

## Plan EJ 2014: EPA's Roadmap for Environmental Justice

In September 2011, the U.S. Environmental Protection Agency ("EPA") released Plan EJ 2014, the agency's "roadmap for integrating environmental justice into its programs, policies, and activities." Plan EJ 2014 is one of the most recent efforts by EPA to address the perceived unequal distribution of the burdens of environmental pollution. A copy of the plan is available at <http://www.epa.gov/compliance/ej/resources/policy/plan-ej-2014/plan-ej-2011-09.pdf>.

Plan EJ 2014, released in conjunction with the twentieth anniversary of EO 12,898, an Executive Order issued by President Clinton in 1994 requiring each federal agency to include achieving environmental justice as part of its mission, is a comprehensive plan for integrating environmental justice into EPA programs. The plan includes five cross-agency focus areas, four tools development areas, and numerous program initiatives designed to advance the agency's environmental justice goals.

EPA's cross-agency focus areas involve cooperation among various agencies and programs to address environmental justice across the federal government. The five cross-agency focus areas included in Plan EJ 2014 are as follows:

- 1) incorporating environmental justice into rulemaking;
- 2) considering environmental justice in permitting;
- 3) advancing environmental justice through compliance and enforcement;
- 4) supporting community-based action programs; and
- 5) fostering administration-wide action on environmental justice.

In July 2010, EPA published *Interim Guidance on Considering Environmental Justice During the Development of an Action* which encourages the consideration of environmental justice impacts during all stages of rule development and provides specific steps that rule writers can take to assess the impact of proposed rules on overburdened communities. A technical guidance document is also being developed to accompany the interim guidance.

EPA will be seeking consideration of the effect of permitted activities on the health of community residents by promoting participation in the permit process by members of "affected" communities and, EPA says, by developing measures to ensure that environmental justice goals are taken into account in the issuance of every permit. According to EPA, achieving these goals will require assessment of the cumulative impacts resulting from exposure to multiple permitted facilities, both existing and new. EPA believes that because minority and low-income communities are often proximate to factories, plants, and other industrial sources of pollution, the determination of the collective effect of these sources on human health and the environment is crucial to the promotion of environmental justice.

In a similar vein, Plan EJ 2014 contemplates the incorporation of environmental justice concerns in compliance and enforcement activities. First, the concerns of "overburdened" communities will be factored into the selection of EPA's National Enforcement Initiatives. Many of the initiatives for FY 2011-2013 address some of the problems facing communities such as control of sanitary sewer overflows and decreasing emissions of toxic air pollutants. Second, specific enforcement efforts within these categories will be targeted towards violations that affect communities. Third, remedies may be tailored to meet specific needs of communities.

EPA's Plan EJ 2014 also reiterates the agency's stated commitment to supporting community-based action programs. EPA says it will utilize existing programs and guidance to increase public access to information and enhance coordination among local groups. According to EPA, the National Environmental Performance Partnership System (NEPPS), the National Program Manager (NPM), and the Community Action for a Renewed Environment (CARE) principles all provide mechanisms that may be used for reaching environmental justice goals through support of community programs.

Finally, EPA says it will seek to encourage administration-wide action on environmental justice by encouraging coordination among all relevant agencies through participation in the Environmental Justice Interagency Working Group and other federal partnerships. EPA believes that "[a] coordinated and holistic approach is essential to ensuring that [EPA] address[es] the full scope of adverse human health and environmental effects in overburdened communities, legacy pollution problems rooted in historical discrimination, and cumulative impacts; and ensure[s] that all communities participate in, and benefit from, the transition to a clean energy economy." As part of this initiative, EPA plans to encourage the use of existing statutes such as the National Environmental Policy Act and Title VI of the Civil Rights Act of 1964 to ensure equal treatment of individuals in decisions affecting health and the environment across all agencies.

Plan EJ 2014 identifies four tools development areas – science, law, information, and resources – to support the cross-agency initiatives discussed above. EPA will supposedly inform its decisions regarding environmental justice with scientific research, particularly transdisciplinary research addressing multi-media, cumulative impacts as well as input from the community (although it is unclear now how "input from the community" will constitute "science"). EPA's Office of General Counsel will supposedly identify existing legal authority that may be utilized to advance environmental justice. To promote the availability of current information regarding pollution and its effect on certain demographics, EPA claims to be developing "a suite of tools, data and services known as EPA's GeoPlatform that will help coordinate and consolidate mapping activities, applications, and data across the Agency" as well as an environmental justice screening tool "to help identify communities living with the greatest potential for negative environmental and health effects." EPA also plans to give away money, provide "technical assistance" for communities, and increase workforce diversity within EPA to reflect the diversity of the communities that the agency serves.

Plan EJ 2014 intends also to identify initiatives within specific EPA programs that can be tailored to provide environmental justice benefits.

As government agencies incorporate environmental justice concerns into their programs, industries will face increased environmental regulation and more stringent review of environmental permit applications, particularly in highly industrialized communities. These communities, armed with the knowledge and resources contemplated by Plan EJ 2014, will be in a better position to petition agencies for greater protection from perceived environmental harms and to lobby against projects that they perceive as detrimental to the environment as well as using these taxpayer-funded tools to provide the basis for tort lawsuits and other kinds of environmental claims. Industries will see a similar effect in compliance and enforcement activities. The availability of additional resources for the achievement environmental justice goals will likely to lead to an increase in enforcement activities in targeted communities. Industries in these communities may be subject to more rigorous scrutiny, and, as mentioned above, may be required to implement more community-specific remedies in the form of environmental projects, in addition to the traditional payment of monetary fines.

Additionally, the plan's focus on the cumulative impacts of pollution could require industries in "overburdened" communities to consider not only their own environmental decisions, but the decisions of neighboring industries as well. Although the goals set forth in Plan EJ 2014 do not change the statutes and regulations currently in place regarding the siting and permitting of facilities, these goals could conceivably result in the promulgation of rules under the various environmental protection statutes – Clean Water Act, Clean Air Act, the Resource Conservation and Recovery Act, and others – that place a greater emphasis on the interaction among the various pollutant-producing facilities and the cumulative impact of these facilities on the local environment. The implementation of Plan EJ 2014 programs could, therefore, change the way companies make decisions regarding the siting and operation of facilities.

## **ADDITIONAL ITEMS OF INTEREST:**

### [Gulf Coast Ecosystem Restoration Task Force Releases Final Strategy](#)

On December 2, the task force created to coordinate conservation and restoration efforts in the Gulf Coast area following the *Deepwater Horizon* oil spill delivered to the President its final strategy for restoring the Gulf Coast ecosystem. The plan seeks collaboration at all levels – from local communities to federal agencies – to restore and conserve habitat, restore water quality, replenish and protect coastal and marine resources, and enhance community resilience. Implementation of the plan will be aided by the Gulf of Mexico Initiative of the U.S. Department of Agriculture's Natural Resource Conservation Service which will provide \$50 million in financial assistance.

### [Proposed General Permits to Reduce Administrative Burden for Commercial Vessels](#)

EPA issued a new draft Vessel General Permit and draft Small Vessel General Permit for discharges from commercial vessels subject to the Clean Water Act. The Vessel General Permit, which applies to commercial vessels longer than 79 feet, revises reporting requirements and streamlines certain self-inspection requirements. The Small Vessel General Permit applies to discharges from vessels less than 79 feet in length and specifies best management practices to reduce the risk of spreading invasive species. The draft permits will undergo a public comment period and, if finalized, will go into effect in 2013. Copies of the draft permits are available at <http://www.epa.gov/npdes/vessels>.

### [Online Mapping Tool Provides Interactive Environmental Enforcement Data](#)

EPA's Enforcement and Compliance History Online (ECHO) database now contains an interactive EPA and State Enforcement Actions Map that allows users to view enforcement action at both the federal and state level by searching by year, media, state, or facility or by clicking on the desired state. Links provide detailed compliance information for each facility. The map can be viewed via the ECHO webpage, <http://www.epa-echo.gov>.

### [EPA Refines Modeling of Air Pollutants](#)

EPA's Community Multi-scale Air Quality model (CMAQ) has been upgraded to provide more detailed information for local areas and allow application to larger scales. The CMAQ models the interaction between pollutants the weather and is used to estimate air quality levels and determine the effect of regulatory decisions.

### [Chemical Weapons Destruction Operation Completed in Anniston](#)

In late September, ADEM announced the completion of chemical munitions incineration at the Anniston Chemical Demilitarization Facility, one of largest chemical weapons destruction operations in U.S. history. The facility was constructed pursuant to an Alabama Hazardous Waste Management Act permit received in 1997 and operations have been ongoing since 2003. Closure activities at the site continue.

### [EPA Commits to Development of Natural Gas Wastewater Standards](#)

In October, EPA announced its intent to develop effluent guidelines under the Clean Water Act for wastewater discharges from natural gas extraction from coalbed and shale formations. For coalbed methane extraction, EPA plans to develop uniform national standards for discharges and pretreatment requirements by 2013. Proposed standards for pretreatment of wastewater from shale gas extraction should follow in 2014.

### [EPA Adopts Integrated Planning Process for Municipal Clean Water Act Compliance](#)

In recognition of the budget crisis facing many local governments, EPA is committed to attainment of Clean Water Act goals for control of wastewater and stormwater by working with local governments to prioritize investments and identify cost-effective solutions. This integrated planning approach will provide municipalities with increased flexibility in managing local resources. The memorandum announcing the approach is available at <http://cfpub.epa.gov/npdes/integratedplans.cfm>.

### [EPA's Internal Watch List of High Priority Clean Air Act Violators Disclosed](#)

In response to a Freedom of Information Act request from NPR and the Center for Public Integrity, EPA disclosed an internal list of serious or chronic violators of the Clean Air Act and that have not been subject to enforcement action for a significant length of time. Of the over 400 facilities on the two versions of the list that were disclosed, over 40 are located in EPA Region IV. A copy of the list is available on the Center for Public Integrity's iWatch News website at <http://www.iwatchnews.org/2011/11/03/7280/epas-internal-clear-air-act-watch-list>.

### [Most States Now Meet NAAQS for Lead](#)

In November, EPA announced that 39 states now meet the National Ambient Air Quality Standards (NAAQS) for lead established in 2008. In Alabama, only one city remains non-attainment for lead – Troy in Pike County. Non-attainment areas have 18 months to develop plans for attainment of the NAAQS within 5 years. For a listing of all non-attainment areas, go to <http://www.epa.gov/leaddesignations>.

## **SPOTLIGHT ON CRIMINAL ENFORCEMENT ACTIONS:**

### [New York Developer Faces Criminal Charges for Filling of Wetlands](#)

In November 2011, an indictment was issued in the Western District of New York charging William L. Huntress and his development companies with violation of the Clean Water Act, conspiracy to violate the Clean Water Act and conspiracy to defraud the U.S., obstruction of justice, false statements, concealment of material facts, and contempt of court. The indictment alleges that Huntress purchased property, knowingly filled the wetlands on the property, then concealed the illegal conduct by concealing documents, making false statements to federal officials, and disregarding injunctive orders.

### [Indiana Waste Treatment Company Indicted for Unpermitted Discharges to POTW](#)

Tierra Environmental, an Indiana wastewater treatment company, faces felony criminal charges for violation of the Clean Water Act's prohibition on discharges to publicly owned treatment works (POTW) at unpermitted locations and conspiracy. The government alleges in the November 2011 indictment that Tierra collected wastewater from its customers, lacked a permit for proper disposal of wastewater, and disposed of the water illegally through a closed facility to the local POTW. The owner and the manager of the facility were also charged. The felony violations of the Clean Water Act could carry up to three years in jail and up to \$250,000 per count upon conviction.

### [Natural Gas Company Pleads Guilty to CWA Violations for Discharge of Fracking Fluid](#)

Integrated Production Services, LLC pleaded guilty in October 2011 to a misdemeanor violation of the Clean Water Act and has agreed to pay a \$140,000 criminal fine, make a community service payment of \$22,000, and institute a \$38,000 employee training program. The company was charged after 400-700 gallons of hydrochloric acid was discharged to a local creek during its natural gas drilling operations in Oklahoma. The company supervisor whose actions directly resulted in the discharge also pleaded guilty to a misdemeanor violation of the CWA and could face a \$100,000 fine and a year in prison.

### [Federal Court Imposes \\$1.8 Million Fine for Illegal Trade in Black Coral](#)

In October 2011, GEM Manufacturing, LLC, a company based in the Virgin Islands, was sentenced to pay a \$1.8 million fine for violations of the Lacey Act and the Endangered Species Act (ESA) for knowingly trading in falsely-labeled coral, a federally-protected species. The ESA imposes strict trade regulations on black coral, a species listed in the Convention of International Trade in Endangered Species of Wild Fauna and Flora, and the Lacey Act prohibits the false labeling of wildlife in involved in international commerce. GEM was also required to make \$500,000 in community service payments and ordered to forfeit over \$2.17 million in sculptures, jewelry, and raw black coral.

### [Fishing Company Faces Criminal Charges for Discharges of Bilge Waste](#)

Sanford Ltd., a New Zealand based fishing company, was indicted in late 2011 for violations of the Act to Prevent Pollution from Ships (APPS), conspiracy, and obstruction of justice based on alleged discharges of oily bilge waste from the Vessel *San Nikunau*, failure to maintain appropriate records, presentation of false documents, and deception of the Coast Guard during inspection. Sanford Ltd. could face fines of \$500,000 per count on each of the seven counts plus criminal forfeiture of over \$24 million in earnings derived from criminal conduct.

### [Federal Judge Sentences Man to Five Years for Storing Hazardous Waste in Yard](#)

In April 2011, Edward Wyman was convicted of violating the Resource Conservation and Recovery Act (RCRA) by storing in his backyard toxic materials and explosives including corroded ammunition, lead-contaminated waste from shooting ranges, gunpowder, and industrial solvents which led to a fire and explosions. In November, based on the jury's determination that Wyman knowingly placed others in imminent danger, a federal judge in California sentenced him to five years in federal prison and ordered him to pay an \$800,000 fine.

## ATTORNEY PROFILES

**Richard E. Davis** is a partner with Starnes Davis Florie LLP. He represents clients in federal and state courts in Alabama as well as in matters involving federal and state regulatory agencies. Richard's environmental practice includes Clean Water Act, Clean Air Act, CERCLA and RCRA litigation; natural resource and property damage claims; land and water use issues, and the defense of corporations and individuals accused of environmental crimes as well as regulatory enforcement and compliance matters. Richard also defends personal injury actions based on chemical exposure. In addition, he is experienced in the prosecution and defense of claims in biotechnology and pharmaceutical litigation (including product development and professional liability), in business litigation (including fraud, breach of contract, antitrust and other unfair competition), and in insurance coverage and employee benefits disputes. Richard is a Fellow in the Litigation Counsel of America Trial Lawyer Honorary, was listed in the 2008 - 2011 editions of *Alabama Super Lawyers*® magazine for Environmental Litigation, was selected by his peers for inclusion in the 2011 and 2012 editions of *Best Lawyers in America*®—in 2011 for both Environmental Law and Natural Resources Law and in 2012 for both Litigation-Environmental and Natural Resources Law, and is Immediate Past Chair of the Alabama State Bar Environmental Law Section.

**J. Scott Dickens** is a partner with Starnes Davis Florie LLP. Scott's practice is primarily devoted to environmental and construction litigation. He has represented clients in all State and Federal Courts in Alabama, in arbitration proceedings before the American Arbitration Association and Alabama Building Commission, and in the United States Court of Federal Claims. Scott's practice includes CERCLA and RCRA litigation; architect and engineer liability claims, particularly relating to environmental issues; and construction related matters. He also frequently speaks at environmental and construction seminars. Scott is a 1996 graduate of Cumberland School of Law where he was a member of the *Cumberland Law Review*.

**Amber M. Whillock** is an associate with Starnes Davis Florie LLP. Amber's practice is primarily devoted to environmental litigation and regulatory compliance. While attending Cumberland School of Law, Amber was the Executive Editor of the *Cumberland Law Review*, a Thomley Scholarship Recipient, a George M. Stewart Banking Award Recipient and the recipient of numerous Scholar of Merit Awards. Amber was also active in the Phi Alpha Delta Law Fraternity and served as a Judge Abraham Caruthers Legal Research and Writing Teaching Assistant. Amber is currently an associate member of the Environmental Law Institute, and a member of the Birmingham and American Bar Associations.

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