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CHAIR MESSAGE

Thomas P. Redick and Donald D. Anderson

As the chairs of Agricultural Management and Environmental Litigation and Toxic Torts (ELTT) Committees we want to welcome all of you and encourage participation in committee activities. Both committees are planning another active year with a steady stream of newsletters and interesting programming. This issue of our newsletter combines the interests of agriculture and litigation, which are among the highest profile issues in environmental law.

The Section had a very successful Fall Meeting in Austin, Texas, this past October, with programs on agriculture and a plenary session on the Clean Water Act. Continuing this focus on the Supreme Court's approach to the law of water pollution, our program vice chairs have already submitted program proposals for the 21st Fall Conference in Baltimore, Maryland. We encourage members to attend and enjoy interesting "CLE" content, and network with colleagues. We are committed to providing the information and assistance that our members need to be better lawyers. Our committees have always had solid member participation, with quality programs arising from member involvement. If you would like to be a part of program planning or committee activities, please let us or Agricultural Management Programs Vice Chairs Brandee Ketchum and Brandon Neuschafer or ELTT Program Vice Chair Rich Beaulieu know about your interest and ideas.

With the New Year here, it is time to make plans to get out to Salt Lake City in March for the 42nd Spring Conference. SEER's annual conference on environmental law will once again touch upon climate change regulation and litigation, which has agricultural angles, and will have content relating to agriculture and water conservation and include programs on hydraulic fracturing and expanding litigation under the Resource Conservation and Recovery Act.

This newsletter opens with a case law update from Corey Parton. Chad Burchard writes on trace-back liability risks and the availability of recall insurance to manage those risks. Christopher W. Hayes discusses the impending Farm Bill and associated litigation issues. Deanne Miller and Roger Smith sum up EPA Enforcement activity under President Obama. Lastly, Katelyn Atwood looks at state legislatures' efforts to manage the legal implications of raw milk sales.

Our committees have new "social media" vice chairs, who will assist with making the best possible use of social media. ELTT's social media vice chair is David Scriven-Young. Agricultural Management has appointed Stan Benda and Devan Flahive as its social media co- vice chairs, and looks forward to creating specialized groups on LinkedIn. In keeping with the theme of this newsletter, the Agricultural Management Committee plans to create a group focusing on the laws relating to water pollution in agriculture.

If you want to get more involved in any of our committees' activities, including any topics that you

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financial assistance, to research, to conservation and natural resources protection. With President Obama entering his second presidential administration, and the nation becoming more and more concerned about a growing federal deficit, the question remains as to whether environmental considerations will continue to be an in integral part of Farm Bill legislation as they have been in the past.

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THE OBAMA ADMINISTRATION AND EPA ENFORCEMENT: A LOOK BACK, A LOOK FORWARD

Deanne L. Miller and Roger K. Smith

I. Introduction

In 2009, President Obama and his Administrator of the Environmental Protection Agency (EPA), Lisa Jackson, entered office rather famously pledging that under their watch "the environmental cop will be back on the beat." Three years later, have President Obama and Administrator Jackson lived up to their pledge? How different has the Obama EPA been with regard to enforcement from its predecessor? These are the questions that this article seeks to answer.

II. The Environmental Protection Agency and the Obama Administration

A. Enforcement: Looking Back

During the Bush administration, the EPA's budget had hovered at approximately $8 billion dollars per year. ROBERT ESWORTHY ET AL., CONG. RES. SERV., R41149, ENVIRONMENTAL PROTECTION AGENCY: APPROPRIATIONS FOR FY 2011, at 30–31 (2010), *available at* http://www.nationalaglawcenter.org/assets/crs/R41149.pdf. In 2009, the Obama administration added to the already budgeted amount of $7 billion an additional $7 billion as part of the "economic stimulus package." For fiscal year (FY) 2010, the Obama administration requested $10.29 billion for the EPA, $586 million of which was set aside for the EPA's Enforcement and Compliance Assurance program (an increase of $24 million over the FY 2009 request). For FY 2011, the Obama administration reduced the EPA's budget slightly, bringing it down from $10.29 billion to $10.02 billion. One area that did not see a decrease in funding for FY 2011 was Enforcement and Compliance; its budget was increased from $586 million to $619 million. These figures are taken from the "Compliance and Environmental Stewardship" line item under the "Environmental Programs and Management" account. *See* OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 2010 AND FISCAL YEAR 2011, *available at* http://

www.gpo.gov/fdsys/browse/collectionGPO.action?collectionCode=BUDGET.

For FY 2012, the Obama administration proposed a sharp decrease in spending for the EPA, reducing overall funding to $8.97 billion. The House Republicans, however, sought even deeper cuts in the EPA's funding for FY 2012, proposing a budget of just $7.1 billion in H.R. 2584. John McArdle, *Jackson Summons Top Aides for Budget Pow-Wow as GOP Sharpens Knife*, N.Y. TIMES (July 19, 2011), http://www.nytimes.com/gwire/2011/07/19/19greenwire-jackson-summons-top-aides-for-budget-pow-wow-as-1668.html. Funding for enforcement, however, was slated to increase by $27.5 million. *Id.*

1. How Has All This New Money Been Spent?

On January 14, 2009, in a prepared statement for her confirmation hearing, Administrator Jackson identified "five key objectives: reducing greenhouse gas emissions; reducing other air pollutants; addressing toxic chemicals; cleaning up hazardous-waste sites; and protecting water." A little over a year later, Catherine McCabe, one of the EPA's enforcement administrators, put things a little more starkly to an audience of lawyers. According to Ms. McCabe, the EPA's primary "enforcement goal" is to "[***a***]***ggressively*** go after pollution problems that make a difference in communities"; this goal is to be accomplished by "[***v***]***igorous*** civil and criminal enforcement that targets the most serious water, air and chemical hazards." Catherine McCabe, Principal Deputy Assistant Administrator of the EPA Office of Enforcement and Compliance Assurance, American Bar Association 39th Annual Conference of Environmental Law: EPA Enforcement Goals (March 18–20, 2010) (emphasis added).

2. How Well Has This Money Been Spent?

When the first 18 months of the Obama administration are compared with the first 18 months of President George W. Bush's first term, the EPA has been significantly more dogged or, to use Ms. McCabe's term, "vigorous" in its enforcement efforts. For example, using only case statistics as a benchmark, the Obama administration opened and closed more cases brought under the Clean Air Act. In its first 18 months, the Obama administration opened 795 cases and closed 99 percent of them, while the Bush administration opened 658 and closed only 86 percent of them. Enforcement & Compliance History Online, U.S. Environmental Protection Agency, http://www.epa.gov/echo/index.html. Similarly, with regard to cases brought under the Clean Water Act, while both administrations opened approximately 1300 cases each, the Obama administration was more successful in completing cases, closing 95 percent of its cases while the Bush administration closed only 87 percent of its cases. *Id.*

The most dramatic difference is found with regard to waste management. In its first 18 months, the Obama EPA opened 709 cases under the Resource Conservation and Recovery Act (RCRA), a significantly higher number than the 473 cases opened under the Bush administration. *Id.* The Obama administration also completed 96 percent of those cases, while the Bush administration completed only 78 percent of its cases. *Id.*

Moreover, the EPA under the Obama administration took less time to complete actions under the Clean Air Act, the Clean Water Act, and RCRA. On average, it took the Obama administration between five and nine days to complete a case, while the Bush administration took between 26 and 37 days to complete a case. *Id.*

Not only is the EPA under the Obama administration opening more cases, closing more cases, and closing them more quickly, it is also issuing penalties for serious violations at a generally higher rate than in the past. However, the size of the penalties has tended to be smaller under the Obama administration than under the Bush administration. For example, in its first 18 months, the Obama administration levied penalties in 65 percent of the cases brought under the Clean Air Act. *Id.*; *see also* "The Obama Approach to Public Protection: Enforcement," OMB WATCH 24–29 (2010), http://www.ombwatch.org/files/regs/obamamidtermenforcementreport.pdf. In comparison, with the Bush administration's first 18 months, penalties were levied in only 30 percent of the cases brought under the Clean Air Act. It should be noted, however,

that the average penalty during the first 18 months of the Bush administration was higher ($28,666) than the average penalty during the same period for the Obama administration ($15,688). *Id.*

3. Change or Continuity?

While the Obama administration might be more aggressive than its predecessor when the comparison is between the first years of each administration, a slightly different picture emerges when one compares the last two years of the Bush administration with the first two years of the Obama administration. During the last two years of the Bush administration, 372 cases were completed and, adjusting inflation to FY 2009 dollars, $131.6 million in penalties were levied. OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, U.S. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL ENFORCEMENT TRENDS (NETS) REPORT, F-1 (2011), *available at* http://www.epa.gov/compliance/resources/reports/nets/nets.pdf. During the first two years of the Obama administration, 401 cases were concluded and, again adjusting to FY 2009 dollars, $163.1 million in penalties were levied. These numbers suggest that the real difference between the Obama administration and its predecessor is more one of degree and emphasis, than any kind of revolutionary change. Indeed, when one looks behind these total numbers to the programmatic subtotals, one is again struck by the similarities rather than the differences between the Bush EPA in its last two years and the Obama EPA in its first two years.

Numbers, however, don't tell the whole story. Indeed, the real story about the Obama administration and the EPA may be found in a whole new field of environmental regulation and enforcement—greenhouse gases (GHG).

4. GHG: A New Enforcement Arena?

Mobile Sources of GHGs

In April 2009, just four months after President Obama took office, the EPA issued a proposed finding that six specific GHGs may endanger public health or welfare. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886 (proposed Apr. 24, 2009).

Fiscal Year	Civil Judicial Penalties (in $M Inflation adjusted to FY 2010 Dollars)	Number of Civil Judicial Conclusions
2007 (Bush)		
CAA	$7.9	30
CERCLA	$0.4	106
CWA	$6.6	28
RCRA	$5.2	6
2008 (Bush)		
CAA	$8.5	25
CERCLA	$0.8	119
CWA	$6.0	30
RCRA	$10.6	5
2009 (Obama)		
CAA	$6.1	38
CERCLA	$0.5	112
CWA	$6.9	30
RCRA	$7.7	8
2010 (Obama)		
CAA	$6.1	39
CERCLA	$0.7	100
CWA	$6.3	27
RCRA	$7.6	12

Id. at E-7b, F-3d. In short, a case can be made that there is a fair amount of continuity between the later years of the Bush administration and the early years of the Obama administration.

The proposed "endangerment finding" of April 2009 was followed in a matter of weeks by an announcement that the Obama administration had reached agreement with nine auto manufacturers and with the state of California (which had developed its own GHG emission standards for motor vehicles), as well as with other interested parties, regarding the major outlines of a joint greenhouse gas/fuel economy rulemaking. As announced by the President on May 19, 2009, the EPA and the National Highway Traffic Safety Administration (which administers fuel economy standards for cars and trucks) would integrate corporate average fuel economy (CAFE) standards for new cars and light trucks (collectively known as "light-duty motor vehicles") with national greenhouse gas emission standards to be issued by EPA. The objective of the joint standards is to achieve GHG reduction levels similar to those adopted by California, which harmonized its own standards with those of the EPA as part of the agreement. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454, 49,460 (Sept. 28, 2009) (to be codified at 49 C.F.R. pts. 531, 533, 537, 538).

The proposed endangerment finding was subsequently finalized in December 2009. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009). Although generally referred to as simply "the endangerment finding," the EPA Administrator actually finalized two separate findings: a finding that six greenhouse gases endanger public health and welfare, and a separate "cause or contribute" finding that the combined emissions of greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas pollution that endangers public health and welfare. The endangerment finding has been challenged by approximately 80 other parties, including the Chamber of Commerce. *See Coalition for Responsible Regulation, et al. v. EPA*, Case No. 09-1322 (D.C. Cir.). In April 2010, one year after the endangerment finding was first proposed, the EPA used its existing authority under Section 202 of the Clean Air Act to set the first national GHG emission standards, the standards which will control emissions from new light-duty motor vehicles beginning in model year 2012. "EPA and NHTSA Finalize Historic National Program to Reduce Greenhouse Gases and Improve Fuel Economy for Cars and Trucks, EPA Office of Transportation and Air Quality" (2010), *available at* http://www.epa.gov/otaq/climate/regulations/420f10014.pdf; *see also* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010).

Emboldened by the endangerment finding, certain private organizations have sued the EPA in an attempt to compel it to issue endangerment findings for other mobile sources of GHGs. For example, the Center for Biological Diversity, Center for Food Safety, Friends of the Earth, International Center for Technology Assessment, and Oceana sued EPA in 2010 claiming the agency had failed to respond to their petitions for making an endangerment finding for GHG emissions from aircraft, marine vessels, and other non-road engines. On July 5, 2011, the District Court for the District of Columbia granted, in part, the EPA's motion to dismiss. *Center for Biological Diversity v. EPA*, 794 F. Supp. 2d 151 (D.D.C. 2011). Judge Henry H. Kennedy Jr. dismissed the portions of the lawsuit involving the endangerment findings for marine vessels and other non-road engines, citing EPA discretion. However, Judge Kennedy did not dismiss that part of the lawsuit dealing with aircraft greenhouse emissions. In its ruling, the court stated that the endangerment finding for aircraft emissions is a "compulsory" and "mandatory" step under Section 231 of the Clean Air Act, 42 U.S.C. § 7401 et seq. *Id.* at 160–61.

a. Stationary Sources of GHGs

The new GHC regulations affect stationary sources of air pollution in two different ways. First, effective January 2, 2011, new or modified major stationary sources will have to undergo new source review (NSR) with respect to their GHGs in addition to any other pollutants subject to regulation under the Clean Air Act that are emitted by the source. This review will require affected sources to install Best Available Control Technology (BACT) to address their GHG emissions. Second, all major sources of GHGs (existing and new) will have to obtain permits under Title V of the Clean Air Act (or have existing permits modified to include their GHG requirements). In

addition, because stationary sources, particularly coal-fired power plants, are the largest sources of greenhouse gas emissions, the EPA is likely to find itself compelled to issue endangerment findings under other parts of the act, resulting in new source performance standards for stationary sources or emission standards under other sections of the act. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010); *see also* Final Rule: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, U.S. Environmental Protection Agency, http://www.epa.gov/nsr/documents/20100413fs.pdf.

b. Procedural Setbacks and Hurdles to More GHC Regulation?

In September 2011, however, the Obama administration's effort to regulate GHGs was thrown into doubt when the EPA's Inspector General (IG) issued a report calling into question the scientific assessment upon which the endangerment finding was based. *See* U.S. Environmental Protection Agency, Office of Inspector General, 11-P-0702, Procedural Review of EPA's Greenhouse Gases Endangerment Finding Data Quality Processes (2011), *available at* http://www.epa.gov/oig/reports/2011/20110926-11-P-0702.pdf. According to the IG report, the EPA failed to follow the Office of Management and Budget's (OMB) peer review procedures for a "highly influential scientific assessment," which is defined as an assessment that could have an impact of more than $500 million in one year and is "novel, controversial, or precedent setting." In particular, the document was reviewed by a 12-member panel that included an EPA employee, violating rules on neutrality. The report also found that the EPA did not make the review results public, as required, or certify whether it complied with internal or OMB requirements. In a statement accompanying the report, the IG emphasized that his office "did not assess whether the scientific information and data supported the endangerment finding."

Although the basis for the Obama administration's activism with regarding to GHGs has been called somewhat into question by the report of the EPA's IG, it must be remembered that the catalyst for this activism pre-dates the Obama administration and rests with a 2007 decision by the U.S. Supreme Court, *Massachusetts v. EPA*, 549 U.S. 497 (2007).

In 1998, during the Clinton administration, EPA General Counsel Jonathan Cannon concluded in a memorandum to the agency's Administrator that greenhouse gases were air pollutants within the Clean Air Act's definition of the term, and therefore could be regulated under the Clean Air Act. On October 20, 1999, relying on the Cannon memorandum as well as the statute itself, a group of 19 organizations petitioned EPA to regulate greenhouse gas emissions from new motor vehicles under Section 202 of the Clean Air Act. Section 202 gives the EPA administrator broad authority to set "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles" if in her judgment they cause or contribute to air pollution that "may reasonably be anticipated to endanger public health or welfare."

On August 28, 2003, the EPA under the Bush administration denied the petition on the basis of a new general counsel memorandum dated the same day, in which it concluded that the Clean Air Act does not grant the EPA authority to regulate carbon dioxide and other GHG emissions based on their climate change impacts. The denial was challenged by Massachusetts, 11 other states, and various other petitioners in a case that ultimately reached the Supreme Court. In an April 2, 2007, decision, the Court found by a 5-4 vote that the EPA does have authority to regulate greenhouse gas emissions, since the emissions are clearly air pollutants under the Clean Air Act's definition of that term. The Court's majority concluded that EPA must, therefore, decide whether emissions of these pollutants from new motor vehicles contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. When it makes such a finding of endangerment, the act requires the agency to establish standards for emissions of the pollutants. In the nearly two years following the Court's decision, the Bush administration's EPA did not respond to the original petition or make a finding regarding endangerment, thereby setting the stage for the Obama administration's "endangerment finding" in April 2009.

In the wake of *Massachusetts v. EPA*, a number of different groups have commenced lawsuits seeking to use the common law of public nuisance to compel companies to reduce their GHG emissions. In *State of Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009), the plaintiffs—a group consisting of several states and the city of New York—alleged that GHG emissions from power plants owned by the defendant companies pose a threat to the general public and therefore constitute a public nuisance. The suit sought to hold the defendants jointly and severally liable for contributing to a public nuisance and requested an injunction requiring each of the defendants to abate the nuisance by instituting a declining emission cap. The district court granted defendants' motion to dismiss the case, concluding that the complaint raised nonjusticiable political questions that were beyond the limits of the court's jurisdiction. *State of Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005). The Second Circuit reversed and remanded the case back to the district court after finding that the facts did not differ significantly from other complex public nuisance cases decided in the past and that judicial resolution would not contradict prior decisions made by the other branches of government. *American Electric Power Co.*, 582 F. 3d at 392–93. Defendants appealed to the U.S. Supreme Court, which granted a writ of certiorari in December 2010 in *American Electric Power v. Connecticut*, 131 S. Ct. 813 (2010).

A few months after the Second Circuit's decision in *Connecticut v. American Electric*, the Fifth Circuit reached a similar conclusion in *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *reh'g en banc granted*, 598 F.3d 208 (5th Cir. 2010), *on reh'g en banc*, 607 F.3d 1049 (5th Cir. 2010). The plaintiffs in *Comer* filed a class action against a group of energy, fossil fuel, and chemical companies alleging that GHG emissions from their facilities contributed to global warming which, in turn, caused a rise in sea levels that contributed to the damage to their property caused by Hurricane Katrina. The district court dismissed the lawsuit after concluding that the Mississippians had no standing to bring the lawsuit and that the suit posed nonjusticiable political questions.

On appeal, the Fifth Circuit concluded that plaintiffs' claims easily satisfied Mississippi's liberal standing requirements. The court went on to find that the public nuisance, trespass, and negligence claims raised by plaintiffs did not present any specific question that was exclusively committed by law to the legislative or executive branch. *Comer*, 585 F.3d at 864–68. According to the Court:

> There is no federal constitutional or statutory provision making such a commitment, and the defendants do not point to any provision that has that effect. The most that the defendants legitimately could argue is that in the future Congress may enact laws, or federal agencies may adopt regulations, so as to comprehensively govern greenhouse gas emissions and that such laws or regulations might preempt certain aspects of state common law tort claims. *Id.* at 870.

In so holding, the *Comer* court effectively authorized climate change-related nuisance and trespass claims against major GHG emitters by private property owners seeking damages. Although the Fifth Circuit granted a rehearing by the full court, new circumstances arose that caused the disqualification and recusal of one of nine judges on the panel. As a result, the court could not assemble the necessary quorum, leading the appellate court to dismiss the appeal and let stand the district court's decision dismissing the action on standing and nonjusticiable political question grounds. *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010).

A California district court faced with similar allegations that defendants' GHG emissions gave rise to a cause of action for public nuisance reached a similar conclusion as the *Comer* district court in a pair of recent cases. In the first case, the state of California sued several leading automakers in federal court, alleging that carbon dioxide emissions from vehicles manufactured by the defendants created a public nuisance in violation of federal common law and the California Civil Code relating to public nuisance. The court in *California v. General Motors Corp.*, Case No. 06-5755, 2007 WL 2726871 (N.D. Cal. 2007) dismissed the case after concluding that it raised a nonjusticiable political question.

More recently, the same California district court dismissed a cause of action brought by an Eskimo village and city against various oil, energy, and utility companies for federal common law public nuisance based on allegations that GHG emissions contributed to global warming which caused the melting of arctic sea ice that protected the village from erosion. In *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), the District Court for the Northern District of California reviewed the various factors to be considered in determining whether a case involves a nonjusticiable political question and concluded that while the issue of whether emissions of GHGs from defendants' activities contributed to global warming was not relegated exclusively to the political branches of government, the court lacked the judicially discoverable and manageable standards needed to guide it in reaching its decision, effectively rejecting the Second Circuit's decision in *Connecticut v. American Electric Power Co.*, discussed above. The court went on to find that resolving the case would require it to make the type of initial policy determinations that are better suited to the legislature. *See also Center for Biological Diversity v. Department of the Interior*, 563 F.3d 466, 476–79 (D.C. Cir. 2009) (finding procedural standing for a citizen group's climate change claims, which challenged a government leasing plan for offshore oil and gas development, but limiting, in what may be dicta, the finding of standing in *Massachusetts v. EPA* to only those instances where a sovereign entity sues to protect its own particular harmed interests and not to protect a generalized harm that is widely shared).

B. Enforcement: Looking Ahead

On September 30, 2010, the EPA released its fiscal year (FY) 2011–2015 strategic plan. EPA Strategic Plan for FY 2011–2015, *available at* http://www.epa.gov/planandbudget/strategicplan.html. Under the Government Performance and Results Act (GPRA) (P.L. 103-62), federal agencies are held accountable for using resources wisely and achieving program results. Specifically, the GPRA requires agencies to develop strategic plans that include a mission statement and establish long-term goals, objectives, and strategic measures over a five-year time horizon. The Plan identifies five strategic goals to guide the agency's work over the course of the next five years: (1) "Taking Action on Climate Change and Improving Air Quality"; (2) "Protecting America's Waters"; (3) "Cleaning Up Communities and Advancing Sustainable Development"; (4) "Ensuring the Safety of Chemicals and Preventing Pollution"; and (5) "Enforcing Environmental Laws."

When the Plan is compared with Administrator Jackson's 2009 written statement for her confirmation hearing, the most striking difference is the elevation of enforcement to one of the agency's five top priorities. An even more striking contrast may be found by comparing the EPA's strategic plan for FY 2006–2011 with its successor. In the plan for FY 2006–2011, the goal was not "enforcement" per se, but rather encouraging "compliance and environmental stewardship" through a combination of enforcement and the promotion of "partnerships" with the public, private actors, state and local governments, and tribes. *See* EPA Strategic Plan for FY 2006–2011, at 130–45 (2006), *available at* http://nepis.epa.gov/Adobe/PDF/P1001IPK.PDF.

Of particular note in the strategic plan for FY 2011–2015 is an emphasis on criminal enforcement as a means of "enhancing strategic deterrence." Strategic Plan for FY 2011–2015, at 55. Specifically, by 2015, the EPA aims to "increase the percentage of criminal cases having the most significant health, environmental, and deterrence impacts to 50 percent (FY 2010 baseline: 36 percent)" and to "maintain 75 percent of criminal cases with an individual defendant." *Id.* The logic behind this strategy appears to be that, because prison time cannot be passed along to consumers as a cost of doing business, criminal cases are a strong deterrent to noncompliance with environmental protection laws.

If the EPA is in fact committed to increasing the number of criminal cases, this would represent a rather significant change. For example, in FY 2009, 387 criminal cases were opened—a 21 percent increase over the number of criminal cases opened in FY 2008. In FY 2010, the EPA opened slightly fewer criminal cases than in the previous fiscal year (346), but 289 defendants were charged, the most in the last five years. FISCAL YEAR 2010 ENFORCEMENT & COMPLIANCE ANNUAL RESULTS, U.S. ENVIRONMENTAL

PROTECTION AGENCY, at 6 (2010), http://www.epa.gov/compliance/resources/reports/endofyear/eoy2010/fy2010results.pdf.

Although fewer criminal cases were opened in FY 2010, the EPA appears to be committed to increasing that number over the course of the next five years. Less than a week before the strategic plan for FY 2011–2015 was issued, Cynthia Giles, the agency's assistant administrator for enforcement and compliance, announced that the EPA had submitted a budget request for 200 special agents for its Criminal Investigation Division (CID). The 1990 Pollution Prosecution Act (P.L. 101-593) requires the CID to hire and maintain 200 criminal investigators. However, according to the *New York Times*, the EPA has not met this staffing requirement since 2003. *See* Gabriel Nelson, *Criminal Enforcement Roster Will Swell Next Week, EPA Division Chief Vows*, N.Y. TIMES (Sept. 24, 2010), http://www.nytimes.com/gwire/2010/09/24/24greenwire-criminal-enforcement-roster-will-swell-next-we-51330.html.

Although the EPA's strategic plan for FY 2011–2015 was written before voters went to the polls in the 2010 mid-term elections, it was released at a time when the likely results of that election were becoming apparent. As a result, it seems that, at least for the short run, we can expect to see more of the same with regard to both the opening and closing of cases—administrative, civil, and criminal. This short-run trend, however, is nothing new, but rather the extension of a much longer trend.

The combination of a slightly more assertive EPA under the Obama administration and the surprisingly mixed and sometimes troubling results from various courts in the aftermath of *Massachusetts v. EPA* strongly suggests that GHG regulation and enforcement litigation will proceed, if at all, in fits and starts. In short, it appears that the more things change, the more they stay the same. The flip side of enforcement actions brought by the EPA is actions brought against the agency. Here, too, recent studies have found "no discernible trend" over a 16-year period between 1995 and 2010 in environmental cases brought against the EPA. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-11-650, ENVIRONMENTAL LITIGATION: CASES AGAINST EPA AND ASSOCIATED COSTS OVER TIME (2011), *available at* http://www.gao.gov/new.items/d11650.pdf.

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Enforcement Actions	**FY 2004**	**FY 2005**	**FY 2006**	**FY 2007**	**FY 2008**	**FY 2009**	**FY 2010**
Administrative Compliance Orders	1,807	1,916	1,438	1,247	1,390	1,588	1,302
Final Administrative Penalty Orders	2,248	2,273	4,624	2,256	2,084	1,916	1,530
Civil Cases Referred to DoJ	268	259	286	278	280	277	233
Civil Actions Concluded	176	157	173	180	192	201	200
Criminal	422	372	305	340	319	387	346

OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, U.S. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL ENFORCEMENT TRENDS (NETS) REPORT (2010), *available at* http://www.epa.gov/compliance/data/results/nets.html; and FISCAL YEAR 2010 ENFORCEMENT & COMPLIANCE ANNUAL RESULTS, U.S. ENVIRONMENTAL PROTECTION AGENCY, at 6 (2010) http://www.epa.gov/compliance/resources/reports/endofyear/eoy2010/fy2010results.pdf.