

# NEW DEVELOPMENTS IN ENVIRONMENTAL LAW

April 8, 2011

## Watch Out for More EPA Enforcement!

Under President Obama's budget, the Environmental Protection Agency (EPA) is taking a 12.6 percent funding cut. However, while funding for programs like the Great Lakes Restoration Initiative and state grants for infrastructure are proposed to be slashed, EPA will **increase** its enforcement budget by \$24 million. EPA chief Lisa Jackson has stated repeatedly that EPA will not back down on enforcement. The new funding will be used to improve EPA inspectors' ability to analyze emission data and to spot ozone and air toxic emission violations. Facilities located near population centers (especially oil refineries and chemical processing facilities) will be scrutinized for air toxic releases and hazardous waste management practices. Additional EPA budget increases include: \$46 million to administer greenhouse gas emission reduction programs at large facilities, \$20 million to administer the greenhouse gas reporting rule, and \$30.5 million to enforce oil spill compliance and prevention rules.

## Vapor Intrusion Regulatory and Litigation Concerns Continue to Grow

Vapor intrusion continues to grow in prominence as an environmental concern and area of environmental regulation and litigation. On January 28, the EPA issued a Notice of Opportunity for Public Comment stating that it would accept public input on whether vapor intrusion should be included as a component of the Hazard Ranking System used to determine site placement on the National Priorities List (NPL) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Vapor intrusion occurs when subsurface chemical vapors migrate into buildings and other structures nearby. The cause of vapor intrusion is not always easy to identify, as it could occur from other chemicals present on-site. The EPA will evaluate all information collected (through both public comment and public listening sessions) before determining if it should issue a proposed rule. If the EPA does issue this rule, many more sites would likely be added to the NPL, particularly in urban areas. This is of particular concern for property owners of potentially emitting sites, as people living or working near the site would more than likely institute toxic tort lawsuits against the owners, and there has been litigation regarding whether vapor intrusion may present an "imminent and substantial endangerment" under the Resource Conservation and Recovery Act (RCRA),

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which has a citizen suit provision. Also, with the ASTM Standard Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions having been revised in 2010, additional attention is being paid to vapor intrusion as an issue to be considered in due diligence for property and financing transactions. New York has stated that soil vapor intrusion evaluations rank among its top priorities. Accordingly, New York has stated that all past, current, and future contaminated sites will need to be evaluated as to whether there is a potential for exposures related to soil vapor intrusion.

### Increased Regulation of Boilers

On February 21, 2011, EPA issued final rules to reduce emissions of air pollutants from existing and new boilers. For industrial, commercial, and institutional boilers and process heaters that are located at, or are part of, a major source of Hazardous Air Pollutants (HAP) (sources that have a potential to emit at least 10 tons per year of a single HAP or 25 tons per year of any combination of HAPs), Maximum Achievable Control Technology (MACT) controls are required; these boilers (depending on their classification) must meet air toxic emission standards.

The final rules represent a change from the rule as proposed. In response to strident opposition (including such claims as the rules would kill more than 300,000 jobs), EPA revised the rule for smaller boilers (less than 10 million Btu/hour) at area sources (sources that have a potential to emit less than 10 tons per year of a single HAP and less than 25 tons per year of any combination of HAPs), to require only operational tune-ups every two years. Larger boilers (greater than 10 million Btu/hour) at area sources must adopt energy conservation measures to avoid installing MACT controls. According to EPA, this focus on maintenance will adequately reduce mercury, lead, cadmium, dioxin, formaldehyde, and hydrochloric acid emissions. Although this revision helped cut the estimated cost from \$4 billion, the final rule will still cost the regulated community an estimated \$1.4 billion.

### What Constitutes a Federal Jurisdictional Wetland Is Still Unclear

Rather than clarifying how to determine whether wetlands are subject to federal jurisdiction under the Clean Water Act (CWA), the Supreme Court's 2006 decision in *Rapanos v. United States*, 547 U.S. 715, included multiple opinions which have caused even more confusion. The EPA and U.S. Army Corps of Engineers issued guidance on jurisdictional determinations after *Rapanos* and there has been subsequent litigation over jurisdictional issues. Recently, in *Precon Development v. U.S. Army Corps of Engineers*, Civ. No. 09-2239 (4th Cir. Jan. 25, 2011), the Fourth Circuit joined other circuits by adopting Justice Kennedy's "significant nexus test," one of the opinions set forth in *Rapanos*. The Fourth Circuit seems to require a greater evidentiary showing to prove there is a "significant nexus" between the wetlands and navigable waterways. At issue in *Precon Development* are 4.8 acres of wetlands that are adjacent to a drainage ditch, located seven miles upstream from the nearest river. The Army Corps took the position that these wetlands were subject to CWA jurisdiction—using the EPA/Army Corps guidance published after the *Rapanos* decision—and that it could prohibit the landowner from dredging and filling the wetlands under Section 404 of the CWA. The court found that the evidence relied upon by the Army Corps was insufficient to establish the required nexus. Also, the court refused to give great deference to the EPA/Army Corps nonbinding guidance document because there was no notice-and-comment rulemaking. New "guidance" is expected to be issued by EPA/Army Corps in the near future, which is expected to expand CWA jurisdiction and spur more litigation.

## State Environmental Quality Review Act Environmental Assessment Forms to Be Amended

The New York State Department of Environmental Conservation (NYSDEC) has proposed amending its Short and Full Environmental Assessment Forms (EAFs) for the first time since 1987. EAFs are used to help assess environmental impacts under a State Environmental Quality Review Act (SEQRA) review and help determine whether an environmental impact statement should be prepared to further assess potentially significant impacts. The proposed amendments are intended to update the forms to make them more appropriate based on the various changes to the way projects are developed since the last update. NYSDEC has proposed modifications to the forms which include consideration of climate change and energy conservation, environmental justice, and pollution prevention. Additionally, the structure of the forms has been updated in order to make them more user friendly, as well as easily compatible with electronic media.