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EPA Proposes National Priorities for Enforcement and Compliance Assurance

Every three years, the U.S. Environmental Protection Agency (EPA) selects national enforcement priorities on which to focus its resources. On January 4, EPA released a set of proposed priorities for FY 2011–2013 for public comment. 75 Fed. Reg. 146. Comments are due on or before January 19.

The national enforcement priorities are purportedly designed to reflect the most significant environmental risks where noncompliance is a significant contributing factor. The selection criteria include: whether focused EPA action can mitigate adverse environmental impact; whether there are significant trends of noncompliance; and whether the federal government is best positioned to take action. Final national priority selection is incorporated into the EPA Office of Enforcement and Compliance Assurance National Program Manager Guidance, currently slated for release in April. The 15 proposed priorities are set forth below.

Candidate National Priorities for FY 2011–2013, Subject to Public Comment

- Air Toxics
- Concentrated Animal Feeding Operations (CAFOs)
- Environmental Justice—Community Based Approach
- Indian Country Drinking Water
- Marine Debris
- Mineral Processing
- Municipal Infrastructure (Wet Weather)
- New Source Review/Prevention of Significant Deterioration (NSR/PSD)
- Resource Conservation and Recovery Act (RCRA) Enforcement (Corrective Action)
- RCRA Financial Assurance
- Resource Extraction
- Pesticides at Day Care Facilities
- Surface Impoundments
- Wetlands
- Worker Protection Standards (for Agricultural Pesticides)

Katten Muchin Rosenman LLP's [Environmental Practice](#) has extensive experience in environmental enforcement and defense and in the design of environmental management systems. For more information or if you are interested in providing comment to EPA or would like any guidance regarding EPA's national priorities or related issues, please contact your Katten attorney or any member of the Environmental Practice listed below:

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Consistency with EPA National Priorities for Enforcement and Compliance Assurance (FY 2008–2010)

Several of the candidates for 2011–2013 national priorities remain consistent with the existing priorities for 2008–2010, which include Air Toxics, CAFOs, Financial Responsibility, Indian Country, Mineral Processing, Municipal Combined Sewer and Sanitary Sewer Overflows, NSR/PSD and Stormwater:

- **Air Toxics** is still considered to be one of the “national problem areas.” EPA notes that there are over 90 leak detection and repair (LDAR) investigations underway as of January 2010. LDAR, according to EPA, continues to be a “productive enforcement target.”
- EPA’s **NSR/PSD** program has been the subject of several high-profile judicial skirmishes that have included both wins and losses for EPA. NSR/PSD enforcement remains on the proposed 2011–2013 list as well, making continued litigation a likely outcome.
- EPA will continue to examine whether facilities are maintaining sufficient **RCRA Financial Assurance**, reflecting EPA’s concern that the current economic environment may undermine this program.
- The proposed **Municipal Infrastructure** priority combines the existing Municipal Combined Sewer and Sanitary Sewer Overflows priority as well as components of the existing Stormwater priority. This proposal follows a July 2009 General Accounting Office report to the House Subcommittee on Water Resources and Environment, which described a significant gap in the funding available to improve and maintain the nation’s wastewater treatment system.
- **CAFOs, Mineral Processing** and **Indian Country Drinking Water** also continue to appear on the proposed 2011–2013 list.

Departures from EPA National Priorities for Enforcement and Compliance Assurance (FY 2008–2010)

Other candidates for 2011–2013 national priorities represent developing trends and potentially new areas of focus:

- EPA’s proposed 2011–2013 priority list includes **Surface Impoundments**, reflecting growing concerns that may be related to the Tennessee Valley Authority coal ash spill. EPA reports that there are an estimated 18,000 surface impoundments nationwide and that a 2001 EPA study suggested that 90% of industrial surface water impoundments are not correctly reporting all chemicals of concern. EPA’s proposal was not unexpected: In an October 2009 press release, EPA announced that it “is investigating ponds . . . , referred to as surface impoundments, as part of a nationwide initiative.”
 - The proposed listing of **Marine Debris** may arise out of vessel pollution enforcement efforts that comprise approximately one-fourth of the environmental criminal cases prosecuted by the U.S. Department of Justice (DOJ). According to the DOJ Environmental Crimes Section, the criminal penalties imposed in vessel pollution cases over the past decade have totaled over \$200 million and responsible officers have been sentenced to more than 17 years of incarceration.
 - The addition of **Resource Extraction** to the proposed list appears to be a function of the Obama administration’s efforts to balance its clean energy goals. If climate change legislation or EPA greenhouse gas rules prompt a shift away from coal-fired power toward natural gas, then a resource extraction initiative could play a key role in mitigating potential groundwater contamination and air quality concerns.
 - The scope of EPA’s jurisdiction over **Wetlands** remains unclear in the wake of the U.S. Supreme Court’s decisions in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (“SWANCC”) and *Rapanos v. United States*. By its own admission, EPA has recognized the need for legislative changes to define the extent of EPA’s authority under the Clean Water Act. According to EPA, the SWANCC and *Rapanos* decisions have “negatively impacted EPA’s ability to enforce by significantly increasing the amount of time and resources it takes to bring enforcement actions necessary to protect our waters.” Given the usual expectation that matters for enforcement should not involve areas of legal ambiguity or unsettled legal definitions, this proposal would appear to require careful planning by the Agency to avoid litigation that could further impact EPA’s ability to enforce.
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- **Environmental Justice—Community Based Approach** appears to be a paramount concern for EPA and is discussed throughout the background papers EPA issued in connection with the proposed national priorities. According to EPA, Administrator Lisa Jackson is committing the Agency to “take special pains to connect with those who have been historically underrepresented in EPA decision making.” Notably, this issue is also of particular interest to Ignacia Moreno, the newly confirmed Assistant Attorney General for the DOJ Environment and Natural Resources Division.
 - Revisiting a previously set goal, the proposed listing of **RCRA Enforcement** for corrective action programs aims to achieve a goal of completing corrective action at 95% of the facilities requiring it by 2020. EPA reports that there is a universe of approximately 2,500 facilities currently requiring corrective action, many of which were listed in the late 1980s and throughout the 1990s.
 - Concerns with pesticide handling and application round out the list. **Worker Protection Standards** for agricultural pesticides and **Pesticides at Day Care Facilities** are also proposed for inclusion.

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