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## Emerging and Developing Environmental Issues Affecting the Energy Industry

October 27, 2011



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## WATER RIGHTS: “Staring into the Abyss”

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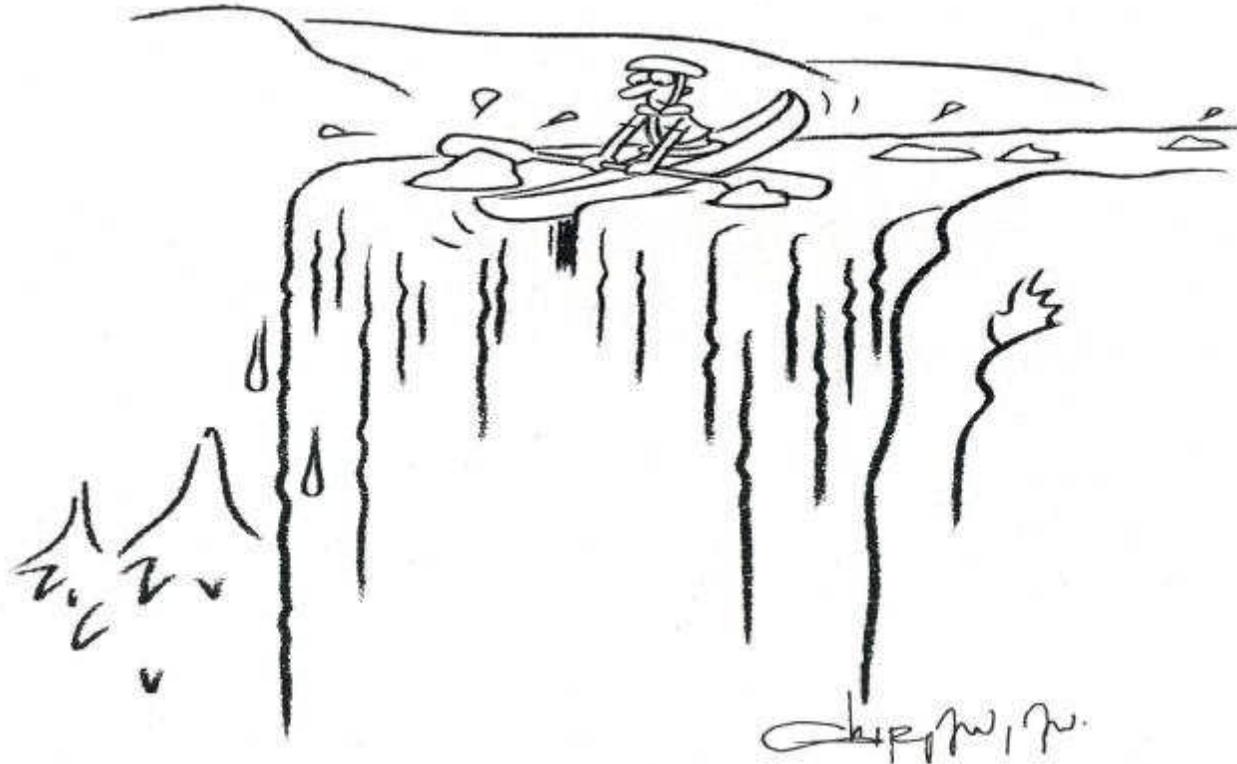
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# Topics Covered

- “Staring into the Abyss”
- Overview of Water Rights
  - Eastern States
  - Western States
  - Texas
- How Water is Allocated During a Shortage
- Case Study: Brazos River
- Finding Alternatives to Surface Water Use
- Recommendations Going Forward

# “Staring into the Abyss”

- Direct quote from state regulator in Texas regarding the Brazos River Basin.



# “Staring into the Abyss” (cont)

- Main concerns:
  - Uncharted territory
    - Drought of Record
      - 7 year drought of the 1950s vs. the 2010-2011(?) drought
    - Senior water right holder request to release water to improve water quality.
  - Allocation of water
    - Municipalities
    - Industries
    - Farms
  - Enforcement

# Overview of Water Rights

- Eastern States (Generally)
  - Riparian Right
    - A riparian owner is entitled to the natural flow of a stream running through or along his land in its accustomed channel, undiminished in quantity and unimpaired in quality, except as may be occasioned by reasonable use of the water by other like owners.
    - Must own land along the stream.

# Overview of Water Rights (cont)

- Eastern States (Generally)
  - Riparian right is only a right to use the water. It is not a property right.
  - Most states require some form of permitting to use surface water.
  - The permitting system is designed to minimize adverse impacts on downstream riparian owners, and to maintain some minimal level of flow for aquatic habitats.



"You should have been here yesterday, they were really biting."

# Overview of Water Rights (cont)

- Western States (Generally)
  - Appropriation Right
    - First in time is first in right.
    - A person's right to a specific quantity of water depends on when the use of the water began.
    - The person's right to use water may be restricted to a particular use (e.g., irrigation, industrial, municipal).

# Overview of Water Rights (cont)

- Western States (Generally)
  - As was the case with riparian rights, the water right holder does not own the water, but only has a right to use the water.
  - Unlike riparian rights, an appropriation right is generally independent of landownership and can be sold and transferred.
  - Some form of permitting is used in the western states to indicate the amount of water that can be diverted and how the water will be used.

# Overview of Water Rights (cont)

- Texas (Generally)
  - Some states, such as Texas, have multiple water rights systems. Texas uses an appropriation right system, but also recognizes certain riparian rights and utilizes a priority classification system for portions of the Rio Grande River.

# Overview of Water Rights (cont)

- Texas (Generally)
  - Riparian rights recognized in Texas
    - Diversions of water by a riparian owner for domestic and livestock use is permitted without the need for a water rights permit.
    - Though not exactly a riparian right, stock ponds (used for watering livestock) that impound 200 ac-ft or less are also exempt from the requirement to have a permit. This exemption applies to all land in Texas, not just land that borders a river or stream.

# Overview of Water Rights (cont)

- Texas (Generally)
  - Appropriation rights recognized in Texas
    - When there is not enough water for all permitted uses, water is distributed based upon the water permit's "priority date".
    - A person who holds a permit with a priority date that is earlier in time than another permit holder is said to have a "senior" water right.
    - The senior water right holder is "first in line" for the available water.
    - There is no priority given to municipal uses of water. If the municipal water right holder has a junior priority date, the more senior water user is first in line.

# Overview of Water Rights (cont)

- Texas (Generally)
  - Mid and Lower Rio Grande River
    - Applies to water diverted from the Rio Grande River below Lake Amistad Dam.
    - Priority classification based upon water use.
      - Municipal Use
      - Class A Water Rights
      - Class B Water Rights

# Allocation of Water During a Shortage

- Riparian Rights
  - All riparian water right owners are treated equally (all suffer alike).
  - In Texas, “appropriated water rights” (i.e., water rights that require a permit) are behind the riparian water right holder for the available water
- Appropriation Rights
  - The senior water right holder is “first in line” during a water shortage with respect to all appropriation water rights with a later priority date.
  - There is no requirement for a senior water right holder to make available at least some water to a more junior water right holder. As a consequence, the junior water right holder may need to eliminate all of its water use so that the more senior water right holder can obtain all the water he is authorized to take.
  - How the water is used does not change the priority system.

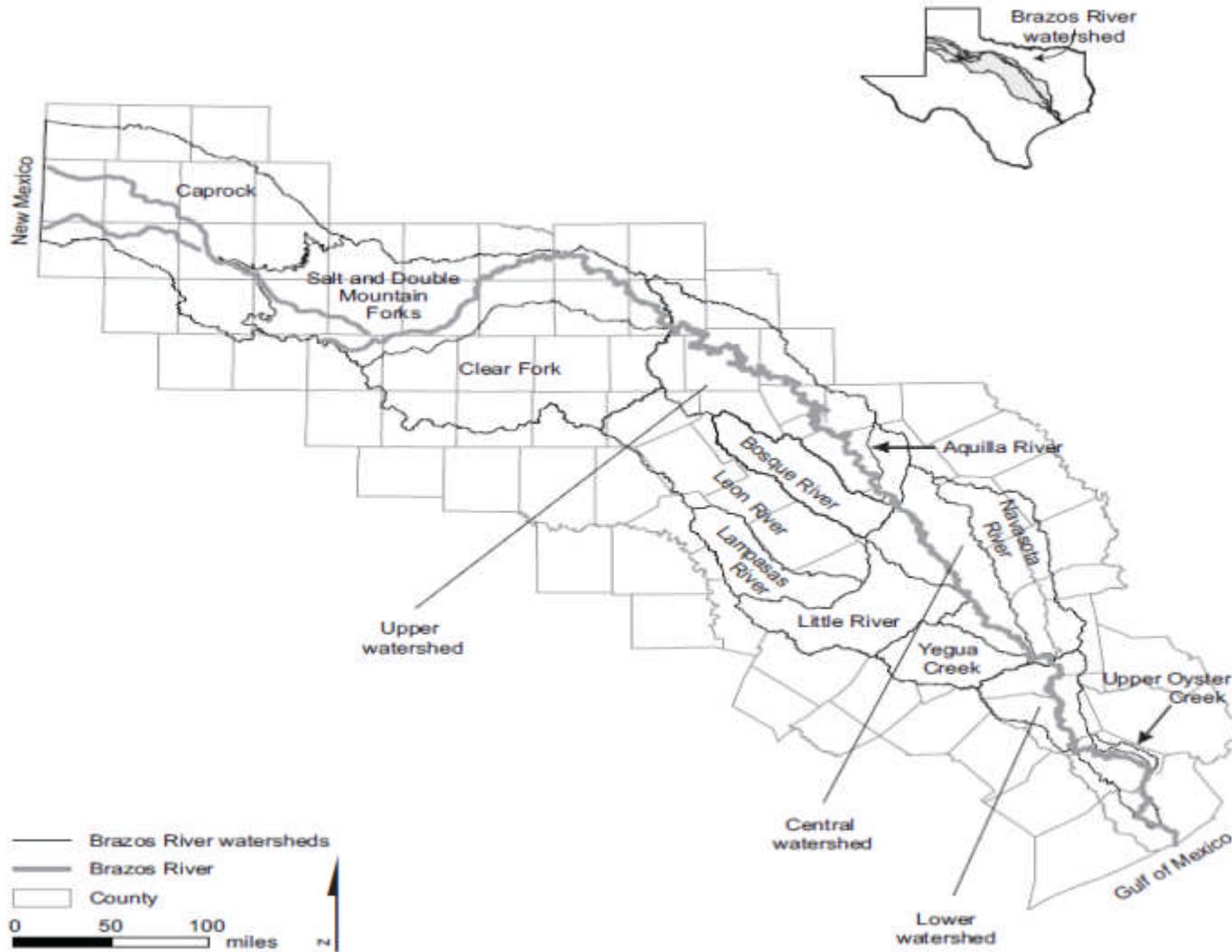
# Allocation of Water During a Shortage (cont)

- Priority Classification
  - How the water is used determines its priority.
  - Typically, municipal users are first in line. Agricultural users must share any remaining water.
- Other
  - Industrial water supply contracts generally contain a provision that during a water shortage, all customers will receive water on a pro rata basis.
  - In some instances, existing water customers are first in line during a water shortage.

# Allocation of Water During a Shortage (cont)

- Hard to put into practice
  - Municipal use behind agricultural use
    - Will a state really reduce water to a municipality to satisfy a more senior agricultural water right?
  - Enforcement
    - State Agencies?
    - Courts?
  - Priority for Certain Industries
    - Priority given to certain necessary industries?

# Brazos River Case Study



# Brazos River Case Study (cont)

- Brazos River Facts
  - After the drought of the 1950s, numerous reservoirs were constructed.
  - Reservoirs were seen as the best method to store water during times of plenty for use during drought conditions.
  - One major water right holder in the basin is the Brazos River Authority.
    - Total Reservoir Storage = 1,888,956 ac ft.

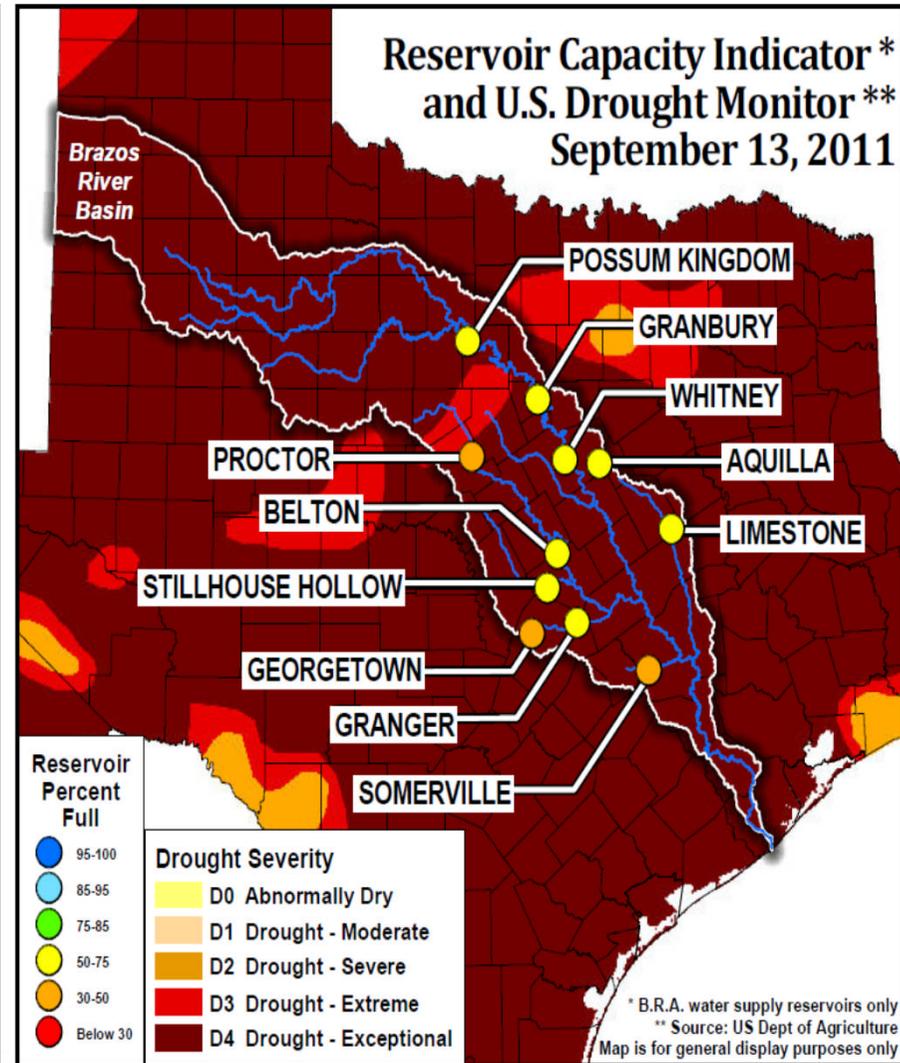
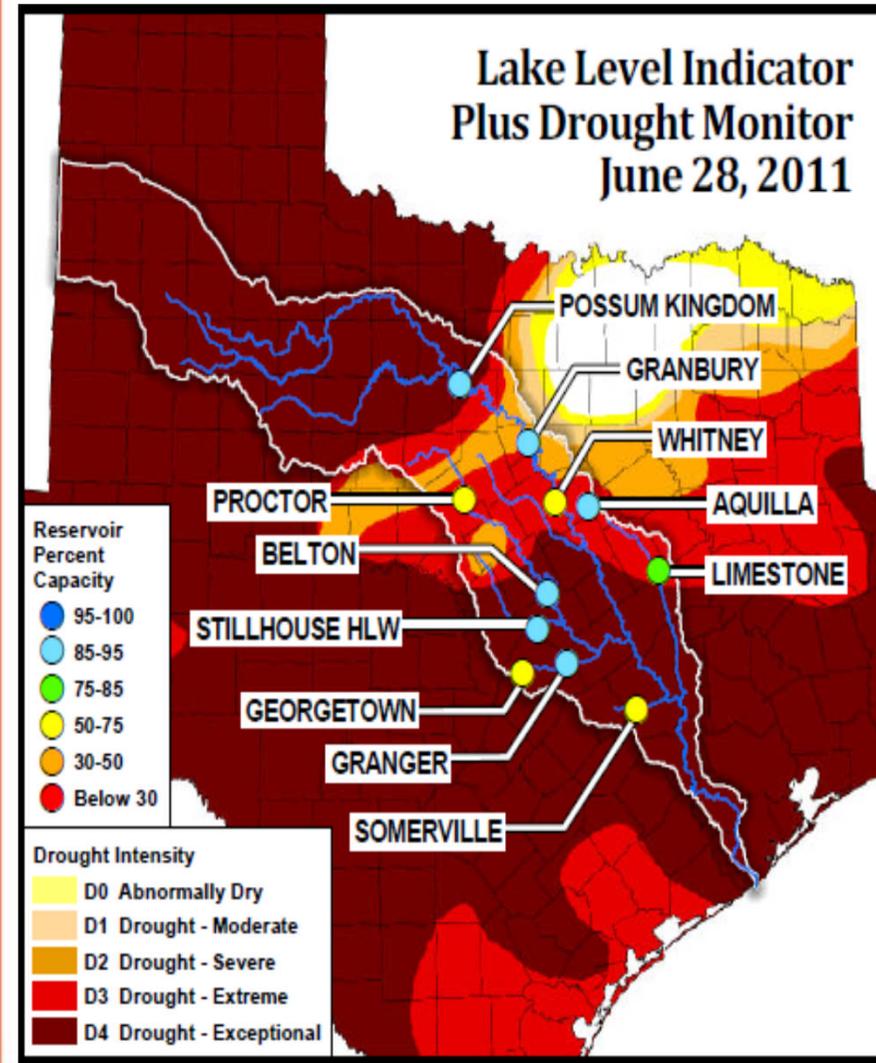
# Brazos River Case Study (cont)



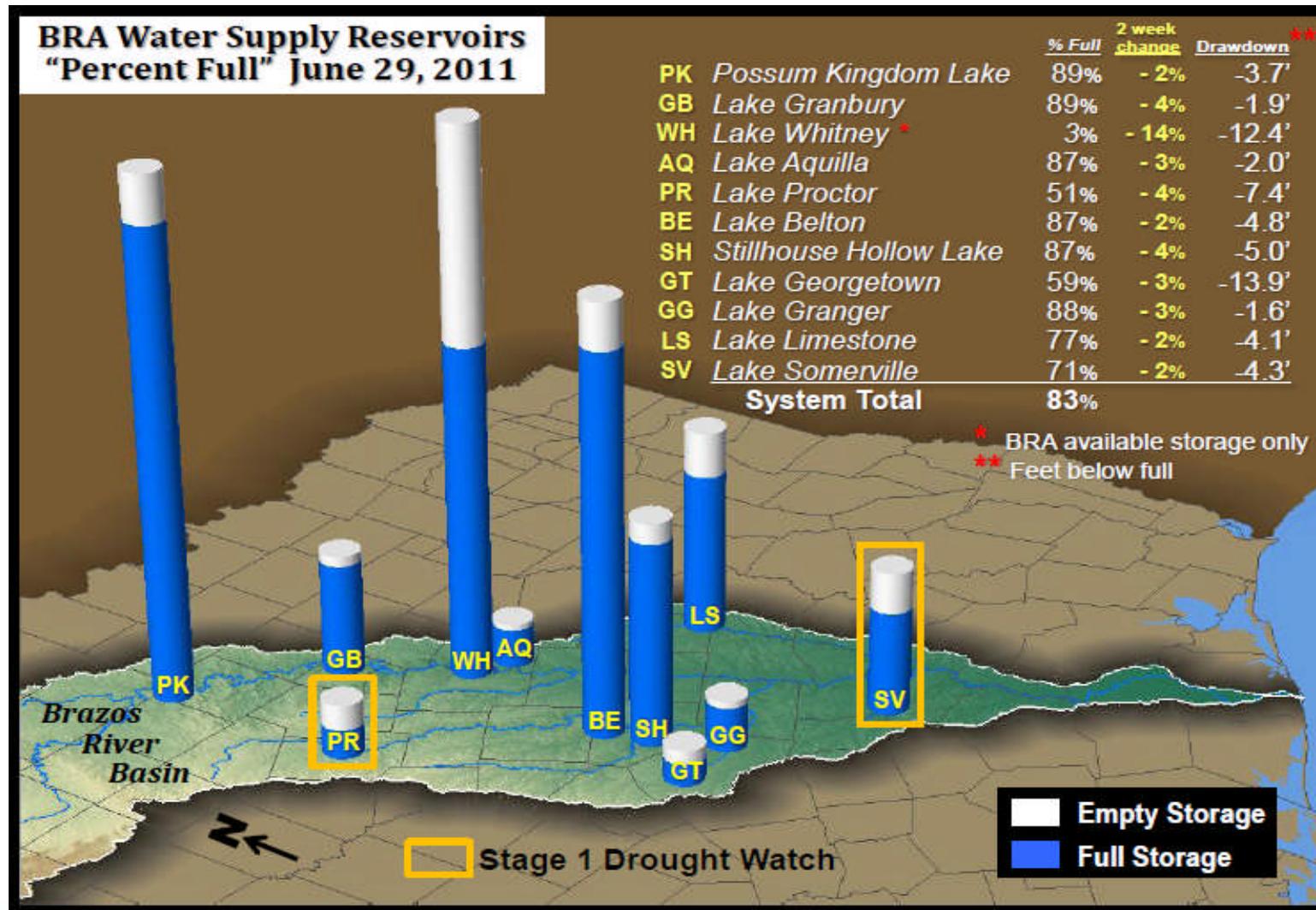
# Brazos River Case Study (cont)

- Brazos River Authority Drought Contingency Plan
  - Stage 1
    - Total Conservation Storage - ~74%.
    - Raise customer awareness of drought potential.
    - No goal for reduction of water use.
  - Stage 2
    - Total Conservation Storage - ~ 55%.
    - Reduce water use by 3%.
  - Stage 3
    - Total Conservation Storage - ~37%.
    - Reduce water use by 7%.

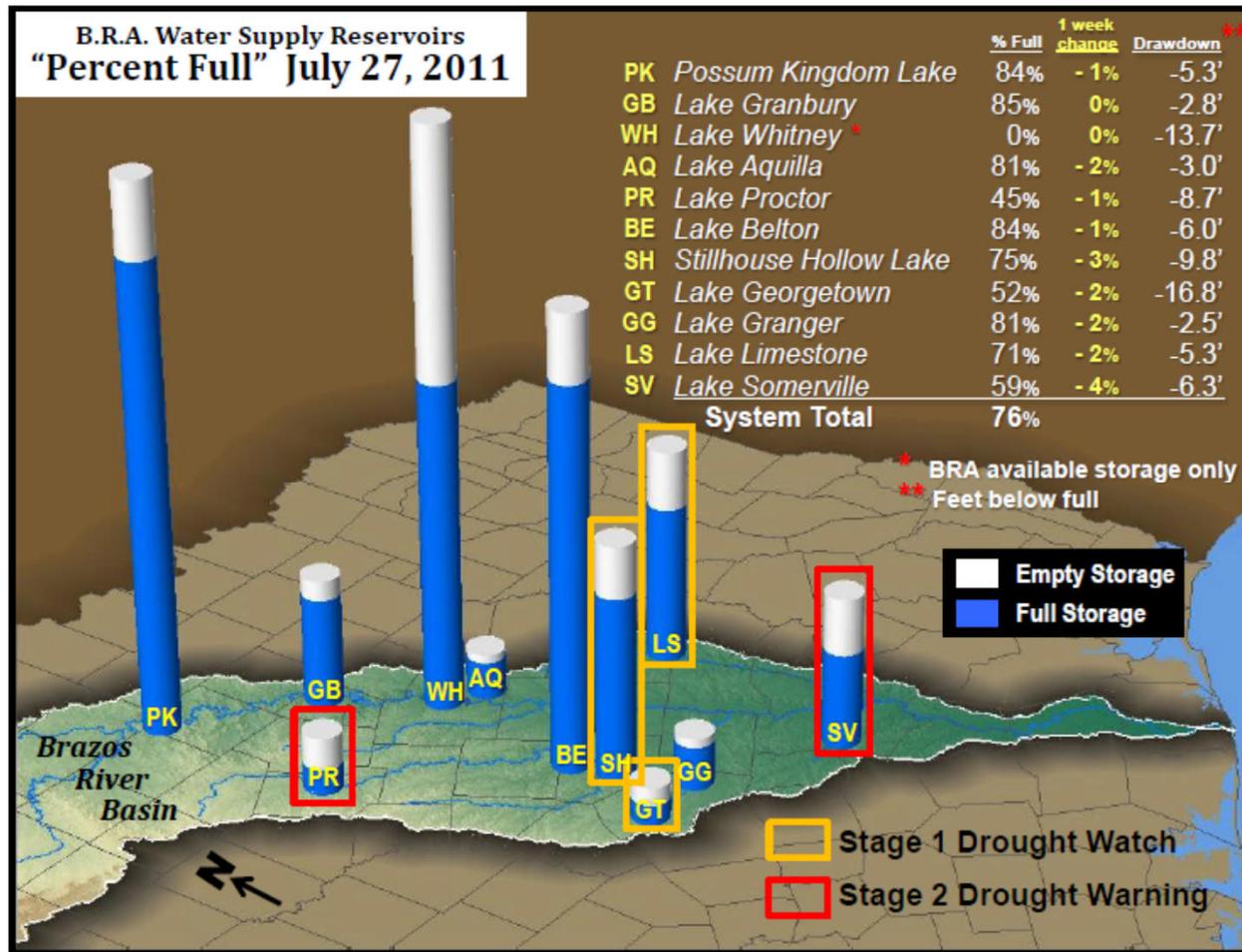
# Brazos River Case Study (cont)



# Brazos River Case Study (cont)



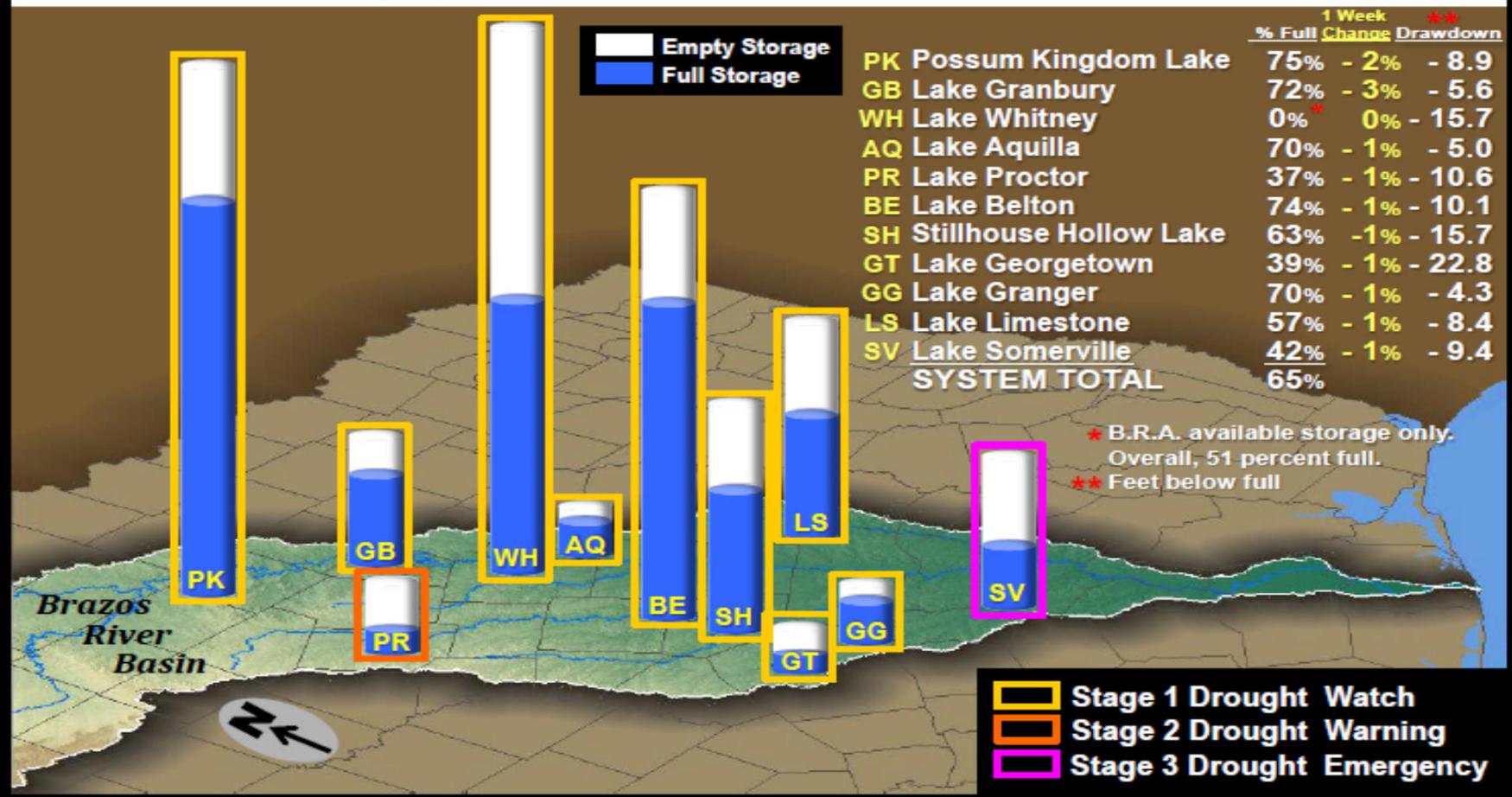
# Brazos River Case Study (cont)



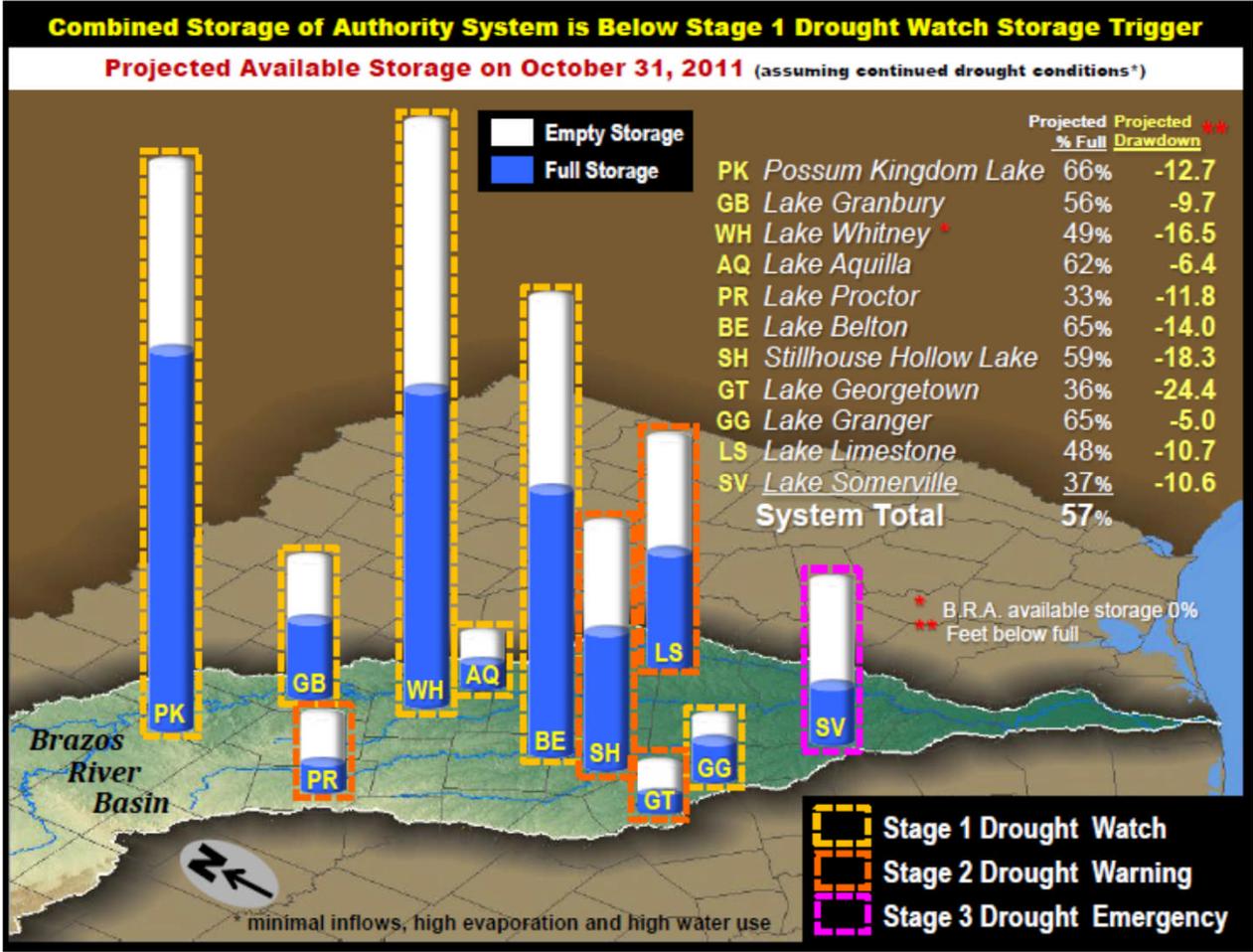
# Brazos River Case Study (cont)

**Combined Storage of Authority System is Below Stage 1 Drought Watch Storage Trigger**

**B.R.A. Water Supply Reservoirs "Percent Full" for September 14, 2011**



# Brazos River Case Study (cont)



# Brazos River Case Study (cont)

- There are approximately 1800 permitted water rights holders in the Brazos River Basin.
- Total water allocated from this basin is approximately 6.5 million acre-feet per year.
- Most areas are behind yearly rainfall averages by 15 inches or more.
- Water in the Brazos River tends to have higher concentrations of chlorides and total dissolved solids due to naturally occurring salt deposits in the upper portion of the basin.

# Brazos River Case Study (cont)

- Actions Taken by TCEQ
  - April 18, 2011: TCEQ received a senior priority call in the Brazos River Basin indicating that the water rights holder was not able to get the water that should have been available under its senior right.
  - May 18, 2011: TCEQ suspends all rights to divert water for those permit holders in the lower Brazos River Basin with a priority date of **1980** or later. Suspended rights do not include riparian rights for domestic and livestock use, municipal uses, and water used for power generation.

# Brazos River Case Study (cont)

- Actions Taken by TCEQ
  - June 27, 2011: TCEQ suspends all rights to divert water for those permit holders in the lower Brazos River Basin with a priority date of **1960** or later. Suspended rights do not include riparian rights for domestic and livestock use, municipal uses, and water used for power generation.
  - August 8, 2011: TCEQ suspends all rights to divert water for those permit holders in the upper-middle Brazos River Basin with a priority date of **1960** or later. Suspended rights do not include riparian rights for domestic and livestock use, municipal uses, and water used for power generation.

# Brazos River Case Study (cont)

- Actions Taken by TCEQ
  - August 11, 2011: TCEQ calls a stakeholder meeting to solicit informal comments for the development of new rules dealing with actions the agency can take during a “drought” or “emergency shortage of water”. See HB 2694.

# Brazos River Case Study (cont)

- Unanswered Questions
  - Does the TCEQ have authority to favor certain water uses (such as municipal use and water needed for power generation) at the expense of more senior water right holders?
  - What happens if drought conditions worsen and choices need to be made between types of municipal uses (i.e., hospitals, businesses, neighborhoods, firefighting)?
  - Will impoundment water right holders be asked to release water to address other issues resulting from the drought (i.e., environmental flows and water quality concerns) and will they comply?

# Alternatives to Surface Water Use



# Alternatives to Surface Water Use

- Groundwater
  - May be subject to allocation just like surface water
  - Regulations may restrict the amount of water that can be captured
  - Water quality concerns
- Treated Wastewater
  - May require infrastructure to transport the treated wastewater where needed
  - May require further treatment before reuse
- Rainwater Harvesting
  - Feasible only in limited circumstances
  - Difficult to store large quantities for later use
  - May not be an option in your state

# Alternatives to Surface Water Use (cont)

- Desalination Plants
  - High capital costs
  - Major permitting effort
  - Feasibility depends upon location of facility
- More Reservoirs
  - Can be controversial
  - Expensive
  - Difficult to permit
- Interbasin Transfers
  - Can be highly controversial
  - May require special state legislation to implement

# Recommendations

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*"It's from my attorney."*

# Recommendations

- Assess the dependability of existing water sources. Determine if water would be available to you during a “drought of record”.
- Evaluate the feasibility of using alternatives to surface water (i.e., groundwater, treated wastewater, etc.).
- If your facility is dependent upon a vulnerable water supply, make plans now to find alternative water sources.
- Identify and implement water conservation measures to reduce the amount of water needed at the facility.

# Conclusion/Q&A

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## Fractured but not Broken: Increasing Environmental Regulation of Hydraulic Fracturing

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# Overview

- Texas HB 3328 Implementation – Disclosure of Composition of Hydraulic Fracturing Fluids
- Upcoming Department of Interior Regulation
- EPA's Proposed New Source Performance Standards
- Local Water Usage Controls

# Proposed Texas Disclosure Requirements

- Statute requiring rulemaking became effective September 1, 2011.
- Rules proposed: September 9, 2011. New 16 TAC § 3.29.
- Comment period ended: October 11, 2011.
- Applicability:
  - Hydraulic fracturing treatment on Texas wells for which an initial drilling permit was issued on or after the effective date of the rules.
  - RRC estimates that in 2010, 13,000 of 15,466 wells (85%) for which drilling permits were issued were hydraulically fractured.

# Proposed Texas Disclosure Requirements

- Required disclosures:
  - Supplier and Service Company disclosures:  
Not later than 30 days following completion of fracking treatment, must provide well operator with each chemical ingredient intentionally added to the fracking fluid, including:
    - chemicals subject to 29 CFR § 1910.1200 (g)(2) (MSDS requirements).
    - all other chemicals intentionally included for fracking treatment.

# Proposed Texas Disclosure Requirements

- Required Disclosures:
  - Operator disclosures: On or before submission of well completion report for a well in which fracking was conducted, the operator must complete the Chemical Disclosure Registry form and posts on the Chemical Disclosure Registry known as FracFocus.

# Proposed Texas Disclosure Requirements

- Contents of Operator Disclosure
  - Name
  - Date of fracking treatment
  - County where well is located
  - Well API number
  - Well name and number
  - Latitude and Longitude of wellhead
  - Vertical depth
  - **Total volume of water used, or the type and volume of base fluid if something other than water.**
  - **Each additive and the trade name, supplier, and brief description of its function or use.**
  - **Each chemical used in the fracking treatment that is subject to 29 CFR § 1910.1200 (g)(2).**
  - **All other chemical ingredients intentionally added.**
  - **Actual or maximum concentration of each chemical.**

# Proposed Texas Disclosure Requirements

- If FracFocus is inoperable, supply to RRC with well completion report, and enter into FracFocus when operable.
- Operator must provide the following with well completion report:
  - Copy of disclosure report form posted on the Chemical Disclosure Registry.
  - Supplemental list of all chemicals and their CAS numbers not listed on the Chemical Disclosure Registry.

# Proposed Texas Disclosure Requirements

- Disclosure not required for:
  - Ingredients not disclosed by manufacturer, supplier, or service company.
  - Ingredients not intentionally added.
  - Ingredients that occur incidentally or that are otherwise unintentionally present.
  - Specific chemical ingredients eligible for trade secret protection.

# Proposed Texas Disclosure Requirements

- Trade Secrets
  - If supplier, service company or operator claim that identity or amount of any chemical or additive is entitled to protection as a trade secret, operator must indicate such on the Chemical Disclosure Registry Form or supplemental list
    - Must still identify chemical family or other descriptive information.
    - Must provide contact information for the person claiming a trade secret.
    - Disclosures to health professionals and emergency responders still required, subject to their confidentiality obligations.

# Proposed Texas Disclosure Requirements

- The person withholding information as a trade secret must provide to the RRC information that:
  - Discloses the chemical family of the ingredient,
  - States that the identity and/or concentration of the ingredient are entitled to protection as a trade secret, and
  - Discloses the properties and effects of the chemicals.

# Proposed Texas Disclosure Requirements

- Trade Secret Challenges
  - Who may challenge?
    - landowner,
    - adjacent landowner, or
    - State agency with jurisdiction over a matter to which the trade secret information is relevant.
  - When must the challenge be filed? Within 24 months after the operator files a final well completion report.

# Proposed Texas Disclosure Requirements

- Upon receipt of a challenge, RRC within 10 business days must:
  - submit to the Attorney General's office a request to decide the challenge,
  - notify the owner of the claimed trade secret of the request to the AG's office, the requirement to submit the claimed trade secret information to the AG, and the opportunity to substantiate the trade secret claim.
- AG decision may be appealed within 10 business days to Travis County District Court.

# Proposed Texas Disclosure Requirements

- If the AG or a court upon appeal determines that information is not entitled to trade secret protection:
  - Disclose within 30 days, or
  - Cease use in Texas
- Consequences of Violations.
  - Penalties.
  - Revocation of a well's certificate of compliance to connection to a gas pipeline under 16 TAC § 3.73.

# Future Department of Interior Regulations

- Proposal expected by end of 2011.
- Applicable to drilling on federal lands.
- Likely scope:
  - Disclosure of chemical ingredients in fracking fluids.
  - “Some safeguards concerning proprietary information.”
  - Requirements for well design to prevent escape of gas as a threat to drinking water supplies.

# New Source Performance Standards

- New 40 CFR Part 60; Subpart OOOO; 70 Fed. Reg. 52738 *et seq.*
- Proposed: August 23, 2011.
- Comment Period Ends: October 31, 2011.
- Applicability:
  - Affected facilities that commence construction, reconstruction or modification after August 21, 2011.
  - Gas well completions following hydraulic fracturing operations.
    - Newly drilled and fractured wells.
    - Refractured wells (constitutes a modification).

# New Source Performance Standards

- Applicability:
  - Modification determination limited to well bore, casing and tubing, and any conveyance through which gas is vented to the atmosphere.
  - EPA estimates that 20,000 well completions and re-completions annually will be subject to the new rules.

# New Source Performance Standards

- EPA's concern: Emissions during flowback.
  - Flowback: Return of fracturing fluids and proppants (propping agents) to the surface as the well is purged of these mixtures.
  - Often a 3-10 day period.
  - EPA estimates that fracked wells vent 200 times more VOCs than non-fracked wells: 23 tons vs. 0.12 tons.

# New Source Performance Standards

- Standards consist of operational standards.
  - Non-exploratory and non-delineation wells: Reduced Emission Completion methods (Green Completion) and pit flaring of gas not suitable for entering gathering lines (except where may cause fire or explosion).
  - Exploratory and delineation wells: Pit flaring.

# New Source Performance Standards

- Green Completion:
  - Minimizing emissions associated with venting of hydrocarbon liquids and gas during flowback by routing recovered liquids into storage vessels and routing gas into gathering lines/collection systems.
  - Using sand traps, surge vessels, and tanks during flowback and cleanout operations to maximize resource recovery and minimize releases. All salable gas must be routed to the gas gathering line as soon as possible.

# New Source Performance Standards

- Other requirements:
  - Maintain log on a daily basis for well completion.
    - Well location.
    - Duration of flowback, recovery to the sales line, combustion and venting.
    - Specific reasons for venting and not capturing or combusting emissions.

# New Source Performance Standards

- Other requirements:
  - 30 day advance notice of proposed completion or re-completion of fracked wells.
  - Notification within 30 days of commencing well completion operation.
  - Submittal of initial and annual reports (first report due one year after startup), including reports of deviations from rule requirements.

# New Source Performance Standards

- Additional Issues:
  - Electronic means for notification/reporting.
  - Third Party Verification.
    - Clearinghouse for notifications.
    - Verification of submitted data.

# Local Water Usage Controls

- Grand Prairie – banning use of city water for fracking as a non-essential use under its drought contingency plan.
- Arlington – City water may not be taken from an individual drill site.
- High Plains Underground Water Conservation District No. 1- beginning January 1, 2012, all persons who own or operate a well or well system that withdraws groundwater from the Ogallala Aquifer are required to limit the total amount of production from the well or well system to the Allowable Production Rate of 1.75 acre feet per Contiguous Acre per year. Permitted withdrawal rates decrease in subsequent 2 year periods.
- Evergreen Underground Water Conservation District – Restricts pumping to 2 acre-feet/acre/year.
- Key considerations:
  - Acre-foot = ~ 325,000 gallons
  - Fracking may use 1-10 million gallons.

# Conclusion/Q&A

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## The “E” Word: Enforcement of Hydraulic Fracturing Through the Safe Drinking Water Act

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# What is the EPA's role in regulating fracking?

- Primary mechanism for regulating fracking process is the Safe Drinking Water Act (SDWA)
- Passed in 1974, SDWA provides EPA's central authority to protect drinking water
- Part C of the SDWA required EPA to develop minimum standards for regulatory programs that would prevent underground injections that endanger drinking water

# SDWA and underground injections

- EPA regulates the subsurface emplacement of fluid through its Underground Injection Control (UIC) program
- SDWA authorizes states to assume primary responsibilities for their own UIC programs from EPA
- One of the SDWA minimum standards is that UIC programs must prohibit all underground injections that are not authorized by permit-by-rule or individual permit. 42 U.S.C. § 300h(b)(1)(A).
- From passage of SDWA, fracking was essentially unregulated under UIC programs because EPA considered it to be a “well stimulation technique”
- That began to change in early to mid-1990s, when environmental groups challenged the unregulated fracking of coal-bed methane gas wells in Alabama. . .

# The LEAF litigation

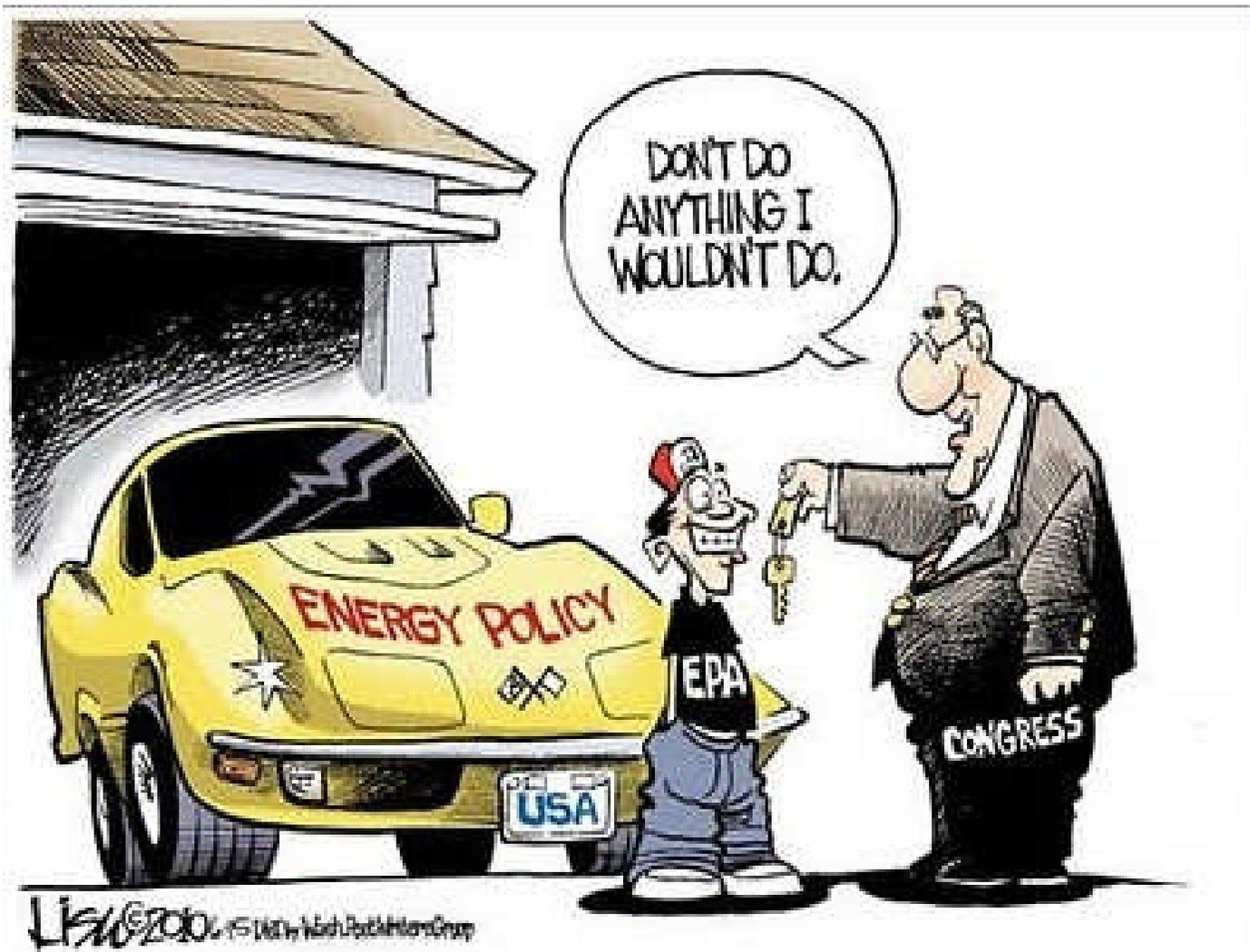
- An environmental group, LEAF, sued over Alabama's UIC program
- The 11th Circuit Court of Appeals ruled that fracking of coal-bed methane wells was subject to the SDWA and UIC regulations under Alabama's UIC program
- Potential broader holding that Part C of SDWA requires UIC programs to prohibit ANY underground injection, including fracking

# Aftermath of LEAF

- Alabama reformed its UIC program, but EPA did not change its regulations or require states outside of the 11<sup>th</sup> Circuit to regulate fracking under the SDWA
- 1999 – EPA begins study on fracking of coal-bed methane reservoirs to evaluate the potential risks to drinking water
- 2003 – EPA enters into Memorandum of Agreement with three large oilfield services companies to eliminate diesel
- 2004 – EPA study concludes that there was little to no risk of fracking fluid contaminating underground sources of drinking water during fracking of coal-bed methane production wells
- These study results, along with a more open energy policy and press for deregulation, led to amendment of SDWA in 2005 . . .

# Fracking Exception to SDWA

- As part of the Energy Policy Act of 2005, Congress excluded from regulation “the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.”
- No federal regulations regarding fracking with diesel have been developed, resulting in regulatory gap



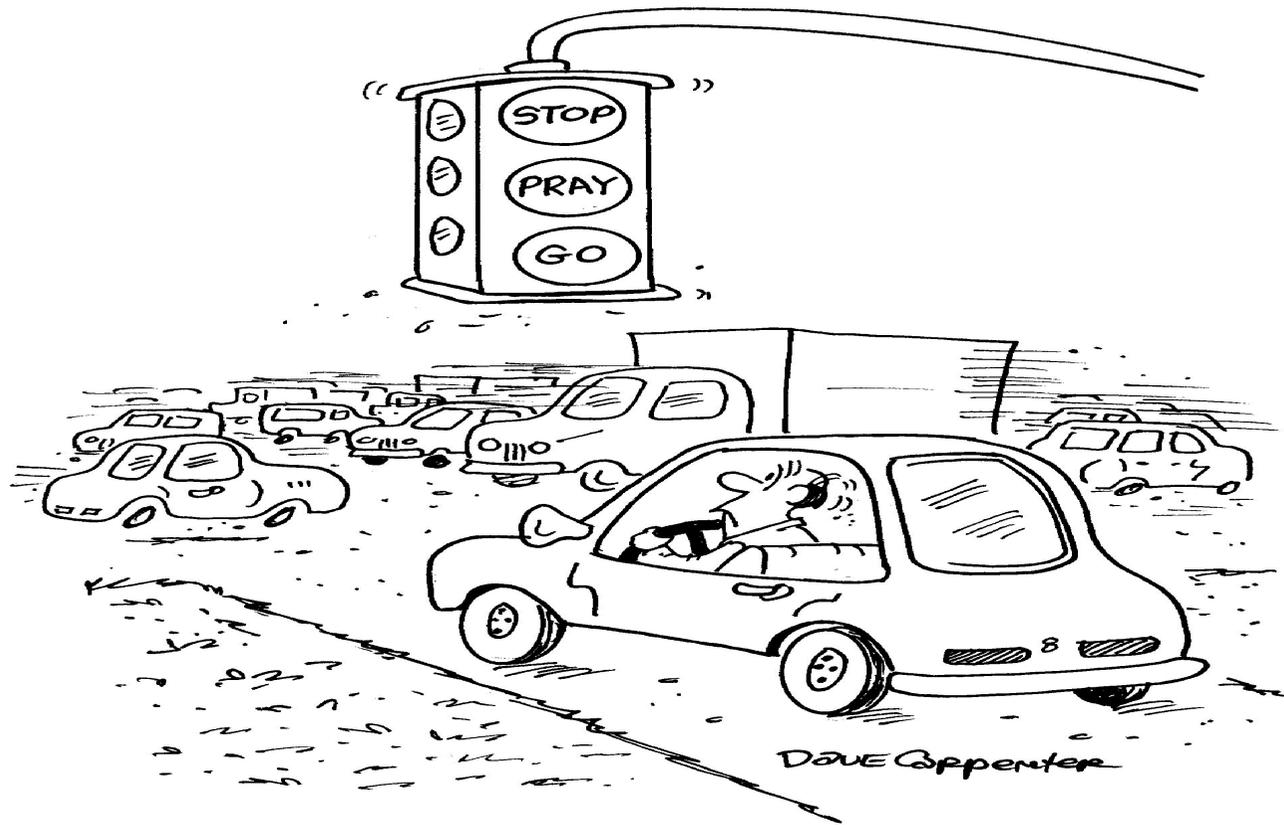
# EPA's website "policy" and the IPAA litigation

- In 2010, EPA added a statement on its website that “[a]ny service company that performs hydraulic fracturing using diesel fuel must receive prior authorization from the UIC program.”
- Immediately caused a stir in the industry
- Independent Petroleum Association of America (IPAA) and the U.S. Oil & Gas Association filed suit in the D.C. Circuit Court of Appeals, alleging that this was tantamount to a rulemaking, and that proper rulemaking procedures had not been followed
- Issues include (1) the implications of an agency posting information on its website; and (2) whether fracking activities that use diesel must be permitted under SDWA

# Throwing down the gauntlet

- Lisa Jackson, EPA Administrator, in April 2011: “Our belief is that this [fracking with diesel] is not exempt. That exception specifically says that diesel is not exempt. So if you are injecting diesel, that is a concern.”

EPA's website states that "EPA has made energy extraction sector compliance with environmental laws one of EPA's National Enforcement Initiatives for 2011 to 2013. The initiative focuses on areas of the country where energy extraction activities such as hydraulic fracturing are concentrated, and EPA's enforcement activities will vary with the type of activity and pollution problem presented."



# EPA Guidance on Fracking with Diesel

- In the May 2011, EPA held meetings with stakeholders and stated that it is developing guidance for permitting of fracking activities that use diesel fuels
- New guidance will likely require permitting under current UIC class II requirements
- The guidance will make recommendations for permit writers to consider in writing permits, but will not “set new regulations or change existing regulations”
- EPA expected to release the draft guidance this past summer

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*"It's from my attorney."*

# Ongoing EPA Studies on Fracking

- In June 2011, EPA announced study on fracking focusing on Haynesville Shale formation in DeSoto Parish, Louisiana, and the Marcellus Shale in Washington County, Pennsylvania
- Study will also include retrospective case studies in North Dakota, Texas, Pennsylvania, and Colorado
- Goal is to understand impacts on groundwater, with findings expected by end of 2012 and report by 2014
- Findings will likely directly impact regulation of fracking (or lack thereof) under SDWA

# EPA's SDWA emergency powers

- At present, no direct regulation of non-diesel fracking, but “indirect” regulation has occurred
- EPA retains power to issue emergency orders or initiate a civil action for an "imminent and substantial endangerment" to the health of person when:
  - EPA receives information that a contaminant which is present in or likely to enter public water system or underground source of drinking water; and
  - State/local authorities have not taken action.

See 42 U.S.C. § 300i(a) (Section 1431 of the Safe Drinking Water Act).



# Range Resources

- Recently, emergency powers have been used against companies operating fracked gas well
- In 2009, Range Resources Corp. drilled and fracked a well in Hood County, Texas
- EPA made claims based on dubious science – “isotopic fingerprinting” – concluding that methane in nearby drinking wells was “likely from the same source” as Range well

# Range Resources, cont.

- EPA issued an emergency order under SDWA on December 7, 2010, for an “imminent and substantial endangerment”
- EPA alleged that methane and benzene were identified in unsafe concentrations as a result of Range's operations
- EPA ordered Range to:
  - Immediately deliver potable water to the two residences;
  - Immediately sample soil gas around the residences;
  - Immediately sample all nearby drinking water wells to determine the extent of aquifer contamination;
  - Provide methane gas monitors to alert homeowners of dangerous conditions in their houses;
  - Develop a plan to remediate areas of the aquifer that have been contaminated; and
  - Investigate the structural integrity of its nearby natural gas well to determine if it is the source of contamination.

# Range Resources, cont.

- The Texas Railroad Commission reviewed and sided with Range, holding that the Range gas well could not have been the source of the water well contamination
- Range is seeking dismissal of the emergency order in the 5th Circuit
- In a concurrent EPA action seeking enforcement of the order in N.D. Tex., the court refused to dismiss, instead staying EPA's action pending the 5th Circuit's review

# Non-SDWA litigation risks

- Perceived potential for fracking to impact groundwater has led to flurry of environmental tort lawsuits and has become a tool for plaintiffs' lawyers
- The Lipskys (whose well was allegedly contaminated in the Range Resources enforcement) have recently filed separate lawsuit in state court against both home developer and Range for tort and contract-based claims
- Tort-based lawsuits based on allegation that fracking chemicals contaminated a homeowners' soil and/or groundwater are also pending in other states, including Arkansas, Louisiana, Pennsylvania, West Virginia
- Another May 2011 lawsuit in Arkansas state court is based on allegation that fracking led to earthquakes in the state that have damaged residents of Faulkner and surrounding counties

# Where does that leave us?

- Fracking without diesel is currently excluded from SDWA regulation
- Fracking with diesel without a UIC permit is risky
- EPA guidance is on the way, and is expected to state that fracking with diesel must be permitted under UIC Class II
- The results of ongoing EPA studies could provide the basis for additional fracking-related regulation
- Fracking will continue to be “indirectly” regulated via EPA’s emergency powers under the SDWA under certain conditions
- Fracking-related tort claims are a fast developing area of the law; number and frequency of lawsuits are increasing

**DILBERT** by SCOTT ADAMS



# Conclusion/Q&A

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## Federal Regulatory and Legislative Update for Environmental Policy

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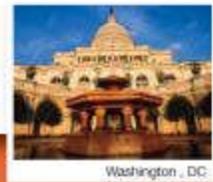
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# Overview

## I. Regulatory:

- 1) Smog Rule
- 2) Hydraulic Fracturing “fracking,”
- 3) Cross-State Air Pollution Rule,
- 4) Pending Rules for Industrial Boilers,  
Solid Waste Incinerators, and Cement Plants
- 5) GHG
- 6) XL Keystone
- 7) Others: Brownfields, ESA, Superfund taxes...

# Overview

## II. Legislative:

- 1) Flurry of EPA related Legislation in the Republican led House of Representatives
- 2) RESTORE ACT (Senate Action)

## III. Energy: Section 1603 & Clean Energy Standard

## IV. Snapshot of 2012 Political Landscape

## V. Public Sentiment on Environment

# Smog Rule

- Sept 2<sup>nd</sup>, President Obama halted a tighter smog standard.
- The proposed smog standard would have required cities to lower ozone emissions, most of which come from power plants, vehicles and factories.
- It was estimated to cost anywhere between \$19 billion and \$90 billion, depending on how strictly enforced it would be.
- EPA is updating a 2006 review of the science that will result in the reconsideration of the ozone standard in 2013.



# Fracking

- Recently, an Independent federal advisory panel suggested that state governments are well-suited to oversee the environmental effects of drilling.
- Environmentalists and some Democrats say the technique threatens groundwater supplies and should be subject to tighter federal controls.
- A 2005 law (PL 109-58) largely exempts the practice from federal regulation under the Safe Drinking Water Act (PL 93-523), except in cases where diesel fuel is used in the mixture injected deep below ground.

# Fracking

- EPA is studying hydraulic fracturing's impacts on local drinking water resources. The initial findings are not expected until late 2012, with a final report due in 2014.
- The Interior Department is considering new requirements for oil and gas fracking operations on public land and is expected to release new controls on fracking in the next few months.

# Cross-State Air Pollution Rule

- Replaces EPA's 2005 Clean Air Interstate Rule (CAIR). Set to take effect Jan '12, imposes caps on sulfur dioxide and other pollutants that drift across borders. It applies to Texas and 26 eastern states.
- ERCOT, said Sept. 1 that the regulation could lead to blackouts. Texas filed a lawsuit Sept. 20 in the U.S. Court of Appeals for the District of Columbia seeking a delay in the rule.
- Oct. 6<sup>th</sup>, EPA announced a proposed rule to revise the Cross-State Air Pollution Rule. The public comment period will be 30 days (45 days if a request is made for the public hearing). EPA has scheduled a provisional hearing for October 28 in Washington, D.C.

# Cross-State Air Pollution Rule

- Thirty-one of Texas' 32 House members said in a letter to EPA Administrator Lisa Jackson that "though any relief is helpful," flawed assumptions that went into the original rule caused the agency to overestimate the capacity of the state's grid.
- There are now more than 30 lawsuits asking the U.S. Court of Appeals for the District of Columbia Circuit to block the Cross-State Air Pollution Rule

# Industrial Boilers and Solid Waste Incinerators

- Boilers and Solid Waste Incinerators – The MACT standards require facilities to install what has been determined to be the most efficient currently available pollution control technology for their process. The "Boiler MACT" refers to four interrelated rules governing emissions of mercury, dioxin, particulate matter, hydrogen chloride, and carbon monoxide from some 200,000 boilers nationwide and some 88 solid waste incinerators that burn waste at commercial or industrial facilities.
- The agency will postpone finalizing the standards until April 2012

# Cement Plants

- Cement Plants: The "Cement MACT" rules refers to similar new standards that apply specifically to the Portland cement industry. Some of the MACT technologies include air scrubbers to remove sulfur dioxide (SO<sub>2</sub>) sorbent injection for nitrogen oxides (NO<sub>x</sub>), and baghouses (or dust collection systems) to remove particulate matter (i.e. dust pollution and mercury).
- Rules set to go into effect in 2013.

# Green House Gases

- EPA's authority to regulate greenhouse gas (GHG) emissions stems from the U.S. Supreme Court decision in Massachusetts v. EPA (2007); American Electric Power v. Connecticut (2011) reaffirmed that the Environmental Protection Agency (EPA) has the authority to regulate greenhouse gases (GHGs) that cause global climate change.
- The EPA postponed indefinitely its proposed new greenhouse gas regulations affecting power plants and oil refineries when it could not meet its deadline of Sept, 30. It has committed to finalize the rules by May 26, 2012.

# XL Keystone

- Allow TransCanada to construct and operate a 1,700-mile-long pipeline between Hardisty, Alberta, and Port Arthur, Tex.
- Nebraska Governor Dave Heineman's (R) requested in an August, 2011 letter to President Obama and Secretary of State Clinton to deny the proposed route for the Keystone XL pipeline (Sens. Nelson (D) and Johanns (R) supported the Governor's request) over concerns with the Ogallala Aquifer.
- Senate Majority Leader Harry M. Reid (D-Nev.) wrote to Secretary of State Hillary Rodham Clinton on Oct. 5, saying he had "serious concern" about

# XL Keystone

- Twenty House Democrats, led by Rep. Gene Green (D-Tex.), wrote to President Obama last week, asking him to approve the pipeline. Several labor unions and business groups back the project.
- The State Department is charged with overseeing the permit (“United States’ national interest”), but the President would have to make the decision if any of the other agencies involved (i.e. EPA) in the process challenge State’s final determination.
- The State Department, which has to approve the pipeline because it would cross the U.S.-Canada border, is expected to decide by the end of the year.

# Brownfields

- Brownfields are real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.
- Senate EPW Committee held an Oversight hearing on October 19, 2011. First authorized in 2002 with authorization ending 4 years afterwards. However, Congress continues to fund it.
- EPA has cleaned up 600 brownfields since then, estimated 450,000 sites.
- Enjoys bi-partisan support as Ranking Member Inhofe (R-Ok) noted because it “does increase economic activity.”

# Brownfields Funding

EPA is encouraging eligible entities to apply now through Nov. 28, 2011, for 2012 Brownfields funding:

- These grant funds can be used to address sites contaminated by petroleum and hazardous substances, pollutants, or contaminants, including hazardous substances comingled with petroleum.
- Available grants from EPA's Brownfields Program include assessment grants (each funded up to \$200,000 over three years; coalitions are funded up to \$1 million over three years); cleanup grants (each funded up to \$200,000 over three years); and revolving loan funds (each funded up to \$1 million over five years).
- WHO CAN APPLY? Individuals from eligible local, state, and tribal governments; non-profits; coalitions; land clearance authorities; and quasi-governmental entities interested in a brownfields assessment, cleanup, or revolving loan fund grant.

<http://www.epa.gov/brownfields/applicat.htm>

# ESA and Superfund

- Endangered Species: On September 29, 2011, FWS started a process to extend new federal protections to a list of over 700 imperiled animals(i.e. Texas kangaroo rat) and plants.
  - FWS signed two agreements in federal court, one with the Center for Biological Diversity (CBD), and another with WildEarth Guardians (WEG) in which the parties agreed to a timeline for review of the individual species' cases through 2018.
- Superfund Taxes. Taxes that would be reinstated to fund the clean-up of the worst hazardous waste dumps were submitted by the Obama Administration to the Super Committee.

# U.S. House of Representatives

Republican Party (242)

Democratic Party (192)

- 15 of the 80 freshman House Republicans are Tea Party Caucus, accounting for a quarter of the 60 official tea party Republicans in the House.
- 218 is the magic number to pass legislation through the House and it is much more difficult for the minority to slow or defeat legislation
- The Democrats will need to pick up 25 seats to regain control.
- 2010 Redistricting: Texas will gain 4 seats (32 currently)



# House Republicans in Lockstep on Policy

- In February, the House voted to block pending EPA regulations limiting emissions of carbon dioxide and other gases linked to global climate change; even the GOP members from districts that backed Obama in 2008 voted **59-2** for the bill.
- In April, every voting House Republican (including **all 61** from Obama districts) opted to overturn EPA's scientific finding that climate change posed a public-health threat.
- In September, the Obama-district Republicans voted **56-4** to shelve EPA rules reducing pollution from coal-fired power plants;
- In October, the House passed by a **262-161** vote, a bill to force the EPA to rewrite regulations designed to reduce pollution at about 150 cement plants nationwide; Also passed a bill **275-142**, would require the EPA to re-propose the rules Boiler MACT.
- Appropriations: Republicans attempted to defund ESA programs through Interior Bill

# U.S. Senate

Democrats 53 members

Republicans 47 members

- 33 Senate seats are up for grabs in 2012, with 23 of those belonging to Democrats.
- If Republicans pick up Missouri, Montana, Nebraska and North Dakota (cannot lose Mass. and Nevada), they win back Senate.
- Senate is much more deliberative given the ability to filibuster and the need for 60 votes to end debate on a bill.



# Senate EPW Committee

On Oct. 6th, Sen. Boxer released a report: "A STRONG EPA PROTECTS OUR HEALTH AND PROMOTES ECONOMIC GROWTH" / The reports cites the bi-partisan support for the creation of EPA and various environmental laws signed by Republican Presidents (i.e. EPA and Clean Air Act '70(Nixon), Safe Drinking Water Act '74 (Ford))

TRAIN ACT – "Today, the House passed the TRAIN Act, which would obstruct EPA's process of setting new health standards -- delaying life-saving protections. Let me be clear: this is a train we must stop. *I will do everything I can to block the rollbacks being pushed by House Republicans and polluters.*"

**None of the House passed bills** delaying or halting EPA's regulatory authority have been brought up in the EPW Committee or passed by the Senate.



# Restore Act

On Sept. 21<sup>st</sup>, Senate EPW passed the RESTORE ACT.

Dedicates 80 percent of Clean Water Act penalties charged to BP to the restoration of the Gulf Coast

- The Clean Water Act gives the EPA authority to fine parties found to be responsible for an oil spill and can collect as much as \$4,300 in fines for each barrel of oil spilled in an accident (BP spill estimated at 4.9 million barrels)
- Under current law, these penalties are not returned to the place where the injury occurred.
- A portion of the funds will be allocated directly and equally to the five Gulf Coast states for ecological and economic recovery.

# Section 1603

## 1603 Program

- Payments for Specified Energy Property in Lieu of Tax Credits. Funding was extended in December 2010 until December 31, 2011.

## Overview

- The purpose of the 1603 payment is to reimburse eligible applicants for a portion of the cost of installing specified energy property used in a trade or business or for the production of income. A 1603 payment is made after the energy property is placed in service; a 1603 payment is not made prior to or during construction of the energy property.

## Funding

- Funding for the program has no overall cap. The amount payable to any applicant for a qualifying project or projects is not limited. However, the maximum amount payable for any project is limited to 30% or 10% of the eligible costs depending on the type of project. The payment may not exceed a specified amount for each kilowatt of capacity for qualified fuel cell property and qualified micro turbine property.

Here is a link of awards made under this section:

[http://www.novoco.com/energy/resource\\_files/hot\\_topics/1603\\_awards\\_050511.xls](http://www.novoco.com/energy/resource_files/hot_topics/1603_awards_050511.xls)

This is a link to a summary of awards/projects:

[http://www.novoco.com/energy/resource\\_files/other\\_guidance/wh\\_memo\\_loan-guarantee-grants\\_102510.pdf](http://www.novoco.com/energy/resource_files/other_guidance/wh_memo_loan-guarantee-grants_102510.pdf)

# Clean Energy Standard

- The Administration proposed investments in clean energy technology by ending 4 Billion in tax subsidies to gas, oil and fossil fuel industries.
- The administration embraced a clean energy standard that would encourage the development of new electricity technology by requiring utilities to generate 80 percent of their power from wind, solar, clean coal, or natural gas by 2035.
- Neither of these proposals have been passed by this Congress.

# Presidential Election

According to a Oct. 20 AP-GfK poll, when adults are asked about hypothetical head-to-head matchups, Obama and Romney run almost even, 48 percent for Obama to 45 percent for Romney. Obama holds a narrow lead over Cain, 49 percent to 43 percent and leads Perry, 51 percent to 42 percent.

Jobs and the Environment will be major issues in the Presidential Campaign

# Public Opinion

## Voters of Two Minds on EPA Regulations

A Oct. 4 United Technologies/National Journal Congressional Connection found most Americans worry that government regulation is hurting the economy; BUT most backed specific EPA rules to limit GHGs and pollution from coal-fired plants.

In the survey, those regulations were especially popular among suburbanites along the East and West Coasts.

# Questions



# Conclusion/Q&A

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## Emerging and Developing Environmental Issues Affecting the Energy Industry

October 27, 2011



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## Environmental Jeopardy: Test Your Environmental Knowledge

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*ENVIRONMENTAL*

**JEOPARDY!**

# Environmental Jeopardy

Permitting	Superfund	Transactional Consideration	Waste	Potpourri
<u>100</u>	<u>100</u>	<u>100</u>	<u>100</u>	<u>100</u>
<u>200</u>	<u>200</u>	<u>200</u>	<u>200</u>	<u>200</u>
<u>300</u>	<u>300</u>	<u>300</u>	<u>300</u>	<u>300</u>
<u>400</u>	<u>400</u>	<u>400</u>	<u>400</u>	<u>400</u>
<u>500</u>	<u>500</u>	<u>500</u>	<u>500</u>	<u>500</u>

# Permitting for 100

**pH, heat, and dirt are  
examples of these**

# Permitting for 100

**What would be “pollutants”  
under the Clean Water Act**

# Permitting for 200

**Sometimes only notice is required, other times other procedures are necessary**

# Permitting for 200

**What is the process necessary  
to transfer a permit**

# Permitting for 300

**Containers with residue or piles of debris are examples of this**

# Permitting for 300

**What are solid waste  
management units**

# Permitting for 400

**Big problems could happen  
if you start this before  
receiving your air permit**

Permitting for 400

**What is construction**

# Permitting for 500

**These constitute enforceable representations as to facility operations**

# Permitting for 500

**What is the site description  
contained in a permit  
application**

# Superfund for 100

**Ground lessees and sellers of contaminated land at a significant discount are sometimes examples of these**

Superfund for 100

**What are responsible parties**

# Superfund for 200

**Establishing a violation of  
some applicable legal  
standard is sometimes an  
element of this**

# Superfund for 200

**What is the CERCLA cause of action**

Superfund for 300

**But I didn't mean to!**

# Superfund for 300

**What is a potential generator defense in light of the Supreme Court's Burlington Northern decision**

# Superfund for 400

**Continuing enterprise and  
mere continuation are  
examples of these**

# Superfund for 400

**What are CERCLA theories  
of successor liability**

# Superfund for 500

**3 years, 6 years, and under  
Texas state law, we just don't  
know**

# Superfund for 500

**What are the statutes of limitations under federal and Texas Superfund laws**

# Transactional Considerations for 100

**This is good practice when  
buying/leasing industrial  
property**

# Transactional Considerations for 100

**What is a Phase 2 Study**

# Transactional Considerations for 200

**Environmental Compliance  
is not a part of this**

# Transactional Considerations for 200

**What is a standard ASTM  
Phase 1 Audit**

# Transactional Considerations for 300

**A good practice when buying  
or selling a facility**

# Transactional Considerations for 300

**What would be a Phase 1  
Audit**

# Transactional Considerations for 400

**A contract Operator  
Agreement, by way of  
example**

# Transactional Considerations for 400

**What would be a means to  
operate lawfully during the  
pendency of permit transfers**

# Transactional Considerations for 500

*A review of previously  
owned/operated facilities*

# Transactional Considerations for 500

**What would be due diligence  
to determine liability based  
on past operations**

# Waste for 100

**Construction debris, gas cylinders, and spilled liquids, for example**

Waste for 100

**What are solid wastes**

# Waste for 200

**Unused product and recyclable materials that are stored indefinitely and not used**

Waste for 200

**What are wastes**

# Waste for 300

**These materials are not hazardous wastes, but still could be subject to CERCLA**

Waste for 300

**What are Oilfield Wastes or  
Mining Wastes**

# Waste for 400

**The clean-up standard for this common solvent could soon become more stringent**

Waste for 400

TCE

Waste for 500

**Historical operational  
releases could trigger this  
obligation**

Waste for 500

**What would be reporting and  
clean-up**

# Potpourri for 100

**The Star Cactus and the  
Texas Horned Lizard, for  
example**

# Potpourri for 100

**What are endangered species**

# Potpourri for 200

**This type of Opinion is particularly hard to share**

# Potpourri for 200

**What is an environmental  
legal opinion**

# Potpourri for 300

**The second largest  
environmental regulatory  
agency of all**

Potpourri for 300

**What would be the TCEQ**

# Potpourri for 400

**Damage to wildlife, plants,  
and even groundwater at  
times**

# Potpourri for 400

**What are natural resource  
damages**

# Potpourri for 500

**NPL is the acronym for this  
term of art under CERCLA**

# Potpourri for 500

**What is the National  
Priorities List**

# *Environmental Double*

**JEOPARDY!**

# Environmental Double Jeopardy

Environmental Litigation	Contract Negotiation	Environmental Crimes	Environmental Trends	What's Up With That?
<u>200</u>	<u>200</u>	<u>200</u>	<u>200</u>	<u>200</u>
<u>400</u>	<u>400</u>	<u>400</u>	<u>400</u>	<u>400</u>
<u>600</u>	<u>600</u>	<u>600</u>	<u>600</u>	<u>600</u>
<u>800</u>	<u>800</u>	<u>800</u>	<u>800</u>	<u>800</u>
<u>1,000</u>	<u>1,000</u>	<u>1,000</u>	<u>1,000</u>	<u>1,000</u>

# Environmental Litigation for 200

**An “As-Is” clause may not  
prevent this type of law suit**

# Environmental Litigation for 200

**What would be a statutory  
environmental claim**

# Environmental Litigation for 400

**Tossing a copper penny into  
a stream may be enough if it  
costs a nickel to remove it**

# Environmental Litigation for 400

**What is a CERCLA cause of  
action**

# Environmental Litigation for 600

**Time of ownership, nature of discharge, and waste volume, by way of example**

# Environmental Litigation for 600

**What are factors a court may  
use to allocate environmental  
liability**

# Environmental Litigation for 800

**Carbon dating, former  
employees, and  
governmental records are a  
starting point**

# Environmental Litigation for 800

**What is evidence of when  
releases occurred**

# Environmental Litigation for 1,000

**This typically shifts when  
CERCLA liability is  
established**

# Environmental Litigation for 1,000

**What is the burden of proof  
to establish a share of  
liability**

# Contract Negotiation for 200

**Bold and capital letters are  
important to be sure these  
provisions are enforceable**

# Contract Negotiation for 200

**What are environmental  
indemnities**

# Contract Negotiation for 400

**A representation and warranty relating to “violations” may not always protect against this type of liability**

# Contract Negotiation for 400

**What is CERCLA liability**

# Contract Negotiation for 600

**Ability to recover these fees  
is a good reason to include a  
contractual clean-up  
provision**

# Contract Negotiation for 600

**What are attorney's fees**

# Contract Negotiation for 800

**Nature and timing of remedy,  
clean-up standard, and business  
interruption are all important  
considerations for this**

# Contract Negotiation for 800

**What are considerations in a  
contractual clean-up  
provision**

# Contract Negotiation for 1,000

**An exclusive remedies  
provision, waiver of claims,  
and covenant not to sue**

# Contract Negotiation for 1,000

**What are ways to limit post-closing claims to contractual remedies**

# Environmental Crimes for 200

**The liability standard in  
Texas for certain criminal  
waste disposal and Water  
Code violations**

# Environmental Crimes for 200

**What is strict liability**

# Environmental Crimes for 400

**Knowledge of the actions,  
not knowledge of the  
violation**

# Environmental Crimes for 400

**What is the general standard  
for a federal criminal  
violation**

# Environmental Crimes for 600

**This can lead to a jail  
sentence of up to 15 years**

# Environmental Crimes for 600

**What is “knowing  
endangerment”**

# Environmental Crimes for 800

**The unauthorized knowing or negligent discharge of oil into the U.S. exclusive economic zone**

# Environmental Crimes for 800

**What is a criminal violation  
under the Clean Water Act**

# Environmental Crimes for 1,000

**Mistake of fact or Statutory  
Exemption for example**

# Environmental Crimes for 1,000

**What are limited defenses to  
Environmental criminal  
charges**

# Environmental Trends for 200

**Greenhouse gas reporting and  
SEC regulations on climate  
change are examples of this  
trend**

# Environmental Trends for 200

**What are public disclosure  
requirements**

# Environmental Trends for 400

**The migration of vapors from  
the subsurface into a  
building's interior**

# Environmental Trends for 400

**What is vapor intrusion**

# Environmental Trends for 600

**A basis for holding corporate executives criminally liable for the illegal activities of their employees**

# Environmental Trends for 600

**What is the Responsible  
Corporate Officer Doctrine**

# Environmental Trends for 800

**EPA's September 2011 plan to integrate environmental justice and civil rights into its regulations are a basis for this program**

# Environmental Trends for 800

**What is EJ-2014**

# Environmental Trends for 1,000

**A means to deem  
geographically distinct  
emissions as combined to  
require a permit**

# Environmental Trends for 1.000

**What is source aggregation**

# What's Up With That for 200

**In litigation, the share of  
damages attributable to  
unknown sources**

# What's Up With That for 200

**What is the Orphan Share**

# What's Up With That for 400

**For enforcement purposes, a  
sanitary sewer line or storm  
water drainage system**

# What's Up With That for 400

**What are “waters of the  
state”**

# What's Up With That for 600

**Critics state that EPA's July  
2011 Cross-State Air  
Pollution Rule will raise  
monthly electric bills and  
result in the shutdown of  
these type of plants**

# What's Up With That for 600

**What are fossil-fuel burning  
power plants**

# What's Up With That for 800

**This proposed regulation, if promulgated, would have been *udderly* disastrous**

# What's Up With That for 800

**What is a milk spill disaster  
plan**

# What's Up With That for 1,000

**Some commentators say  
these new EPA regulations  
will actually create 230,000  
new jobs**

What's Up With That for  
1,000

**What are EPA's Greenhouse  
gas permitting rules**

FINAL

JEOPARDY!

# Final Jeopardy

**This 1972 statute generally established the current permitting program held to be applicable to rain soaked forest roads by the 9<sup>th</sup> Circuit.**

# Final Jeopardy

**What is the Federal Water  
Pollution Control Act**

# Conclusion/Q&A

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## The U.S. Fish & Wildlife Service: America's New Energy Regulatory Agency

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# Introduction

- Siting of energy facilities has historically been a state issue
- Federal approval over siting has generally been limited to major emitting facilities or those with a federal nexus subject to NEPA
- Historically, this has covered most major facilities
- In past few years, significant new energy development has occurred that has not been subject to federal regulation:
  - Shale gas exploration
  - Alternative energy (e.g. wind, solar)

# USFWS Jurisdiction

- USFWS has authority for three statutes that give it the power to fill this “gap”
  - Migratory Bird Treaty Act - 16 U.S.C. §§ 703-712
    - Unlawful to “pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird [or] any part, nest, or egg of any such bird . . .” listed under the statute, except when specifically authorized by DOI.
  - Bald & Golden Eagle Protection Act - 16 U.S.C. §§ 668-668d
    - Unlawful to take any bald eagle or golden eagle in any manner, including by killing, wounding, molesting or disturbing to a degree that causes injury, decrease in productivity, or nest abandonment.
  - Endangered Species Act - 16 U.S.C. §§ 1531-1544
    - Unlawful to take any listed species (“harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct”)

# Land-Based Wind Energy Guidelines

- MBTA is strict liability
  - No provision authorizing permits for take, incidental or otherwise
  - Historically, enforcement has been highly discretionary
- In 2003, USFWS published “*Service Interim Guidance on Avoiding and Minimizing Wildlife Impacts from Wind Turbines*”
  - Intended to assist Service staff in providing technical assistance on proper evaluation of potential sites, design of turbines and associated structures, and pre- and post-construction research and monitoring to identify/assess impacts to wildlife.
  - Recommendations were relatively general, high level.
  - While guidance was voluntary and reserved Service’s enforcement authority, contained language expressly stating that Service’s Office of Law Enforcement and DOJ “have used enforcement and prosecutorial discretion in the past regarding individuals, companies, or agencies who have made good faith efforts to avoid the take of migratory birds.”

# Land-Based Wind Energy Guidelines

- *Service Interim Guidance* was not widely adhered to, but many of the practices referenced were widely adopted, such as:
  - Tubular vs. lattice towers
  - No guy wires; internal ladders
  - Minimum lighting required by FAA
  - Burying of collection lines
  - Avoidance of known sensitive areas/species
  - Micrositing to avoid anticipated impacts, attractive features, etc.
  - Layout to avoid fragmentation

# Land-Based Wind Energy Guidelines

- In 2007, Service convened the Wind Turbine Guidelines Advisory Committee (“FAC”) to provide recommendations for new guidelines
  - Representatives of federal, tribal, state, private industries and conservation organizations
- FAC submitted final recommendations on March 4, 2010
  - Proposed comprehensive tiered framework for site assessment, development and post-construction monitoring
  - Represented a negotiated compromise among government, industry, NGOs
  - FWS was expected to adopt FAC recommendations; never did

# Land-Based Wind Energy Guidelines

- In February 2011 Service issued its own “Draft Voluntary Land-Based Wind Energy Guidelines”
  - Far more stringent than FAC recommendations
  - Onerous to the point of untenable
  - Key changes:
    - Min. 3 years pre-construction surveys
    - Generally applicable post-construction requirements
    - Service involvement in decision to move among tiers
    - No phase-in period
    - Expanded FWS mitigation policy and BGEPA mitigation
    - Weakened enforcement discretion language

### Comparison of FAC Recommendations to FWS Draft Voluntary Guidelines

*This is not the exhaustive list of all differences, but includes some of the major factors that will be of most interest to stakeholders.*

<b>TOPIC</b>	<b>FAC Recommendations</b>	<b>FWS Draft Voluntary Guidelines</b>
Study Duration	No specific study duration time mentioned	Pre-construction has a minimum study duration of 3 years; post-construction has a minimum of 2 years
Decision Process	The developer makes key decisions at the end of each tier	The developer decides in coordination with FWS whether to move to the next tier
Implementation	Requirement of a 2-year phase in process	Removed the 2-year phase in process
Preamble	Premise and principles section included	Not included, particularly the incentive language. Some elements were incorporated into the Introduction.
Cost Savings	Many decisions included a consideration of cost for surveys, mitigation, etc.	Modified the reference and revised mitigation language.
Adverse Effect	Referred to as “significant” adverse effects	Removed the term “significant” from the language and is referred to now as adverse effects.
Use of project descriptors and other terms	Area of interest, project area, project site, species of concern, species of habitat fragmentation concern	Area of influence, project site, extent of direct effects, extent of indirect effects, affected species, species sensitive to habitat fragmentation
Adaptive Management	Used Adaptive Management concepts from outside sources	Used the Department of Interior Handbook on Adaptive Management
Noise	Issues with noise disturbance not included	Noise is included, specifically in Tiers 3-5.
Habitat Fragmentation	Extensive discussion on effects of habitat fragmentation to sage grouse and prairie chickens	Expanded discussion to include loss and degradation, and moved sage grouse-specific discussion to website
Tiers 4 and 5	Tier 4 Post-construction Fatality Studies and Tier 5 Other Post-construction Studies	Split Tier 4 into 4a (Fatality Monitoring) and 4b (Other Effects); moved habitat effects from Tier 5 to Tier 4b
Mitigation	Brief discussion of general mitigation considerations	Expanded FWS Mitigation Policy and added Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act
Conflict Resolution	Identified a specific individual in the Washington Office to respond to conflicts	Modified to standard chain of command in FWS/DOI
Legal White Paper	Discussed legal statutes, as well as various options such as bird letters, migratory bird permits, conservation banking, etc.	Replaced with FWS Legal Considerations – discussion of legal authorities and statutes, but did not include MBTA permits and bird letters

*Source: U.S. Fish & Wildlife Service*

# Land-Based Wind Energy Guidelines

- Industry stridently objected to draft guidelines. Met directly with Sec. Salazar to voice concerns
- FAC was reconvened for several sessions to weigh in on Draft Voluntary Guidelines
- Many of the most egregious provisions have been changed, but still far beyond the original FAC recommendations
- Though voluntary, Guidelines are de facto regulation of the wind industry, not a final rule so not subject to APA

# Eagle Permit Rule/Guidance

- Makes it illegal to take any bald eagle or golden eagle in any manner, including by killing, wounding, molesting or disturbing to a degree that causes injury, decrease in productivity, or nest abandonment
- Statute authorizes permits for taking of:
  - eagles, for the protection of wildlife or of agricultural or *other interests* in any particular locality, and
  - golden eagle nests that interfere with resource development or recovery operations
- No permitting framework existed until recently

# Eagle Permit Rule/Guidance

- Final Eagle Permit Rule – issued Sep 11, 2009
  - Authorized limited issuance of permits for incidental takes of bald and golden eagles
  - Take must be *necessary* to protect the interest, i.e., the interest cannot be protected without taking eagles despite implementation of all practicable measures to avoid and minimize impact to eagles
  - Requires permittees to avoid and minimize to the point where take is unavoidable
  - Also requires mitigation for permitted takes
- Significance of rule was unclear at time it was proposed
  - Service stated that it was proposing a permit process that would be less burdensome than ESA incidental take permit process
  - Rule subsequently tightened in a draft EA, again escaping notice

# Eagle Permit Rule/Guidance

- Service issued Draft Eagle Conservation Plan Guidance in January 2011
  - Interprets and clarifies provision of Eagle Permit Rule
  - Calls for wind developers to consult with Service in a 5-tiered process:
    - Early landscape level assessments
    - Site-specific surveys
    - Risk assessment
    - Avoiding, minimizing and mitigating impacts
    - Post-construction monitoring

# Eagle Permit Rule/Guidance

- Permit process established by Rule/Guidance is more burdensome, less certain, and more costly than incidental take permits under ESA
  - Permits available with just a 5 year term, no automatic renewal
  - Lack of “No Surprises” assurances
  - AMM aspects focus on worst case scenarios rather than realistic evaluation of project risks
  - Permits don’t address liability under other wildlife statutes
  - Based on required elements, application process could take as many as 7 years (per AWEA estimates)

# Eagle Permit Rule/Guidance

- Impact on Project Siting
  - “Important Eagle Use Areas”
    - Defined as eagle nest, foraging area, or communal roost site that eagles rely on for breeding, sheltering or feeding, and the surrounding landscape features essential for the continued viability of the site for breeding, feeding or sheltering eagles
    - Developers must identify all IEUAs within 10 miles of perimeter of project
    - Requires “rigorous, landscape-scale site-assessment process” involving use of “multiple data sources” and “site-level reconnaissance” over 2-3 years
  - Presumption against development within IEUAs – projects kicked into higher tiers of analysis
  - Results in extensive USFWS influence in siting decisions

# Endangered Species Act

- Listed/candidate species are widespread, affecting project development in renewable and traditional energy industries
  - Wind: Indiana bats, whooping cranes, sage grouse, lesser prairie chicken, et al.
  - Pipeline/transmission lines: Indiana bats, burying beetle, freshwater mussels, et al.
  - E&P: Dunes sagebrush lizard, et al.

# Endangered Species Act

- Section 10(a)(1)(b) authorizes permits for takes incidental to an otherwise lawful activity
  - Requires development of a Habitat Conservation Plan (HCP) describing impact of take, measures to minimize and mitigate, and alternatives considered to the take
  - Incidental take permits (ITPs) generally require NEPA
  - ITP process generally takes one year or more
  - Requires adequate scientific understanding of the species

# Endangered Species Act

- Recent litigation has expanded influence of the ESA and USFWS activity
- *Animal Welfare Institute, et al. v. Beech Ridge Energy LLC (Dec. 2009)*
  - Citizen suit to prevent construction of Invenergy wind farm in WV due to potential impact on Indiana bats
  - Court found that it was a “virtual certainty” that Indiana bats would be harmed, wounded or killed by the Beech Ridge project
  - Court issued injunction preventing continued construction, operation until permit obtained, despite absence of actual take

# Endangered Species Act

- *WildEarth Guardians v. Salazar (Sep 2011)*
  - Suit by WEG over USFWS failure to act on listing petitions for hundreds of candidate species
  - Settlement with USFWS requires Service to make final listing determinations on 252 candidate species by September 2016, as well as act on various citizen petitions
  - 21 candidate species in Texas alone
  - Likely to result in numerous additional species listings over next 5 years

# Endangered Species Act

- Texas candidate species covered by settlement:

## 18 Animals

- Austin blind salamander
- Diamond Y Spring snail
- Diminutive amphipod
- Georgetown salamander
- Gonzales springsnail
- Jollyville Plateau salamander
- Lesser prairie-chicken
- Louisiana pine snake
- Phantom cave snail
- Phantom springsnail
- Red knot
- Salado salamander

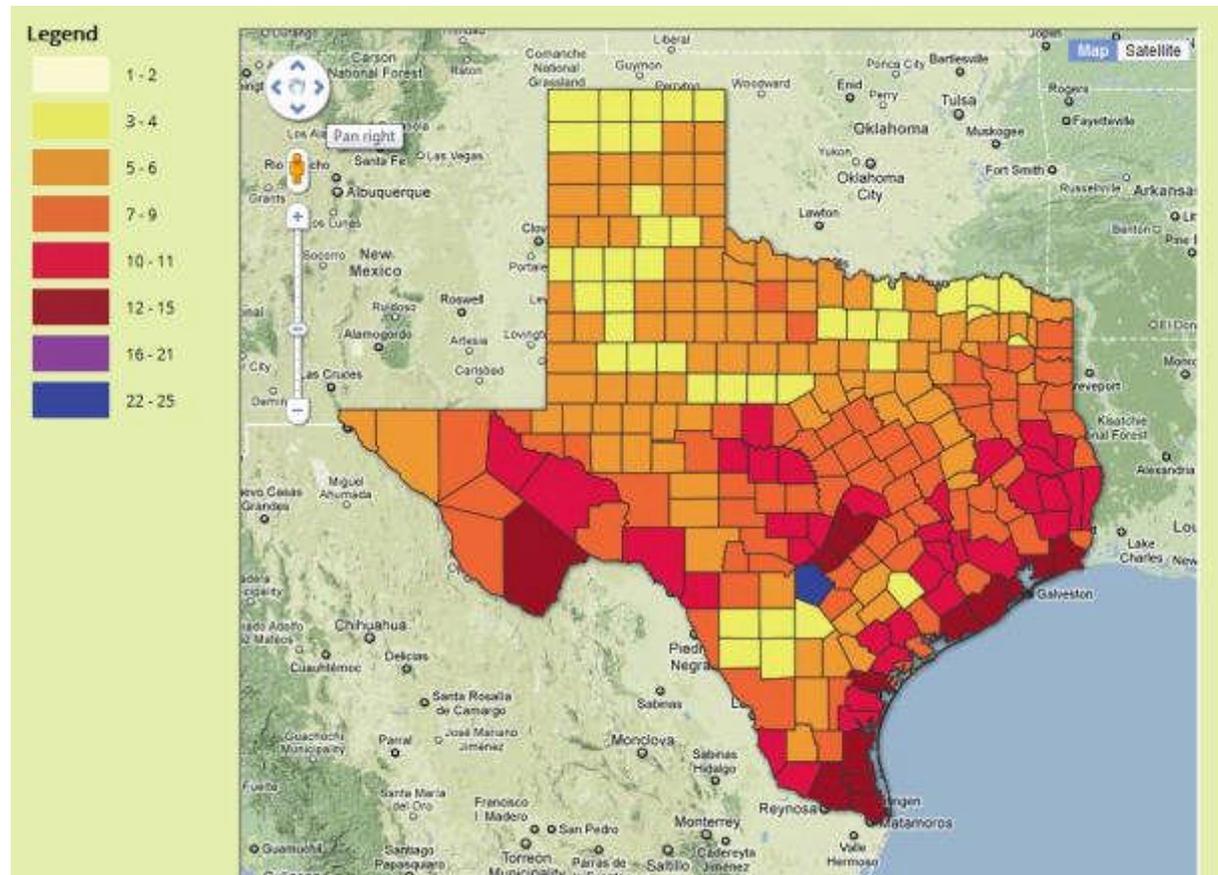
- Sharpnose shiner
- Smalleye shiner
- Sprague's pipit
- Texas hornshell
- Warton Cave meshweaver
- Yellow-billed cuckoo (western U.S. DPS)

## 3 Plants

- Guadalupe fescue
- Neches River rose-mallow
- Texas golden gladecress

# Endangered Species Act

- Texas endangered species abundance:



Source: TexasAhead.com

# Endangered Species Act

- More than 90 listed species in Texas
- Another 100 species under review
- USFWS' expanded authority from *Beech Ridge*, plus *Wild Earth Guardians* settlement may have significant effect on energy development
  - Need for agency consultations in siting
  - Increased costs for avoidance, minimization and monitoring

# Endangered Species Act

- Dunes Sagebrush Lizard
  - Proposed for listing in December 2010
  - Found in Permian Basin region of Texas, as well as Chaves, Roosevelt, Lea and Eddy counties in NM
  - TxOGA working with USFWS to develop Texas Conservation Plan for DSL
    - May require buffer around shinnery oak dune habitat
    - Restoration of P&A'd well sites
    - Removal of overhead infrastructure and fences
    - Removal of roads and restoration
    - Purging of pipelines to prevent potential spills

# Conclusion

- USFWS relying on its broad authority under long-overlooked wildlife statutes to take an active role in siting and development
- Acts mostly through guidance/policy rather than rulemaking, limiting opportunities for public involvement while avoiding judicial review
- Permitting/compliance programs are onerous due to statutory standards for preservation/recovery of species
- Disproportionate burden on industry for species declines that have many other causes
- Very different risk profile from traditional media-based environmental statutes – industry must adapt

# Conclusion/Q&A

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## A Watched Pot Never Boils: An Update on EPA's Boiler MACT Rule

**Scott Elliott**

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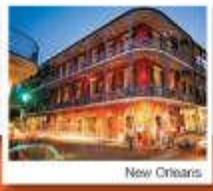
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# “Final” Boiler MACT Rules

- “Final” rules issued on February 21, 2011
- The Boiler MACT Rule is a part of an action consisting of 4 related rules:
  - Major Source Boiler Rule, 76 Fed. Reg. 15608
  - Area Source Boiler Rule, 76 Fed. Reg. 15554
  - Commercial and Industrial Solid Waste Incineration Units Rule (76 Fed. Reg. 15704)
  - RCRA Solid Waste Rule (76 Fed. Reg. 15456)



# History of the Boiler MACT Rules

- September 13, 2004: EPA originally promulgated Boiler MACT rules
- June 2007: Litigation ensued over expanded definition of non-hazardous solid waste, D.C. Circuit Court of Appeals vacated the rules
  - definition of solid waste in related rule was too narrow, resulting in solid waste incineration units being considered boilers
- April 2010: Boiler MACT Rules re-proposed
- December 16, 2010: Court gives EPA until this date to finalize new rules
- February 21, 2011: EPA requests a 15 month extension, court grants limited extension until this date
  - Concurrent with issuance of rules, EPA issues a notice of reconsideration of the boiler rules
    - Issues of “central relevance” arose after public comment, additional public comment is appropriate. 76 Fed. Reg. 15267

# Impact of the Boiler Rules

- Major Source Boiler Rule: Estimated to cost \$5.1 billion in capital costs and \$1.8 billion in annual operating costs (reduced \$1.5 billion from proposed rule)
  - the majority of these costs fall on units combusting solid fuel; approximately 1,014 units are estimated to incur \$2 billion in capital costs and \$108 million in testing and monitoring costs
- Area Source Boiler Rule: Estimated to cost \$487 million per year (reduced \$209 million from proposed rule)

# Terminology

- Hazardous Air Pollutants (“HAPs”): pollutants known or suspected to cause cancer or serious health effects; 188 HAPs recognized by EPA
- Major Sources: stationary sources with the potential to emit 10 tons per year (TPY) or more of any single HAP or 25 TPY or more of any combination of HAPs
- Area Source: any stationary source of HAPs that is not a major source
  - EPA must ensure that area sources representing 90 percent of the emissions of 30 most dangerous HAPs in the largest number of urban areas are regulated

# More Terminology

- Maximum Achievable Control Technology (“MACT”): standard applicable to emissions from major sources
- Generally Achievable Control Technology (“GACT”): standard applicable to emissions from area sources
- National Emissions Standards for Hazardous Air Pollutants (“NESHAPs”): regulations establishing emissions standards for affected categories

# Air Toxics Overview

- Clean Air Act § 112 requires that EPA promulgate national emission standards for each category or subcategory of major and area sources of HAP emissions
  - Over 96 source categories regulated
- Emissions standards must be technology-based (rather than risk based)
  - Standards must be based on MACT for major sources; GACT for area sources

# Technology Based Standards

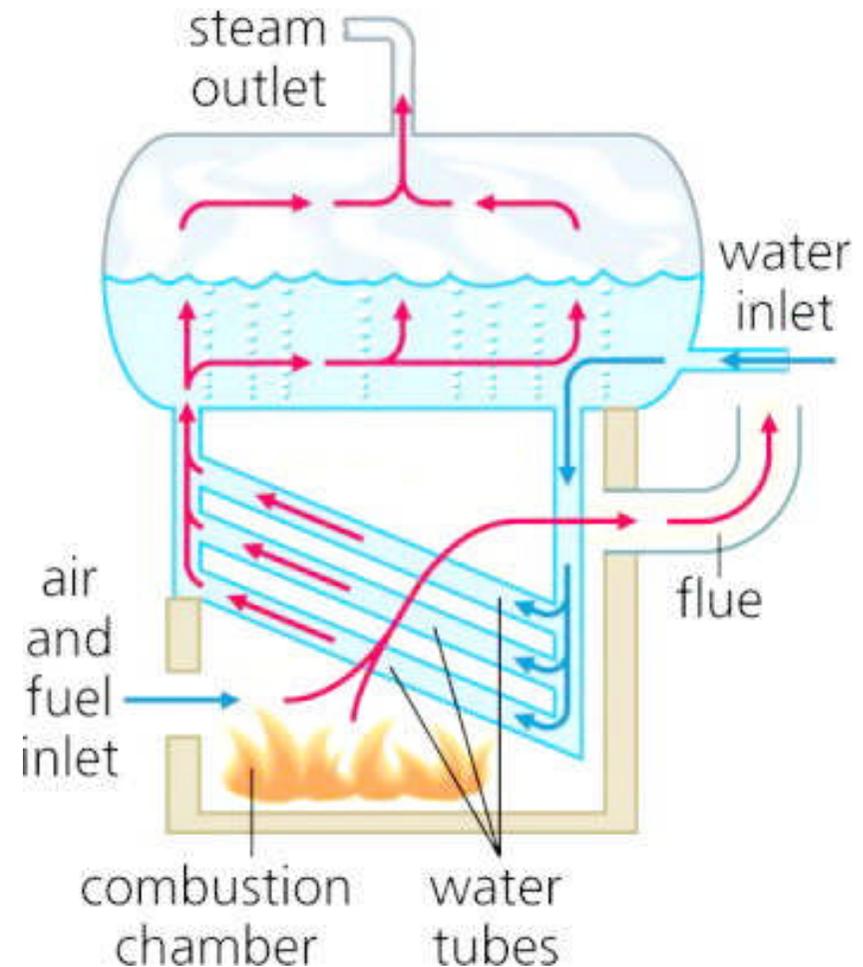
- How is MACT determined? EPA creates a “MACT floor”
  - New Sources: emission control that is achieved in practice by the best controlled similar source
  - Existing Sources: the average emission limitation achieved by the best performing 12 percent of the existing sources
- EPA may go “beyond the floor” but when doing so must consider costs, energy, and non-air environmental impacts

# Technology Based Standards

- § 112(d)(5) allows GACT for area sources
  - When determining GACT EPA will consider control technologies and management practices that are generally available to area sources; costs and economic impacts are also a consideration
  - Major source control technologies and management practices may be included where they are easily transferable from major sources

# What is a Boiler?

- A Boiler is an “enclosed device using controlled flame combustion and having the primary purpose of recovering thermal energy in the form of steam or hot water” 40 C.F.R. 63.7575
- 200,000 affected boilers, including approximately 14,000 major source and 187,000 area source boilers



# What Is a Process Heater?

- A process heater is an “enclosed device using controlled flame, and the primary purpose is to transfer heat indirectly to a process material or to heat a transfer material for use in a process unit, instead of generating steam” 40 C.F.R. 63.7575

# What is an Solid Waste Incinerator?

- Regulated under CAA § 129
  - any unit which combusts any solid waste material
- Standards for CISWIs:
  - apply to all sources
  - regulates emissions from nine pollutants

## CAA 129 Pollutants:

- Cadmium
- Carbon Monoxide
- Dioxins/Furans
- Hydrogen Chloride
- Lead
- Mercury
- Nox
- Particulate Matter
- Sulfur Dioxide

# Boiler Rules: Key Elements

- Emissions Limits
- Energy Assessment
- Work Practice Standards
  - Annual or Biennial tune-ups



# Major Source Boiler Rule

- Applies to industrial, commercial, and institutional boilers located at Major Sources
  - the boiler itself does not have to be a major source
  - Emission are broken out over 15 subcategories of boilers; categories designated by fuel type and boiler type

## Boiler Categories:

1. pulverized coal/solid fossil fuel units
2. stokers designed to burn coal/solid fossil fuel
3. fluidized bed units designed to burn coal/solid fossil fuel
4. stokers designed to burn biomass/bio-based solid
5. fluidized bed units designed to burn biomass/bio-based solid
6. suspension burners/Dutch Ovens designed to burn biomass/bio-based solid
7. fuel cells designed to burn biomass/bio-based solid
8. hybrid suspension/grate burners designed to burn biomass/bio-based solid
9. units designed to burn solid fuel
10. units designed to burn liquid fuel
11. units designed to burn liquid fuel in non-continental States or territories
12. units designed to burn natural gas, refinery gas or other gas 1 fuels
13. units designed to burn gas 2 (other) gases
14. metal process furnaces
15. limited-use boilers and process heaters

# Major Sources Boiler Rule: Key Elements

- Emissions Limits
  - The Boiler MACT regulates Hydrogen Chloride, Particulate Matter, Carbon Monoxide, Mercury, and Dioxin/Furan emissions
  - With limited exceptions, emissions limits apply to all large major source boilers
  - Owners must conduct initial and annual performance tests to demonstrate compliance with these limits
  - Monitoring: Large Boilers must monitor oxygen to assess quality of combustion
- Emissions limits do not apply to:
  - Large natural gas or refinery gas fired boilers
    - “other” gases may qualify
  - Limited use boilers
  - new and existing small boilers

# Major Source Boiler Rule: Key Elements

- Work Practice Standards
  - annual tune-ups for natural gas boilers
  - biennial tune-ups for small boilers
- Energy Assessments
  - Beyond the floor requirement
  - All existing major source facilities must conduct a one-time audit
  - must be conducted by a qualified energy assessor
  - The assessment includes the boiler and part of the facility accounting for a portion of the energy output (e.g., for facilities using less than 0.3 trillion Btu per year, the assessment must include the boiler and the energy use system accounting for at least 50 percent of the energy output)

# Area Source Boiler Rule: Key Elements

- Applies to three subcategories of boilers: coal, oil and biomass
  - gas fired boilers are excluded from the requirements of the area source rule
- Emissions Limits
  - New and Existing large, coal-fired boilers required to meet emission limits for mercury, PM and CO
  - Other new large boilers required to meet emissions limits for PM
- Work Practice Standard
  - New and Existing Small Boilers
  - New and Existing Large Biomass or Oil Boilers
- Energy Assessment
  - Required for all existing large boilers at area sources

# Implementation

- **Major Source Implementation**
  - New Boilers: upon startup
  - Existing Boilers: within 3 years (March 21, 2014)
- **Area Source Implementation:**
  - New Boilers: upon startup
  - Existing Boilers: 3 years for sources subject to emissions standards, 1 year for sources subject only to work practice standards

# Criticisms of the Boiler MACT Rules

- Costs
  - Potentially underestimated, CIBO estimates costs as high as \$20 billion
- Implementation Time
  - Industry concerns that three years may not be long enough
- Emissions Limits
  - Unachievable, few existing boilers compliant

# EPA Delays Effectiveness

- EPA delays effectiveness to reconsider a number of issues, including (see 76 Fed. Reg. 15267):
  - proposed subcategories in the major source boiler rule
  - review of fuel specifications
  - establishment of work practice standards for major sources
  - establishment of standards for biomass and oil-fired boilers based on GACT
  - providing an affirmative defense for malfunction events for major and area source boilers
  - revision to the proposed monitoring requirements for carbon monoxide for major source boilers
  - revision to the proposed dioxin emission limit and testing requirements for major source boilers
  - establishing a full-load stack test requirement for carbon monoxide coupled with continuous oxygen monitoring for major source boilers
  - setting PM standards under GACT for oil-fired area source boilers
  - certain findings regarding the applicability of Title V permitting requirements for area source boilers

# What does the Future Hold?

- In court filings EPA has indicated that it intends to sign a new proposed rule by October 31, 2011, final rule to be signed by April 30, 2012
- HR 2250 – the EPA Regulatory Relief Act
  - passed the House, bipartisan support
  - Stays Boiler MACT rules 15 months for re-proposal
  - Extends compliance deadlines to 5 years
  - Requires emission limits to be achievable by real world boilers
- Additional Court Challenges

# Conclusion/Q&A

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## AB 32: California's Bid to Save the Planet .... One State at a Time

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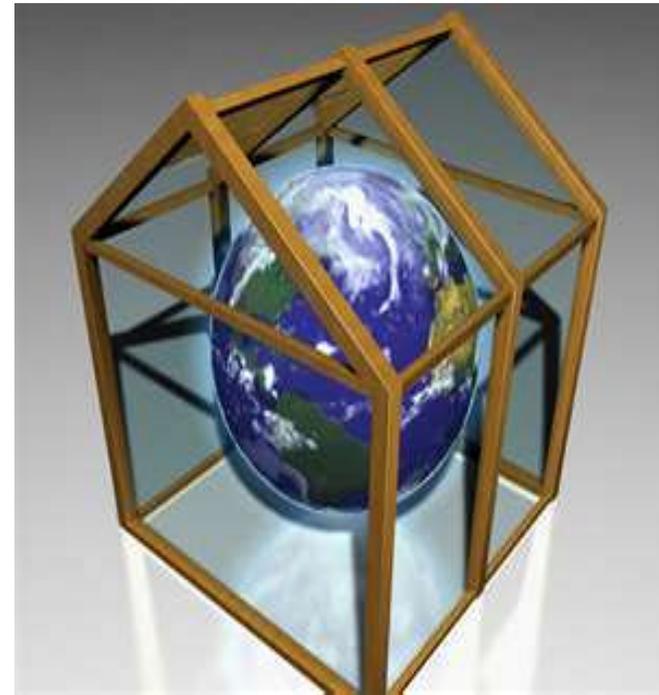
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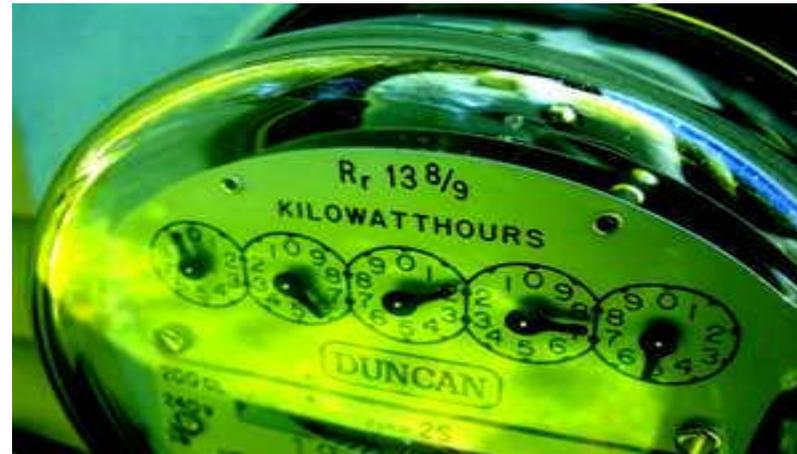
# AB 32 – The California Global Warming Solutions Act

- Comprehensive Program to Reduce Greenhouse Gas (GHG) Emissions
- Reduce GHG to 1990 levels by 2020 = 15% reduction statewide (169 MMTCO<sub>2</sub>E)
- Reduce GHG by 80% from 1990 levels by 2050 [Schwarzenegger Executive Order S-3-05]
- California Air Resources Board (CARB) to develop regulations and market mechanisms



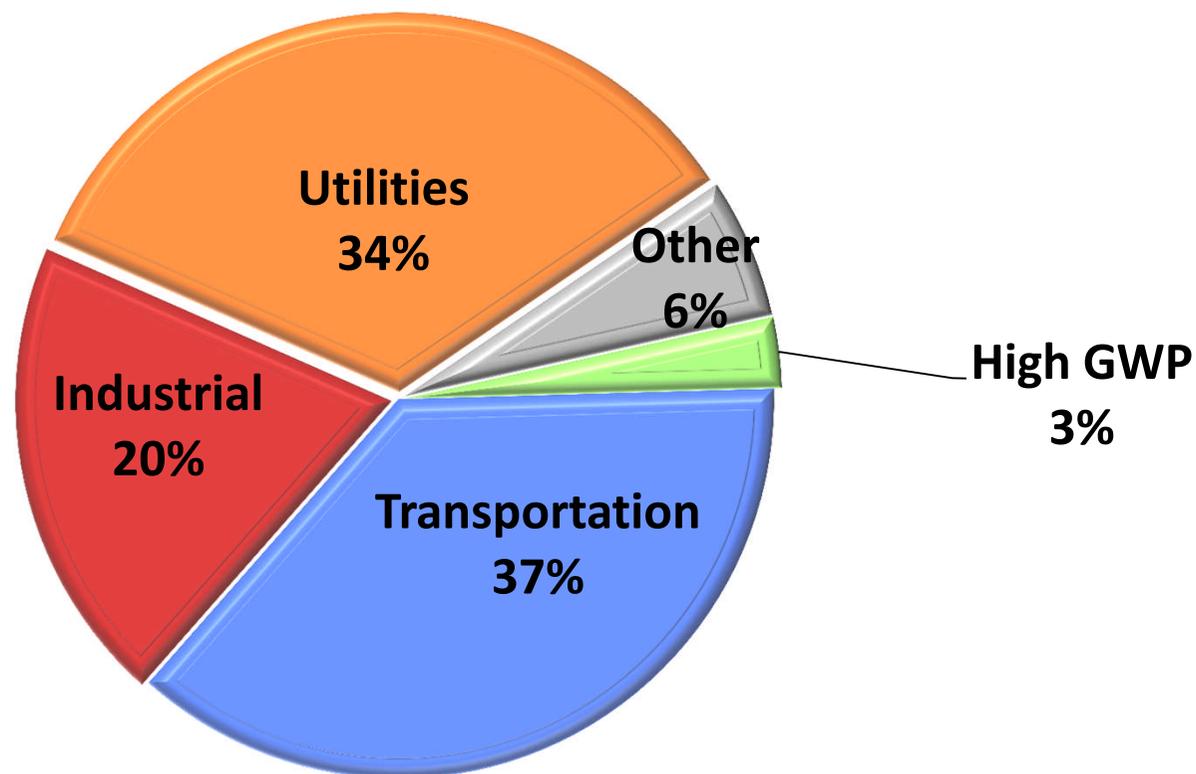
# California's Position

- Leads the nation in energy efficiency standards and plays a lead role in environmental protection
- But is also the 12<sup>th</sup> largest emitter of carbon worldwide
- 8<sup>th</sup> largest economy worldwide
- Defines GHG to include:
  - Carbon dioxide
  - Methane
  - Nitrous oxide
  - Sulfur hexafluoride
  - Hydrofluorocarbons
  - Perfluorocarbons[same gases listed in Kyoto protocol]



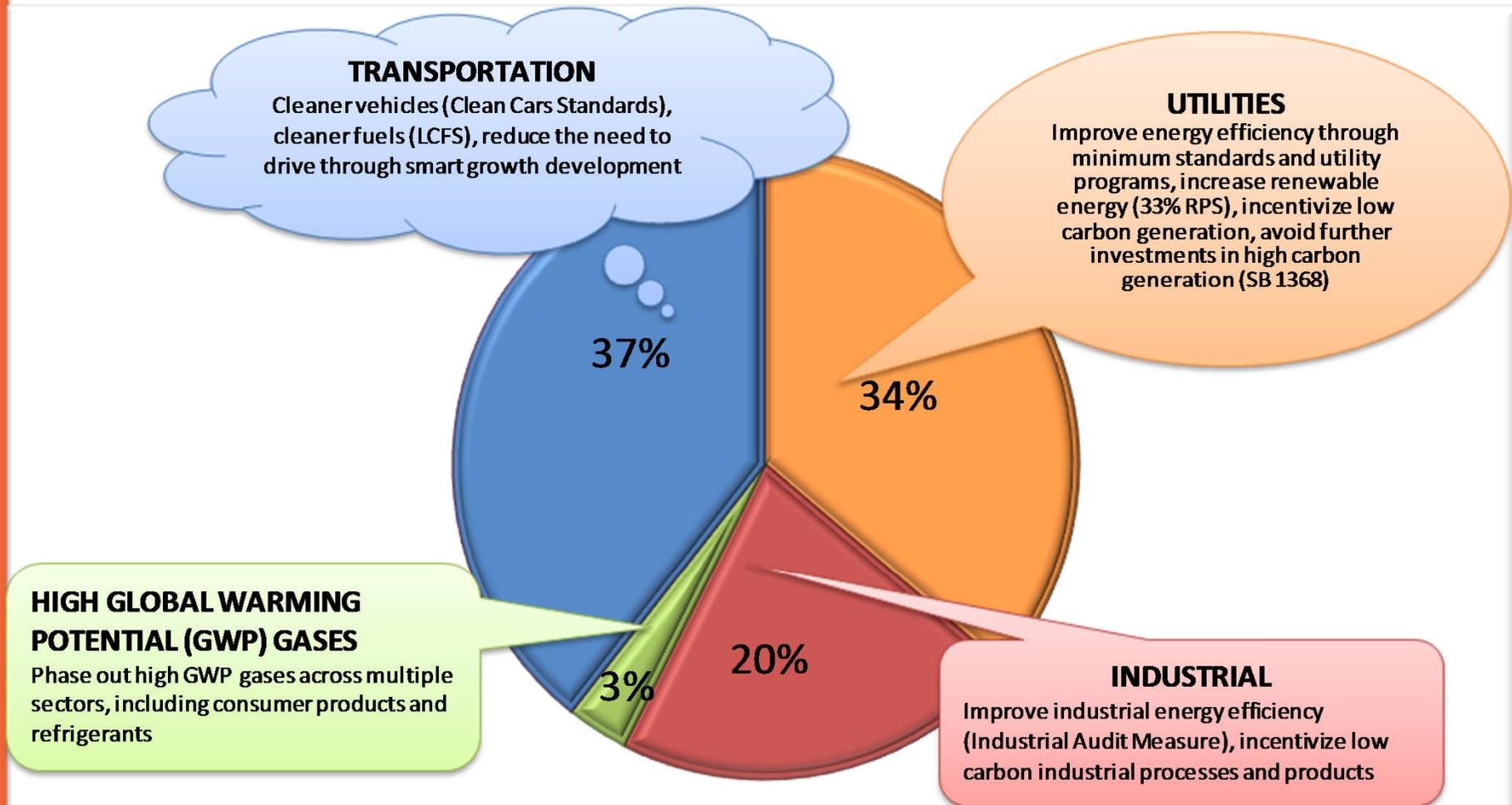
# California Emission Sources (2008)

(Sector, Percent of Total)



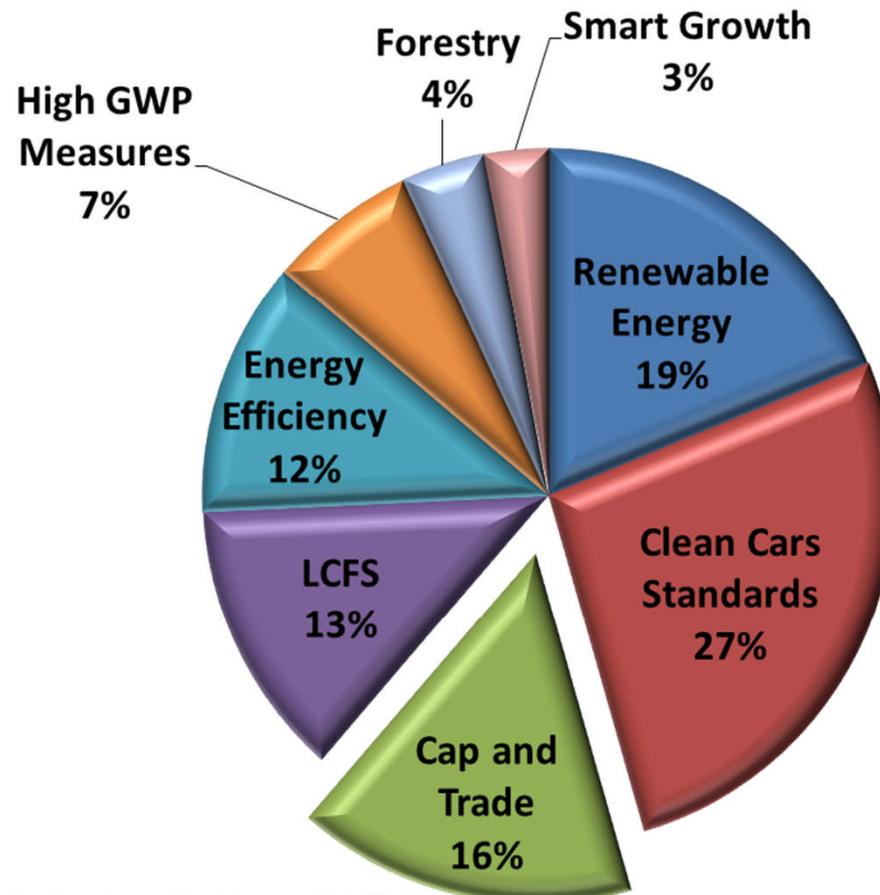
SOURCE: CARB, California GHG Inventory for 2000-2008

# Selected AB 32 Scoping Plan Solutions



SOURCE: CARB, California GHG Inventory for 2000-2008

# AB 32 Emission Reduction Strategies (Measure, Percent of Total)



Source: CARB, Emissions Reductions from Scoping Plan Measures; 2020 GHG Emissions Forecast

# Cap-and-Trade In Concept



- First of its kind market mechanism that allows the buying and selling of carbon allowances (the right to emit carbon into the atmosphere) by the private sector
- Intended to account for nearly 1/5 of total AB-32 emission reductions
- Designed and administered in collaboration with Western Climate Initiative (6 Western states and 4 Canadian provinces)
- Covers 85% of all emissions statewide
- Market flexibility intended to allow most efficient emissions reductions at lowest cost

# Cap-and-Trade

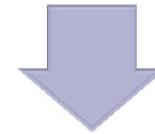
## Who/What is Covered

Objective = to achieve greatest emissions reductions by regulating smallest number of entities.



Beginning in first compliance period (2013)

- Electrical utilities over 25,000 MTCO<sub>2</sub>E/yr
- Large industrial facilities over 25,000 MTCO<sub>2</sub>E/yr



Eventually totaling over 350 businesses at over 600 locations throughout the State.



Beginning in second compliance period (2015)

- Upstream treatment of industries with emissions below 25,000 MTCO<sub>2</sub>E/yr and commercial and residential emissions regulated at point where fuel enters into commerce.
- Upstream treatment of transportation fuels regulated where fuel enters into commerce

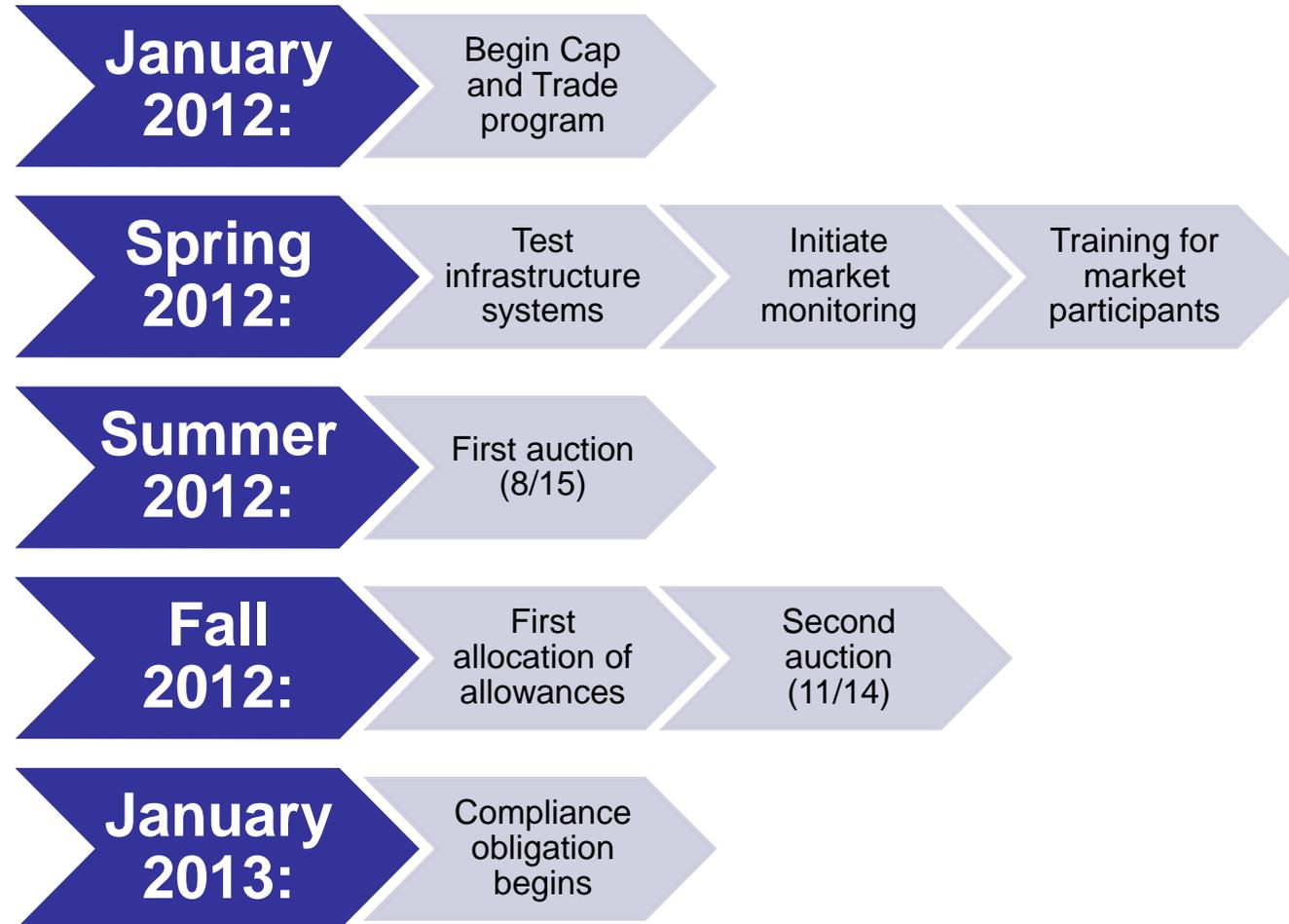
# Cap-and-Trade

## How it Works

- Analysis and modeling to determine best estimate of starting emissions total (2013).
- Allocations of allowances – 90% initially
- Starting emissions cap in 2013 that will be reduced by 2% each year to 2015 and 3% each year from 2015 to 2020.
- Auction or trading to buy allowances for additional emissions.
- Offsets, such as planting of trees, can be relied upon to account for up to 8% of emissions.
- “Truing up” at end of compliance period and surrender of allowances = to actual emissions level.
- Enforcement – surrender of three additional allowances for each  $\text{MTCO}_2\text{E}$  not covered by an allowance at the deadline plus additional penalties.



# Cap-and-Trade Implementation Timeline



# Cap-and-Trade Hypothetical Example

	Soft Start	1st Compliance Period		2nd Compliance Period			3rd Compliance Period		
	2012	2013	2014	2015	2016	2017	2018	2019	2020
<b>MTCO<sub>2</sub>E CAP</b>	100	98	96	93	90	87	84	81	78
<b>MTCO<sub>2</sub>E ACTUAL</b>	100	100	100	100	100	100	100	100	100
<b>ALLOWANCE</b>	90	88	86	70	68	65	63	61	59
<b>NEEDED AT AUCTION</b>	10	12	14	30	32	35	37	39	41

**Note:** 2012 - 2014 - 2% cap reduction / Allowance 90%

2015 - 2020 - 3% cap reduction / Allowance 75%

# Cap-and-Trade

## Unique (Unresolved) Issues

- Leakage (i.e., transfer of jobs and carbon emissions out of California to jurisdictions with lower environmental standards)
- Banking of allowances
- Auction reserve price, limits on sales and purchases
- “Going it alone” – WCI
- Purchases solely to retire allowances



# CARB's Projected Economic Benefits in 2020

- Increased economic production of \$33 Billion
- Increased overall gross State product of \$7 Billion
- Increased overall personal income by \$16 Billion
- Increased per-capita income of \$200
- Increased jobs by more than 100,000
- Compare the environmental and public health costs of inaction (reduced snowpack, increased forest fires, increased health costs, rising sea level, increased flood protection costs, etc.)



Scoping Plan, IE/08, ES-8-9; Appendix G

# Industry's Projected Economic Losses from AB-32

- Loss of more than \$182.6 billion in gross State output
- Equivalent of more than 1.1 million jobs lost
- Annual increased costs per household of \$3,857
- Annual increased costs per small business of \$49,691



Varshney & Associates, Cost of AB 32 of California Small Business, Summary report of Findings, June 2009

## Projected Costs

### Model Results for Year 2020

	<b>ARB</b>	<b>CRA International</b>	<b>Tanton</b>
Specified Emissions Reduction	25%	25%	25%
Allowance Price Range	-	\$52-\$78	\$20, \$60, \$200 (assumed)
Gross State Product (% change)	-0.2 to -1.4	-1.4 to -2.2	-2.0
Income Gain (+) or Loss (-) per household	+\$86 to - \$270	-\$1175 to -\$1380	-\$930, -\$2800, and -\$9330  for allow prices of \$20, \$60, and \$200
Jobs Gained (+) or Lost (-) (thousands)	+10 to -320		-162, -485, -1617  for allow prices of \$20, \$60, and \$200

Revised Appendix – Comments by the Economic Impacts Subcommittee of the Economic and Allocation Advisory Committee

# Legislative/Legal Challenges to AB-32

- Proposition 23 on November 2010 ballot
- *Association of Irrigated Residents, et al. v. California Air Resources Board, et al.*, Superior Court of California, County of San Francisco Case No. CPF-09-509562
- *Association of Irrigated Residents, et al. v. California Air Resources Board, et al.*, California Court of Appeal, 1<sup>st</sup> Appellate District, Division 3, Case No. A132165

# Conclusion/Q&A

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## How to Avoid Hearing the Clang of the Jail Cell Door

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London



Los Angeles



New Orleans



New York



Sacramento



San Francisco



Washington, DC

*If I only knew then what I know  
now...*



# What to Know About “Knowing”

- Felony versus Misdemeanor
  - Felony → “Knowing”
  - Misdemeanor → “Negligence” or Strict Liability

# Welcome to the World of Criminal Law

- Substantive environmental crimes are just the beginning
- Environmental crime investigations often lead to non-environmental crime charges, including:
  - conspiracy
  - false statements
  - Obstruction

# Conspiracy



# False Statement



# Obstruction/Tampering with Evidence



# Collateral Consequences of Felony Conviction

# Company Liability for Acts of Employees

- Federal Law:
  - If crime committed by employee (1) acting within scope of employment and (2) with at least some intent to benefit the Company, Company is criminally responsible
  - EVEN if action violated Company policy

# Company Liability for Acts of Employees

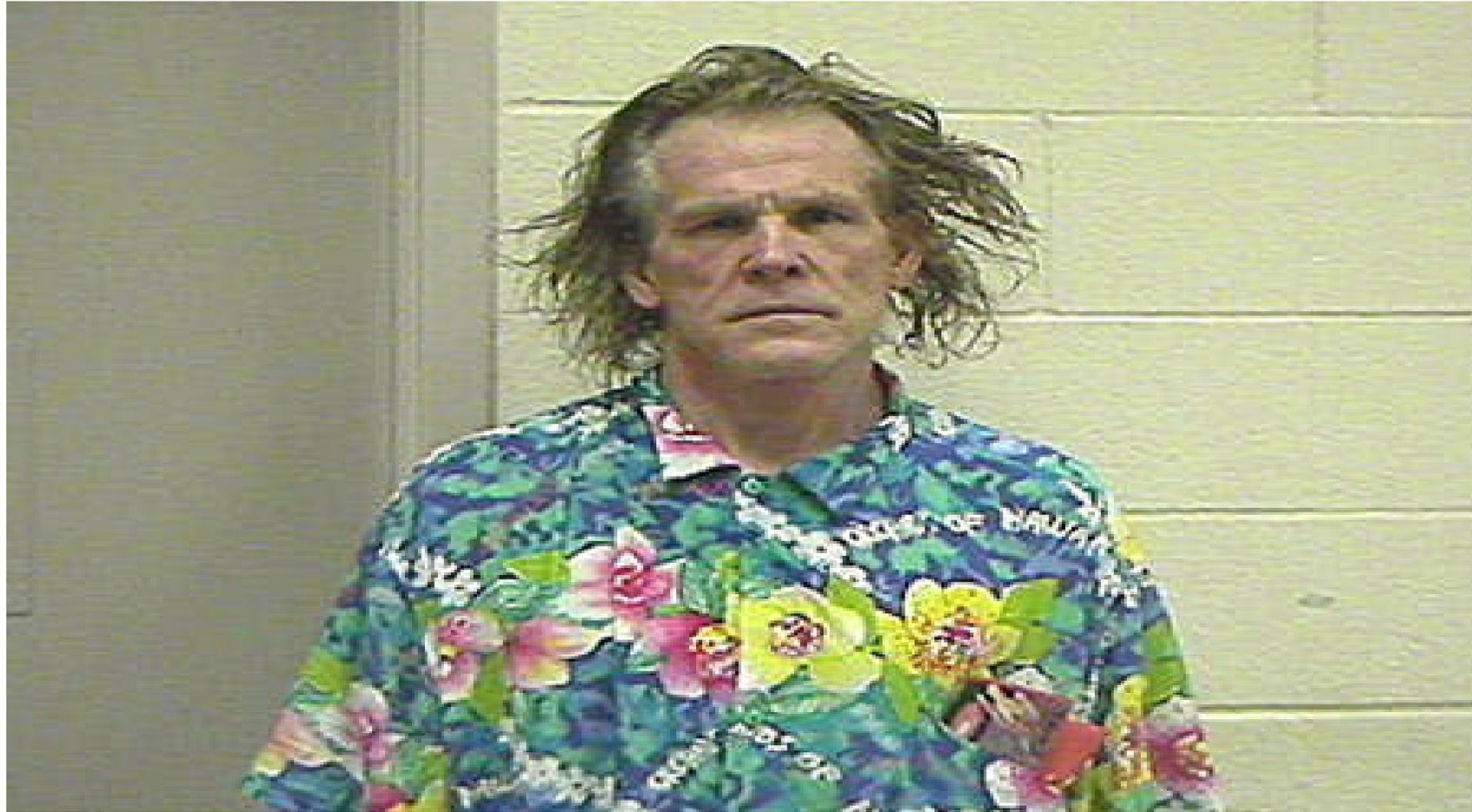
- State Law
  - Similar Concepts although slightly more for State to convict:
    - A corporation/company can be criminally responsible for an offense performed by an agent acting on its behalf and within the scope of his office/employment - but for a felony, only if its commission was authorized or recklessly tolerated by (i) a majority of the governing board, or (ii) a high managerial agent
    - “High managerial agent”
    - Affirmative defense

# Company Liability for Acts of Employees

- Sometimes, employees can be a little *too* helpful...



# It's Not Always the Other Guy ...



# Criminal Liability of Individuals

## John Littlehale

- **VP of Manufacturing for Multi-Color Corporation**
- Violated **Clean Air Act** by making **False Statements** to investigators
- 18 months prison
- **Plant Manager** – received 6 months House Arrest + 5 years probation for **Failure to Report False Statement**

# Criminal Liability of Individuals

## James Schaubach

- President of asbestos abatement firm
- Convicted of **Conspiracy to Defraud** EPA by falsely certifying workers training
- 21 FCI + \$1.5M fine + 3 years Supervised Release

# Criminal Liability of Individuals

## Donald Spencer

- President of Oregon company in 2008 who had authority to exercise control over the handling of waste and used oil at a plant and failed to insure adequate controls
- 6 months FCI + 1 year Supervised Release

# Criminal Liability of Individuals

- Direct Liability
  - Can be directly liable for conduct you engage in or direct others to engage in
- Responsible Corporate Officer/High Managerial Agent
  - Essentially, anyone in a supervisory capacity can be personally liable:
    - If become aware of violation, have authority to control it, and don't take steps to intervene and remedy it, OR
    - If have duty to implement preventative measures to ensure that violations won't occur and fail to do so
  - “Willful blindness”

# Trends and Developments in Criminal Enforcement

# State Enforcement is Expanding

- TCEQ and the Travis County District Attorney's office created an environmental crimes prosecutor position in November 2009
  - Most crimes under the Texas Water Code and the Texas Health and Safety Code provide for venue in Travis County
- Some counties have dedicated environmental crimes divisions
- “Book ‘em, Danno!”

# Federal Enforcement is Ramping Up

- EPA Criminal Investigation Division/  
Region 6 Office of Regional Counsel  
focusing more on individuals for leverage  
on companies
- EPA now has a Most Wanted Fugitives list  
just like FBI



# WANTED



by the  
U.S. Environmental Protection Agency  
CRIMINAL INVESTIGATION DIVISION

Name: Baggett, Larkin  
Alias:  
Sex: Male  
Race: White  
Date of Birth: 04/12/1955  
Place of Birth:  
Height: 5'10"  
Weight: 260 lbs  
Eyes: Green  
Hair: Brown  
Scars/Tattoos:  
FBI #: 678691TC3  
NIC #: W984245199  
Last Known Address: Salt Lake City, Utah



#### Case Summary:

- Baggett, owner and operator of Chemical Consultants Inc., was charged in the District of Utah.
- Baggett's alleged violations include:
  - Illegally treating and disposing of hazardous waste
  - Illegally discharging acidic chemical wastes into a sewer system
- Baggett fled the jurisdiction prior to trial.
- Baggett remains at large and is believed to be in Utah. Due to the large amount of weapons in his possession at the time of his arrest, he may be armed and dangerous.

Anyone with information regarding this fugitive should contact the U. S. Environmental Protection Agency, Criminal Investigation Division - Salt Lake City, Utah office at: 1-801-524-5173 or complete the form located at: <http://www.epa.gov/compliance/criminal/fugitives/report-location-form.html>

U.S. EPA/CID Wanted Poster November 1, 2008

[www.epa.gov/fugitives](http://www.epa.gov/fugitives)



# WANTED



by the

## U.S. Environmental Protection Agency's CRIMINAL INVESTIGATION DIVISION

Name: Yousef Ishaq Abuteir  
Alias: Joseph Abuteir, Mike Abuteir  
Mik Abuteir, Pa Abuteir  
Sex: Male  
Race: White  
Date of Birth: 05/29/1958  
Place of Birth: State of Israel  
Height: 5' 08"  
Weight: 160 lbs  
Eyes: Green  
Hair: Black  
Scars/Tattoos: Unknown  
FBI #: 53083TCO  
NIC #: W545936383  
Last Known Address: Mossy Elm Ct; Houston, TX



### Case Summary:

- Abuteir was charged in the State of Texas on multiple counts for the blending of motor fuel, engaging in motor fuel tax scheme and evading State of Texas motor fuel taxes. He was also indicted in the Southern District of Texas for conspiring to evade federal fuel excise taxes.
- A plea agreement was reached on April 14, 2008, for his role in conspiring to evade federal fuel excise taxes.
- In December 2008, Abuteir was found guilty by a jury in the State of Texas, but fled prior to being sentenced.
- Abuteir failed to appear for several scheduled federal and state court hearings which resulted in the issuance of both state and federal arrest warrants.
- **Abuteir is known to carry a weapon at all times.**
- Abuteir currently is a fugitive. He was last seen in Houston, Texas, but could be in Mexico or Israel.

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Anyone with information regarding this fugitive should contact the U.S. Environmental Protection Agency, Criminal Investigation Division Dallas, Texas at: 1-214-665-6600 or complete the form located at:  
<http://www.epa.gov/compliance/criminal/fugitives/report-location-form.html>

U.S. EPA/CID Wanted Poster June 7, 2010

[www.epa.gov/fugitives](http://www.epa.gov/fugitives)

# Criminal Law 101

- Emails
- When confronted by inquisitive investigators
- When they want to search

# Conclusion/Q&A

## **Charley Davidson**

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