

CURRENT & EMERGING ENVIRONMENTAL LAW ISSUES

Presented by Steptoe & Johnson LLP



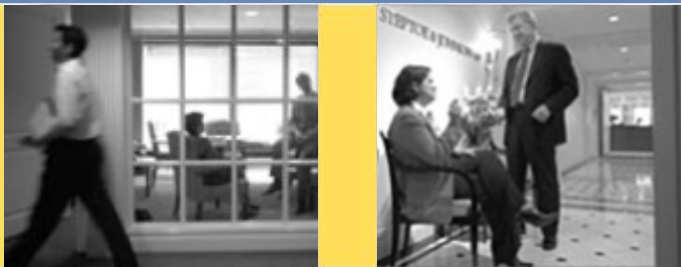
STEPTOE & JOHNSON LLP

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December 7, 2006

PROVEN STRATEGIES FOR WORKING WITH ENVIRONMENTAL AGENCIES, THE MEDIA AND ADVERSARY GROUPS

Presented by James Derouin



STEPTOE & JOHNSON LLP

How to Get What You Want

Dealing with the Government, the
Media and Your Opponents

Truth About the Government

- Government has more money.
- Government has more power.
- Government does not work for us.
- Government does not empathize with us.

So . . . should you deal with the
government?

Do you have a choice?

Of course not.

Fact: Government has what you want.

Object: To get the government to give you what you want.

How to Get the Government to Give You What You Want

- Demonstrate seriousness of purpose.
- Make good offers--avoid traditional negotiating ploys and conventional negotiating tactics.
- Be patient.
- Be respectful.
- Don't be a "bully," you lose.
- Be persistent.
- Be firm, but rational.
- Don't promise what you can't produce.
- Keep your promises.
- Tell the truth.
- Admit error.

How to Get the Government to Give You What You Want (cont.)

- Don't represent information as facts until you know that they are the facts.
- Tell them what you need.
- Figure out what they need.
- Agreements are based on what each side needs, not on what they ideally want.
- Recognize nature of the social compact—the Great Compromise.
- If the government trusts you, your job is easier.
- The key to getting what you want is to get the government to trust you.

Truth About the Press

- Press is interested in selling papers.
- Press does not know your business.
- Press loves tree huggers.
- Press distrusts business.
- Press buys its ink by the barrel.

So . . . should you talk to the
Press?

Absolutely. You don't have a
choice.

Why You Should Deal with the Press

- The story will be 100% against you if you do not talk to the press.
- “No comment” = nolo contendere guilty plea.
- You are only as strong with the agency as you are with the public.
- You communicate with the public through the media.
- Your strongest point is the one you can make absolutely in an unqualified fashion.

How to Deal With the Press

- Talk to the press.
- Tell the truth.
- Be accessible.
- Help them do their job.
- Simplify the story.
- Tell the good and the bad.
- Be an advocate.

Truth About Opponents

- They dislike you.
- They distrust you.
- They distrust government.
- They are disorganized.
- Their ideas are generally disorganized.
- They want to be considered.

- So . . . should you deal with your opponents?
- Absolutely.

Why You Should Talk to Your Opponents

- They are important to you.
- They are important to the government.
- They are important to the press.
- They want to be relevant.
- They usually want mitigation and not extinction.

How to Deal with Opponents

- Talk to them—separate the curds from the whey.
- Tell the truth.
- Listen
- Be accessible.
- Simplify.
- Tell the good with the bad.
- Be an advocate.

What Do You Want?

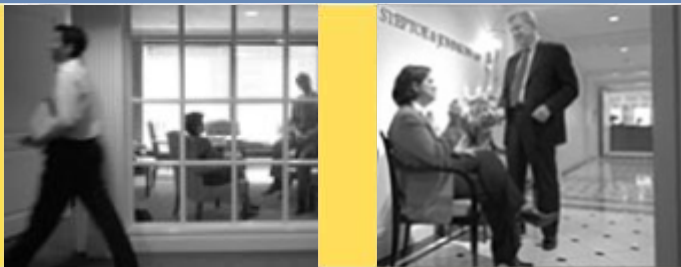
- Your permit/settlement

or

- To tell everyone to go to Hades

CURRENT ISSUES IN AIR QUALITY AND HAZARDOUS WASTE

Presented by Mark Freeze



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December 7, 2006

NAAQS

- CAA directs EPA to issue national air quality criteria for those air pollutants that it deems widespread and harmful.
- EPA has designated six criteria pollutants for which it has established National Ambient Air Quality Standards:
 - Carbon monoxide;
 - Ozone;
 - Nitrogen dioxide;
 - Particulate matter;
 - Sulfur dioxide; and
 - Lead.

NAAQS (continued)

- States are required to designate areas as either attainment or nonattainment for the NAAQS.
- States develop a plan for achieving the NAAQS: State Implementation Plan (SIP).
- Additional federal requirements exist for nonattainment areas.

Revised PM NAAQS

- January 17, 2006. Proposed Rule
 - Lower standards for PM_{2.5} averaged over 24 hours from 65 micrograms per cubic meter to 35.
 - Maintain standard for PM_{2.5} averaged on an annual basis at 15 micrograms per cubic meter.
 - New standard for PM₁₀ averaged over 24 hours of 70 micrograms per cubic meter to apply only in urban areas. Replaces standard for PM₁₀ averaged on an annual basis of 50 micrograms per cubic meter and averaged on a daily basis of 150 micrograms per cubic meter.

Revised PM NAAQS (continued)

- EPA Publishes Final Rule on October 17, 2006
 - Drops revision to PM₁₀ standard averaged over 24 hours.
 - Keeps revision to PM_{2.5} averaged over 24 hours.
 - Drops standard for PM₁₀ averaged annually.

Ozone Standard

- Current standard – .08 ppm averaged over 8 hours.
- EPA must decide by the end of 2007 whether to revise ozone standard under a consent order.
- July 25, 2006 – EPA office of Air & Radiation recommends considering lowering standard to .07 ppm averaged over 8 hours.
- August 25, 2006 – Federal Advisory Panel, Clean Air Scientific Advisory Committee, calls for revising standard to no more than .07 ppm. Panel also recommends consideration of .055 or .060 ppm averaged over 8 hours.

MAG PM-10 5% Plan

- Maricopa County is non-attainment for 24 hour PM-10.
- Exceedances have increased significantly from 1 in 2004 to 19 in 2005. There were 15 exceedances in the first half of 2006.
- MAG designated by Governor in 1978 to serve as Regional Air Quality Planning Agency to address attainment issues.

MAG PM-10 5% Plan (continued)

- Required by CAA Section 189(d).
- Due to EPA by December 31, 2007.
- 5% reduction in emissions per year until PM-10 standard is attained.
- 3 years of clean data needed at all PM-10 monitors to attain the standard.

MAG PM-10 5% Plan (continued)

- February – March, 2007 – Suggested list of measures for consideration.
- June 2007 – Commitment to implement measures.
- September 2007 – Document available.
- October 2007 – Public hearing.

The New Source Review Program

- Applies in attainment and nonattainment areas.
- To prevent deterioration of air quality in attainment areas, and to better achieve attainment in nonattainment areas.
- PSD Program and Nonattainment Area Permitting Program.
- Preconstruction Review.

PSD Program

- Applicability – Major Source and Major Modification
- Major Source
 - 100 tpy if one of listed sources.
 - Otherwise, 250 tpy.
 - PTE – source’s maximum capacity to emit under physical and operational design.
 - Take into account limitations enforceable as a practical matter, including pollution control equipment.

PSD Program (continued)

- Major Modification

- Physical change or change in method of operation.
- Resulting in significant net emissions increase.
- Does not include routine maintenance, repair and replacement.

PSD Program (continued)

- Net Emissions Increase
 - Two step process. First – emissions increase from project.
 - Projected actual less baseline actual.
 - Based on tpy.
 - Second step includes contemporaneous and creditable prior increase/decreases.
- Significant
 - Set for each pollutant.
 - If none set, any increase is significant.
 - Not significant if aggregate of contemporaneous and credible increases/decreases at source offsets increase to below significance (netting).

PSD Program (continued)

- Allowable Increments
 - Sets allowable degradation of air quality in area.
 - Depends on classification.
 - Set only for PM₁₀, SO₂, NO₂.
- Best Achievable Control Technology (BACT)
 - For each pollutant for which PTE is significant.
 - “Maximum degree of [emission] reduction . . . taking into account energy, environmental, and economic impacts and other costs . . . [that] is achievable.
 - Case-by-case determination.

Nonattainment Area Permitting

- Major source thresholds are decreased.
- Significance levels are decreased.
- Lowest Achievable Emission Rate (LAER).
- Emissions offsets apply.

Measuring Increase in Emissions

- NSR – focuses on increase in annual emissions.
- NSPS – focuses on increase in hourly rate of emissions.
- U.S. v. Duke Energy (4th Cir. June 15, 2005) EPA must use same definition of modification for NSR and NSPS (increase in hourly rate).
- Proposed Rule. October 20, 2005. To establish hourly emissions test for NSR for Electric Generating Units.

Measuring Increase in Emissions (continued)

- May 15, 2006 – Supreme Court agreed to hear Duke case.
- July 21, 2006 – EPA brief in Duke case makes 4th Circuit jurisdiction a major argument.
- August 17, 2006 – 7th Circuit rules that EPA could properly adopt annual emissions test for NSR U.S. v. Cinergy Corp.
- August 18, 2006 – EPA sends draft regulatory language of rule adopting hourly emissions test for power plants to OMB for review.
- November 1, 2006 – Arguments in Duke case heard by Supreme Court.

Debottlenecking, Aggregation and Project Netting

- Proposed Rule – September 14, 2006.
- Comment Period Closed – November 13, 2006.
- Agency looks to finalize by May 2007.

Debottlenecking, Aggregation and Project Netting (continued)

- Debottlenecking
 - Occurs when change to one unit at a source removes a limitation that had constrained another unit.
 - Currently, emissions increase includes those units not changed that experience emissions increase as a result of the change.
 - Presumption that increases at bottlenecked unit are caused by the project.
 - New preferred approach – include only if upstream/downstream sources exceed permit limits (cause attributed to initial permitting actions).

Debottlenecking, Aggregation and Project Netting (continued)

- Aggregation
 - Whether multiple projects occurring over a period of time shall be treated as a single project.
 - Not currently addressed in statute or rules.
 - To clarify EPA position on aggregation. Many thought timing a decisive factor.
 - Timing alone is not conclusive.

Debottlenecking, Aggregation and Project Netting (continued)

- Aggregation (continued)
 - Projects are aggregated if technically or economically dependent on another project.
 - Technical dependence = where one project is incapable of performing as planned in the absence of the other project.
 - Economic dependence = focuses on whether each project would be economically viable without the other.
 - EPA solicits comments on timing presumptions.

Debottlenecking, Aggregation and Project Netting (continued)

- Netting
 - Current Test For Significant Increase:
 - First step – evaluate emission increase from project. If significant, proceed to Step 2.
 - Second step – consider contemporaneous increases and decreases to determine if significant.
 - New netting procedure would consider emissions decreases from the project in the First Step.

Equipment Replacement Rule

- Routine maintenance, repair and replacement not defined in statute or regulations.
- Determined on a case-by-case basis using a four factor test:
 - 1) nature and extent;
 - 2) purpose;
 - 3) frequency; and
 - 4) cost, plus other factors as appropriate.

Equipment Replacement Rule (continued)

- The following types of changes are not routine:
 - Replacement of components with new or different design;
 - Increases, in heat, work, or production rates;
 - Changes that increase working life of equipment beyond original specifications;
 - Changes that restore lost capacity, e.g., eliminate “wear and tear” loss that would normally not be fixed or repaired in the industry; and
 - Changes that eliminate previously unavoidable down time or eliminate a bottleneck.

Equipment Replacement Rule (continued)

- 68 FR 61248 (October 27, 2003)

Qualifies if:

- 1) Involves replacement of component of a process unit with component that is identical or serves same purpose;
- 2) Costs do not exceed 20% of replacement value of process unit;
- 3) Replacement does not alter basic design parameters of process unit; and/or
- 4) Replacement does not cause unit to exceed emissions limit that applies and is legally enforceable.

Equipment Replacement Rule (continued)

- Effectiveness ordered stayed by D.C. Circuit. December 24, 2003.
- D.C. Circuit invalidates equipment replacement rule. March 17, 2006. *New York v. EPA*.
 - Violates statutory language that states that “modification” includes “any physical change.”
 - Rehearing en Banc denied June 30, 2006.

Maricopa County Notice of Deficiency

- June 2, 2005 – EPA publishes Notice of Deficiency for CAA Title V operating permits program for Maricopa County.
- October 20, 2006 – MCAQD submits response to Notice of Deficiency. This includes Interim Guidance Document for Title V Permit Revisions.
- November 9, 2006 – EPA announces that Maricopa County has corrected the deficiencies. Notice of Deficiency is withdrawn.

Maricopa County Notice of Deficiency

- Interim Guidance Document
 - 40 CFR § 51.160 requires SIPs to contain minor source NSR requirements.
 - Current MCAQD Rule 210 allows minor permit revision process unless modification increases PTE by “significant” amount.
 - The significance levels are for major source NSR.

Maricopa County Notice of Deficiency

- Interim Guidance Document
 - Requires pre-construction review for various changes.
 - Including, changes that install, repair or replace equipment with potential emissions without controls greater than .5 tpy of any HAP and 2 tpy of any other air pollutant.

HAPS Program

- Those pollutants known or suspected to cause cancer or other serious health effects.
- Congress listed 189 pollutants as HAPs in 1990.
- Major Source – emits or has potential to emit at least 10 tpy of any HAP, or at least 25 tpy of any combination of HAPs.
- An Area Source is a stationary source that is not a Major Source.

HAPS Program (continued)

- EPA must publish a list of source categories and promulgate emission standards for each source.
- Major Sources must meet MACT.
- Area Sources must meet GACT.

HAPS Program (continued)

- EPA finished work on major sources in 2004.
- For Area Sources, EPA has issued standards for only 16 out of 70 source categories.
- EPA was required by the CAA to issue the standards for Area Sources by December 15, 2000.
- In March, a federal court ordered EPA to issue standards for the first four area sources by December 15, 2006 and to continue on a schedule every six months until completion by June 15, 2009.
- October 6, 2006 – EPA published proposed rule for 4 area sources.

Arizona HAPs Program

- Final Rulemaking – June 6, 2006.
- Effective Date – January 1, 2007.
- Does not apply to major sources subject to Federal MACT standards or minor sources subject to federal GACT standards.
- Similar in structure to NSR program.
- Uses list of federal HAPs; no new state HAPs.

Arizona HAPs Program (continued)

- Applies to all new major sources with PTE of 10 tpy of a single HAP, or 25 tpy of a combination of HAPs.
- Applies to new minor sources in specified source categories with PTE of 1 tpy of a single source, or 2.5 tpy of a combination of HAPs.
- Applies to modifications that increase emissions of a HAP by more than a de minimis amount.
- There are 25 minor source categories.

Arizona HAPs Program (continued)

- Major sources must comply with Arizona MACT.
- Minor sources must comply with HAP RACT.
- Will not have to comply if RMA demonstrates that imposition of control technology is not necessary to avoid adverse effects to health or environment.

Arizona HAPs Program (continued)

- April 26 – Passage of SB 1356. Bill required that in order to establish an amount as de minimis, ADEQ must find that the de minimis amount itself causes adverse effects.
- May 2 – Governor vetoes legislation.

Greenhouse Gases

- CAA Section 202 provides:

The administrator shall by regulation . . . prescribe . . . standards applicable to the emission of any air pollutant from . . . new motor vehicles . . . which in his judgment, cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

Greenhouse Gases (continued)

- CAA defines “air pollutant” as
Any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.

Greenhouse Gases (continued)

- 1999 – Several environmental groups file administrative petition requesting EPA to establish motor vehicle emissions standards for carbon dioxide and three other greenhouse gases.
- September 8, 2003 – EPA denies petition. It states that it does not have such authority, and that even if it did, it would not set a standard for various policy reasons.
- 16 states (including Arizona) and several environmental groups appealed the denial of the petition directly to the D.C. Circuit Court of Appeals. *Massachusetts v. EPA*.

Greenhouse Gases (continued)

- D.C. Circuit avoids jurisdiction question and question of authority to regulate. Holds that statute gives EPA discretion, which EPA properly exercised.
- Concurring Opinion – no jurisdiction. Cannot show injury, causation and redressability.
- Dissent. Jurisdiction present. EPA has the authority to regulate. EPA failed to offer a lawful reason not to regulate, which must be based on endangerment.

Greenhouse Gases (continued)

- June 26 – Supreme Court agrees to review.
- Opening briefs filed August 31.
- Oral argument on November 29.
- Decision expected – Spring 2007.

California Global Warming Solutions Act

- Signed by Governor on September 27.
- Administered by State Air Resources Board.
- Greenhouse gas includes carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.
- Greenhouse gas emission source – a source or category of sources whose emissions are at a level of significance, established by the State Board, that its participation in the program will enable the State Board to effectively reduce emissions and monitor compliance.

California Global Warming Solutions Act (continued)

- Emissions Reporting
 - State Board to adopt regulations by January 1, 2008.
 - Regulations must require the monitoring and annual reporting of greenhouse gas emissions from greenhouse gas emission sources.
 - Focus first on sources or categories of sources that contribute the most to statewide emissions.

California Global Warming Solutions Act (continued)

- Statewide Emissions Limit
 - To be established by State Board by January 1, 2008.
 - Determine what statewide greenhouse gas emissions level was in 1990.
 - Approve a statewide emissions limit equal to that level to be achieved by 2010.

California Global Warming Solutions Act (continued)

- Greenhouse Gas Emissions Reductions
 - On or before January 1, 2011.
 - To become operative January 1, 2012.
 - Adopt annual emissions limits expressed in tons of carbon dioxide equivalents.
 - Adopt emission reduction measures.
 - May adopt a regulation that establishes a system of market-based declining annual aggregate emission limits for sources or categories of sources, applicable from January 1, 2012 to December 31, 2020.
 - Any violation of a rule, regulation, order, emission limitation, emission reduction measure may be enjoined and is subject to penalties (fines and/or imprisonment).

Arizona CCAG

- February 2, 2005 – Executive Order 2005-02 establishes Climate Change Advisory Group to provide recommendations for reducing greenhouse gases.
- August 30, 2006 – CCAG submits Climate Change Action Plan to Governor.
 - Recommends comprehensive set of 49 policy options:
 - 5 general;
 - 12 for residential, commercial, industrial and waste management sectors;
 - 8 for energy supply sector;
 - 13 for transportation sector; and
 - 11 for agriculture and forestry sector.

Arizona CCAG (continued)

- September 7, 2006. Executive Order 2006-13
 - Sets goal to reduce GHG emissions in Arizona to 2000 level by 2020 and to 50% below 2000 level by 2040.
 - Adopts some of recommendations.
 - Establishes Climate Change Executive Committee to recommend strategies for implementing recommendations.

Arizona CCAG (continued)

- Executive Order 2006-13 (continued)
 - Directs ADEQ to develop an emissions reporting mechanism.
 - Directs ADEQ to establish a GHG Registry to enable tracking, management, crediting and baseline protection for entities in Arizona that reduced GHG emissions.
 - Directs ADEQ to adopt and implement the Clean Car Program (California LEV II Program).

Arizona CCAG (continued)

- Executive Order 2006-13 (continued)
 - Directs ADEQ and ADWM to develop standards for neat biodiesel, biodiesel blends, and ethanol blends sold in Arizona.
 - Directs ADOT to develop pilot program allowing hybrid vehicles to drive in HOV lanes.
 - Beginning January 1, 2007, all state agencies shall purchase only hybrids, vehicles that meet low GHG emission standards, or vehicles that use low GHG alternative fuels.

Greenhouse Gases

- Prospects for federal legislation.
 - Multiple bills already.
 - Barbara Boxer (California) – Senate Environment and Public Works.
 - Jeff Bingaman (New Mexico) – Senate Energy and Natural Resources.
 - John Dingall (Michigan) – House Energy and Commerce Committee.

Most Frequently Cited RCRA Violations

- 1. Failure to Make a Waste Determination
 - All persons that generate a solid waste must make this determination.
 - This includes conditionally exempt small quantity generator.
 - Process for determination:
 - Is waste a solid waste?
 - Is waste excluded solid waste?
 - Is solid waste a listed hazardous waste?
 - Is solid waste a characteristic hazardous waste?

Most Frequently Cited RCRA Violations

- 1. Failure to Make a Waste Determination
(continued)
 - ❑ Requirement has been enforced whose waste was determined not to be hazardous.
 - ❑ The first three determinations should be based on knowledge.
 - ❑ The fourth determination may be based on testing or process knowledge.
 - ❑ Must keep a record of determinations for three years from when the waste was last sent for treatment, storage or disposal.

Most Frequently Cited RCRA Violations

- 2. Satellite Accumulation
 - Generators must meet several requirements regarding hazardous waste accumulation, including:
 - Time limit (90 days for LQG and 180 days for SQG);
 - Dating;
 - Preparedness, prevention and control plan requirements;
 - Personnel training; and
 - Inspections.

Most Frequently Cited RCRA Violations

- 2. Satellite Accumulation (continued)
 - Generator may accumulate up to 55 gallons in containers at or near any point of generation where waste initially accumulates, which is under control of operator of process generating the waste.
 - Does not have to comply with accumulation requirements, but must:
 - Mark containers as hazardous waste or words identifying their contents;
 - Container must be in good condition;
 - Waste compatible with container; and
 - Must be closed except when necessary to add or remove waste.

Most Frequently Cited RCRA Violations

- 2. Satellite Accumulation (continued)
 - For any amounts in excess of 55 gallons, must comply with accumulation requirements within three days.
 - Must date the excess with the date that the excess amount began accumulating.

Most Frequently Cited RCRA Violations

- 3. Wastewater Treatment Unit
 - Exemption designed to avoid duplicative control standards under both RCRA and the CWA.
 - The requirements of Parts 264, 265 and 270 do not apply to the owner or operator of a wastewater treatment unit.
 - 264 – Standards for Owners/Operators of TSD Facilities.
 - 265 – Interim States Standards for Owners/Operators of TSD Facilities.
 - 270 – Hazardous Waste Permit Program.

Most Frequently Cited RCRA Violations

- 3. Wastewater Treatment Unit (continued)
 - A wastewater treatment unit is a unit which:
 - Is part of a wastewater treatment facility that is subject to regulation under either Section 402 (NPDES permitting) or 307(b) (pretreatment program) of the CWA.
 - Receives and treats or shares an influent wastewater that is a hazardous waste, or generates and accumulates a wastewater treatment sledge that is a hazardous waste, or stores or treats a wastewater treatment sledge that is a hazardous waste.
 - Meets the definition of a tank or tank system.

Most Frequently Cited RCRA Violations

- 3. Wastewater Treatment Unit (continued)
 - A permitted zero discharge unit meets the definition of WWTU.
 - EPA has not promulgated a definition of “wastewater.”
 - Pursuant to guidance, wastewater is generally thought to be wastes “that are substantially water with contaminants amounting to a few percent at most.”
 - Wastewater is not concentrated chemicals.

Most Frequently Cited RCRA Violations

- 3. Wastewater Treatment Unit (continued)
 - Definition of “tank system” includes ancillary equipment.
 - “Ancillary equipment” includes any device, including pipes and pumps used to distribute the flow of hazardous waste from its point of generation to a storage or treatment tank.
 - A container used to store wastewater prior to introduction to a tank used for treating wastewater is not considered ancillary equipment. Such containers are subject to waste accumulation requirements.

Most Frequently Cited RCRA Violations

- 3. Wastewater Treatment Unit (continued)
 - ❑ Sludge removed from a WWTU that is characteristic or listed is subject to RCRA requirements.
 - ❑ WWTUs are also exempt from accumulation requirements.
 - ❑ To be eligible, a WWTU must be dedicated solely for wastewater treatment. It cannot be for dual use.
 - ❑ Tanks used to manage hazardous wastewater prior to offsite shipment are not WWTUs.
 - ❑ A tank that leaks cannot be a WWTU. This is because they would no longer be considered tanks, because tanks must “contain an accumulation of hazardous waste.”

Most Frequently Cited RCRA Violations

- 4. Elementary Neutralization Unit
 - Requirements of Parts 264, 265 and 270 do not apply to the owner or operator of an Elementary Neutralization Unit.
 - Elementary Neutralization Unit
 - Used for neutralizing wastes that are hazardous only because they exhibit the corrosivity characteristic.
 - Meets the definition of a tank, tank system, container, or transport vehicle.

Most Frequently Cited RCRA Violations

- 4. Elementary Neutralization Unit (continued)
 - To be eligible, the treated waste cannot be otherwise hazardous due either to listing or exhibiting a different hazardous characteristic.
 - Containers used to store corrosive wastewater at a facility prior to neutralization in a tank are not ENUs but are subject to RCRA standards.
 - ENUs are exempt from generator accumulation requirements.

Most Frequently Cited RCRA Violations

- 5. Other Common Violations
 - Improper disposal of MEK Cotton Swabs.
 - Improper disposal of fluorescent light bulbs.
 - Improper labeling.

What Triggers a Hazardous Waste Inspection?

- If there has been a release at a facility to which the Fire Department responded and evacuated the surrounding area, there will be a hazardous waste inspection looking into all areas of compliance.

Clean Water Act Update

Presented by David Nelson



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Clean Water Act Update – 12/7/06

■ Part 1 - Clean Water Jurisdiction

□ Post *Rapanos* and *Carabell* :

- ACOE Jurisdiction over Wetlands - CWA § 404
- EPA Jurisdiction over NPDES - CWA § 402

CWA Jurisdiction –

The Evolving Definition of Navigable Waters of United States

- **1972 – Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251, *et seq.***
 - **Requires a Permit for the Discharge of any Pollutant into Navigable Waters of the United States (CWA § § 301, 402).**
 - **Requires a Permit for the *Discharge of Dredged and Fill Material to Navigable Waters of the United States* (CWA § 404).**

CWA Jurisdiction – The Evolving Definition of Navigable Waters

- **1985 – *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).**
 - ❑ **Clean Water Act prohibits any discharge of dredged or fill materials into “navigable waters”-defined as the “waters of the United States.”-**
 - ❑ **The Corps’ regulation of wetlands adjacent to navigable waters, even if not inundated or frequently flooded by the navigable water, was reasonable under its statutory authority.**
 - ❑ **“Waters of the United States” include wetlands adjacent to, and that “actually abut,” traditional navigable waters.**

CWA Jurisdiction –

The Evolving Definition of Navigable Waters of United States

- **2001 *Solid Waste Agency of Northern Cook County (“SWANCC”) v. Army Corps of Engineers*, 531 U.S. 159 (2001).**
 - U.S. Supreme Court Rejects ACOE Wetlands Jurisdiction over Isolated Ponds Based on Presence of Migratory Birds.
 - “Water of the United States” do not include nonnavigable, isolated, intrastate waters” that do not have a “significant nexus” to a navigable waterway.
 - Post SWANCC – ACOE and EPA interpret CWA jurisdiction to be waters with “any hydrological connection” to navigable waters, including tributaries and wetlands adjacent to such waters.

CWA Jurisdiction –

The Evolving Definition of Navigable Waters of United States

- **June 19, 2006 - *Rapanos v. United States* & *Carabell v. U.S. Army Corps of Engineers*, 126 S.Ct. 2206: Supreme Court Splits 4-1-4**
 - **Five votes reject “any-hydrological connections” theory.**
 - **In *Rapanos* – wetlands were adjacent to ditch 20 miles from navigable river.**
 - **In *Carabell* – wetlands were adjacent to a ditch, but still separated from navigable waters by a berm.**
 - **Sixth Circuit ruled both were wetlands because they had a hydrological connection - via ditches, creeks, and culverts - to navigable waters.**

CWA Jurisdiction –

The Evolving Definition of Navigable Waters of United States

■ 2006 - *Rapanos v. United States*

□ *Scalia, Roberts, Alito & Thomas:*

- **Case must be remanded back to the Sixth Circuit. ACOE improperly extended navigable waters to include ditches, drains and desert washes far distant from navigable waters.**
- *Navigable waters are “[o]nly those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams, oceans, rivers, [and] lakes’” and excluding “channels, through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”*

CWA Jurisdiction – The Evolving Definition of Navigable Waters

■ 2006 - *Rapanos v. United States*

□ *Kennedy (concurring in part)*

- *Agrees with Scalia in rejecting “any-hydrological connection” theory, and also rejects ACOE’s “Ordinary High Water Mark” rule.*
- *Reiterates “significant nexus” standard recognized in the Courts earlier ruling in SWANCC.*
- *For CWA jurisdiction, navigable waters must be “substantial.” “Minor flows” and being “adjacent” to navigable waters are insufficient.*
- *Until Corps issues more specific regulations, it must establish a significant nexus on a “case by case” basis looking at such factors as volume of flow, frequency of flow, and proximity to traditional navigable waters.*

CWA Jurisdiction – The Evolving Definition of Navigable Waters

- **Rapanos Impact on Other CWA Permits.**
 - **Scalia distinguishes CWA § 404 discharges from the discharge of pollutants requiring a NPDES permit under CWA § 402, leaving EPA jurisdiction alone (for now).**
 - *“In contrast to the pollutants normally covered by the permitting requirements of 1342(a), “dredged or fill material” typically does not normally wash downstream, and thus does not normally constitute an “addition ... to navigable waters” when deposited in upstream isolated wetlands.”*

CWA Jurisdiction – The Evolving Definition of Navigable Waters

- **August 2006 – Post Rapanos:**
 - Onslaught of litigation begins– over three dozen cases filed in appellate and district courts throughout the country.
 - ***Nat. Assoc. of Home Builders v. U.S. Army Corps of Engineers*, (D.D.C.)**
 - Court remands administrative appeal back to the Corps after the Corps withdraws its decision that road side ditches are navigable waters. Corps acknowledges that *Rapanos* now requires joint rulemaking with EPA.

CWA Jurisdiction – The Evolving Definition of Navigable Waters

- ❑ ***U.S. v. Chevron Pipe Line Co.,***
(N.D. Texas - 6/28/06)
 - Chevron was not liable under the CWA because there was no “significant nexus” between an intermittent stream where oil spill took place and navigable water.
 - “Generally dry channels and creek beds will not suffice to create a significant nexus.”
- ❑ ***N. California River Watch v. Healdsburg***
(9th Cir. 8/10/06).
 - Wastewater treatment discharged to a pond adjacent to the Russian River does require a NDPES Permit. There is a significant nexus because the pond water seeps into an aquifer which then seeps into the river.

CWA Jurisdiction – The Evolving Definition of Navigable Waters

- ***Impact of Rapanos Today:***
 - **CWA § 404 jurisdiction over wetlands is substantially curtailed until further rulemaking. For each wetland, the Corps must show more than just a hydrological connection to navigable waters.**
 - **EPA retains its jurisdiction under the CWA act to require NPDES permits for the discharge of pollutants.**
 - ***But EPA may have to show how contaminants impact navigable waters to enforce § 402.***

Clean Water Act Update – 12/7/06

- **Part 2 – Arizona NPDES Delegation**
 - **CWA § 301 makes it unlawful for any person to discharge any pollutant into navigable waters without a permit.**
 - **CWA § 402 NPDES Permits describe “effluent limitations” – how much of which pollutant can be discharged in compliance with the law, and govern stormwater.**

NPDES Delegation - Arizona Pollution Discharge Elimination System ("AZPDES")

- ❑ **December 2002** – EPA approves transfer of pollution permitting (NPDES) authority to the State of Arizona. 67 Fed. Reg. 79,629.
- ❑ **February 2003** – ADEQ Issues a General AZPDES Permit for Construction Activity based on EPA's Construction General Permit, 40 C.F.R. 122.26, and pursues rulemaking for a Multi-Sector General Permit for other industries.
 - Example: Construction may proceed without an individual stormwater permit by filing a Notice of Intent with ADEQ and satisfying the terms of AZG2003-1.

AZPDES Delegation

- **With AZPDES, why worry about the impact of *Rapanos* on EPA's NPDES Jurisdiction?**
- **August 2005 – *Defenders of Wildlife v. U.S. EPA*, 420 F.3d 946 (9th Cir. 2005).**
 - **Ninth Circuit rules that EPA's delegation of NPDES authority to Arizona was arbitrary and capricious - EPA wrongly concluded that it could not consider the impact of its delegation on endangered species.**
 - **Arizona cannot continue issuing AZPDES permits until EPA properly delegates authority.**

AZPDES Delegation

- ***Defenders of Wildlife v. U.S. EPA.***
 - **Status Quo Remains:**
 - **September, 2005 – EPA informs ADEQ that, until the Ninth Circuit issues a mandate withdrawing Arizona’s NPDES authority, Arizona may continue issuing permits.**
 - **October, 2005 – To avoid the court’s mandate, the defendants request a rehearing before the entire Ninth Circuit.**
 - **June, 2006 – The Ninth Circuit denies rehearing (see dissent), but issues 90 day stay pending a petition for *certiorari* before the U.S. Supreme Court**

AZPDES Delegation

- ***Defenders of Wildlife v. U.S. EPA.***
 - **September, 2006** – Nat. Assoc. of Home Builders petitions the U.S. Supreme Court to hear the case.
 - **October, 2006** – EPA Petitions the U.S. Supreme Court.
 - **ESA § 7(a)(2) requires federal agencies (not state agencies) to consult with Fish & Wildlife to insure actions do not harm species or habitat.**
 - **CWA § 402(b) requires EPA give approval of delegation based on nine criteria. Harm to species or habitat is not one of the criteria.**
 - **ESA does not trump the CWA regarding EPA's delegation to States.**

AZPDES Delegation

- ***Defenders of Wildlife v. U.S. EPA.***
 - **October 23, 2006 – Justice Kennedy recommends certiorari be granted.**
 - Kennedy states that § 402(b) prescribes “a system for mandatory approval of a conforming state program.” Cites *Shell Oil v. Train*, 585 F.2d 408 (9th Cir. 1978).
 - The Ninth Circuit [wrongly] construed § 402(b) to be a “discretionary” action described in ESA under 16 U.S.C. 1532(a)(2).
 - The Ninth Circuit’s ruling in *Defenders of Wildlife v. U.S. EPA* is erroneous. The ESA did not repeal by implication the limited criteria in CWA § 402(b).

AZPDES Delegation

- ***Defenders of Wildlife v. U.S. EPA.***
 - **Pending Final Decision of U.S. Supreme Ct.:**
 - **The Ninth Circuit's Stay of its Decision Remains in Effect. (June 16th Order).**
 - **Arizona may continue issuing AZPDES permits. (EPA letter to ADEQ, Sept. 16, 2005).**

Clean Water Act Update – 12/7/06

- **Part 3 – AZPDES/NPDES MSGP**
 - **Multi-Sector General Permit (MSGP)**
 - **October 2000: EPA issued a General Permit for Stormwater discharges associated with Industrial Activity (MSGP-2000).**
 - **MSGP-2000 provides facility-specific requirements for many industries under one overall permit. (Referenced by SIC numbers).**
 - **MSGP-2000 provides steps a facility must take to develop and implement a stormwater pollution prevention plan.**

Multi-Sector General Permits

- **December 2002** – After EPA transferred pollution permitting (NPDES) authority to Arizona, ADEQ began administering MSGP2000.
- **August 2005** – *Defenders of Wildlife v. U.S. EPA* vacated ADEQ authority.
- **October 2005** – EPA's MSGP2000 expired, prior to EPA's MSGP2006 becoming final, and prior to ADEQ rulemaking approving a new MSGP under AZPDES.
- **October 2006** – Justice Kennedy recommends that U.S. Supreme Ct. vacate *Defenders of Wildlife v. U.S. EPA*, keeping Arizona NPDES authority [and existing MSGPs] in place.

Multi-Sector General Permits

- **Current Status of MSGP in Arizona:**
 - Facilities covered by MSGP2000 before it expired (Oct. 2005) are granted an administrative continuance.
 - Facilities without coverage under MSGP2000 can no longer apply for a MSGP2000. (ADEQ is no longer accepting NOI's.)
 - ADEQ recommends facilities without coverage still follow MSGP2000 until MSGP2006 is final.
 - Both ADEQ and EPA have adopted a policy making enforcement of MSGP2000 a low priority pending MSGP2006 approval.

Construction General Permits

- **Wait – There’s More!!**
 - **2003 – Arizona’s AZPDES program adopted a Construction General Permit, AZG2003-0001.**
 - **A.A.C. R18-9-A905 incorporated by reference 40 CFR 122.26 governing stormwater discharges for large (>5 acres) and small (<5 acres, > 1 acre) construction activity.**
 - **Oct. 2006 – Grant of *certiorari* by U.S. Sup. Ct. allows coverage under AZG2003-0001 to continue, for now.**

Construction General Permits

- ***Just when you thought it was safe to go back in the water –***
 - **June 27, 2006 - *NRDC v. U.S. EPA*, 437 F.Supp.2d 1137 (C.D.Cal. 2006):**
 - Court grants summary judgment in favor of NRDC, NY and Conn. EPA must adopt Effluent Limitation Guidelines (ELGs) and New Source Performance Standards (NSPSs) for stormwater discharges by the construction and development industry.

Construction General Permits

- ***NRDC v. U.S. EPA*, 437 F.Supp.2d 1137.**
 - 33 U.S.C. § 1314(m)(1)(B) requires EPA, every two years, to publish a plan for identifying categories of sources discharging toxic or nonconventional pollutants.
 - 2002 – EPA proposed ELGs and NSPSs for the Construction Industry, but withdrew proposed regulations after public comment.
 - Instead of national ELGs and NSPSs, EPA allowed delegated states with NPDES authority to continue issuing permits based on “best professional judgment” exercised on a case-by-case basis.

Construction General Permits

- ***NRDC v. U.S. EPA, 437 F.Supp.2d 1137.***
 - NRDC, NY and Connecticut filed suit to force EPA to adopt uniform ELGs and NSPSs throughout the country.
 - District Court in California Agrees:
 - *The CWA was designed to require that “each polluter within a category or class of industrial sources ... achieve nationally uniform effluent limitations based on “best practicable technology” by a specific date. EPA’s 2004 decision not to promulgate national guidelines for the Construction Industry was at odds with the CWA.*

Construction General Permits

- ***NRDC v. U.S. EPA, 437 F.Supp.2d 1137.***
 - EPA was required to promulgate limitations three years after it first identified the Construction Industry in 2000.
 - EPA may continue issuing permits during the interim.
 - Once national limitations are established, state permit programs are required to apply them in order to achieve the statutory goal of uniform effluent limitations. *Id.* at 1160.

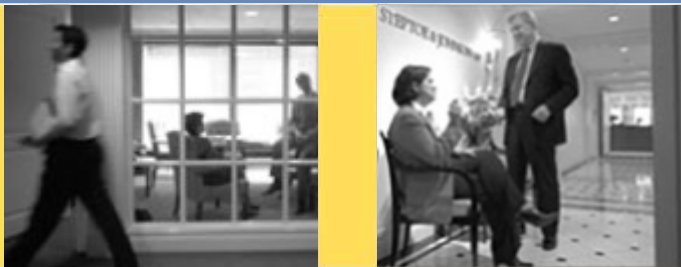
Clean Water Act Update – 12/7/06

■ Take Away:

- ❑ CWA § 404: Watch for new ACOE regulations re-defining “wetlands” or federal legislation adopting the Corps’ old definition.
- ❑ AZPDES: Arizona seems likely to retain jurisdiction, but watch for the U.S. Supreme Court’s Decision in *Defenders of Wildlife v. U.S. EPA*, and decisions applying *Rapanos* to EPA’s NPDES authority.
- ❑ MSGP: Watch for final approval of EPA’s MSGP2006.
- ❑ Construction: Watch for new ELG’s and NSPS’s incorporated into AZG2003-0001.

Emerging Trends In Toxic Torts

Presented by Fredric Bellamy



STEPTOE & JOHNSON LLP

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December 7, 2006

#1 Perchlorate Lawsuits

- What is Perchlorate?
 - A man-made inorganic salt used since the late 1940's as a component in solid rocket fuel, munitions, pyrotechnics, and airbags.

Perchlorate Lawsuits

- Alleged risks associated with exposure to perchlorate
 - Can limit the uptake of iodide by the thyroid gland
 - Some studies suggest changes in level of thyroid hormones can result in tumors
 - Infants and pregnant women are most at risk

Perchlorate Lawsuits

- Media coverage regarding perchlorate contamination
 - As a contaminate perchlorate reportedly has migrated into groundwater in at least 30 states
 - Water from Colorado River is used to irrigate millions of acres of farm land
 - FDA investigators have found perchlorate in milk and lettuce in 15 states

Perchlorate Lawsuits

- Federal and state agencies have debated over what is an acceptable level of human exposure
 - Pentagon and NASA say 200 parts per billion
 - EPA recently advocated standard of 1 PPB
 - ADEQ recently advocated standard of 14 PPB
 - California adopted public health goal of 6 PPB
 - Nevada set its level at 18 PPB

Perchlorate Lawsuits

- Who's been sued for perchlorate exposure?
 - *Alaska Community Acton on Toxics v. U.S. Army*, D. Alaska, Case No. A02-0083-CV
 - *NRDC v. U.S. Department of Defense et al.*, C.D. Cal., Case No. 2:04CV02062
 - *Rianda v. Olin Corp.*, 2006 WL 1525694
 - *Palmisano v. Olin Corp.*, 2005 WL 1514076
 - Two lawsuits filed in California against Lockheed Martin and Aerojet

#2 Global Warming Lawsuits

- Global warming refers to an increase in the Earth's temperature that is claimed to be brought about by the emission of greenhouse gases, such as carbon dioxide
- Claimed impacts of global warming:
 - Rising sea levels
 - Melting ice caps
 - Reduced water supplies
 - Intensified summer heat waves
 - Increased storm intensity

Global Warming Lawsuits

- September 2006, California's Attorney General filed lawsuit in U.S. District for Northern District of California
 - Named defendants: Chrysler Motors, General Motors, Ford Motor Company, Toyota, Honda and Nissan
- *Connecticut v. American Electric Power Co.*, 406 F.Supp. 2d 265 (S.D.N.Y. 2005)

Global Warming Lawsuits

- January 2005 a New York resident brought a public nuisance claim against EPA, New York State Department of Environmental Conservation and New York City Department of Environmental Protection
- September 2005 a class action suit was filed in U.S. District Court in Southern District of Mississippi against several insurance carriers and oil and refining companies

#3 United States Supreme Court Re-Visits Punitive Damages

- *Phillip Morris v. Williams*, No. 05-1256
 - The U.S. Supreme Court will apply their “guideposts” for first time
 - Oregon jury awarded widow \$821,000 in compensatory damages and \$79.5 million in punitive damages
 - Oregon Court of Appeals upheld fraud finding and reinstated punitive damages

United States Supreme Court Re-Visits Punitive Damages

- *Phillip Morris v. Williams*, No. 05-1256
 - Oregon Supreme Court denied review
 - U.S. Supreme Court granted certiorari, vacated the judgment and remanded the case in light of recent ruling in *State Farm Mutual Auto Insurance Co., v. Campbell*, 538 U.S. 408 (2003)

United States Supreme Court Re-Visits Punitive Damages

- Two key precedents
 - *BMW of North America v. Gore*, 517 U.S. 559 (1996)
 - *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408 (2003)

#4 Court Allows Emotional Distress Damages in Contamination Suit Alleging Property Harm

- *Nnadili v. Chevron U.S.A. Inc.*, D.D.C., No.02-1620, 6/1/06

#5 Clients Sue Class Counsel in Asbestos Fight for Disgorgement of Fees

- *Huber v. Taylor*, No. 05-1757 (Oct. 31)

#6 Judge Rejects National Class-Action Lawsuit Over Vioxx

- *In re: Vioxx Products Liability Litigation*, MDL No. 1657
 - A judge ruled on November 22, 2006 that thousands of federal lawsuits against Merck & Co., the manufacturer of Vioxx, could not be pooled into one national class action.

#7 Expanding Employer's Duty to Third Parties

- Plaintiffs' bar is now attempting to expand the duties employers owe to third parties who never worked at the premise.
- Typically the cases involve a family member who was exposed to some toxic chemical that was trapped on the clothes of the person who worked at the premise.

#8 Court Requires Plaintiff to Present Degree of Exposure in Toxic Tort Case

- *Parker v. Mobil Oil Corp.*, 2006 WL 2945397 (N.Y., Oct. 17, 2006)
 - Court held that a plaintiff will need to prove that the exposure to the chemical exceeds the threshold shown to cause the illness.

#9 FDA Preemption

- FDA Preamble states:

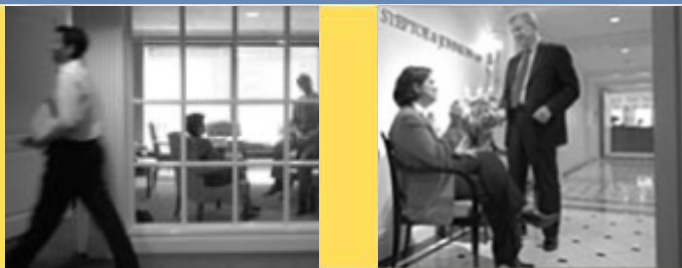
“...under existing preemption principles, FDA approval of labeling...preempts conflicting or contrary state law.” 71 Fed. Reg. 3921
- Preemption language has spawned a judicial divide.

#10 State Prevails in Public Nuisance Suit Against Lead Paint Industry

- *Rhode Island v. Lead Industries Ass'n*, R.I. Super. Ct., No. 99-5526, 2/28/06
- This was the first lawsuit filed by a State against the lead paint industry.
- The State alleged that the lead manufacturers knew that lead-based paint was toxic, but continued to market and sell the paint until it was banned.

WQARF UPDATE

Presented by Nicholas Wallwork



STEPTOE & JOHNSON LLP

www.step toe.com

December 7, 2006

WQARF Annual Report

- Funding
 - Mandated \$15 million/year from corporate income tax.
 - Budget shortfalls resulted in \$41 million for FY 2002-2006.
 - Shortfall of \$34 million.
 - Appropriations for FY 2007 are at full funding.

WQARF Annual Report

- Early Response Actions
 - High priority for ERAs where
 - Human health potentially impacted.
 - Sources of contamination can cause significant environmental impact.
 - Early actions can save WQARF funds by limiting spread of contamination.

WQARF Annual Report

- Early Response Actions (continued)
 - O&M continued at 11 ERAs initiated in prior years.
 - Initiated 8 ERAs in FY 2006.
 - Cooper and Commerce.
 - West Central Phoenix North Canal Plume.
 - Klondyke.
 - East Central Phoenix (32nd St. and Indian School).
 - East Central Phoenix (40th St. and Indian School).
 - Broadway – Pantano.
 - Shannon Road/El Camino del Cerro.
 - 7th St. and Arizona.

WQARF Annual Report

- Interim Remedial Actions
 - Miracle Mile – via cooperative agreement with Flowing Wells Irrigation District.
 - Shannon Road/El Camino del Cerro – via cooperative agreement with Metropolitan Domestic Water Irrigation District.

WQARF Annual Report

- Remedial Investigation Reports Completed
 - West Central Phoenix – East Grand Avenue.
 - West Central Phoenix – West Grand Avenue.

WQARF Annual Report

- FY 2006 WQARF Site Accomplishments
 - 2,861 million gallons of groundwater treated.
 - 1,688 lbs. of VOCs removed from environment.
 - 3,151,910 lbs. of metals removed from environment.
 - 48 groundwater wells installed by ADEQ.
 - 33 groundwater wells installed by PRPs.

WQARF Annual Report

- FY 2006 WQARF Site Accomplishments (continued)
 - 0 Consent Decrees.
 - 0 Qualified Business Settlements.
 - 0 Financial Hardship Settlements.
 - 3 Prospective Purchaser Agreements.
 - 23 Access Agreements.
 - 0 PRP Searches Started.

WQARF Annual Report

- FY 2006 Activities at Federal Sites Supported by ADEQ
 - ❑ 13,428 million gallons of groundwater treated.
 - ❑ 112,258 lbs. of VOCs removed from environment.
 - ❑ 121,406 lbs. of hazardous substances removed from environment.
 - ❑ 206,000 lbs. of metals removed from environment.
 - ❑ 2,816 tons of contaminated soil removed.
 - ❑ 0 Consent Decrees.
 - ❑ 0 RODs.

WQARF Annual Report

- Emergency Response Program
 - Emergency Response Unit notified of 180 incidents, 28 of which required response actions.
 - Tanker truck accident.
 - Explosion and fire at Universal Propulsion Co.

WQARF Annual Report

- Department Issues for FY 2007
 - Delisting.
 - Aggressively pursuing PRP searches and associated RIs.
 - Staffing issues.
 - Working party actions.
 - Communication of long-term funding needs.

WQARF Annual Report

- Status and Program Results
 - As of June 2006, there are 26 sites on the WQARF PI list:
 - 17 pending PI sites; and
 - 9 active PI sites.
 - Completed PIs at 4 sites:
 - ECP – 40th Street and Meadowbrook;
 - ECP – 40th Street and Thomas;
 - Miller Valley Road and Hillside Avenue (Prescott); and
 - Main and Kofa (Quartzsite).

WQARF Program Report

- The WQARF Board shall report on the improvements to the WQARF Program that would result in efficiency savings of time or funding for the remediation of listed sites, the reduction of program costs not directly associated with a listed site, and the enhancement of the recovery of costs from responsible parties.

WQARF Program Report

- Efficiency. Savings of time or funding for the remediation of listed sites.
 - Implementation of ERAs.
 - Site groundwater monitoring optimization.
 - Re-deployment of remediation equipment.
 - ASRAC modifications.
 - Delisting of sites.

WQARF Program Report

- Reduction of Program Costs Not Directly Associated With a Listed Site.
 - Streamline internal business processes.
 - Superfund Information Tracking and Evaluation System.
 - Cost sharing.

WQARF Program Report

- Enhancement of Recovery Costs from Responsible Parties
 - Consent orders.
 - Referrals to other programs.
 - Qualified business settlement.