MESSAGE FROM THE CHAIRS
Peter Gioello, Jr., Esq. and Eugene Schmittgens, Esq.

It is certainly a fact that many aspects of our environmental practices are interrelated. The theme of the year for the ABA is “content convergence” and we are happy to report that the Environmental Transactions and Brownfields (ETAB) and the Environmental Disclosure committees are starting the year off correctly by publishing this joint newsletter. The overlap between our two sections has to do mostly with overlap amongst our committee members in addition to some of the topics. Many of our committee members are environmental transactional or deal attorneys who focus both on diligence and advising corporate clients with respect to disclosure obligations and considerations.

From ETAB we have two articles discussing two somewhat disparate concepts. The first relates to what one has to report when one finds a minimal amount of contamination during a due diligence effort. Although it is limited to a discussion of California law, it does provide a starting point for examining the issues in other states.

The second is a discussion of an issue which continually causes concerns and that is how to address the needs of the community with the redevelopment of property. The article highlights an initiative, BRIGHT: Bright Revitalization Initiative for Green, Healthy, Towns, by the

Environmental Law Institute, which pilot project will focus on Ward 7 in Washington, DC. Here the disclosure involves working with the community to consider its needs.

From the Environmental Disclosure Committee, the first article provides a good overview of the significant amendments to TSCA, including what is happening both in the interim and the long-term. As suggested in the article, practitioners in this area might be able to help shape policy as the EPA establishes guidelines based on its obligations under the amendments.

The second article examines the varied approaches among companies with respect to climate change disclosure, focusing on two regulatory developments in this space.

It is our hope that these collaborative efforts will continue for the benefit of the environmental bar as we attempt to take holistic approaches to the problems which confront us, and our clients.

Peter Gioello, Jr., Esq. is an associate at Cahill Gordon & Reindel LLP in the New York office. He is chair of the Environmental Disclosure Committee.

Eugene Schmittgens, Esq. is a member at Evans & Dixon, LLC in the St. Louis office. He is the chair of the Environmental Transactions and Brownfields Committee.
Environmental Disclosure Committee Newsletter  
Kurt Herman, Editor

In this issue:

Message from the Chairs  
Peter Gioello, Jr., Esq. and Eugene Schmittgens, Esq. .....................1

Calling It In: When to Report and Remediate “Minor” Environmental Contamination  
Alison Torbitt and Andrew Lojo, P.G. ..3

The Bright Program™: A Convening and Research Initiative of the Environmental Law Institute  
Scott Wilson Badenoch Jr., Esq. .............8

The New TSCA: Greater Certainty for Safer Chemicals  
Jessie M. Kneeland, Ph.D., Jiaru Zhang, M.P.H., and Ari S. Lewis, M.S. ..........11

Mid-2016 Snapshot of Greenhouse Gas Regulatory Disclosures  
Thomas A. Utzinger, Esq. .....................15

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Environmental Disclosure Committee, December 2016
CALLING IT IN: WHEN TO REPORT AND REMEDIATE “MINOR” ENVIRONMENTAL CONTAMINATION
Alison Torbitt, Esq.
Nixon Peabody LLP
San Francisco, California
Andrew Lojo, P.G.
Terraphase Engineering Inc.
Oakland, California

Thousands of property transactions occur in the United States every year. They range in size and complexity from the average single-family residential house to large manufacturing companies buying and selling one another. Typically, the residential property transaction is facilitated by real estate brokers who make sure long-established, legally mandated inspections and disclosures are made, using form documents with little to no site-specific variation, including flood hazard zones, geologic hazards, lead-based paint, and even former ordnance disposal sites. They rarely include environmental documentation specific to the site such as subsurface soil, groundwater, or vapor intrusion testing.

Commercial transactions are more complex. When a large manufacturing company buys a facility from another, there is typically a site-specific purchase and sale agreement, coupled with a “due diligence period” during which the buyer performs its “all appropriate inquiry” into historical uses and operations that may be a source of releases to the environment. If all appropriate inquiry reveals a likelihood of contamination, the purchase and sale agreements may include remedial cost-sharing provisions, where the seller may retain some liability for known issues or unknown problems that may be discovered at a future date. During due diligence, sellers may provide potential buyers with boxes and boxes of “environmental testing” reports, obtained over many years, documenting the collection and chemical analysis of soil, surface water, groundwater, soil vapor, and/or indoor air. Often, these reports are prepared pursuant to a regulation, permit condition, or a mandate under the oversight of a governmental body authorized to enforce environmental laws in that jurisdiction (a “Regulatory Authority”).

If contamination is identified and a Regulatory Authority is notified, that Regulatory Authority typically requires some level of investigation. If, after the investigation, the Regulatory Authority determines that no remediation is required, the Regulatory Authority may issue a seal of official approval: the coveted “No Further Action” letter, or a similar closure document. Otherwise, the investigation is generally followed by remediation, whether active or through natural attenuation, and then the Regulatory Authority provides the No Further Action letter. The No Further Action letter can cover anything from a complete site investigation and remedial action that has successfully removed all known contamination, to a determination that residual materials can remain in place if the use of the site is limited to certain defined uses. Generally, the suitability for limited use is pre-conditioned to ensure the known remaining contamination will not harm current or future occupants or migrate beyond its currently defined limits. Such a No Further Action letter, or similar official document, gives the buyer and/or financing party comfort that the contamination is fully remediated, contained, and/or determined to be unlikely to pose significant future expense or complication. However, obtaining this regulatory seal of approval can take months to years and a significant amount of costs, and often includes the caveats that it covers only the “known” conditions as defined by the investigation work, and that the Regulatory Authority retains the right to reopen the case if new contamination is found. The significant costs and delays associated with obtaining a No Further Action letter may make this traditional response to contamination unattractive to some sellers, especially if the contamination identified is “minor.” For purposes of this article, “minor” levels of contamination are where the detections of hazardous substances beneath the site are above current regulatory screening levels, but are reasonably believed not to present a significant, present, or potential hazard to human health and safety, property, or the environment.
The focus of this article is on this decision-making process and how to ensure that minor environmental issues do not become fatal to the ability to close on a transaction at reasonable cost and within a reasonable time frame. As discussed below, here are the main steps for an analysis of a site with minor contamination: (1) determine whether there is a reporting obligation to the Regulatory Authority; (2) determine whether there is a reporting obligation to the buyer or seller depending on who discovered the contamination; (3) determine whether the issue can be addressed, legally and expeditiously outside a regulatory process; and (4) if you decide to disclose to the Regulatory Authority, how to make the regulatory process most efficient? This article will focus on California law and will peel back the many layers of regulatory disclosure requirements for real property contaminated by minor releases, discussing the impact of disclosures on later decisions to sell, the immediate costs and time delays of getting regulators involved, and the practicalities surrounding a decision to notify.

What Are the Regulatory Disclosure Requirements for Minor Contamination?

Unfortunately, legal precedent on disclosure interpretations for minor contamination cases is limited. Likely this is an indication that minor environmental cases are too small to warrant litigation that would result in a reported opinion. In short, a seller or buyer conducts a spot remediation, the minor contamination is never discovered, or it is discovered but ignored for purposes of the transaction. Similarly, depending on the power and financial conditions of the buyer and seller, it is often unlikely that the financials are such that a seller will be brought to court for non-disclosure. Instead, some sort of settlement or cost-sharing agreement is more common.

Notification to the Regulatory Authority

In California, under California Health and Safety §§ 25501 and 25507, any material that would pose a hazard, due to the material’s quantity, concentration, or physical or chemical characteristics, to human health and safety or the environment if released into the workplace or the environment, must be immediately reported upon discovery to the California Office of Emergency Services and the applicable Certified Unified Program Agency (CUPA). However, under 19 C.C.R. § 2703(c) there is an exception if “there is a reasonable belief that the release or threatened release poses no significant present or potential hazard to human health and safety, property, or the environment.” Consequently, if minor contamination is discovered, since there is a reasonable belief that the release or threatened release poses no significant present or potential hazard to human health and safety, property, or the environment, the owner of the real property technically has a decision: to voluntarily report the contamination to a Regulatory Authority, to remediate the contamination without Regulatory Authority supervision, or to leave the contamination in place.

Under the majority of state laws, the legal burden of disclosure to a Regulatory Authority typically falls on the current owner or operator of the property. In practice, however, the buyer, or the buyer’s lender, often first discovers the contamination during its due diligence process. Usually, buyer then discloses this information to the seller, as it is generally in buyer’s best interests to do so. Disclosure of that data by the buyer to the seller then triggers a series of discussions. First, does the seller need to disclose that information to the Regulatory Authority, which could result in diminution of the property’s value, and the start of a lengthy and costly regulatory process to investigate and, if necessary, remediate? Second, the cost of obtaining that environmental data may have been significant, especially if subsurface soil and/or groundwater sampling was involved, and often, the buyer has fronted those costs. Is the seller willing to reimburse for those costs, especially as the buyer’s data can have significant value to the seller to offset the investigation costs? The access agreement may require the buyer to provide copies of all data collected, which may later haunt both
parties by preventing the chance of buyer to recoup costs and forcing the seller’s hand to disclose to the Regulatory Authority. If a seller refuses to disclose to a Regulatory Authority, and the buyer and/or the buyer’s consultant reasonably believes there is an “imminent and substantial endangerment,” certain state laws and/or professional licensing duties may require that the buyer and/or the consultant disclose despite the seller’s refusal. Accordingly, it is important for both the buyer and seller to be knowledgeable of their disclosure requirements and be prepared to address them quickly once the sampling data come in.

**Notification to the Buyer**

When selling or leasing real property in California, there are three statutes regarding mandatory notification to the buyer that may be applicable. California Health and Safety Code § 25359.7(a) states that:

Any owner of nonresidential real property who knows, or has reasonable cause to believe, that any release of hazardous substance has come to be located on or beneath that real property shall, prior to the sale, lease, or rental of the real property . . . give written notice of that condition to the buyer, lessee, or renter of the real property.

For residential real property, California Civil Code §§ 1102 and 1102.6 similarly require sellers to disclose to buyers as soon as practicable prior to a sale any known hazards, including, without limitation, asbestos, formaldehyde, radon gas, lead-based paint, fire, chemical storage tanks, and/or contaminated soil and water. Any waiver of these disclosure requirements is considered void as against public policy. These statutes do not provide for any minimum levels of contamination that must be met prior to mandatory disclosure. In other words, they clearly require disclosure to buyers of even minor contamination.

Similarly, as part of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code § 25249.6 (commonly known as “Prop 65”), “[no] person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known . . . to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual . . .” Technically, such a prohibition extends from a seller to a buyer of real property. While the safe harbors of “No Significant Risk Levels” (“NSRLs”) for cancer-causing chemicals and Maximum Allowable Dose Levels (“MADLs”) for chemicals causing reproductive toxicity may exempt some minor contamination from such required disclosures, only about 300 of the 800-plus listed chemicals have these default safe harbor levels. For the remaining chemicals, companies hold the burden to establish their own safe harbor levels, an expensive and likely infeasible proposition for the seller of real property. Therefore, sellers should also be advised to provide buyers of contaminated property with clear and reasonable warnings.

**Potential Liability When Transferring Real Property Having Minor Contamination**

In an unpublished opinion from 2011, the Court of Appeal for the Fourth District of California highlighted the importance of sellers notifying buyers prior to the closing if hazardous materials are present on real property. See Makallon Atlanta Huntington Beach, LLC v. Chevron Land and Development Co., No. G042413, 2011 WL 862024 (Cal. Ct. App. Mar. 14, 2011). In that case, the seller of real property did inform the buyer, concurrent with the sale, that the property included oil fields and had been previously used to store oil. The sellers informed the buyer that the property might be contaminated with oil and other hydrocarbon products, as well as other forms of hazardous waste. As a result of these disclosures, the purchase agreement contained a cost-sharing provision that required the buyer to remediate oily dirt, and once the total costs of remediation reached $30 million any excess cost was to be borne by the sellers. At that point, the sellers had the choice of paying the cost of the buyer’s remediation efforts, or performing the remediation themselves.
at their own cost. Additionally, the buyer had five years from the date of the closing to complete investigations of the property and inform the sellers of any previously undisclosed hazardous substances. The sellers were required to remediate those additional hazardous substances at their own cost. Later, a subsequent buyer discovered lead contaminants on the property and sued the original sellers for failure to disclose under California Health and Safety Code § 25359.7(a), using the theory that the previous disclosure was limited to oil and hydrocarbons, and did not include lead-related contamination.

The court held that mentioning the activities that had taken place on the property, along with the statement that hazardous substances may be present, was enough to give the subsequent buyers adequate notice of potential unknown conditions. As a result, summary judgment in favor of the sellers was upheld, and they were not required to contribute to the cleanup of the lead contamination. Under this precedent, a seller is strongly recommended to provide clear and reasonable disclosures, specific enough to warn of any known contamination or activities and operations that might have resulted in contamination, but drafted broadly enough to cover other related, but currently unknown, contaminants.

**Effect of “As-Is” Clauses**

As a side note, in dicta in *Makallon*, the court reasoned that the seller’s use of clauses stating the property was being purchased in “as-is” condition served to protect the seller because the clauses existed alongside explicit notifications of possible hazardous substances and the seller’s potential liability for portions of the remedial costs. In contrast, the court in *Reality Principle, Inc. v. George*, a separate unpublished opinion from the Court of Appeal for the Second District, found that “as-is” clauses could not absolve a seller from liability regarding remediation costs, when the purchase agreement also contained the representation that there were no contaminants present on the property. No. B209666, 2009 WL 1843094 (Cal. Ct. App. June 29, 2009). Given that waivers of the mandatory disclosure statutes discussed above are considered void as a matter of public policy in California, it only makes sense that an as-is clause standing alone in a purchase agreement may not protect a seller from a claim based on nondisclosure.

**Next Steps for Sellers If Minor Conditions Exist**

Due to the mandatory notification obligations placed on a seller, and the above case law, a seller has several options. First, and arguably the most advantageous, is to simply remediate minor known environmental contamination prior to selling real property, and then disclose the minor contamination as a prior condition. It is also helpful to a sale if a No Further Action letter was obtained or is forthcoming. As an alternative to the expensive and time-intensive No Further Action letter process discussed previously, a seller may choose to not notify a Regulatory Authority at all, and instead obtain a remediation report prepared and certified by a properly registered environmental consultant. This report can then serve as a disclosure document to the buyer that a minor contamination issue was identified and remediated according to current regulatory screening levels, and the registered consultant’s certification may be viewed as acceptable by the buyer and/or its lender in lieu of approvals by the Regulatory Authority. It is important to remember that regulatory screening levels change, and are not “standards.” Instead they are generally accepted levels below which Regulatory Authorities do not usually require further investigation or remediation. Depending on the buyer and the financing parties involved, the remediation report alone may be sufficient to satisfy a buyer.

A more conservative alternative is engaging with the appropriate Regulatory Authority at the time the minor contamination is identified and prior to performing the remedial work. Doing so provides the seller and potential buyer with an added level of certainty that the appropriate remedial action
is being taken, that future occupants will be in an environmentally “safe” location, and could add to the price paid for the property. However, engaging a Regulatory Authority adds significant costs and time. Depending on the state where the property is located, we estimate that engaging a Regulatory Authority such as by participating in a voluntary cleanup program adds a minimum of 3 to 12 months (though the added time can be years) to the project for a minor contamination issue. The Regulatory Authority not only requires time to review the work, it may, depending on the state, also require public comment periods of 30 to 60 days before it can approve a remedial plan and issue the No Further Action letter. It is also critical to carefully select which Regulatory Authority to engage. Depending on the circumstances, a site with minor contamination in California may have a choice between California’s Certified Unified Program Agency, the Regional Water Quality Control Board, the local Air District, and/or the Department of Toxic Substances Control. Each of these Regulatory Authorities has its own expertise, its own focus on the key environmental media and standards at issue, and its own protocols and timing for remedial cases. Taking the time to discuss these possibilities with a consultant and an attorney familiar with the regional location can save months and thousands of dollars in potentially unnecessary follow-up work.

Another option is for a seller to leave the minor contamination in place and specifically disclose that hazardous substances may be present in accordance with the disclosure laws discussed above, and then sell the property “as-is” and hope that joint and several liability under the Comprehensive Environmental Response, Compensation, and Liability Act or state law won’t cause the seller to face future liability. This is fairly common practice for “minor” remediation cases and puts the burden of environmental due diligence on the buyer. The buyer can then choose whether to continue with the purchase, require some sort of cost-sharing and/or purchase price reduction, or require disclosure to a Regulatory Authority and a No Further Action letter as a closing condition. Each of these possibilities shifts the burden of minor contamination to the buyer, who then faces its own decision, post-closing, whether to remediate and/or notify a Regulatory Authority.

These decisions will influence the disclosure requirements for subsequent sales. For example, a decision to leave minor contamination in place may discourage future buyers with a lower appetite for risk. One common scenario where a decision is made to ignore minor, known contamination is when no one is expected to encounter the hazardous substance at all; for example, lead-based paint in a portion of a building deemed inaccessible. Theoretically, there is no practical exposure risk, but there is still a disclosure requirement, which provides a buyer a basis to request a purchase price reduction. There are also very complicated rules and regulations used to determine whether or not minor levels of contamination could cause soil to be considered a hazardous waste. These regulations should be evaluated thoroughly before deciding to leave minor contamination in place.

In conclusion, a minor environmental condition need not defeat a potential sale. A seller must recognize that an “as-is” clause does not act as a “get out of jail free card.” Instead, the seller should provide a clear and reasonable warning regarding any known (or reasonably should be known) potential hazardous substances present on the site, no matter how minor. In preparation for such a disclosure, the seller should analyze whether to remediate and whether to engage a Regulatory Authority. If the seller chooses to engage a Regulatory Authority, additional considerations need to be discussed regarding which one. Finally, the seller must be prepared to deal with the buyer’s reaction to whatever decisions are made, which could include preparing for potential ongoing liabilities well past the closing.
THE BRIGHT PROGRAM™: A CONVENING AND RESEARCH INITIATIVE OF THE ENVIRONMENTAL LAW INSTITUTE
Scott Wilson Badenoch Jr., Esq.
Environmental Law Institute
Washington, D.C.

BRIGHT: Blight Revitalization Initiative for Green, Healthy Towns

The Environmental Law Institute (ELI) has recently launched the BRIGHT Program™, which is focused on revitalizing corridors of blighted properties in communities of need. A pilot project in Ward 7 of the District of Columbia has commenced with the Anacostia Waterfront Trust and the Anacostia Park and Community Collaborative (a coalition comprised of 17 organizations based in and serving “East of the River” communities) and key business, university, public policy, and public health entities. The partners are developing a plan for the revitalization of a corridor along the lower Watts Branch, combining environmental remediation, open space, watershed management, climate resiliency, urban agriculture, public health amenities, net zero facilities, and employment opportunities.

Environmental justice concerns riddle the nation’s cities and towns, and countless blighted properties are in need of redevelopment. The District of Columbia has made major strides to achieve ambitious climate goals established in its Sustainable DC Plan1 and those established in the recent Paris Climate Agreement and echoed in the District’s draft Climate Plan. The BRIGHT Program is working to prove the corridor approach to blight revitalization model works in the nation’s capital because of its communities of need and its proximity to legislators and decision makers.

For this pilot project, the neighborhood partners will select up to 20 blighted sites to revitalize with a combination of end uses. ELI will assist the partners with research -- including best practices, site analysis, and funding identification -- as well as facilitate partnerships among communities, governments, businesses, and nongovernmental organizations. Throughout the process, ELI will document and analyze the project, eventually creating a replicable revitalization model. ELI will work to publish the results of the project, including the legal framework, model agreements, stories of impasses and solutions, and funding mechanisms in the form of the “BRIGHT Program Workbook: A Blight Revitalization Toolkit.”

Community Need

The Anacostia River cuts through DC from the Maryland border to the Potomac, effectively dividing the city into a prosperous western side and a starkly different eastern side. Since the 1950s, the far eastern quarter of Washington, which is more than 95 percent African American, has lagged far beyond the rest of the city in economic, health, and educational indicators. Although 21 percent of the District’s population resides east of the river, these communities are chronically under-resourced and continue to face significant challenges.

One in four children east of the river lives in poverty, compared to fewer than one in twenty west of the river. Unemployment ranges from 13 to 16 percent, 91 percent of babies are born to single parents, and, in the two neighboring Ward 8 public high schools, fewer than half the students graduate in four years. Nearly a quarter of adults are without a high school diploma, while two-thirds of children live below the poverty line. There are far higher instances of property crime and violent crime than west of the river. Unemployment is triple the citywide rate, and death from diabetes, cancer, asthma, and cerebrovascular diseases is four times higher than the DC average (Urban Institute).

The proposed project area, located along Watts Branch, a tributary of the Anacostia River, is located in the heart of this community. It is home to residents who are particularly vulnerable to public health challenges due to high rates of unemployment, poverty, asthma, and obesity, and the fact that the area is a food desert. These
factors make the population more sensitive to heat waves and less able to adapt to threats like climate change than other parts of the city. Further, the District of Columbia’s draft climate adaptation plan identifies the Watts Branch corridor as one of the five areas in the city most vulnerable to the impacts of climate change. The area has the highest concentration of schools, public housing, and medical services in a flood-prone area.

The prevalence of numerous vacant and blighted sites throughout this corridor, a key factor in the project partners’ and community stakeholders’ selection of the area, is a further challenge. Not only does the potential environmental contamination of sites pose environmental health and justice threats to the already vulnerable population, but the sites, which currently detract from community livability, could be used for purposes that would benefit local residents, as well as contribute to climate goals. The redevelopment of blighted sites within the project area presents the unique opportunity to mitigate these significant and important public health challenges and increase the community’s resiliency and quality of life.

The 7 Stages of the BRIGHT Program™

1. **Site Selection:** ELI works with the municipality to determine the neighborhoods most in need, and then culls the larger lists of blighted or vacant sites to establish a coherent corridor that would provide the greatest community and environmental benefits.

2. **Coalition Building:** ELI convenes community groups, government agencies, solar providers, developers, regulators, foundations, and funders to ensure the project will succeed on all levels.

3. **Classification and Assessment:** Once sites within the corridor are identified, the official process of understanding the nature of the challenges at each site begins. From due diligence around historic uses, chain of title, liens, permits, and known toxins, to Phase I and II site assessments, ELI will facilitate the process.

4. **Remediation and/or Demolition:** The stakeholders will oversee the demolition and/or remedial action. These will be determined in stage 3.

5. **Design:** The stakeholders will determine the most appropriate design for the sites.

6. **Development of End Uses:** The partners will deploy an array of end uses across the corridor based on need and funding.

7. **Institutional Controls and Long-term Monitoring:** Partners will work to ensure long-term safety of each site that requires remedial action. ELI will work with partners to quantify the environmental savings yielded by the project in terms of greenhouse gas emissions, energy, waste, water, and money.

**Types of Blight**

Blight falls into three general categories.

1. **Brownfields:** Contaminated properties, from former drycleaners and automotive repair shops, to industrial facilities and dumps. Leaking underground storage tank sites (LUST) and Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) sites are some of the more challenging to remediate, but will be heavily considered given their importance for achieving the goal of green, healthy communities.

2. **Grayfields:** Blighted and vacant properties that may not need remedial action, but will need demolition and removal. This includes occupied facilities that desperately need energy efficiency upgrades and facial renovation.

3. **Redfields:** Properties that are terminally insolvent, with no hope of rectifying the situation. Municipalities know the properties that have little or no tax revenue per square foot.
End Uses

The end uses will be defined by the stakeholders and partners and will be heavily guided by the needs and wishes of the community and the goals of the municipality and neighborhoods. Because each site and neighborhood is unique, there is no predetermined outcome. The pilot project will seek to show how combinations of end uses can work across a corridor. For instance, some sites may have a solar array, a pocket park, watershed protection infrastructure, urban agriculture, and a low-income housing unit. Special effort will be made to create “healthfields,” which are defined by the Environmental Protection Agency (EPA) as any end use that improves the health and wellness of the community, including parks, grocery stores, farmers’ markets, clinics, and similar uses.

The Paris Agreement and Reporting Under the Conference of the Parties 21 (COP21)

Under the Paris Agreement, the United States has committed to significant greenhouse gas (GHG) reductions in the coming years. The ability to transform a brownfield site from a source of carbon pollution to a carbon sink, once remediated, and turn it into a localized, decentralized, diversified, alternative energy use or park space is significant. If replicated across the nation’s brownfield sites, remediation could be a major driver for achieving the nation’s COP21 marks. ELI will work with the District Department of Energy and Environment, foundations, EPA, and potentially other federal agencies to quantify the savings generated by this pilot project in order to help with the District’s reporting goals and to help other towns and municipalities understand how to calculate savings on future blight revitalization projects.

Additional Benefits

Local job creation and training programs, community educational opportunities involving remediation, alternative energy, and watershed management, establishing a network of law firms, corporations, financing partners, government agencies, and foundations are some of the additional benefits the BRIGHT Program seeks to bring to bear on all future multi-site redevelopment projects in DC and beyond.

If you, your firm, or organization is interested in contributing to the pilot project in Ward 7, another project elsewhere in the country, or the Blight Revitalization Toolkit publication given past and current experience on corridor projects in communities of need, please contact the BRIGHT Program founder, Scott Wilson Badenoch Jr., Esq., at badenoch@eli.org.

Endnotes

1 Sustainable DC is a District Government led plan to make the city the healthiest, greenest, and most livable city in the United States. It is a citywide initiative crafted for and by the city’s diverse community with the ultimate goal of making DC more socially equitable, environmentally responsive, and economically prosperous.
THE NEW TSCA: GREATER CERTAINTY FOR SAFER CHEMICALS
Jessie M. Kneeland, Ph.D.
Jiaru Zhang, M.P.H.
Ari S. Lewis, M.S.
Gradient
Cambridge, Massachusetts

Introduction

The Frank R. Launtenberg Chemical Safety for the 21st Century Act (TSCA Reform Act), signed into law on June 22, 2016, substantially updates the 1976 Toxic Substances Control Act (TSCA). TSCA regulates chemicals in products we use every day, and the reforms should provide more certainty for consumers, state regulators, and the chemical industry regarding how chemical risks will be evaluated and managed by the U.S. Environmental Protection Agency (EPA). EPA released a first-year implementation plan on June 29 to provide clarity on EPA’s first steps. However, there is still uncertainty regarding how EPA will implement the new law’s requirements, given the tight deadlines and evolving science on how best to determine chemical hazards, potential exposures, and the resulting risks to human health and the environment. Manufacturers will face a new burden to substantiate confidentiality claims in order to protect valuable information from public disclosure. More than ever, however, the desire to protect proprietary information will need to be balanced with an increased emphasis on providing transparent information on health and environmental safety to workers and the public. It is clear that meeting the new law’s mandates will require significant effort from EPA and industry, and there will be multiple opportunities for input from interested companies and the public.

Overview of the TSCA Reform Act and EPA’s Implementation Plan

New Chemicals and New Uses
Section 5 of TSCA grants EPA the authority to review new chemicals that have not previously been introduced to the marketplace and new uses of existing chemicals that are substantially different from their current uses. The TSCA Reform Act does not change the overall notification and review process for new chemicals and new uses. However, revisions to Section 5 now require EPA to make an affirmative determination of safety; that is, they must determine that a new chemical or use is unlikely to pose risks to human health or the environment before the chemical can enter the marketplace or the new use can be approved. Further, due to revisions in Section 4, EPA now has additional authority (by rule, order, or consent agreement) to require companies to provide new information on chemical hazards and exposures. Companies preparing new Premanufacture Notices (PMNs) and Significant New Use Notifications (SNUNs), the documentation needed prior to manufacturing new chemicals or using existing chemicals in new ways, should carefully review the data they plan to submit in order to anticipate EPA’s determination regarding the safety of the new chemical or use. Without a safety determination from EPA, new chemicals cannot be marketed in the United States. The practical implication of these changes is that many more chemicals entering the market will undergo a comprehensive evaluation and be subject to testing than was required under the old TSCA provisions. EPA will also publish summaries of its health and safety evaluations for new chemicals, which will provide greater transparency to the public regarding new chemical safety.

Chemical Prioritization
Amendments to Section 6 of TSCA require that EPA quickly establish a procedure for prioritizing existing chemicals as either high priorities for further risk evaluation (if they could pose a risk to human health and the environment) or low priorities for further risk evaluation (if they are not expected to pose a risk to human health and the environment). The proposed rule establishing these procedures is expected to be released in December 2016. Given the tight timeline for implementation, EPA may look to existing chemical prioritization frameworks such as those recently revised by the
California EPA and Health Canada, and adapt some best practices from those frameworks. EPA currently has a suite of tools that it regularly uses for screening chemicals for toxicity potential (e.g., computer models that predict toxicity based on chemical structure), but the agency will be challenged to identify and further develop more innovative procedures for estimating potential risk, such as utilizing the “ToxCast” and “ExpoCast” high-throughput screening tools in the risk prioritization process. Companies that manufacture and use chemicals should monitor developments in exposure measurement and estimation techniques and understand how risk prioritization could affect their supply chain.

**Chemical Risk Evaluation**

EPA will also need to quickly establish and implement a plan to conduct extensive risk evaluations for high-priority chemicals. By December 2016, EPA plans to publish a list of 10 chemicals drawn from the 2014 update of the TSCA Work Plan for Chemical Assessment and initiate extensive risk evaluations of those chemicals. Preference will be given to chemicals that are persistent (i.e., do not readily degrade in the environment) and bioaccumulative (i.e., biomagnify up the food chain), or are known human carcinogens and demonstrate high acute and chronic toxicity (i.e., harmful effects observed following short- or long-term exposure to the chemical at a low dose). Other chemicals may enter the risk evaluation process after being designated “high priority” in the risk prioritization phase.

Chemical risk evaluation will require EPA to evaluate chemical hazards and uses to determine whether people or the environment may be at risk from exposure to a hazardous chemical. EPA must implement risk management measures if they determine that the use of a chemical poses an unreasonable risk to human health or the environment. The risk prioritization and evaluation processes may not consider the chemical’s cost or available alternative chemicals, but risk management decisions will consider both. Companies may specifically request early risk prioritization and evaluation to expedite EPA’s consideration of their chemical, because they may wish to gain certainty that low-risk chemicals will not be subject to further scrutiny by EPA and consumers, or to get quicker clarity on what risk management measures are required for high-risk chemicals. Manufacturers will want to understand the available chemical safety data to determine whether such a proactive approach would be advantageous for them.

A new aspect of risk prioritization and evaluation for both new and existing chemicals in the TSCA Reform Act is the explicit requirement that EPA consider risks to “potentially exposed and susceptible subpopulations,” such as “infants, children, pregnant women, workers, or the elderly.” New chemical toxicity and exposure information may be required to evaluate these risks. EPA’s expanded authority under Section 4 also allows it to require companies to provide it with new information needed to conduct chemical risk prioritizations and evaluations, including the consideration of potential risks to vulnerable populations.

**Disclosure of Confidential Business Information**

Finally, the TSCA Reform Act changes how EPA will treat confidential business information (CBI). The TSCA inventory of existing substances (i.e., those chemicals already in commerce) will be divided into active and inactive chemicals. To define which chemicals are active in commerce, EPA will require manufacturers (and potentially processors) to report on chemicals they have manufactured (or processed) during the 10 years prior to enactment of the new law. This reporting rule will go into effect no later than June 2017. The active TSCA inventory will continue to have a confidential portion, but companies will need to resubstantiate CBI claims to maintain confidential inventory status for active chemicals. The TSCA Reform Act revises the process by which companies can claim CBI and requires EPA to evaluate companies’ CBI claims. In particular, companies asserting a CBI claim must specify
that they have taken measures to protect the confidential information, that the information is not already available or discoverable to the public, and that disclosure would cause substantial competitive harm. Specific manufacturing processes and chemical formulations can be kept confidential without substantiating CBI claims.

The TSCA Reform Act retains the exclusion that health and safety studies cannot be treated as CBI. However, the identities of the test substances may be claimed as confidential. In these scenarios, EPA will provide a unique identifier for each CBI chemical identity. Under the TSCA Reform Act, the use of generic names for chemicals claimed to be CBI will also undergo review.

The TSCA Reform Act also specifies several scenarios in which EPA may disclose CBI, such as during medical or environmental emergencies, or if the chemical is subject to a required ban or phaseout.

Technical Challenges and Opportunities

Risk Prioritization and Evaluation

Although the specific scope of the chemical risk prioritization and evaluations EPA will perform is still unclear, it is likely that the full risk evaluations will be technically challenging and potentially controversial among both industry and public advocacy groups. EPA will likely require that companies provide additional chemical hazard data (i.e., toxicity testing) as well as refined and sophisticated exposure assessments for both workers and consumers. Interpreting the results of such assessments can also be technically challenging, requiring in-depth knowledge of toxicology and experimental design. Companies should understand how to leverage their existing product stewardship and environmental health and safety programs to avoid duplicating information already gathered for a different purpose. For example, product use information gathered for product stewardship purposes may provide consumer exposure information. Also, should toxicity testing be required, companies should consider conducting this testing in a manner that allows the information to fulfill the TSCA Reform Act requirements as well as mandates from other countries around the world.

EPA plans to publish a proposed rule on risk evaluation in December 2016 and stakeholders should be prepared to offer comments on it. In the longer term, EPA will develop guidance that allows third parties to submit draft risk evaluations of chemicals undergoing EPA review under the TSCA Reform Act; this guidance could also be used by companies that wish to anticipate the outcome of an EPA risk evaluation and whether EPA will require further risk management measures for a chemical (e.g., use or volume restrictions).

Alternatives to Animal Testing

Under the TSCA Reform Act, EPA must establish a plan to minimize the use of vertebrate testing by giving preference to alternative sources of chemical hazard information. Traditional animal-based toxicity tests can cost upwards of several million dollars and take two to three years (for long-term studies, such as those assessing reproductive and developmental toxicity). Many traditional toxicity tests rely on rodents (which raises animal welfare concerns) and doses of uncertain relevance to human exposures. The science of toxicity testing is rapidly developing, and EPA will need to support and prioritize new non-vertebrate testing methods to assess chemical safety using computational methods, high-throughput screening (e.g., ToxCast data) grouping of similar chemicals, and tiered screening and testing protocols, with an increasing emphasis on in-vitro test data (i.e., tests conducted with human or animal cells in petri dishes). Expert judgment will be required to weigh differing results. For example, results from a validated in-vitro method for assessing skin corrosion should typically have more weight in the hazard determination compared to results from a computational model. EPA will also encourage industry consortia to jointly conduct any required testing. Companies that conduct business in the European Union (EU) may already have alternative data developed under the Registration, Evaluation,
Authorisation and Restriction of Chemicals (REACH) legislation and will want to understand how to use that information and strategically develop new testing programs that comply with any EPA guidelines that differ from those of REACH.

While a 2014 National Center for Environmental Assessment report, “Next Generation Risk Assessment: Incorporation of Recent Advances in Molecular, Computational, and Systems Biology,” sheds some light on how toxicity data in the 21st century could better inform chemical risk assessment and may be used by EPA in formulating its own policies, procedures, and guidance, it is likely that the interpretation of new non-vertebrate test results will require specific toxicological and chemical expertise.

**Conclusion**

Companies and their counsel need to understand the requirements of the TSCA Reform Act and closely follow EPA’s implementation of the new law, because there will be many opportunities to both shape the direction of EPA’s new chemical safety measures and align company product stewardship policies with the best available science to clearly communicate chemical safety information with customers and workers, while protecting valuable proprietary information.

**Ari Lewis** is a Principal at Gradient, an environmental and risk sciences consulting firm. She specializes in hazard and risk assessment of chemicals in products, the environment, and the workplace. She works from her home office in Trumbull, CT. **Jiaru Zhang** is a senior toxicologist specializing in chemical hazard assessment and **Jessie Kneeland** is a senior environmental chemist with expertise in global chemical registration requirements. They are both based in Gradient’s Cambridge, MA office.

**Endnotes**

1 EPA’s ToxCast program is using computational *(in silico)* approaches to screen chemicals for further testing, describe complex biological pathways, and make predictions about toxicity.
Introduction

As the second quarter of 2016 passed and public corporations filed their quarterly reports in late July and early August, investors obtained a mid-year view of how a number of high-profile greenhouse gas (GHG) and air quality rulemakings are affecting those companies. These regulations are in the spotlight because they present, in some cases, potentially significant business risks. And yet upon analyzing reports from companies within the same industry sector, especially electric power, it becomes clear that a wide disparity exists in how individual companies assess and disclose GHG regulatory risks.

This article examines two U.S. Environmental Protection Agency (EPA) regulatory programs for GHGs, namely, (1) the 2015 “Clean Power Plan” for existing fossil fuel-fired electric utility steam generating units and combustion turbines, and (2) the 2016 “endangerment finding” applicable to GHG emissions from certain aircraft engines. The Clean Power Plan is currently the target of high-profile legal challenges, and a marathon of oral arguments was held before the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) en banc on September 27, 2016. Meanwhile, parties seeking to challenge the aviation endangerment finding may file petitions for review in the D.C. Circuit by October 14, 2016.

While this article focuses on GHG regulation, there are many environmental rulemakings of concern to industry and subject to litigation in 2016. These include, among others, the Mercury and Air Toxics Standards (MATS) for mercury and other hazardous air pollutants from coal- and oil-fired power plants; the revised National Ambient Air Quality Standard for ground-level ozone (reduced from 0.075 ppm to 0.070 ppm); and the amended New Source Performance Standards (NSPS) and additional GHG and volatile organic compound standards for the oil and natural gas sector. While treatment of all these rulemakings is beyond the scope of this article, the concept that individual companies within an industry sector evaluate and disclose regulatory risks differently still applies.

General Requirements for Disclosure

Corporations that develop, register, and sell securities in the United States (issuers) are subject to the jurisdiction of the Securities and Exchange Commission (SEC) and its registration and disclosure requirements. Specifically, U.S. issuers must comply with the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act) and disclose material facts necessary for investors to make informed decisions. Rules promulgated by the SEC, now contained within SEC Regulation S-K, prescribe disclosure requirements for registration statements, quarterly (10-Q) reports, and annual (10-K) reports. Foreign issuers are subject to similar although not as prescriptive reporting and disclosure requirements.

Several sections of Regulation S-K require disclosures of material information, which can include environmental liabilities. Item 101(Description of Business) requires that issuers disclose, among other things, the material effects of environmental legal requirements on capital expenditures, earnings, and competitive position. Item 103 (Legal Proceedings) requires companies to describe material administrative or judicial legal proceedings arising from federal, state, or local environmental laws. Item 303 (Management Discussion and Analysis or MD&A) provides a company’s view of known trends, events, or uncertainties that may materially affect the company’s financial condition, including, for example, a regulation reasonably determined to require increased pollution control costs. Finally, Item 503 (Risk Factors) requires the disclosure in a company’s prospectus of industry risks, company risks, and investment risks.
Additionally, in 2010, the SEC issued its *Commission Guidance Regarding Disclosure Related to Climate Change*, available at https://www.sec.gov/rules/interp/2010/33-9106.pdf (SEC Guidance), providing direction for issuers evaluating climate change risks under Items 101, 103, 303, and 503. Companies should assess whether climate-related regulations, legislation, and accords, or anticipated changes in consumer demand, or potential impacts to corporate assets, should be disclosed in SEC filings. To date, companies have implemented the SEC Guidance in a variety of ways, if at all. See *Climate Change Disclosures Disappoint Investors, Again*, Environmental Disclosure Committee (May 2016), available at http://www.americanbar.org/content/dam/aba/publications/nr_newsletters/ed/201604_ed.authcheckdam.pdf. More recently, the SEC requested comments on modernizing certain Regulation S-K disclosure requirements, including companies’ evaluations of material climate change risks.4

**Power Companies Diverge Significantly as to Clean Power Plan Risks**

**Regulatory Background**

On June 25, 2013, President Barack Obama announced his Climate Action Plan, available at https://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf, a multi-pronged strategy to address U.S. GHG emissions. A Presidential Memorandum released along with the Climate Action Plan, available at https://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards, directed EPA to regulate GHGs from new and existing power plants under, respectively, Sections 111(b) and 111(d) of the Clean Air Act. This article focuses on the requirements for existing sources under Section 111(d).

On June 18, 2014, EPA published its proposed emissions guidelines for states to follow in developing plans to regulate GHGs from existing fossil fuel-fired generating units.5 On August 3, 2015, EPA Administrator Gina McCarthy signed a final rule, and on October 23, 2015, the Clean Power Plan was published in the *Federal Register*.6 The Clean Power Plan is intended to achieve an approximately 32 percent reduction in carbon dioxide (CO₂) emissions from 2005 levels by 2030.

Generally, Section 111 of the Clean Air Act requires the EPA to establish “standards of performance” (NSPS) for emissions from new, modified, and reconstructed sources in listed source categories, under Section 111(b). A final NSPS, in turn, can trigger requirements under Section 111(d) to publish emission guidelines for existing sources in that particular source category. The level of control is called the “best system of emission reduction” (BSER).

In the case of the Clean Power Plan, EPA determined BSER to consist of three “building blocks.” These include (1) reducing carbon intensity by improving the heat rate of coal-fired power plants; (2) substituting higher-emitting coal-fired plants with lower-emitting natural gas-fired plants (generation shifting); and (3) increasing the use of new zero-emitting renewable sources.

The Clean Power Plan has a multistep framework. First, EPA used the three building blocks to determine national CO₂ emission performance rates for two power plant subcategories: fossil fuel-fired electric steam generating units and natural gas-fired combined cycle generating units. Second, EPA calculated state-specific targets, and states are given a choice of using a rate-based goal measured in pounds per megawatt hour, a mass-based goal measured in total short tons of CO₂, or a mass-based goal that also allows for the addition of new sources. Third, states must develop implementation plans assuring that in-state power plants, individually or combined with additional measures, achieve interim CO₂ performance rates from 2022 to 2029 and final performance rates, rate-based goals, or mass-based goals by 2030. States may choose how to structure their implementation plans, and may develop those plans individually or in cooperation with other states. EPA can
impose a federal plan if a state fails to submit an implementation plan (the original deadline was September 6, 2016 but has been effectively postponed due to a stay of the Clean Power Plan).

Finally, EPA offers a Clean Energy Incentive Program (CEIP) to reward early investments in renewable energy and demand-side energy efficiency. EPA published a proposed rule offering further guidance in June 2016.7

Being one of the most controversial regulations ever promulgated by EPA, the Clean Power Plan has been subject to extensive challenges, some filed before the final rule was even published. Numerous petitions have been consolidated in the D.C. Circuit under the caption West Virginia v. EPA (No. 15-1363). The procedural history includes a stay request to the Supreme Court of the United States, which was granted on February 9, 2016.8 The stay applies to the rule’s implementation pending judicial review in the D.C. Circuit. Despite the stay, some states have continued to make preparations, to some degree.

The case, originally scheduled for oral argument before a three-judge panel on June 2, 2016, was rescheduled for oral argument before the full D.C. Circuit (en banc) on September 27, 2016.9 It is expected that any decision of the D.C. Circuit will be appealed to the Supreme Court.

Company Disclosures
Electric power companies’ second quarter disclosures related to the Clean Power Plan range from caution as to potential financial impacts and plant closures, to support for the regulation’s implementation. These differences exist mainly due to the composition of a company’s power generation fleet. Fleets that have sizeable coal-fired capacity will be more susceptible to the Clean Power Plan. Fleets that utilize more natural gas-fired capacity and renewables are in a better position to withstand the rule’s implementation.

Ohio-based American Electric Power Company, Inc. (AEP), for example, owns or operates more than 60 generating stations with a capacity of approximately 31,000 MW. Approximately 60 percent of that capacity is coal-fired. AEP states in its second quarter report that management is currently evaluating the potential impacts of the Clean Power Plan and anticipated actions by states where assets are located. The company then warns that federal and state legislation or regulation of CO2 “could result in significant increases in capital expenditures and operating costs” and that excessive increased costs “might force AEP to close some coal-fired facilities and could lead to possible impairment of assets.” See AEP’s 10-Q report filed July 28, 2016, available at https://www.sec.gov/Archives/edgar/data/4904/000000490416000086/aep20162q10q.htm.

Virginia-based Dominion Resources, Inc. (Dominion) primarily uses coal for its fossil-fuel fired power plants. In its second quarter report, Dominion expects that potential expenditures under several alternative compliance plans “will be material.” Dominion is unique, however, because the report also notes that the company’s subsidiary, Dominion Virginia Power, has already made plans for “additional coal unit retirements and additional low or zero-carbon resources.” See Dominion’s 10-Q report filed Aug. 3, 2016, available at https://www.sec.gov/Archives/edgar/data/103682/000119312516669379/d234681d10q.htm. In addition, Dominion submitted an amicus brief in the West Virginia v. EPA litigation on April 1, 2016, noting that compliance with the Clean Power Plan is feasible.10

Chicago-based Exelon Corporation (Exelon) has a fleet that is mostly powered by nuclear and natural gas. This “clean” generation mix serves as a competitive advantage, leading to Exelon’s favorable attitude toward the Clean Power Plan. Exelon states in its second quarter report that the company “supports comprehensive climate change legislation or regulation” and mentions an “urgent need to reduce national GHG emissions.” See Exelon 10-Q report filed Aug. 9, 2016, available at https://www.sec.gov/Archives/edgar/
Calpine Corporation (Calpine), which primarily utilizes natural gas-fired and geothermal plants, actively supports the Clean Power Plan. In its second quarter report, the company states that it is “well positioned to comply” and that it expects the Clean Power Plan “to be beneficial to Calpine.” See Calpine’s 10-Q report filed July 29, 2016, available at https://www.sec.gov/Archives/edgar/data/916457/000091645716000096/cpn_10qx06302016.htm. Calpine is also an intervenor in the West Virginia v. EPA litigation, in support of EPA.11

Regulation of Aircraft GHG Emissions Takes Flight; Litigation Imminent

Regulatory Background

In this action, Administrator Gina McCarthy made two findings under Section 231(a)(2) (A) of the Clean Air Act. First, she found that elevated concentrations of six well-mixed GHGs in the atmosphere (CO₂, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride) endanger the public health and welfare. This “endangerment finding” was based on the technical information in the record supporting EPA's similar 2009 finding for new motor vehicles under Clean Air Act Section 202(a).12 Second, the Administrator found that GHG emissions from certain classes of engines used in certain types of aircraft contribute to the greater mix of GHGs that endangers public health and welfare. This “cause or contribute finding” applies to “covered aircraft” such as jet airliners, larger turboprops, and larger business jets, while excluding smaller jet, turboprop and piston aircraft, and helicopters and military aircraft. For simplicity, both findings may be referred to collectively as the “endangerment finding.”


Regulatory developments are occurring internationally as well. On February 8, 2016, the International Civil Aviation Organization’s Committee on Aviation Environmental Protection (ICAO/CAEP) agreed on a recommended international CO₂ emission standard for new aircraft designs as of 2020 and current in-production types as of 2023. See New ICAO Aircraft CO₂ Standard One Step Closer to Final Adoption, ICAO (Feb. 8, 2016), available at http://www.icao.int/Newsroom/Pages/New-ICAO-Aircraft-CO2-Standard-One-Step-Closer-To-Final-Adoption.aspx. Approval by the ICAO’s Assembly is expected in October 2016 with formal ratification expected to follow in March 2017. The ICAO, meeting in Montreal during late September and early October 2016, also considered additional measures including aviation biofuels and a market-based program capping emissions at 2020 levels. See Landmark Agreement on International Aviation Emissions Expected as World Governments Gather for 39th ICAO Assembly, ICAO (Sept. 27, 2016), available at http://www.icao.int/Newsroom/Pages/Landmark-agreement-on-international-aviation-emissions.aspx.

Environmentalists support Clean Air Act-based controls for aircraft GHG emissions; in essence, a strict domestic rule for aircraft including aircraft currently in-use. The aviation industry, however, generally favors U.S. regulations that would reflect or incorporate the ICAO standards for new and in-production aircraft and, for in-use aircraft, market-based-measures. See EPA Faces Doubts Over Power To Address GHG Limits Tor “In-Use” Aircraft, Inside EPA (Apr. 25, 2016), available at http://insideepa.com/daily-news/epa-faces-doubts-over-power-address-ghg-limits-use-aircraft.

Although the Obama administration will not finalize any aircraft GHG rulemaking before January 2017, the existence of an endangerment finding obligates the next administration to develop aircraft GHG emission standards in some form. Once EPA moves forward with crafting GHG regulations under the Clean Air Act, the agency may translate any final ICAO standard into the domestic rule. But EPA could also propose a stricter standard. See EPA Sends Aircraft GHG Endangerment Finding to OMB, Inside EPA (May 9, 2016), available at http://insideepa.com/news-briefs/epa-sends-aircraft-ghg-endangerment-finding-omb. Further, once EPA promulgates a substantive GHG regulation for aircraft engines, that rule will also be subject to legal challenges.

In the meantime, the aviation industry has been setting its own goals for GHG reductions, including targets set by the International Air Transport Association (IATA) to improve fuel efficiency by an average of 1.5 percent per year up to 2020; stabilize GHG emissions from 2020 with carbon-neutral growth; and reduce GHG emissions by half by 2050 as compared to 2005. See Halving Emissions by 2050—Aviation Brings Its Targets to Copenhagen, IATA (Dec. 8, 2009), available at http://www.iata.org/pressroom/pr/Pages/2009-12-08-01.aspx.

Company Disclosures

Aircraft manufacturers and airlines have discussed GHG regulation in a variety of ways and detail in their SEC filings. For example, the Boeing Company, in its second quarter report, only refers to the broad category of “potential environmental liabilities” as one of many factors that could cause Boeing’s actual results to differ materially from stated forward-looking statements. See Boeing’s 10-Q report filed July 27, 2016, available at https://www.sec.gov/Archives/edgar/data/12927/000001292716000143/a201606jun3010-q.htm. In its 2015 annual report, however, Boeing also mentions that the “industry remains vulnerable to . . . increased global environmental regulations.” See Boeing’s 10-K report filed Feb. 10, 2016,
In its second quarter report, United Continental Holdings, Inc., makes a general reference to “environmental regulations” in its list of risk factors. See United’s 10-Q report filed July 19, 2016, available at https://www.sec.gov/Archives/edgar/data/100517/000119312516468479/d13806d10q.htm. More detail is provided in the 2015 annual report, in which United sets forth a section on climate change. That section notes, in part, that the increased global regulatory focus on GHGs includes actions by the ICAO “to reach agreement on a global approach for international aviation” including a global market-based measure and a CO₂ standard. See United’s 10-K report filed February 19, 2016, available at https://www.sec.gov/Archives/edgar/data/100517/000119312516651221/d188420d10q.htm.

American Airlines Group Inc. provides, in contrast, a robust discussion of international GHG regulation in the company’s second quarter report, building on a similar discussion in the 2015 annual report. In its quarterly report, American examines the ICAO’s and EPA’s efforts to address GHG emissions. With respect to the ICAO, American warns that the international agency’s efforts “could significantly impact our business” and that future compliance with emissions requirements or an emissions trading scheme “could significantly increase our operating costs.” With respect to EPA’s proposed endangerment finding, American acknowledges that such a finding obligates EPA to set aircraft GHG standards under the Clean Air Act, and anticipates that those regulations “would closely align with emission standards currently being developed by ICAO.” See American’s 10-Q report filed July 22, 2016, available at https://www.sec.gov/Archives/edgar/data/4515/000119312516654354/d204187d10q.htm.

Conclusion

While many regulations are in play at any given time, 2016 is a year for GHG regulatory programs that, once settled by litigation or some other resolution, will have wide-ranging effects across multiple industries. Irrespective of the regulation at hand, however, this article also demonstrates how a particular “industry” is not a monolith but is composed of individual entities, each with unique objectives and varying levels of business advantages or disadvantages.

Finally, the next administration will begin to move forward with maintaining, amending, or attempting to reverse these regulatory programs, at which time a replacement justice for Antonin Scalia may or may not have been appointed. The timing of that appointment will be particularly important for the fate of the Clean Power Plan, as the D.C. Circuit’s decision will be appealed to the Supreme Court. Should the Supreme Court decide to hear the case, and a replacement justice has not been appointed, a potential 4-4 tie would leave in place the D.C. Circuit’s ruling, whatever it may be.

Endnotes


11 Unopposed Motion of Calpine Corporation, the City of Austin d/b/a Austin Energy, the City of Seattle, by and through its City Light Department, National Grid Generation, LLC, and Pacific Gas and Electric Company for Leave to Intervene in Support of Respondents, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Nov. 5, 2015).


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