



# Overview of USEPA Priorities and Select Issues of Environmental Liability Potentially Impacting States

National Conference of State Legislatures  
Environment Committee Presentation

April 9, 2010

**PATTON BOGGS** LLP  
[www.pattonboggs.com](http://www.pattonboggs.com)



# Overview

- Introduction
- EPA Budget and Priorities
  - How EPA Focus Impacts States
- Federal Enforcement Risks
  - Example: Clean Water Act § 309(e) Liability
  - Example: State-owned Superfund Sites
- Citizen Suit Risks
  - Example: Sierra Club's *Beyond Coal* Campaign

# EPA Budget Increases

- EPA Budget has increased to over \$10 Billion for 2010 and 2011
  - Highest Budgets in Agency history
  - Over 35% increase over recent prior years
- Focus:
  - Enforcement – additional enforcement staff
  - Enhanced Collaboration with States and Tribes
  - Comprehensive – Air, Water, Waste, Chemical Safety, Climate and Clean Energy

# 2008-2010 EPA Enforcement Priorities

- Air Toxics
- New Source Review/Prevention of Significant Deterioration (NSR/PSD)
- Concentrated Animal Feeding Operations
- Municipal Combined Sewer and Sanitary Sewer Overflows (CSOs/SSOs)
- Storm Water
- Mineral Processing
- Financial Responsibility
- Indian Country

# EPA's National Enforcement Initiatives for 2011-2013

- Similar to the previous cycle
  - Keep Raw Sewage and Contaminated Storm Water out of nation's waterways
  - Prevent animal waste from contaminating surface and ground water
  - Cut toxic air pollution
  - Reduce widespread air pollution from the largest sources
  - Reduce pollution from mineral processing operations
  - Assure energy extraction sector compliance with environmental laws

# Additional Considerations for 2011-2013 Cycle

- EPA Enforcement Goals
  - Targeting impaired areas with most serious water, air and chemical hazards
    - Protecting vulnerable communities
  - Resetting Relationship with States
    - Shared accountability
    - Assure strong and effective state enforcement of federal environmental laws
    - Push for a consistent enforcement across states and regions
    - New model for shared accountability and strengthened oversight – starting with water enforcement
  - Improve Transparency

# EPA Enforcement Goals – Early Impacts on States

- Resetting Relationship with States
  - Clean Water Act Enforcement Action Plan
    - Targeted enforcement, focusing on impaired waters
    - Strengthened oversight of state permitting and enforcement
    - Improved accountability and transparency
  - EPA disapproval of Qualified Facilities exemption rule submitted by Texas for inclusion in its federally approved State Implementation Plan (SIP)
    - [http://www.epa.gov/region6/6xa/pdf/qualified\\_facilities\\_summary.pdf](http://www.epa.gov/region6/6xa/pdf/qualified_facilities_summary.pdf)
    - Improves transparency when plant modifications made
    - Potential increased focus on “SIP gaps”

# Additional Examples of Improved Transparency and Public Data Access

- EPA Civil & Criminal Enforcement Tracking Map
  - Web-based, interactive map allows public access to detailed information about enforcement actions
  - <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2009/index.html>
- EPA's Rulemaking Gateway
  - New Web portal providing substantially simpler public access to EPA's priority rules
  - More powerful searches ease public participation
  - Able to track whether rulemaking likely to have impact on state governments
    - Potential impacts categorized into two types
      - State likely to be involved in the implementation of the action
      - State likely to be regulated by the action
  - <http://www.epa.gov/rulemaking/>

# Federal Enforcement Risks

- Clean Water Act Section 309(e) Liability
  - When a municipality is a party to a civil suit brought by the United States, “the state in which the municipality is located shall be joined as a party. 33 U.S.C. § 1319(e)
  - State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality “to the extent that the laws of that State prevent the municipality from raising revenues to comply with such judgment.” 33 U.S.C. § 1319(e)
  - Relationship to EPA Enforcement Initiatives
    - CSO/SSO cases – Often multi-hundred million dollar exposures
  - However, states most often aligned as plaintiffs

# Federal Enforcement Risks

- State-owned Superfund Sites
  - Discussion Example:
    - Colorado School of Mines Research Institute Site, Golden, CO
      - Former metallurgical and mining research facility active from 1912-1987
      - Elevated metals in soils and elevated uranium concentrations in groundwater
      - Colorado School of Mines and State of Colorado PRPs guided remediation efforts under order from EPA
      - Total Site exposure estimated at \$15-20 million
      - Other PRPs exist
        - » Complexities with unitary executive, pursuit of and settlement with other PRPs

# Citizen Suit Risks

- Over a dozen federal environmental statutes authorize citizens suits
  - Section 304 of the Clean Air Act (CAA) allows citizens to bring enforcement actions. 42 U.S.C. § 7604
  - Sierra Club’s national *Beyond Coal* campaign targeting entities that operate coal combustion facilities with, among other things, citizen suits
  - Stated goal of Sierra Club’s national *Campuses Beyond Coal* campaign – “to shut down or replace campus-based coal plants and end our schools’ dependence on the coal-generated electricity they purchase”
    - Sierra Club has identified over 60 universities, including numerous public universities that own coal-fired boilers

# Citizen Suit Risks

- Implications of *Campuses Beyond Coal* Campaign
  - Discussion Example: Sierra Club lawsuit against Wisconsin Department of Administration and the University of Wisconsin ([\*Sierra Club v. Morgan\*, 2007 WL 3287850 \(W.D. Wis. Nov. 7, 2007\)](#))
    - Patterned on federal government enforcement actions against coal-fired utilities
    - Alleged major modifications to a major stationary source that resulted in a significant net emissions increase without obtaining a permit
    - State lost lawsuit and ultimately settled with Sierra Club, agreeing to convert the power plant at issue to alternate fuel
      - Set to spend approximately \$250 million to convert **one** plant from coal to natural gas or biomass
      - Paid Sierra Club over \$250,000 in legal fees and costs
    - State owns 14 other coal-fired plants
- Further Reading:  
<http://www.pattonboggs.com/news/detail.aspx?news=1094>

# Questions & Answers

## Contact Information:

Scott Stewart

Patton Boggs LLP

2550 M Street, NW

Washington, DC 20037

(202) 457-6012

[sstewart@pattonboggs.com](mailto:sstewart@pattonboggs.com)

<http://www.pattonboggs.com/sstewart/>