Message from the Chair

Developments in environmental laws, regulations, and interpretations that affect businesses flow at a steady rate. 2015 has seen EPA come out with new regulations that have drawn opposition from industry, states, and environmentalists alike. Among the new regulations are those defining "waters of the United States" under the Clean Water Act, potentially limiting development; the "Clean Power Plan" restricting greenhouse gas emissions; and a more restrictive standard for ambient ozone—which have the potential to throw areas of the country into "nonattainment" status for ozone, requiring special plans by states, and triggering new permit schemes. The U.S. Department of Justice has announced that it will more vigorously pursue corporate officers in actions involving corporations. This issue of our newsletter also brings you tips on avoiding common mistakes in environmental site assessments so that the "all appropriate inquiry" requirement for defenses to CERCLA liability can be proven. We also have summaries of significant cases within the last year.

We hope you find this issue helpful to your practice. Please let our newsletter editor, Rory Carlisle, know if there are topics you would especially like to see discussed in future issues of the newsletter. We encourage you to submit articles and summaries directly to her at rory.carlisle@nelsonmullins.com.

Please check our website for case updates as well.

A special thanks to those contributing to this edition, and I hope everyone had a wonderful holiday season.

Bernard F. Hawkins, Jr.

NAFTA and the Commission for Environmental Cooperation: Environmental Enforcement

By E. Lynn Grayson

Effective January 1, 1994, the North American Free Trade Agreement (NAFTA) eliminated trade barriers and most tariffs to promote more commerce between the U.S., Canada, and Mexico. NAFTA opened new business opportunities by providing non-discriminatory foreign investment, protecting IP rights, establishing dispute resolution procedures for the NAFTA Trade Commission,
and opening up government procurement. While NAFTA did not include labor or environmental provisions, the implementing legislation authorized two side agreements, allowing U.S. participation in NAFTA labor and environmental initiatives and providing the necessary funding. Executed in parallel with the NAFTA, the two side agreements, the North American Agreement on Labor Cooperation (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC), promoted cooperation as well as provisions to address a country's failure to enforce its own labor and environmental laws. The NAFTA marked the first time that labor and environmental provisions were associated with a free trade agreement, and, for many, it represented an opportunity for establishing a new type of relationship among NAFTA partners.

The NAFTA, through its NAAEC, created the Commission for Environmental Cooperation (CEC) - an intergovernmental organization addressing environmental concerns and opportunities posed by continent-wide free trade. The CEC includes a Council (cabinet-level representative from each country), Secretariat (technical, administrative, and operational support for the CEC), and the Joint Public Advisory (five citizens from each country advising on NAAEC matters). The CEC is jointly funded by the U.S., Canada, and Mexico through their respective environmental authorities, the Federal Department of Environment, the Secretaría de Medio Ambiente y Recursos Naturales, and the U.S. Environmental Protection Agency.

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**Game Changer? Or Just a Clarification? New Regulatory Definition of "Waters of the United States"**

*By Scott D. Hubbard*

A broad array of state governments, developers, builders, farmers, industries, trade associations, and advocacy groups have filed suit in multiple federal courts to challenge a new regulation under the federal Clean Water Act ("CWA"). The outcome of this litigation has the potential to dramatically affect the level of federal involvement in the development and use of real property in the United States.

**Background.** On June 29, 2015, the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("ACE") issued their final regulation defining "waters of the United States," or "WOTUS," for purposes of the CWA. Immediately upon issuance, the "WOTUS Rule" spawned a torrent of litigation.

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**EPA Revises the Standard for Ground-Level Ozone**

*By Wendy Wilkie Parker*

On October 1, 2015, the Environmental Protection Agency (EPA) promulgated a final rule under the Clean Air Act reducing the primary and secondary National Ambient Air Quality Standard (NAAQS) for ground-level ozone from 75 to 70 parts per billion (ppb). 80 Fed. Reg. 65292. The new standard will increase the number and extent of non-attainment areas around the country, which will in turn increase the permitting requirements and cost for any major new source or major modification in those non-attainment areas.

The new ozone standard reflects a decision by the EPA that the prior standard, issued by the EPA in 2008, no longer protects the public health with an adequate margin of safety as required under the Clean Air Act. Ozone is one of the six (6) criteria pollutants regulated under the NAAQS for the protection of the public health and welfare. The Clean Air Act requires EPA to establish primary
and secondary NAAQS for air pollutants. The primary standards are to protect public health, such as preventing respiratory problems, and the secondary standards are to protect public welfare, including visibility and plant and animal life. The ozone standard is intended to protect the human population, particularly children, older adults, and people with asthma or other lung diseases, against the known adverse health effects of exposure to ozone, including reduced lung function, increased respiratory symptoms and pulmonary inflammation. 80 Fed. Reg. at 65294, 65302.

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Environmental Due Diligence for Purchasers: Top Ten Phase I Issues

By Mary Ellen Ternes

A critical element for purchasers in completing environmental due diligence involving acquisition of real property is completion of a Phase I environmental site assessment ("Phase I") to identify the presence of "Recognized Environmental Conditions" ("RECs") related to releases of "Hazardous Substances" or petroleum constituents. The Phase I, completed properly, demonstrates performance of "All Appropriate Inquiry" ("AAI") under 40 C.F.R. Part 312, one of the elements of demonstrating the "Bona Fide Prospective Purchaser" ("BFPP"), innocent landowner or contiguous property owner status, the essential landowner defenses to liability under the Comprehensive Environmental Recovery, Compensation and Liability Act ("CERCLA"), also known as Superfund. The Phase I standard required to demonstrate AAI, as defined by CERCLA § 101(35)(B), 42 USC § 9601(35)(B), is the ASTM 1527-13 standard implemented pursuant to 40 CFR § 312.11, which has replaced the ASTM E1527-05 (also see ASTM E2247-08 for forestland or rural property).

As environmental consultants become more comfortable with the current standard, it is important to note the common missteps that could prevent a purchaser from demonstrating AAI, and render the purchaser liable for all contamination on the property under CERCLA. This article summarizes the most common issues observed by environmental practitioners in their combined experience.

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Significant Cases


Car purchasers, biodiesel producers, and engine manufacturers combined several challenges to EPA's Clean Air Act regulations for light-duty and heavy-duty vehicles (cars and trucks) based on (1) EPA's failure to consult the Science Advisory Board on the greenhouse gas emissions regulations and (2) assertions that the rules are arbitrary and capricious in failing to account for carbon emissions in the full life-cycle of fuel production, in failing to expand incentives for biodiesel, and in failing to account for economic changes that could increase greenhouse gas emissions. The court held that those who were challenging the rule for the failure to consult the SAB lacked standing, and that the court lacked subject matter jurisdiction as to the "arbitrary and capricious" prong of the challenge because the petitioners had not sought review by the district court for the claims asserted against the National Highway Transportation Administration. As to the claims against EPA, the challengers-competitors to fossil fuel producers--were deemed not to be within the "zone of interests" protected by the Clean Air Act.

The U.S. District Court for the Eastern District of Wisconsin on reconsideration set aside its earlier ruling on the allocation of remediation costs at a river and bay into which PCB-laden wastewater were discharged by paper mills. In a decision in May, the court had held that the danger caused by the discharge of PCBs by numerous PRPs was theoretically divisible, and that a calculation of volume of PCBs contributed allowed for an apportionment of the divisible harm under Burlington Northern v. U.S. 129 S.Ct. 1870 (2009). 2015 WL 2350063 (E.D. Wis. May 15, 2015. On reconsideration, the district court held that the expert testimony on which its May 2015 ruling had been based was flawed because it relied on an analysis of remediation costs rather than on the extent of harm, and because it failed to account for all contributions to the contamination.

Am. Farm Bureau Fed'n v. United States EPA, 792 F.3d 281 (3d Cir. 2015).

The court upheld the Total Maximum Daily Load (TMDL) for nitrogen, phosphorus, and sediment for the Chesapeake Bay, rejecting the arguments of agricultural and home construction trade association that the TMDLs exceeded the scope of EPA's authority by establishing standards that allocated among point sources and non-point source sectors maximum daily loads of the substances. The opinion provides both the history of TMDLs and an interpretation of the statutory requirements for TMDLs and specifies the two-step analysis for Chevron deference.


The U.S. Supreme Court held that the EPA's refusal to consider costs in its issuance of the Mercury and Air Toxics Standard in 2012 was based on an unreasonable interpretation of what constitutes "appropriate and necessary" regulation of utilities under § 7412(n)(1)(A) of the Clean Air Act. EPA on November 20, 2015 proposed a revision to the rule, issuing a Supplemental Finding addressing costs of the new Utility MACT for mercury and air toxics. The D.C. Circuit on December 15, 2015 decided that the remanded rule remains in effect pending revisions to comply with the Supreme Court's decision.


The First Circuit ruled on two important issues often raised in continuous or progressive pollution claims asserted under CGL insurance policies. Under Massachusetts law, an insurer is responsible only for the pro rata share of damage proven to have taken place within its policy period which, the court noted, was difficult to actually prove given that the pollution occurred decades ago. Although the insured typically bears the burden of proving coverage, the court found here that, because the insurer breached the duty to defend its insured, the insurer assumed the burden of proving when the pollution began and ended. The court also held that an insurer is responsible for all defense costs (and not just the insurer's pro rata share of those costs) incurred by an insured in resisting pollution claims if any damage is alleged to have occurred within the insurer's policy period.

Hot Now

- Waters of the United States Definition, 80 Fed. Reg. 37053 (June 20, 2015)
- DOJ Memo "Individual Accountability for Corporate Wrongdoing"
NAFTA and the Commission for Environmental Cooperation: Environmental Enforcement

By: E. Lynn Grayson¹

Effective January 1, 1994, the North American Free Trade Agreement (NAFTA) eliminated trade barriers and most tariffs to promote more commerce between the U.S., Canada, and Mexico. NAFTA opened new business opportunities by providing non-discriminatory foreign investment, protecting IP rights, establishing dispute resolution procedures for the NAFTA Trade Commission, and opening up government procurement. While NAFTA did not include labor or environmental provisions, the implementing legislation authorized two side agreements, allowing U.S. participation in NAFTA labor and environmental initiatives and providing the necessary funding. Executed in parallel with the NAFTA, the two side agreements, the North American Agreement on Labor Cooperation (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC), promoted cooperation as well as provisions to address a country’s failure to enforce its own labor and environmental laws. The NAFTA marked the first time that labor and environmental provisions were associated with a free trade agreement, and, for many, it represented an opportunity for establishing a new type of relationship among NAFTA partners.

The NAFTA, through its NAAEC, created the Commission for Environmental Cooperation (CEC) — an intergovernmental organization addressing environmental concerns and opportunities posed by continent-wide free trade. The CEC includes a Council (cabinet-level representative from each country), Secretariat (technical, administrative, and operational support for the CEC), and the Joint Public Advisory (five citizens from each country advising on

¹ E. Lynn Grayson is Co-Chair of the Environmental and Workplace Health & Safety Practice at Jenner & Block in Chicago. She is a past Chair of the ABA Business Law Section Environmental Law Committee.
NAAEC matters). The CEC is jointly funded by the U.S., Canada, and Mexico through their respective environmental authorities, the Federal Department of Environment, the Secretaría de Medio Ambiente y Recursos Naturales, and the U.S. Environmental Protection Agency.

The CEC’s Mission Statement provides:

“To facilitate cooperation and public participation, to foster conservation, protection, and enhancement of the North American environment for the benefit of present and future generations, in the context of increasing economic, trade, and social links among Canada, Mexico, and the U.S.”

The CEC’s 2010-2015 Strategic Plan identified the following three environmental priorities:

1. Healthy communities and ecosystems (including compatible approaches to identifying and tracking chemicals);
2. Climate change — low carbon economy (focus on emissions data and inventories); and
3. Greening the economy in North America (improved sector environmental performance).

New environmental priorities for the 2015-2020 Strategic Plan recently announced include:

1. Climate change mitigation and adaptation;
2. Green growth; and
3. Sustainable communities and ecosystems.

In general, the CEC’s work is focused upon: ecosystems, green economy, pollutants, climate change, the North American Partnership for Environmental Community Action (NAPECA) grant program, independent reports on important environmental issues, and enforcement.
As to enforcement, the CEC seeks to enhance environmental law enforcement in North America. Recent targeted areas include preventing wildlife trafficking as well as requiring the environmentally sound management and transportation of e-waste, hazardous waste, and spent lead-acid batteries. The CEC also possesses unique enforcement oriented authority under Articles 14 and 15 of the NAAEC, allowing any non-governmental organization or person to make an assertion that any NAFTA country is failing to effectively enforce its environmental law. This process, referred to as Submissions on Enforcement Matters (SEMs), was established to promote transparency and public participation and to enhance understanding regarding environmental law and its enforcement in North America. Each SEM filing alleges that the federal government of any NAFTA country has failed to comply with existing environmental laws. As a fact-finding, non-adversarial procedure, the SEM process is not a dispute resolution mechanism, nor can it result in a member country being required to take any action. The likely outcome of any SEM filing is the issuance of a factual record providing an objective presentation of the facts, including summaries of the submission, response, and other relevant factual information considered by the Secretariat. Extensive information regarding the SEM process is available from the CEC at www.cec.org in its publication titled Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation.

Over the last five years, there have been 13 substantive environmental cases filed with the CEC, including two from the U.S., seven from Mexico, and eight from Canada. These cases address a variety of environmental concerns, including air emissions from refineries, mining concerns, wetlands, water quality, endangered species, and preservation of nature areas. To date, there have been a total of 86 SEM actions filed with the CEC.
The NAAEC establishes two enforcement mechanisms — the SEM process addressed above, as well as a procedure that allows a NAFTA country to seek the imposition of a monetary penalty if another country is found to have engaged in a persistent pattern of failure to enforce environmental law with potential competitiveness impacts in North America. Countries enter into consultations which may result in a monetary penalty not to exceed .007% of the total trade between the countries at issue. To date, no country has initiated a consultation or even threatened to do so.

Environmental enforcement is only one aspect of the CEC’s goals and objectives aimed at promoting environmental protection through cooperation and consensus building. As NAFTA’s environmental watchdog, critics charge that inherent enforcement oriented weaknesses within the CEC have strongly contributed to a regressive environmental platform, particularly in Canada. In the last 12 months, the CEC has rejected three investigations sought into Canada’s failure to comply with its environmental laws related to the lack of protection of polar bears, harmful fishing practices, and continuous leaking of tailings ponds into the Athabasca River. According to CEC supporters, each time such an investigation is rejected, it undermines the CEC’s ability to perform its environmental protection function.

Press surrounding the recently agreed upon Trans-Pacific Partnership (TPP) asserts that the TPP will break new ground on environmental standards for trade agreements. For the first time, environmental commitments will be enforceable and potentially subject to trade sanctions if they are not met. If TPP environmental commitments are fashioned after NAFTA, environmental enforcement will be challenging, if at all possible.
GAME CHANGER? OR JUST A CLARIFICATION?

New Regulatory Definition of "Waters of the United States"

Regulation Stayed by Sixth Circuit; Ruling Sought on Jurisdiction to Hear Appeals

Scott D. Hubbard
Warner Norcross & Judd LLP
December 8, 2015

A broad array of state governments, developers, builders, farmers, industries, trade associations, and advocacy groups have filed suit in multiple federal courts to challenge a new regulation under the federal Clean Water Act ("CWA"). The outcome of this litigation has the potential to dramatically affect the level of federal involvement in the development and use of real property in the United States.

Background. On June 29, 2015, the U.S. Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (“ACE”) issued their final regulation defining "waters of the United States," or "WOTUS," for purposes of the CWA. Immediately upon issuance, the “WOTUS Rule” spawned a torrent of litigation.

The purpose of the rule is to delineate those water bodies and wetlands that fall under the protection of the CWA, and therefore under the jurisdiction of the EPA and/or the ACE, depending on the location and type of activity in question. As such, the rule will in many cases define permissible land uses. This packs a powerful economic punch that affects facility siting, utility availability, project time lines, and of course the cost of development. Obtaining a federal permit can take two years or more.¹ Expanding the number of projects requiring federal permitting can be expected to lengthen the process. The WOTUS Rule has the potential to profoundly impact activities across multiple economic sectors, from new energy development to

¹ Federal permitting can also involve exorbitant transaction costs (averaging, according to one 2002 study, about $271,000).
public infrastructure to the family farm. In addition, the rule has significant potential as a driver of citizen suits by those opposing development. Whatever its merits, it is no surprise that the rule has attracted intense interest.

Some challengers of the WOTUS Rule consider it an unconstitutional incursion on state sovereignty and an unlawful disruption of the federal-state balance in the administration and enforcement of the CWA. On a more practical level, the rule is criticized as an unlawful expansion of the universe of water bodies and wetlands subject to the jurisdiction of EPA and ACE. The rule is also being challenged by environmental groups who believe it does not adequately protect water quality. In the eyes of many commenters, the most compelling criticism of the WOTUS Rule is that it fails to achieve the agencies’ asserted objective of clarifying the reach of the CWA as compared with the status quo, which consists of a hodgepodge of regulations, agency guidance, and conflicting judicial decisions.

The EPA and Army Corps defend the WOTUS Rule as a reasonable interpretation of a series of U.S. Supreme Court decisions on the reach of the CWA. These include, most notably, *Rapanos v. U.S.*, the 2006 decision which stands as the Court’s most definitive judicial statement on the scope of the CWA and the EPA/ACE's regulatory authority.

The *Rapanos Case and Justice Kennedy’s Concurrence*. *Rapanos* involved a dispute about federal jurisdiction over wetlands that were adjacent to ditches and non-navigable tributaries to traditional navigable waters. Writing for a four-member plurality that voted to remand for reconsideration of the jurisdiction issue, Justice Scalia found that “waters of the United States” are limited to relatively permanent, standing or continuously flowing bodies of water forming geographic features; and that wetlands are subject to federal jurisdiction only

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3 This article sets forth a highly condensed version of the complex factual scenarios and judicial analysis presented in *Rapanos* and its companion case, *Carabell v. U.S.*
where there is a “continuous surface connection” to waters that are WOTUS “in their own right.” Because the wetlands at issue in *Rapanos* did not have a continuous surface connection to a tributary that was a relatively permanent water body, the plurality reasoned, the wetlands did not constitute WOTUS.

Justice Kennedy authored a separate opinion concurring in the plurality’s decision to remand, but for altogether different reasons. Under the Kennedy concurrence, WOTUS consist of traditionally navigable waters, and all other waters and wetlands having a “significant nexus” to a traditionally navigable water. Departing from the Scalia plurality, Justice Kennedy found that WOTUS need not be “relatively permanent,” nor must they have a surface connection to navigable waters. In the critical passage of the Kennedy concurrence, he defines “significant nexus” as referring to waters or wetlands which, “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity” of traditionally navigable waters.

Justice Kennedy’s concurrence and his articulation of the “significant nexus” standard were adopted by the EPA and ACE in ensuing guidance documents, and form the conceptual basis for the WOTUS Rule.

**Procedural Status.** As the result of ambiguity in the CWA and inconsistent judicial interpretations, it is not clear whether challenges to the WOTUS Rule must be brought in federal district court or in the federal Court of Appeals. Consequently, many petitioners have filed challenges at both the district and appellate court levels. On July 28, the Judicial Panel on Multidistrict Litigation consolidated all of the Circuit Court petitions in the Court of Appeals for the Sixth Circuit. On October 9, the Sixth Circuit issued a nationwide stay of the rule pending its ruling on the jurisdiction issue.
The Judicial Panel declined to consolidate the many pending federal district court actions challenging the rule. The EPA is seeking stays of many of those actions pending the Sixth Circuit’s conclusion on jurisdiction. Separately, bills have been introduced in both houses on Congress providing for repeal of the WOTUS Rule.

On December 8, the Sixth Circuit heard oral arguments on the question of its jurisdiction to adjudicate these challenges. The court’s decision will fundamentally impact the time line within which the public can hope for some finality on the fate of the WOTUS Rule: the next phase (prior to what some perceive as an inevitable return to the Supreme Court) will be determined either in a consolidated proceeding at the Sixth Circuit, or in an assortment of district court decision across the country, which will eventually wend their way through the various appellate courts.

**Content of the Rule.** The core issue driving most challenges to the WOTUS Rule is the extent to which it will expand the number and types of waters and wetlands that are subject to federal jurisdiction and permitting. There is significant concern in the construction industry, for example, that new developments may be sidelined as the result of commercially infeasible delays in permitting decisions by the EPA or Army Corps. The agricultural community worries that many traditional and long-accepted farming practices may become threatened as a result of murky definitions of regulated waters and broad agency authority to put a federal stamp on many minimally wet areas that have never previously been regarded as jurisdictional.

Some of the concerns more frequently expressed by challengers of the WOTUS Rule are:

- The rule increases the reach of the CWA primarily through new definitions of "tributary" and "adjacent" waters, both of which include subjective elements that effectively preclude predictability and consistency.
- The rule regulates any area having a trace amount of water if it also has – or ever had – a bed, banks, and an ordinary high water mark (“OHWM”). This includes many stormwater channels and other features that are almost perpetually dry. Predictability and certainty are further impaired because a dry bed without an OHWM can be identified as a WOTUS if there exists an OHWM somewhere upstream of the property in question.

- The rule classifies some ephemeral streams (i.e., streams having no flow except from precipitation) as "tributaries" subject to federal jurisdiction if they flow into or through any water that reaches a traditionally navigable water. Similar treatment is given to intermittent streams.

- The rule covers newly defined "neighboring" waters, which are identified by fixed horizontal distance factors instead of ecological and hydrogeological concepts.

- The EPA and ACE have tweaked the language of the CWA as quoted in the Kennedy concurrence: where Justice Kennedy’s “significant nexus” test refers to waters that “significantly affect the chemical, physical, and biological integrity” of traditionally navigable waters, the WOTUS Rule covers waters that affect the “chemical, physical, or biological integrity” of navigable waters.

- With the increase in the scope of federally regulated waters comes a commensurate increase in the potential for third-party citizen suits under Section 505 of the CWA. The CWA citizen suit is a powerful weapon in the hands of those seeking to challenge new developments or property uses. The WOTUS Rule is widely viewed as having failed in its essential purpose of
providing clarity to the regulated community – resulting in considerable “gray areas” that are fertile ground for litigation. In many cases it will not be difficult to articulate a plausible argument calling for a site-specific evaluation of WOTUS status. The resulting delay, of itself, can be enough to make investors and lenders skittish and thus terminate a proposed development before the fact.

- Sanctions for violations of the CWA include natural resource damages, which often reach tens or hundreds of millions of dollars.

- Property values may be impaired as more lands become subject to federal permitting requirements for development.

- As noted by many commenters, the final WOTUS Rule contains substantive changes from the proposed version that were not subjected to public notice and comment.

The WOTUS rule also confirms certain exemptions from federal jurisdiction, offering federal clarification where there has previously been uncertainty. These exemptions include stormwater detention ponds, wastewater treatment facilities, and "puddles."

Many observers are hoping for some clarification in the coming weeks regarding jurisdiction and venue for WOTUS Rule appeals. It will likely be some time before the merits of these challenges are resolved, whether through litigation, negotiated rulemaking, or federal legislation.
EPA Revises the Standard for Ground-Level Ozone

By:  Wendy Wilkie Parker

On October 1, 2015, the Environmental Protection Agency (EPA) promulgated a final rule under the Clean Air Act reducing the primary and secondary National Ambient Air Quality Standard (NAAQS) for ground-level ozone from 75 to 70 parts per billion (ppb). 80 Fed. Reg. 65292. The new standard will increase the number and extent of non-attainment areas around the country, which will in turn increase the permitting requirements and cost for any major new source or major modification in those non-attainment areas.

The new ozone standard reflects a decision by the EPA that the prior standard, issued by the EPA in 2008, no longer protects the public health with an adequate margin of safety as required under the Clean Air Act. Ozone is one of the six (6) criteria pollutants regulated under the NAAQS for the protection of the public health and welfare. The Clean Air Act requires EPA to establish primary and secondary NAAQS for air pollutants. The primary standards are to protect public health, such as preventing respiratory problems, and the secondary standards are to protect public welfare, including visibility and plant and animal life. The ozone standard is intended to protect the human population, particularly children, older adults, and people with asthma or other lung diseases, against the known adverse health effects of exposure to ozone, including reduced lung function, increased respiratory symptoms and pulmonary inflammation. 80 Fed. Reg. at 65294, 65302.

The Clean Air Act requires EPA to review the primary and the secondary ozone standard every five years. After EPA last revised the primary and secondary standard for ozone in 2008, several states, environmental groups, and industry groups appealed the 2008 rule in federal court.

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1 Wendy Wilkie Parker is an attorney with Nelson Mullins Riley & Scarborough, LLP. Ms. Parker's practice focuses on environmental litigation.
The federal court upheld the 2008 standard for the primary ozone standard but remanded the secondary standard for EPA to explain how the standard provided the required protection for public welfare. *Mississippi v. EPA*, 744 F. 3d 1334 (D.C. Cir. 2013). In January of 2014, a group of plaintiffs filed suit against EPA alleging that EPA failed to review the ozone standard within the time provided by statute, and the court in that suit ordered EPA to publish a final rule by October 1, 2015. *Sierra Club, et al. v. EPA*, No. 13-cv-2809-YGR (N.D. Cal., April 29, 2014 order). With the newly revised rule, EPA responds to both the court-ordered remand and deadline. 80 Fed. Reg. at 65299.

While the new rule reduces the ozone standard to 70 ppb, the new rule retains the same averaging time (8-hour) and form (annual fourth-highest daily maximum, averaged over three (3) years) for determining whether an area meets the standard. 80 Fed. Reg. at 65294. However, the new rule lengthens the monitoring season in the District of Columbia and thirty-two (32) states beginning on January 1, 2017. According to EPA, the extension is intended to address the variability of the length of seasons and conditions conducive to ozone formation and to measure ozone occurring in out-of-season months. EPA reports that more than half of the 1,300 ozone monitors currently in operation in the country are already voluntarily operated all year long. 80 Fed. Reg. at 65416.

The rule has already been challenged in federal court. Five (5) states, Arizona, Arkansas, North Dakota, Oklahoma, and the New Mexico Environmental Department, filed suit for review of the rule. *State of Arizona v. EPA*, Case No. 15-1392. Murray Energy Corporation filed a similar suit. The Court of Appeals for the D.C. Circuit consolidated the appeals. *Murray Energy Corporation v. EPA*, Case No. 15-1385. Wisconsin, Utah, and Kentucky have moved to intervene in support of the petitioners. Several environmental and health groups, including the
American Lung Association, Sierra Club, Natural Resources Defense Council and Physicians for Social Responsibility, have moved to intervene in support of the rule. The new standard has not been stayed pending the appeal.

For implementation of the new standard, the next step is for EPA to designate all areas that are in attainment or non-attainment under the new standard. This process is generally a two-year process and will likely be based on data recorded between 2014 and 2016. EPA must finalize the designation process by October 1, 2017. For each state with a non-attainment area within its border, the state must then develop a state implementation plan ("SIP") to meet the standard.

One practical impact for industry is that any major new source or major modification in a nonattainment area will require permitting under the more stringent New Source Review ("NSR") Program. While the designation of non-attainment areas is not due until October 1, 2017, companies planning ahead for a major new source or a major modification may want to begin assessing ozone levels in those areas now.
Environmental Due Diligence for Purchasers: Top Ten Phase I Issues

Mary Ellen Ternes, Shareholder
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A critical element for purchasers in completing environmental due diligence involving acquisition of real property is completion of a Phase I environmental site assessment ("Phase I") to identify the presence of "Recognized Environmental Conditions" ("RECs") related to releases of "Hazardous Substances" or petroleum constituents. The Phase I, completed properly, demonstrates performance of "All Appropriate Inquiry" ("AAI") under 40 C.F.R. Part 312, one of the elements of demonstrating the "Bona Fide Propective Purchaser" ("BFPP"), innocent landowner or contiguous property owner status, the essential landowner defenses to liability under the Comprehensive Environmental Recovery, Compensation and Liability Act ("CERCLA"), also known as Superfund. The Phase I standard required to demonstrate AAI, as defined by CERCLA § 101(35)(B), 42 USC § 9601(35)(B), is the ASTM 1527-13 standard implemented pursuant to 40 CFR § 312.11, which has replaced the ASTM E1527-05 (also see ASTM E2247-08 for forestland or rural property).

As environmental consultants become more comfortable with the current standard, it is important to note the common missteps that could prevent a purchaser from demonstrating AAI, and render the purchaser liable for all contamination on the property under CERCLA. This article summarizes the most common issues observed by environmental practitioners in their combined experience.

Beyond these issues, however, note that first, the Phase I is a CERCLA derived standard which focuses on the "dirt" of the deal, i.e., the subject property or land being purchased, as well as possible impacts to the soil or groundwater in, on or under the subject property. The Phase I does not address environmental permitting or other regulatory compliance with respect to a facility operating on top of the "dirt". Operational issues in transactions will be the subject of an article that will appear in the Summer 2016 issue of this newsletter.

Second, environmental counsel often observe that clients tend to rely on consultants' representations regarding ASTM E1527-13 compliance without independent confirmation. There is also a misperception that completion of a Phase I somehow guarantees that all contamination has been discovered. AAI demands evaluation of "reasonably ascertainable information" rather than a thorough analysis of all site conditions. Moreover, other non-CERCLA authority, such as state law and common law, may impose liability. Environmental counsel are best relied upon for managing environmental risk as members of the initial deal team. With usually just a few hours of coordination and oversight, environmental counsel team members are given the opportunity to manage environmental due diligence working closely with the environmental consultants, whether any environmental issues are initially known or not, to avoid unnecessary issues, and resolve less obvious issues or any future potential issues arising from historic property use.

With these considerations in mind, the top ten common issues seen by practitioners include:

**Issue One: Not Following the Correct Standard**
The phase in period for the new ASTM E1527-13 Phase I standard ended October 6, 2014 (79 Fed. Reg. 60090). It is essential that the 2013 standard be completely and thoughtfully incorporated into a consultant’s Phase I report template. Both large and small consulting firms have still not fully transitioned, and may not be aware of the remaining deficiencies or their significance.

**Issue Two: Not Following Recommended Format**

While it is not absolutely mandatory that the ASTM E1527-13 recommended format be utilized, practically speaking, if the Phase I report is formatted as recommended by Appendix X4, it is much easier to identify departures from the required standard. Moreover, a future reviewing court may rely on the formatting as assurance that the standard was properly followed in finding that the purchaser properly completed AAI and is thus entitled to BFPP status.

**Issue Three: Failing to Include Exact Certification Language**

The due diligence required for AAI includes mandatory language certified by the “Environmental Professional” as defined by 40 CFR § 312.10, issuing the Phase I, as set forth by 40 CFR § 312.21(d). Remarkably, counsel often see consultants qualifying the required language, such that the all important certifications are no longer valid. This required certification language is absolutely mandatory for completion of AAI, thus no changes are allowed.

**Issue Four: Not Properly Utilizing the Defined Terms**

The principle goal of completing the Phase I is to identify “Recognized Environmental Conditions” (“RECs”) for which the purchaser can later assert its BFPP defense to avoid CERCLA liability. The REC definition extends to the “presence or likely presence” of hazardous substances or petroleum products in, on or at the property due to a release, conditions indicating a release or posing a material threat of a future release. De minimis conditions, defined as conditions "that generally [do] not present a threat to human health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies" do not constitute RECs. Because the issue of enforcement action bears on the definition of a REC, it can be considered a question of both fact and law. Clients and practitioners should be wary of consultants who interpret REC over-cautiously and identify RECs where there is no actual evidence of a release or likelihood that there would have been a release, or that even if there had been a release, that the release could have impacted the subject property. For example, RECs identified on adjacent properties where groundwater flows parallel to the subject property (cross gradient) or away (down gradient) from the subject property might be incorrectly viewed as a REC on the subject property. Past uses of the property that in truth suggest only that a release was theoretically possible might be incorrectly identified as a REC. On the other hand, a consultant may misinterpret statutes and regulations and incorrectly classify a release as being unlikely to result in enforcement action (and therefore a de minimis condition rather than a REC), even though concentrations may represent a threat to the environment.

**Issue Five: Not Stating the Purpose and User of the Phase I**

Phase I’s are often completed for reasons other than achieving AAI to support a purchaser’s claim of BFPP status. Given the need to properly identify the “User” and reliance parties, as well as evaluate the relative importance of completing individual elements of the Phase I standard, the consultant should ask, and properly incorporate, the specific purpose of the Phase I in the report as required by the standard. The “User” is the entity that will rely on the Phase I for the CERCLA landowner liability
defense and that must complete a “User” survey providing specific representations. Sometimes an entity other than the "User" pays for the Phase I. Sometimes a landowner “User” completes a Phase I prior to a sale, which can be updated later by the purchaser “User” for the update.

**Issue Six: Including Recommendations for Site Sampling**

Recommendations for Phase II sampling are specifically recognized in ASTM E1527-13 as “Non-Scope Services” and thus are not a required element of the Phase I standard. Practically speaking, counsel typically advises against including such recommendations in the Phase I to avoid creating unnecessary issues in future sales. Issues can arise, for example, when the current purchaser/future seller is asked to provide the future purchaser with copies of all prior Phase I's which may include recommendations for sampling that were not pursued for one reason or another. To avoid possibly creating unnecessary concern in the future, the consultant can, instead, simply discuss recommendations with counsel and client, and then provide a proposal for onsite sampling via a separate letter.

**Issue Seven: Not Conducting Proper File Review**

If the subject property or an adjacent property is identified on the required search of the standard environmental records database, the ASTM E1527-13 Section 8.2.2 requires a review of regulatory files, or files and records from alternative sources, such as interviews with regulatory officials or with those knowledgeable about the basis of the listing. If the Environmental Professional fails to review the files, the report must state why a file review is not necessary. Often, the time-consuming step of conducting a file review is skipped on the justification that it is not necessary where such a review could have revealed "reasonably ascertainable" information critical to the Phase I findings. Thus, counsel often finds that the lack of regulatory file review is not properly justified and constitutes a data gap that can limit options for managing risks from potential liability and may keep the Phase I report from demonstrating AAI.

**Issue Eight: Reusing Phase I Text from the Last Phase I Completed**

Because Phase I reports are completed so routinely, consultants often pull up the report for the last completed Phase I, or the last Phase I for a similar property and utilize that prior report as a template for the current draft rather than an original uniform template. When this shortcut is used, unrelated text from the last report often remains imbedded, and almost invisible, in the dense, repetitive text of the new Phase I posing latent problems that can invalidate the certification and thus the Phase I.

**Issue Nine: Inadequate Documentation in Appendices**

Section 12.2 requires that relevant supporting documentation be included in the Phase I report or adequately referenced to facilitate reconstruction of the assessment by an Environmental Professional other than the Environmental Professional who conducted it. The same section requires that sources that revealed no findings also be documented. Bear in mind that many years could elapse between the preparation of the report and the need to invoke it to prove that AAI was performed before closing. Without documentation to support conclusions, a court could view the assessment as deficient and the defense to CERCLA liability could be lost.

**Issue Ten: Issuing the Phase I as Final Without Counsel Review of the Draft**
When environmental counsel is available, counsel should review the draft of the Phase I report before it is finalized to ensure resolution of any issues listed above as well as any other problems that could result in issues for the client, working closely with the Environmental Professional.
MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
THE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
THE ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
THE ASSISTANT ATTORNEY GENERAL, TAX DIVISION
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES
ALL UNITED STATES ATTORNEYS

FROM: Sally Quillian Yates
Deputy Attorney General

SUBJECT: Individual Accountability for Corporate Wrongdoing

Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. Our nation’s economy depends on effective enforcement of the civil and criminal laws that protect our financial system and, by extension, all our citizens. These are principles that the Department lives and breathes—as evidenced by the many attorneys, agents, and support staff who have worked tirelessly on corporate investigations, particularly in the aftermath of the financial crisis.

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public’s confidence in our justice system.
There are, however, many substantial challenges unique to pursuing individuals for corporate misdeeds. In large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt. This is particularly true when determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs. As a result, investigators often must reconstruct what happened based on a painstaking review of corporate documents, which can number in the millions, and which may be difficult to collect due to legal restrictions.

These challenges make it all the more important that the Department fully leverage its resources to identify culpable individuals at all levels in corporate cases. To address these challenges, the Department convened a working group of senior attorneys from Department components and the United States Attorney community with significant experience in this area. The working group examined how the Department approaches corporate investigations, and identified areas in which it can amend its policies and practices in order to most effectively pursue the individuals responsible for corporate wrongs. This memo is a product of the working group’s discussions.

The measures described in this memo are steps that should be taken in any investigation of corporate misconduct. Some of these measures are new, while others reflect best practices that are already employed by many federal prosecutors. Fundamentally, this memo is designed to ensure that all attorneys across the Department are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct.

The guidance in this memo will also apply to civil corporate matters. In addition to recovering assets, civil enforcement actions serve to redress misconduct and deter future wrongdoing. Thus, civil attorneys investigating corporate wrongdoing should maintain a focus on the responsible individuals, recognizing that holding them to account is an important part of protecting the public fisc in the long term.

The guidance in this memo reflects six key steps to strengthen our pursuit of individual corporate wrongdoing, some of which reflect policy shifts and each of which is described in greater detail below: (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should
memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay.¹

I have directed that certain criminal and civil provisions in the United States Attorney’s Manual, more specifically the Principles of Federal Prosecution of Business Organizations (USAM 9-28.000 et seq.) and the commercial litigation provisions in Title 4 (USAM 4-4.000 et seq.), be revised to reflect these changes. The guidance in this memo will apply to all future investigations of corporate wrongdoing. It will also apply to those matters pending as of the date of this memo, to the extent it is practicable to do so.

1. To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.

In order for a company to receive any consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700 et seq.² Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. The extent of that cooperation credit will depend on all the various factors that have traditionally applied in making this assessment (e.g., the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc.).

This condition of cooperation applies equally to corporations seeking to cooperate in civil matters; a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation. For

¹ The measures laid out in this memo are intended solely to guide attorneys for the government in accordance with their statutory responsibilities and federal law. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

² Nor, if a company is prosecuted, will it support a cooperation-related reduction at sentencing. See U.S.S.G. USSG § 8C2.5(g), Application Note 13 (“A prime test of whether the organization has disclosed all pertinent information” necessary to receive a cooperation-related reduction in its offense level calculation “is whether the information is sufficient … to identify … the individual(s) responsible for the criminal conduct”).
example, the Department’s position on “full cooperation” under the False Claims Act, 31 U.S.C. § 3729(a)(2), will be that, at a minimum, all relevant facts about responsible individuals must be provided.

The requirement that companies cooperate completely as to individuals, within the bounds of the law and legal privileges, see USAM 9-28.700 to 9-28.760, does not mean that Department attorneys should wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, Department attorneys should be proactively investigating individuals at every step of the process – before, during, and after any corporate cooperation. Department attorneys should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals.

Department attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case. But there may be instances where the company’s continued cooperation with respect to individuals will be necessary post-resolution. In these circumstances, the plea or settlement agreement should include a provision that requires the company to provide information about all culpable individuals and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach.

2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

Both criminal and civil attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers from the inception of an investigation, we accomplish multiple goals. First, we maximize our ability to ferret out the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and extent of any corporate misconduct. Second, by focusing our investigation on individuals, we can increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy. Third, by focusing on individuals from the very beginning of an investigation, we maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well.

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.

Early and regular communication between civil attorneys and criminal prosecutors handling corporate investigations can be crucial to our ability to effectively pursue individuals in
these matters. Consultation between the Department’s civil and criminal attorneys, together with agency attorneys, permits consideration of the full range of the government’s potential remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion, suspension and debarment) and promotes the most thorough and appropriate resolution in every case. That is why the Department has long recognized the importance of parallel development of civil and criminal proceedings. See USAM 1-12.000.

Criminal attorneys handling corporate investigations should notify civil attorneys as early as permissible of conduct that might give rise to potential individual civil liability, even if criminal liability continues to be sought. Further, if there is a decision not to pursue a criminal action against an individual – due to questions of intent or burden of proof, for example – criminal attorneys should confer with their civil counterparts so that they may make an assessment under applicable civil statutes and consistent with this guidance. Likewise, if civil attorneys believe that an individual identified in the course of their corporate investigation should be subject to a criminal inquiry, that matter should promptly be referred to criminal prosecutors, regardless of the current status of the civil corporate investigation.

Department attorneys should be alert for circumstances where concurrent criminal and civil investigations of individual misconduct should be pursued. Coordination in this regard should happen early, even if it is not certain that a civil or criminal disposition will be the end result for the individuals or the company.

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.

There may be instances where the Department reaches a resolution with the company before resolving matters with responsible individuals. In these circumstances, Department attorneys should take care to preserve the ability to pursue these individuals. Because of the importance of holding responsible individuals to account, absent extraordinary circumstances or approved departmental policy such as the Antitrust Division’s Corporate Leniency Policy, Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. The same principle holds true in civil corporate matters; absent extraordinary circumstances, the United States should not release claims related to the liability of individuals based on corporate settlement releases. Any such release of criminal or civil liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.
5. Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.

If the investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the prosecution or corporate authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period. If a decision is made at the conclusion of the investigation not to bring civil claims or criminal charges against the individuals who committed the misconduct, the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.

Delays in the corporate investigation should not affect the Department’s ability to pursue potentially culpable individuals. While every effort should be made to resolve a corporate matter within the statutorily allotted time, and tolling agreements should be the rare exception, in situations where it is anticipated that a tolling agreement is nevertheless unavoidable and necessary, all efforts should be made either to resolve the matter against culpable individuals before the limitations period expires or to preserve the ability to charge individuals by tolling the limitations period by agreement or court order.

6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay.

The Department’s civil enforcement efforts are designed not only to return government money to the public fisc, but also to hold the wrongdoers accountable and to deter future wrongdoing. These twin aims – of recovering as much money as possible, on the one hand, and of accountability for and deterrence of individual misconduct, on the other – are equally important. In certain circumstances, though, these dual goals can be in apparent tension with one another, for example, when it comes to the question of whether to pursue civil actions against individual corporate wrongdoers who may not have the necessary financial resources to pay a significant judgment.

Pursuit of civil actions against culpable individuals should not be governed solely by those individuals’ ability to pay. In other words, the fact that an individual may not have sufficient resources to satisfy a significant judgment should not control the decision on whether to bring suit. Rather, in deciding whether to file a civil action against an individual, Department attorneys should consider factors such as whether the person’s misconduct was serious, whether
it is actionable, whether the admissible evidence will probably be sufficient to obtain and sustain a judgment, and whether pursuing the action reflects an important federal interest. Just as our prosecutors do when making charging decisions, civil attorneys should make individualized assessments in deciding whether to bring a case, taking into account numerous factors, such as the individual’s misconduct and past history and the circumstances relating to the commission of the misconduct, the needs of the communities we serve, and federal resources and priorities.

Although in the short term certain cases against individuals may not provide as robust a monetary return on the Department’s investment, pursuing individual actions in civil corporate matters will result in significant long-term deterrence. Only by seeking to hold individuals accountable in view of all of the factors above can the Department ensure that it is doing everything in its power to minimize corporate fraud, and, over the course of time, minimize losses to the public fisc through fraud.

**Conclusion**

The Department makes these changes recognizing the challenges they may present. But we are making these changes because we believe they will maximize our ability to deter misconduct and to hold those who engage in it accountable.

In the months ahead, the Department will be working with components to turn these policies into everyday practice. On September 16, 2015, for example, the Department will be hosting a training conference in Washington, D.C., on this subject, and I look forward to further addressing the topic with some of you then.