-related fines to various industrial facilities, including an [oil production facility](#), [oil distribution facilities](#), and an [oil storage facility](#), for failing to adequately prepare and implement federally regulated SPCC plans.

Following an EPA criminal investigation, an Exxon-Mobil subsidiary has been sentenced to pay \$6 million for violating the criminal provisions of the Clean Water Act in connection with a 15,000-gallon diesel oil spill into the Mystic River from its oil terminal in Everett, Massachusetts.

Significantly, one of the largest coal-mining companies in the U.S. recently agreed to pay a [\\$6.5-million civil penalty](#) to settle violations of the Clean Water Act. The settlement was the third-largest penalty ever paid in a federal Clean Water Act case for discharge permit violations. The mining company allegedly discharged excess amounts of metals, sediment, and other pollutants into numerous rivers and streams, and has agreed to implement additional measures to prevent future violations and perform environmental projects at a total estimated cost of \$6 million.

### **Anticipate increased enforcement activity and risk of criminal prosecution**

In light of the EPA's enforcement priorities, owners and operators should expect increased inspections, regulatory activity, and enforcement actions. Administrative orders, settlement agreements, and fines have already increased in regularity under the Obama administration's direction, and all indications point to the EPA's renewed and continued focus on enforcement. In fact, in the May 12, 2009, Senate testimony of Administrator Jackson on the EPA's 2010 budget proposal, she emphasized that the proposed enforcement and compliance budget is the largest in history—\$600 million, an increase of \$32 million from the prior year.

Jackson declared that the enforcement budget “ensures that EPA has the resources necessary to maintain a robust and effective criminal and civil enforcement program,” including a staffing increase of nearly 30 additional enforcement positions. According to Burnside, the proposed budget will also improve the information flow and result in increased communication and coordination between the civil and criminal enforcement programs. The appointment of Cynthia Giles as the EPA’s chief enforcement officer further emphasizes the EPA’s increased focus on civil and criminal enforcement. The former EPA Enforcement director and Assistant U.S. Attorney is expected to pursue an aggressive stance on industrial pollution.

Companies and their executives should anticipate increased agency oversight and use internal environmental management systems to ensure their businesses are in compliance with regulatory requirements. Failure to abide by environmental statutes can—and will—provide a basis for criminal prosecution. Companies that have been hit hard by the economic downturn, and that have perhaps cut back on compliance efforts, will not be able to escape responsibility.

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