

OCTOBER 30, 2007

EPA Announces Enforcement Priorities for Next Three Years

EXECUTIVE SUMMARY

On October 12th, the Environmental Protection Agency (“EPA”) announced its enforcement priorities for the 2008 to 2010 period. EPA will focus on specific priorities under the Clean Water Act (“CWA”), Clean Air Act (“CAA”), the Resource Conservation Recovery Act (“RCRA”) and the general financial responsibility provisions under various environmental laws. EPA is broadening its enforcement objectives and has declared its intention to focus on several non-traditional enforcement targets, including the home building and big box construction industries.

STORMWATER

EPA has identified stormwater discharges of pollutants as an enforcement priority. Specifically, EPA intends to focus its stormwater enforcement efforts on homebuilding and big box store construction, ready-mix concrete, crushed stone, and sand and gravel operations.

EPA’s designation of big box stores as a priority is particularly notable for real estate developers because of EPA’s lack of a precise definition for big box stores. EPA notes that there is no universal definition of a big box store and focuses on three factors: 1) average square footage, 2) the company’s total revenues, and 3) the number of new stores the company projects will be constructed over the next three years. By looking at company-wide averages, EPA’s criteria are based on ownership characteristics rather than individual store

characteristics. EPA argues that this allows them to address a significant environmental problem on a national basis.

Real estate developers with projects involving national retailers and homebuilders should be particularly mindful of compliance with CWA stormwater requirements. The CWA requires that construction sites of greater than one acre acquire an individual national pollution discharge elimination system (“NPDES”) permit with an approved stormwater prevention plan or join the general stormwater permit. Clients should be aware that all but the smallest construction projects require NPDES permits and that even projects smaller than one acre may require a permit if they are part of a common development plan or scheme.

EPA also included concentrated animal feeding operations (“CAFOs”) among its CWA enforcement priorities. CAFO operations should take steps to ensure that their waste facilities do not overflow during wet-weather events.

EPA’s remaining enforcement priority for sanitary sewer overflow and combined sewer overflow are applicable only to municipalities.

CLEAN AIR ACT

EPA announced that it will focus on air toxics and the new source review/prevention of significant deterioration (“NSR/PSD”) in the 2008-2010 enforcement period. EPA has discontinued

the priority for petroleum refining as EPA's goal of addressing eighty percent of refining capacity has been achieved. Petroleum refining will continue to be monitored and enforced under EPA's core program.

NSR/PSD applies to sources that are in attainment areas under the National Ambient Air Quality Standards ("NAAQS"). EPA's NSR/PSD priorities are in four industrial sectors: coal fired electric utilities, cement manufacturing facilities, sulfuric and nitric acid manufacturing facilities, and glass manufacturing facilities.

EPA's air toxics priorities are focused upon industrial activities rather than industry sectors. The air toxics priorities include leak detection and repair ("LDAR"), industrial flares, and industrial coating. LDAR concerns leaking equipment such as valves, pumps and connectors that are a large source of fugitive volatile organic compounds ("VOCs") and hazardous air pollutants ("HAPs"). With industrial flares, EPA will increase enforcement of regulations that require specific operating conditions for flares used as pollution control devices. Flares must have a continuous pilot flame, not emit smoke, combust gasses above a minimum heat threshold, and generally utilize good engineering practices. Finally, EPA will focus on surface coating to ensure compliance with applicable Maximum Achievable Control Technology ("MACT") standards for fourteen industrial processes for which it has promulgated a surface coating MACT.

MINERAL PROCESSING

EPA will focus on mineral processing wastes under the Resource Conservation and Recovery Act ("RCRA"). Mineral processing is not explicitly defined in either the statute or the regulations, but includes operations like smelting and acid or alkaline digestion that cause a significant physical or chemical change to the ore and minerals. Grinding or crushing of minerals that merely separates or concentrates minerals is known as beneficiation and not mineral processing and is not an enforcement priority. Further, not all mineral processing is included in the enforcement priority. EPA has cited the danger from hazardous wastes from mineral processing as justification for stepped-up enforcement, but wastes from many mineral processing activities are excluded from the definition of hazardous waste under the Bevill exclusion. The Bevill exclusion applies to twenty mineral processing wastes that are listed at 40 CFR 261.4(b)(7).

FINANCIAL RESPONSIBILITY

Many environmental statutes contain financial responsibility provisions that require a facility to either set aside funds or guarantee that funds will be available to address potential long term environmental issues. EPA is beginning its review by examining compliance with the financial responsibility provisions under RCRA closure/post closure, RCRA corrective action, the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), and the Toxic Substances Control Act ("TSCA"). RCRA requires a facility that treats, stores or disposes of hazardous

waste to prepare and maintain its closure and post closure plans and demonstrate that it can meet the financial estimates of the plans through either a 1) trust fund, 2) surety bond, 3) letter of credit 4) insurance policy, or 5) by meeting specified corporate financial criteria. The financial responsibility requirements under CERCLA and TSCA are similar to the RCRA regime outlined above.

All regulated facilities should take extra care to ensure that they meet the financial assurance requirements of relevant environmental laws.

CONCLUSION

Parties who participate in industries or processes that have been declared priorities should expect increased inspections and enforcement. However, parties can expect normal EPA compliance and enforcement activities to continue unchanged. Facilities should take steps to ensure compliance with financial responsibility requirements under RCRA and other environmental statutes.

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ENVIRONMENTAL LAW PRACTICE

Kelley Drye's Environmental Law Practice Group specializes in providing comprehensive solutions for complex problems to facilitate effective business strategies. We provide both advice and representation for clients participating in rule-making and policy-making activities by federal regulatory agencies, including the U.S. Environmental Protection Agency, the Occupational Safety and Health Administration, the U.S. Fish and Wildlife Service, and the U.S. Army Corps of Engineers.

FOR MORE INFORMATION

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