

EPA's Clean Air Act Watch List

In early November, for the first time, the U.S. Environmental Protection Agency (EPA) disclosed portions of its Clean Air Act (CAA) Facility Watch List Management Tool (CAA Watch List).¹ The CAA Watch List contains the names and locations of 464 facilities that EPA believes committed “high priority violations” of the Clean Air Act.² The CAA Watch List is available [here](#). Among the 464 facilities on the CAA Watch List, 380 are power plants, refineries, chemical plants, or other industrial facilities. Approximately half of these 380 industrial facilities are located in the following six states: Illinois, Indiana, Louisiana, Ohio, Texas, and Wisconsin.³

The CAA Watch List is important to the regulated community for three reasons. First, it may provide some additional insight into EPA's enforcement priorities. Second, we would expect environmental groups to scrutinize facilities on the list carefully as they consider potential citizen action suits. Third, the list may also provide fodder for plaintiffs' attorneys seeking to bring toxic tort suits.

EPA created the CAA Watch List in 2004 “[t]o enhance the enforcement program's ability to identify and track facilities with serious CAA ... violations but no apparent formal [federal or state] enforcement responses.”⁴ EPA now generates monthly versions of the list based on the Agency's “best available data.”⁵ According to Cynthia Giles, EPA Assistant Administrator for the Office of Enforcement and Compliance Assurance, EPA intends to begin making the CAA Watch List directly available to the public by the end of 2011.⁶

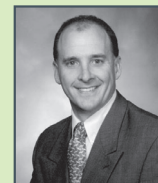
The criteria for being placed on the CAA Watch List are two-fold. First, the facility must be suspected of a “high priority violation” (HPV).⁷ EPA's HPVs policy ([located here](#)) divides HPVs into ten categories:

- 1 EPA, Clean Air Act Facility Watch List Management Tool (2011), available at http://cloudfront-files-1.iwatchnews.org/documents/EPA_watchlist_data.xls.
- 2 EPA, Fact Sheet: Watch List Management Tool 1 (2011), available at <https://s3.amazonaws.com/s3.documentcloud.org/documents/263230/watch-list-fact-sheet.pdf>.
- 3 Elizabeth Shogren, *Secret 'Watch List' Reveals Failure to Curb Toxic Air*, NPR (Nov. 7, 2011), <http://www.npr.org/2011/11/07/142035420/secret-watch-list-reveals-failure-to-curb-toxic-air?sc=17&f=1001>.
- 4 Office of Enforcement & Compliance Assurance, EPA, Reevaluation of the Use of Recidivism Rate Measures for EPA's Civil Enforcement Program 32 (2008), available at <http://epa.gov/oecaerth/resources/reports/compliance/research/recidivism.pdf>.
- 5 Fact Sheet, *supra* note 2, at 1.
- 6 See Shogren, *supra* note 3. It is unclear whether this intention extends to disclosing EPA's similar lists for certain violations of the Clean Water Act and the Resource Conservation and Recovery Act.
- 7 See Fact Sheet, *supra* note 2, at 1.

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- (1) Failure to obtain permits for a new or “modified” facility under the New Source Review (NSR) or Prevention of Significant Deterioration (PSD) regimes;
- (2) Violation of National Emissions Standards for Hazardous Air Pollutants (NESHAPs);
- (3) Violation of a synthetic minor source’s emission limits or permit conditions;
- (4) Violation of a substantive term of a local, state, or federal order, consent decree or administrative order;
- (5) Substantial violation of Title V certification obligations, including a failure to submit a certificate;
- (6) Substantial violation of the facility’s obligation to submit a Title V permit application;
- (7) Violations regarding testing, monitoring, record keeping, or reporting that substantially interfere with enforcement or with determining the source’s compliance with emission limits;
- (8) Violation of an emission test detected during a reference method stack test;
- (9) Other CAA violations by “chronic or recalcitrant violators” that are not individually considered HPVs, but collectively cause EPA and the state to agree to elevate the facility to HPV status; and
- (10) Substantial violations of CAA Section 112(r) (relating to prevention of accidental releases of hazardous air pollutants).⁸

It is worthwhile for companies who appear on the list to evaluate whether they fit within one of these categories, or whether it might be possible to be removed based on an erroneous listing. The second criterion is that nine months after the discovery of the facility’s alleged HPV no federal or state enforcement action has commenced.⁹

If monthly versions of the CAA Watch List become available, this might provide an additional means to track EPA’s enforcement trends, even prior to filing of enforcement actions or announcement of settlements.

The current CAA Watch List reinforces the conclusion that EPA has been focused on three particular enforcement areas that were highlighted in the Agency’s 2011-2013 multimedia National Enforcement Initiatives:

First, EPA is continuing to focus on large sources of air pollutants that are in alleged noncompliance with NSR/PSD permitting requirements. This has been a priority for many years. EPA has identified in its National Enforcement Initiatives the coal-fired utility, cement, glass, and acid sectors for particular attention.¹⁰

Second, EPA is continuing to increase its focus on facilities that emit excess hazardous air pollutants subject to NESHAPs, with a “particular emphasis [on] problems affecting local communities that are disproportionately impacted by pollution,” “including urban minority and low-income communities.”¹¹ EPA does not have nearly the extent of cases in this area as in the NSR/PSD area, and one might expect the trend in focus on NESHAPs to continue upward. Significantly, these are also the kinds of issues that often result in scrutiny from environmental groups considering citizen action suits and from plaintiffs interested in parallel toxic tort claims. Although organizations with facilities on the CAA Watch List may be most immediately concerned with the possibility of regulatory enforcement, attention to the potential for collateral plaintiffs’ claims may be warranted in determining an appropriate course of action.

Third, although not specific to listed HPV categories, the National Enforcement Initiatives identifies the energy extraction sector, and particularly refers to “new techniques” (such as hydraulic fracturing) for oil and gas extraction and coal mining, which pose a “risk for pollution of air, surface

⁸ EPA, The Timely and Appropriate (T&A) Enforcement Response to High Priority Violations (HPVs) 4-5 (1998), available at <http://www.epa.gov/compliance/resources/policies/civil/caa/stationary/issue-ta-rpt.pdf>.

⁹ See FACT SHEET, *supra* note 2, at 1; Jim Morris, *EPA’s Internal Clean Air Act “Watch List”*, IWATCH NEWS (Nov. 8, 2011 10:30 AM), <http://www.iwatchnews.org/2011/11/03/7280/epas-internal-clear-air-act-watch-list>.

¹⁰ EPA, National Enforcement Initiatives for Fiscal Years 2011-2013, EPA: Data, Planning and Results, <http://www.epa.gov/compliance/data/planning/initiatives/initiatives.html>.

¹¹ *Id.*

waters and ground waters if not properly controlled.”¹² These activities might be especially prone to inclusion on the CAA Watch List, where such air emissions concerns might arise.

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¹² *Id.*