UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

TO: Barry E. Hill, Director, Office of Environmental Justice ("OEJ")
Office of Enforcement and Compliance Assurance ("OECA")

FROM: Theodore J. Kim, Legal Counsel, OEJ/OECA **/s/** *Ted Kim*

DATE: September 28, 2006

RE: "Environmental Justice in the News" for the Week Ending September 29, 2006

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This memorandum summarizes select environmental justice news actions for the period beginning August 14, 2006 through the week ending September 29, 2006. The summary is limited to Lexis/Nexis searches conducted using the query: "(environment! w/2 (justice or racism or equity or disproportionate or disparate)) or (environment! w/25 minorit! or low***income) or (executive order 12898) or (civil right! w/25 environmental) or ("fair housing act" w/25 (environment! or zon!))." Please note that multiple articles covering the same topic were not included. Similarly, articles on international or foreign-based environmental justice issues were not included, unless they specifically pertained to the United States.

1. **News Items.**

The following news was particularly noteworthy:

- **"Senate Bill Could Bolster Environment Suits Under Civil Rights Law," Inside EPA (Sep. 29, 2006).** According to the article, Senator Robert Mendendez (D-N.J.) intends to introduce a bill that purports to overturn the Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), which raised "the bar for private parties seeking to bring civil rights litigation against government by requiring plaintiffs to demonstrate an agency decision intentionally discriminated against minorities." The Court's holding in *Alexander* "made it difficult for the public to bring suit under Title VI of the Civil Rights Act, which courts had previously interpreted to require plaintiffs to show proof that agency policies disproportionately harm disadvantaged communities, without addressing intent." Environmental activists strongly support Senator Mendendez's proposed legislation, because they believe that it would reinvigorate

environmental justice efforts to ensure that minority and low-income communities avoid disparate environmental impacts. However, the activists acknowledge that the prospects of the bill's passage are not good. According to the article, the bill "was sparked in part by a critical . . . report [from the Office of Inspector General ("IG") of the United States Environmental Protection Agency ("EPA")] released September 18 finding [that EPA] has failed to conduct environmental justice reviews of its programs and policies despite being required to do so." (See related article at the bottom of the page).

- **"Environmental Meeting Set to Discuss Soil Findings," Mississippi Press (Sept. 24, 2006).** ***See also*** **"Editorial; Bus Stop," Press & Sun-Bulletin (N.Y. Sept. 20, 2006).** The articles discuss the Environmental Justice for All Tour 06 ("Tour") that was scheduled for the week of September 25, 2006 and would conclude in Washington, D.C. on October 1, 2006. The Tour "brings together environmental justice, social justice, public health, human rights, and workers' rights groups from across the country to hold a tour of communities impacted by industrial pollution and to link communities together in a public call for safe solutions to unnecessary toxic contamination. The Tour promotes precautionary policies rooted in safety, security, and health awareness of our cumulative exposure to toxic chemicals and marketing safer alternatives to toxins."

- **"Healthcare Access; An Increase in Severe Poverty in the U.S. Has Serious Implications for Public Health," Law & Health Weekly (Sept. 23, 2006) at 257.** According to the article, a study published in the *American Journal of Preventive Medicine* asserted that the rate of severe poverty in the United States has risen sharply since 2000, which "has significant societal implications, including consequences on public health." The Report stated that the number of Americans in severe poverty increased by 3.6 million between 2000 and 2004. Consequently, the Report's author recognized the "disturbing implications for society and public health" associated with this increase. For instance, "[l]ikely heath consequences include a higher prevalence of chronic illnesses, more frequent and severe disease complications, and increased demands and costs for healthcare services." The increase in severe poverty was found to affect children the most, particularly Hispanic and African-American children who accounted for 45% of Hispanic and African-Americans living in severe poverty. The Report noted that adverse effects on children "carry long-term implications."

- **"IG Study on Environmental Justice Bolsters Democrats' Election Issue," Inside EPA (Sept. 22, 2006).** ***See also*** **""Government Report Shows EPA Fails Minority and Low-Income Communities, Public Health at Risk," Democratic Daily (Sept. 20, 2006); "Enforcement Report Says EPA Has Not Reviewed Programs to Assess Impact on Environmental Justice," Daily Environment (Sept. 19, 2006) at A2;**

"EPA: Agency Lagging on Environmental Justice Reviews – IG," E&E News (Sept. 18, 2006). According to the articles, EPA's IG issued a report entitled, "EPA Needs to Conduct Environmental Justice Reviews of Its Programs, Policies, and Activities" ("Report"), on September 18, 2006 that concluded that EPA failed to conduct environmental justice reviews of its programs to "determine whether they have disproportionately harmed low-income and minority populations." In addition, the Report articulated that "many EPA programs have not conducted the reviews either because they believe they are not required or they lack a clear understanding of how to conduct them . . . [further] EPA has yet to determine which programs, policies, and activities are subject to [Executive Order 12898]." The IG provided some recommendations to EPA, including that EPA: identify which programs need environmental justice reviews and require the appropriate program and regional offices to establish a plan to complete the necessary reviews; ensure that the reviews ascertain whether the programs have a disproportionately high and adverse health and environmental effect on minorities and low-income people; require each program and regional office to develop specific environmental justice review guidance; and designate a responsible office to compile the results of the reviews and make recommendations to EPA's senior level management. In response, EPA's Office of Enforcement and Compliance Assurance ("OECA") noted EPA's general agreement with the IG's Report and acknowledged that the recommendations, with some modifications, would strengthen EPA's environmental justice program. In addition, OECA set forth some of EPA's positive environmental justice work, such as integrating environmental justice into the Agency-wide strategic plan and strengthening its online environmental justice mapping and assessment capabilities. The articles also discuss how the Democrats "are seeking to capitalize" on the Report, which they believe "adds credence to their claims that the Bush administration and Republicans operate in a culture of corruption that favors the wealthy." For instance, Senators John Kerry (D-MA) and Richard Durbin (D-IL) issued a statement that articulated their belief that "the Report shows the Administration doesn't care about [minority and low-income] populations." Congresswoman Hilda L. Solis (D-CA) also articulated that the Report demonstrates the "continued failure . . . to protect the health of low-income and minority communities," and concluded that the Bush Administration "must be held accountable."

- **"EPA Criticized for Shirking Minorities; Syracuse Citizen Groups See Possible Link to Midland Avenue Sewage Project," Post Standard (Sept. 21, 2006) at B1.** In addition to covering the IG Report discussed above, the article noted that the Report bolstered the "claims of several residents on Syracuse's South Side who argue that construction of the Midland Avenue sewage treatment plant violates their civil rights." Specifically, the article stated that EPA may have failed to properly investigate a civil rights complaint in April 2004 that the Partnership for

Onondaga Creek ("Partnership") filed. The Partnership claimed that the "construction of the sewage treatment and storage plant in their neighborhood amounted to environmental racism. The plant is being built in the middle of a mostly black residential neighborhood at Midland Avenue and Oxford and Blaine Streets. A year later, the EPA rejected the neighbors' complaint." One activist asserted that the fact that the IG found that "'EPA is not even conducting these reviews in-house shows this is again another blatant disregard for these people's civil and environmental rights. . . . I'm very hopeful that this will change the way business is conducted in the EPA. To say low-income or minority communities are not impacted differently is ridiculous.'"

- **"East Side Site for Garbage Wins in Court," New York Sun (Sept. 20, 2006) at 1.** ***See also*** **"Judge Makes Way for Upper East Side Garbage Transfer Station," Gothamist (Sept. 20, 2006).** Both articles discuss a decision on September 19, 2006 by a New York State Supreme Court Judge to reject a lawsuit from residential groups on the Upper East Side to "stop the building of a garbage transfer station at East 91st Street and the FDR Drive." The groups had sued the City about the garbage station, because they believed that "putting the facility in the middle of a residential neighborhood is a health hazard that will increase pollution and truck traffic." In rejecting the lawsuit, the court held that the new garbage plan would "'further the City's announced, rational goals of promoting equity among the boroughs for responsibility over waste disposal and reducing truck traffic.'" Minority groups had lobbied for the new garbage station because it would "shift the burden of trash disposal away from their communities." Council Member Charles Barron, who represents one of the poorest sections of the City "applauded the court decision and said that the outer boroughs have carried the burden of the City's trash disposal for too long." In articulating that "[e]nvironmental racism must cease," Mr. Barron noted that the court's decision was "a move in that direction." The article asserted that the Plaintiffs planned to appeal the decision due to several "errors of law."

- **"Transportation Commission Approves Strategic Transit Funding," U.S. States News (Sept. 20, 2006).** The article set forth a press release that the Colorado Department of Transportation issued regarding the Colorado Transportation Commission's approval of the "State's Strategic Transit Program to fund 18 transit projects statewide over the next five years for a total $65.1 million. This decision represents the first time state transportation funds have been set aside specifically for transit purposes." The State's Strategic Transit Task Force ("Task Force") reviewed fifty applications for various transit projects across the State. The Task Force evaluated and ranked the projects based on four criteria, including whether the project was economically vital and/or consistent with environmental justice objectives.

- **"Environmentalists, Regulators Fire on DTSC Site-Cleanup Methods," Inside Cal/EPA (Sept. 15, 2006).** According to the article, environmental justice advocates and some air districts in California have questioned California's Department of Toxic Substances Control's ("DTSC") cleanup of the Midway Village Site ("Site") in Daly City, California. The environmental justice advocates believe that the cleanup at the Site, which housed a gas plant, was not adequate to protect public health. However, DTSC believed that the cleanup was adequate and did not intend to conduct the additional indoor air vapor intrusion investigation that the Office of Environmental Health Hazard Assessment recommended after a review of more than 30 background documents that discussed the contamination at the Site. The California EPA Environmental Justice Interagency Working Group, however, expressed its continuing concern at a meeting that updated the status of several environmental justice pilot projects currently underway in California.

- **"Activists Eye Suit to Block South Coast Credits for Power Projects," Inside Cal/EPA (Sept. 15, 2006).** According to the article, environmental activists "may sue the [South Coast Air Quality Management District ("AQMD")] over a recent decision to open a pollution credit reserve to energy companies seeking to build new plants in the region to meet growing power demands." In addition, AQMD "faces widespread opposition to a plan to potentially hike prices for these credits in environmental justice communities, in an attempt to persuade facilities to locate facilities in non-EJ areas." On September 8, 2006, the AQMD approved amendments to Rule 1309.1, which allowed "new power projects to purchase pollution credits contained in the districts 'priority reserve.'" Previously, only essential public services could use this priority reserve. Further, AQMD adopted Rule 1315, which created an "accounting methodology for [AQMD] to track credits created and those subtracted from the reserve." Environmentalists indicated that a potential lawsuit against AQMD may be imminent over the rules, which they believe "essentially create new credits arbitrarily and revive expired credits, and violate state law. [They] are concerned about plants that are proposed to be located in EJ areas, which they contend will worsen air quality in these already impacted areas." To address these environmental justice concerns, AQMD may propose an "amendment boosting the price of credits for projects planned in EJ communities, . . . [such that] to buy credits in a neighborhood that is EJ . . . would cost . . . twice as much . . . as a credit in an area not as environmentally challenged."

- **"Catch of the Day: Good Info; Fish Advisories Need to Get Out in Three Languages," Capital Times (WI Sept. 15, 2006) at B1.** According to the article, officials in Wisconsin are concerned that the daily consumption of fish in its waters presents a health risk that may not be well-understood by Hmong, African-American, and Hispanic fishermen due to a "limited understanding of English or of eating

advisories." As a result, the officials are calling for "more education and better signs" to allow the fishermen to learn "about the potential health risks from eating too many fish caught in Wisconsin lakes and streams." Wisconsin's Department of Natural Resources "has fish consumption brochures printed in English, Hmong, and Spanish, but the [Dane County Lakes and Watershed Commission ("Commission")] is concerned the message isn't getting out there." Accordingly, the Commission established a task force on September 14, 2006 to explore ways to "get the word out" to other cultures who may have little knowledge of the health risks.

- **"Plant's Foes Aim Anger at City Chief," Boston Globe (Sept. 14, 2006) at 1.** According to the article, residents in Chelsea, Massachusetts staged a rally on September 11, 2006 against a proposed diesel-burning power plant, which may possibly "bring in a minimum of $500,000 in annual property tax revenue." The residents, however, denounced the proposed plant, which would be located near an elementary school complex, because of the potential increased health problems and lower property values. The protestors held signs that stated, among other things, "Environmental Justice for All" and handed out multilingual leaflets against the proposal. Also adding to the protestors' concerns was an unspecified report that asserted that "the City is number one in the State for asthma hospitalizations, stroke, and cardiovascular disease."

- **"EPA Offers Up to $150,000 for Environmental Work in Low-Income and Minority Communities," Environmental Protection Agency Documents and Publications (Sept. 11, 2006).** The press release noted that EPA currently seeks grant applications for projects to aid minority and low-income communities in efforts to assess and address increased environmental and public health risks. EPA's Office of Environmental Justice will award approximately $150,000 under the Environmental Justice Collaborative Problem-Solving Cooperative Agreement Program and the Environmental Justice Small Grants Program. Applications for the grants are due by October 23, 2006. The grants will "encourage low-income and minority communities to develop locally-based solutions to their sometimes disproportionate share of environmental and public health issues."

- **"N.C. Weighs Impact of Waste Imports," Waste News (Sept. 11, 2006) at 9.** The editorial discusses a new Comprehensive Solid Waste Management Plan in New York and its potential environmental justice impacts on North Carolina. Under the plan, New York planned to redistribute its wastes through a barge system that would go to "'more distant – and cheaper – disposal sites," including, potentially, in North Carolina. Accordingly, North Carolina passed a 12-month moratorium on waste disposal to study the issue of solid waste and environmental justice. The editorial noted that while New York's solution to handle its waste was

to send it out of state, the "ultimate destination will be determined more by the economic interest of upstream waste generators than the environmental justice concerns of more distant and cheaper disposal sites downstream."

- **"D-M Trash Plan Concerns Council: Incinerator Site is Just One Issue; Public Forum Set," Arizona Daily Star (Sept. 9, 2006).** According to the article, Arizona's City Council ("Council") expressed concern with a trash burning plan that the Davis-Monthan Air Force Base ("Base") recently proposed. The Council was specifically concerned that the Base wanted to move the site for the burning to a "'low-income area,'" which "'smack[ed] of environmental racism.'" To address these concerns, the Council called for a public meeting that was to be held on September 18, 2006. In addition, the Council was exploring potential legal options to prevent the placement of the trash incinerator at the proposed location.

- **"City Council Cautions East End 'Connectors;' Engineers Behind Project Warned to be Sensitive to Area," Herald Sun (Durham, N.C. Sept. 8, 2006) at B4.** According to the article, Durham City Council members have warned the engineers of a $99 million East End Connector to be sensitive to the neighborhoods that the project may affect. Efforts to get the project moving have been on the "fast track;" however, the article noted that the highway design had "to consider environmental factors." The City's Mayor specifically inquired about, and was assured that, the project's updated environmental study would examine environmental justice to ensure that an effort was made "to gauge whether blacks and other minorities are suffering disproportionate harm from a public project." In addition, one Council member wanted to ensure that all information on the project was made available to all of the City's citizens, particularly "to those who are low- and moderate-income."

- **"Groups Seen Pursuing Bills Clarifying Disputed GHG Program," Inside Cal/EPA (Sept. 8, 2006). *See also* "Landmark California CO2 Plan Faces Key Legal, Political Hurdles," Inside EPA (Sept. 8, 2006); "Companies' Climate Polices May Be Muddled by Legal Disputes in California," Inside Green Business (Sept. 6, 2006); "Emissions Bill Poses Crucial Test; Ambitious Proposal Would Mandate an Aggressive Schedule for Reducing Greenhouse Gases in the State," Contra Costa Times (CA Aug. 26, 2006) at F4; "Emissions-Trading Standoff Threatens Passage of GHG Measure," Inside Cal/EPA (Aug. 25, 2006); "Environmental Justice Arising as New CO2 Trading Program Concern," Energy Washington Week (Aug. 23, 2006).** According to the articles, passage of AB 32 has led California Governor Arnold Schwarzenegger to consider "substantial cleanup legislation" in future years "to clarify what are viewed as vague and controversial sections of the landmark climate change bill passed by the Legislature." AB 32 will clarify aspects of the greenhouse gas ("GHG") emission-reduction program; specifically, the Bill would cut carbon dioxide

("CO2") emissions to 1990 levels by 2020. AB32 would provide California's Air Resources Board ("CARB") with significant authority to "determine current and prior emissions levels and develop programs to achieve an estimated 11 percent reduction from current levels." However, certain sections will be further considered, such as whether "market-based compliance options may allow emission offsets and out-of-state emission reductions to count toward compliance with program requirements." California officials have stated that they "intend the program to eventually allow out-of-state emission offsets to count toward emission reduction mandates in California, a development likely to be heavily scrutinized by environmental justice advocates." Environmental justice advocates do not support any such discretionary "cap-and-trade program because of their concerns over the creation of emission 'hot spots" and disparate impact to low-income and minority communities." Specifically, they raised concerns that "emissions trading could disproportionately affect the health of minority communities by allowing older power plants in low-income neighborhoods to purchase credits rather than reduce emissions." California environmental justice groups "are highly sensitive to emissions trading programs because a local nitrogen oxides and sulfur oxide trading program put in place in the 1990s by Los Angeles air officials – called 'RECLAIM' – has failed to achieve expected pollution reductions, primarily due to questionable emissions allocations, frequent administrative breakdowns and questionable trading practices . . . [t]hese problems have hurt [environmental justice] communities the most."

- **"New Power Plants May Get Leeway on Smog; AQMD Is Considering a Plan to Let Energy Providers Buy Rights to Additional Emissions from Hospitals, Sewage Facilities, Fire Stations," Los Angeles Times (Sept. 8, 2003) at B3. *See also* "Air Quality Management District Rule Change Will Put More Polluting Plants in Already Affected Working-Class Neighborhoods," US Fed News (Sept. 8, 2006).** According to the articles, California's South Coast Air Quality Management District ("AQMD") was expected to vote on a "plan that would allow major new power plants across Southern California to buy air pollution credits designed for hospitals, fire stations, sewage plants, and other essential service providers." While AQMD predicts that the plan will result in significant emissions reductions, environmental justice groups "sharply criticized the proposal, saying that there would be a net gain in air pollution . . . and that poorer communities where the plants would be built would be hit hardest in a region already badly out of compliance with federal clean air laws." For instance, the Natural Resources Defense Council ("NRDC") issued a news release that stated that the "'proposed amendments fly in the face not only of AQMD's commitment to environmental justice but also of the concept of environmental fairness in general.'" In labeling the plan as "corporate welfare for polluters," the NRDC stated that approval of the plan would "open the gate for the construction and operation of new polluting facilities in areas that are

overwhelmingly working-class communities of color." Instead, NRDC, as well as other environmental justice groups, call for conservation and the use of renewable energy.

- **"EPA Questions Applicability of Key Dioxin Study to Michigan Cleanup," Risk Policy Report (Sept. 5, 2006).** According to the article EPA's Region V has questioned whether a recent landmark dioxin exposure study applies to a contentious dioxin cleanup near Dow Chemical Company's ("Dow") headquarters in Michigan. Specifically, EPA asserted that the University of Michigan Dioxin Exposure Study ("Study") failed to "thoroughly target susceptible subpopulations" and does not represent the type of information that allows for proper remediation decisions. The Study demonstrated that "residents in a dioxin-contaminated area near the Dow facility have higher levels of dioxin in their blood, but the Study also found that age, weight, and gender more greatly influenced those levels rather than a person's proximity to the contaminated site." EPA officials questioned the Study, however, for numerous reasons, including that it failed to "specifically target susceptible populations like children, hunters, fishermen, and pregnant and nursing women." In particular, EPA noted that "both subsistence fishermen from environmental justice populations along with recreational fishermen and hunters get a significant portion of their protein intake from fish and game in the area, which are likely to be contaminated with dioxin."

- **"State Proposes Standard for Perchlorate; Water: Inland Providers Say Their Treatment Meets the State's Suggested Level of 6 Parts Per Billion," Press Enterprise (CA Aug. 29, 2006) at B1.** According to the article, the California Department of Health Services announced on August 28, 2006 that it had established a new standard for perchlorate contamination at 6 parts per billion. Environmentalists were disappointed by the new standard, which is three times the level that Massachusetts recently adopted, as they "sought a more restrictive standard for the rocket-fuel chemical considered the Inland region's most pressing water-pollution problem. . . . High perchlorate levels have forced some Inland water agencies to close wells, dilute tainted water with clean water, or undergo a costly treatment process to remove chemical." One environmental justice group expressed concern that the new standard, which could become final on November 3, 2006 following a comment period, would allow cities affected by large amounts of perchlorate to stop treating the wells. The group cited particular concern for young women and young children.

- **"Governor, Perata Pressed to Diversify Water Board Appointments," Inside Cal/EPA (Aug. 26, 2006).** According to the article, California Senate President Don Perata (D-Oakland) called on Governor Arnold Schwarzenegger to "bring more diverse appointments to the Central

Valley regional water board." Senator Perata's comments addressed concerns of environmental justice activists, "for whom Central Valley water board appointments have been particularly contentious because of ongoing battles over the agriculture industry's impacts on water quality." Numerous vacancies on the water board are anticipated within months, such that Senator Perata urged Governor Schwarzenegger to make appointments that truly reflect the community. Senator Perata's actions stem from the fact that activists informed him that "their interests are underrepresented by the board, which will make critical future decisions regarding irrigated lands and dairy runoff. Central Valley [environmental justice] activists recently wrote in a petition to the Central Valley regional board that dairy runoff contributes to nitrate contamination of drinking water in minority and low-income neighborhoods."

- **"Envirobytes," US Fed News (Aug. 25, 2006).** EPA's Region III issued a newsletter that included an update on the progress of a 2006 environmental justice grant in West Virginia. Specifically, it discussed a visit that it conducted to the Southern Appalachian Labor School in Beards Fork, Fayette County, West Virginia, which received a grant in 2006. The visit assessed the grant's progress. The funds were used to "provide test kits to determine the relative levels of contamination in the old coal industry camp houses now occupied by retired miners and other low-income families. The grantee is also working with the Department of Housing and Urban Development using at-risk youth to rebuild and renovate portions of these houses free of charge to the residents."

- **"Rutgers Issues Progress Report; NAACP Leaders Evaluate Findings," Biloxi Sun Herald (Miss. Aug. 24, 2006) at A2.** According to the article, Rutgers University's Initiative for Regional and Community Transformation issued a report entitled, "Envisioning a Better Mississippi: Hurricane Katrina and Mississippi – One Year Later" ("Report"), on August 23, 2006. Among other things, the Report, which addressed community and economic redevelopment, insurance, and affordable housing, noted that exclusion of low-income workers in recovery assistance represented one of the top concerns of state National Association for the Advancement of Colored People ("NAACP") leaders and groups that evaluated Mississippi's progress a year following Hurricane Katrina. The NAACP, accordingly, asserted that a disconnection existed between "residents, especially low-income residents, and the local government." The Report recommended, among other things, the linking of "Community Development Block Grants to low-income tax credits [and the rebuilding] of public housing."

- **"Suit May Test States' Ability to Waive Environmental Rules in Disasters," Inside EPA (Aug. 23, 2006).** According to the article, the Sierra Club and the Louisiana Environmental Action Network filed a lawsuit on August 9, 2006 in federal district court against the Louisiana

Department of Environmental Quality ("LDEQ") that challenged six "declarations of emergency and administrative orders" that LDEQ issued since Hurricane Katrina. The lawsuit, which charged Louisiana "with violating air, water, and waste statutes through a series of emergency orders governing the disposal of waste in landfills, . . . could test states' ability to issue emergency declarations that change environmental requirements in response to disasters." One environmentalist noted that if the lawsuit succeeded, then other states may reconsider using such emergency waivers. Environmentalists believe that such emergency orders conflict with federal environmental statutes.

- **"EPA Tackles Lead Levels in Kids. Both Kansas City and Kansas City, Kan., Get Grants to Eradicate Paint Poisoning," Kansas Star (Aug. 22, 2006).** According to the article, EPA has awarded Kansas City and Kansas City, Kansas $3 million grants under an "initiative to tackle lead poisoning in children." The initiative is particularly important for Kansas City, because it "ranked 19th among large cities for childhood lead poisoning in 2004, although in population it only ranks 40th. The City had 214 new cases that year." Lead poisoning in children has been linked to learning disabilities, seizures, low IQ, bizarre behavior, and death. The grants were intended to spread the word on lead poisoning and pay for testing, which "is crucial because children often don't show symptoms until damage has already occurred." The article noted that the children who are usually most affected are "usually poor and living in the inner city."

- **"Concrete Plant's Permit Faces Review," Albuquerque Journal (N.M. Aug. 18, 2006) at 1.** According to the article, the permit that Albuquerque's Air Quality Division approved for Vulcan Material Company's ("Vulcan") proposed plant will be reviewed based on an appeal that the Mountain View Neighborhood Association ("Association") filed due to concerns about potential pollution and the enforceability of the permit. The Association filed the appeal due to the fact that the proposed plant would be located across the street from the neighborhood's community center. The Association specifically argued that the residents lacked enough time to publicly comment on the proposal to locate the plant and, therefore, the permit was not enforceable. In addition, the Association "also claimed environmental justice concerns were not addressed by the Air Quality Division when it issued the permit. By environmental justice concerns, [the Association] said the neighborhood is already home to many other concrete plants, junk yards, and other polluting industries."

- **"Pesticide Stakeholders Clash Over Human Test-Ban Legislation," Inside Cal/EPA (Aug. 18, 2006).** According to the article, environmental justice advocates in California are at odds with the State's pesticides department over amendments to AB 2078, a Bill that would prohibit "any

State agency from accepting, considering, or relying upon third-party pesticide toxicity studies that intentionally dosed humans." The environmental justice groups fear that the amendments to the Bill would exempt "some human test studies from the ban, but the pesticides department . . . argue[s] the use of key studies to determine product effectiveness is vital." Specifically, amendments set forth on August 7, 2006 "narrowed the scope of the ban on these tests to 'certain pesticide studies,' specifically limiting the ban to 'no observed effect level' ("NOEL") tests. These tests determine a dose level at which no adverse effects from a pesticide occur. Under the amendments, beginning January 1, 2007, no State agency would be able to use studies involving humans that are used to determine a NOEL." According to the article, environmental justice groups "are focusing on the Bill, because they say minority and low-income people are more likely than others to volunteer for pesticide studies."

- **"New Orleans Mayor Closes a Disputed Landfill Used for Debris from Hurricane," New York Times (Aug. 16, 2006).** According to the article, New Orleans Mayor Ray Nagin closed the controversial Chef Menteur Landfill ("Landfill") on August 15, 2006. The Landfill had operated under an emergency order, and the company operating it, Waste Management, failed to obtain a conventional permit to keep the Landfill in operation. The Landfill was the source of "protests and lawsuits since it was opened in February, challenged by environmental groups and by residents of a nearby Vietnamese-American neighborhood." The protestors contended, among other things, that the Landfill contained hazardous material. Waste Management asserted that its permit was valid due to the continuing state of emergency in New Orleans and continues to pursue this matter in court. However, a federal judge has already refused the company's request for a temporary restraining order against New Orleans.

- **"Environmentalist' Climate Exchange Criticisms May Shape GHG Trading," Inside Green Business (Aug. 16, 2006).** According to the article, a coalition of national, state, and local environmental groups have recently criticized the Chicago Climate Exchange ("CCX"), which constitutes the largest greenhouse gas ("GHG") emissions trading market in the United States, for allowing "loopholes" that "could allow companies to claim they are achieving [GHG] reductions when they are not." In an "open letter" dated August 1, 2006, the coalition urged California state and city officials not to join the CCX. According to the article, the environmentalists' criticisms of CCX represent "the latest in a number of recent controversies over emissions trading, including concerns about a California GHG cap-and-trade legislative proposal that has drawn fire for potentially imposing greater pollution burdens on poor and minority communities, raising environmental justice issues."

- **"One in Five Adults in State Is Disabled, Latest Figures Put Kentucky Second Only to West Virginia; Children Fare Poorly, Too," Lexington Herald-Leader (KY Aug. 15, 2006).** According to the article, the United States Census Bureau released data on August 15, 2006 that indicates, among other things, that one in five adults in Kentucky are disabled and nearly one in ten children in the State have some kind of disability. The numbers, which are based on monthly surveys, reflect a "combination of poverty, poor health care, a changing economy, and a culture in which many people depend on public assistance," within the State. Other factors related to poverty, such as malnutrition, also have been cited as causing the high level of disabilities within the State. The report also found that "Kentucky also lags behind other states on 'environmental equity' issues such as removing lead paint from homes where poor children live."

- **"Strengthening ADEM," Montgomery Advertiser (AL Aug. 16, 2006) at A7. *See also* "ADEM May Use Tighter Criteria," Birmingham News (AL Aug. 12, 2006) at 1D.** According to the first article, "Alabama needs to do a better job of protecting its air, land and water, striking a responsible balance between the needs of modern society and the proper care for the fundamental sources that sustain us all. A strategic plan for the Alabama Department of Environmental Management [("ADEM")], proposed by a subcommittee of the commission which oversees ADEM, is a major step in that direction." This editorial noted, among other things, that the plan called for adequate and stable funding, which will allow ADEM to "make greater use of federal funds, which often require matching funds." In addition, the plan calls for the expansion of pollution prevention programs, as well as recycling/reuse efforts. Finally, the plan requires ADEM "to be conscious of environmental justice concerns [by including environmental justice in all programs]. Poor communities and minority populations often are targeted for environmentally questionable projects, yet both are deserving of the same degree of consideration as any other individual or locale would receive." The editorial concluded by urging broad public comment on the plan, as well as "substantial public debate by the commission." The second article provided specifics on the proposed plan, which will require ADEM to "have the most protective regulatory standards in the Nation." In addition, the article noted that ADEM had "appointed [an unnamed] longtime employee to head an environmental justice program at the Department."

- **"Anaconda, Mont., Official Upset with Arco's Dust Abatement Effort," Montana Standard (Aug. 15, 2006).** According to the article, Montana's Chief Executive, Becky Guay, expressed dismay with Arco-British Petroleum's ("Arco") voluntary dust control plan to clean Opportunity Ponds, which is the "toxic waste repository for the Nation's largest Superfund site." Specifically, she noted that Arco's plan did nothing to fix "problems related to respiratory health concerns, diminished property values, and hazardous driving conditions from blowing dust."

Accordingly, she drafted a letter to the Governor, among other others, that demanded action at Opportunity Ponds. The letter, which noted a lack of oversight and enforcement at the site, called for various improvements to the plan, including the inclusion of environmental justice principles.

- **"N.C. Democrats: Protecting Our Environment: Gov. Easley Signs Landfill Moratorium," U.S. Fed. News (Aug. 14, 2006).** According to the article, North Carolina Governor Mike Easley signed Senate Bill 353, into law on August 14, 2006. The new law "stops the State's environmental regulators from issuing permits for landfills for a period of one year so the State can study solid waste disposal issues to protect the environment and public health." In addition, the new law created the Joint Select Committee on Environmental Justice "to examine the location of landfills in the State, with a focus on the economic and demographic nature of the communities, the impact landfills have that are located near minority and low-income communities, and the factors that have lead to the location of landfills in or near minority and low-income communities." The new law took effect immediately upon signing.

- **"Jeffco's Core Urban Areas Showing the Worst Pollution," Birmingham News (AL Aug. 13, 2006) at 8A.** According to the article, the Health Department of Jefferson County, Alabama ("Department") has undertaken air monitoring that reveals that the "air above the core urban areas of Birmingham is far more polluted than the rest of the area." Specifically, the Department found that the "levels of toxic and [carcinogenic] chemicals are higher at two monitors in North Birmingham and one each in Wylam and East Thomas than in rural providence." According to the Legal Environmental Assistance Foundation ("Foundation"), the "difference in air quality is a violation of civil rights laws, because poor and black communities are exposed to more pollution than others." The Foundation, whose goal is "to bring Alabama to adopt rules requiring environmental justice," noted that the air monitoring provided additional evidence that "isolated and disadvantaged communities are suffering from pollution at unacceptable levels in Alabama."

2. Recent Litigation.

- **Coliseum Square Ass'n., Inc. v. HUD, No. 03-30875, No. 04-30522, 2006 U.S. App. LEXIS 23726 (5th Cir. Sept. 18, 2006).** The Fifth Circuit addressed an appeal of the United States District Court for the Eastern District of Louisiana's grant of a cross-motion for summary judgment by the United States Department of Housing and Urban Development ("HUD") regarding claims of violations of the National Environmental Policy Act of 1969 ("NEPA") and the National Historic Preservation Act ("NHPA") on a revitalization project. In this case,

Plaintiffs sought declaratory judgment against HUD claiming that HUD "failed to comply with NEPA and NHPA in funding the St. Thomas Housing Development revitalization project and [requested an] injunction compelling HUD to withhold federal funds from the project until it fully complies with those statutes." The St. Thomas Housing Development revitalization project called for substantial demolition of the preexisting development in New Orleans and its replacement with new low-income and market rate housing, as well as a shopping center and senior care facility. The court addressed numerous arguments that the Plaintiffs set forth, including that "HUD acted arbitrarily, capriciously, or in abuse of its discretion by failing to prepare an [Environmental Impact Statement ("EIS")] although it knew or should have known that the reasonably foreseeable effects of the project would significantly affect the quality of the human environment in many different ways." In affirming the lower court's holding, the Fifth Circuit determined that no evidence revealed that "HUD arbitrarily or capriciously relied on a study not in accordance with a noise guidebook, which was . . . nonbinding. . . . [N]othing suggested the environmental justice study's choice of methodology was arbitrary or capricious." Moreover, the court held that since HUD did not act "arbitrarily, capriciously, or contrary to law in its study, consideration, and findings regarding the project's impacts, [it concluded] that [neither NEPA nor NHPA] impose further requirements on HUD." In so deciding, the court addressed each of the Plaintiffs' arguments separately. With regard to the Plaintiffs' argument regarding environmental justice issues, the court noted from the outset that while Executive Order 12898 "instructs agencies to consider the environmental justice impacts of their actions," it does not create a private right of action. Accordingly, courts review "an agency's consideration of environmental justice issues under the Administrative Procedure Act's deferential 'arbitrary and capricious' standard." Here, Plaintiffs asserted that the environmental justice study was arbitrary and capricious in terms of methodology and failed to properly characterize the project's impacts. The court disagreed and noted that the record did not reveal any "administrative insensitivity to racial or economic inequality. Instead, [the court found] a project that HUD perceived reasonably as a community effort . . . to renovate a deteriorating public housing project for the ultimate and enduring benefit of the community." Further, HUD's September 2002 environmental justice study "determined that those who return to live in the 'new' St. Thomas will benefit from safer, more sanitary living conditions and an improved economic environment." The study also considered displacement issues and reflected that residents "had numerous complaints about the housing project and were at risk from pest infestations, asbestos, drug paraphernalia, lead exposure, and raw sewage." With regard to the issue of lead exposure in the housing units, the court noted that 99% of the residents were minority and that over 200 lawsuits were filed. In addition, the court pointed out that the record "indicates that HUD received and

responded to comments made at a public meeting by Mr. Brod Bagert, whose master's thesis had been highly critical of the HOPE IV program, and of the broader 'market revitalization' approach to improving areas. His comments and his study use the St. Thomas project as an example to attack that particular theory of urban planning." In noting HUD's response to these comments and the fact that the record "certainly reveals that HUD gave attention to the issues Plaintiffs raise," the court concluded that "Plaintiffs offer no evidence suggesting that the environmental justice study was arbitrary or capricious in its choice of methodology. We cannot, therefore, say that [Plaintiffs] met their burden of showing that HUD's consideration of environmental justice concerns was arbitrary and capricious."

- **In re: Prairie State Generating Co., PSD Appeal No. 05-05 (EAB Aug. 24, 2006) (slip op.).** EPA's Environmental Appeals Board ("Board") denied Petitioners' request to review the prevention of significant deterioration ("PSD") permit ("Permit") that the Illinois Environmental Protection Agency ("IEPA") issued to the Prairie State Generating Company, LLC ("Prairie State"), which authorized the construction of a proposed 1500-megawatt pulverized coal-fuel powered electricity generating plant ("Facility"). Included among the Petitioners' numerous concerns was their argument that "IEPA violated environmental justice obligations." In noting that environmental justice issues "must be considered in connection with the issuance of PSD permits by both the Regions and states acting under delegated authority," the Board rejected Petitioners' contention "that IEPA failed to adequately consider the environmental justice issues raised during the public comment period, including the comments regarding whether the proposed Facility would have a disproportionate impact on residents of East St. Louis." Petitioners asserted that "they identified one environmental justice population, subsistence anglers in East St. Louis, as being at risk from mercury emissions and Petitioners argue that IEPA did not respond to the issue." Specifically, Petitioners contend that IEPA "'violated their environmental justice obligations in three ways' – by failing to conduct an environmental justice assessment; by failing to ensure the meaningful public participation of environmental justice communities in and around East St. Louis; and by using a mapping tool that Petitioners contend is illogical in this situation." The Petitioners' arguments failed to persuade the Board, which determined that "IEPA responded to the comments from the public regarding environmental justice issues and specifically with respect to low-income communities in East St. Louis." In support, the Board cited specific IEPA actions, such as: its finding that "'[l]ow-income communities are actually located many miles from the plant, at distances with which other, more affluent communities are interspersed;'" its subsequent conclusion that "'residents of low-income communities would not experience air quality impacts from the plant that are different than

those experienced by residents of more affluent communities;'" and its determination that "'disproportionate impacts on [environmental justice] communities have not been identified from the proposed plant.'" The Board then discussed IEPA's evaluation of demographic data from EPA's Environmental Justice Geographic Assessment Tool for the area surrounding the Facility, which demonstrated that the area was not a low-income or minority area. Moreover, the Board articulated that Petitioners failed to demonstrate clear error in IEPA's findings and conclusions as "Petitioners' reference to subsistence anglers in East St. Louis fails to demonstrate clear error in IEPA's specific finding that East St. Louis falls outside of the proposed Facility's significant area . . . and IEPA's specific finding that the 'proposed plant's emissions do not pose a concern for disproportionate impact because such impacts, if any, are so small as to be trivial.' In short, Petitioners have failed to show by reference to record evidence that there is a potential non-trivial impact that would have a disproportionately high and adverse effect on an environmental justice population. In addition, Petitioners have not pointed to any Agency guidance as showing that IEPA's environmental justice analysis was not in accordance with U.S. EPA policy. Under circumstances such as these, where IEPA found that any impacts to the area where the identified environmental justice population resides would at most be 'trivial' and Petitioners have not shown any error in that conclusion, we are not persuaded that IEPA was required to provide greater opportunity for public participation to that population than was provided here."

- **<u>Ten Residents of Boston v. Boston Redev. Auth.</u>, No. 05-0109 BLS2, 2006 U.S. Mass. Super. LEXIS 390 (Mass. App. Ct. July 31, 2006).** The Superior Court of Massachusetts at Suffolk held that the Massachusetts Secretary of Environmental Affairs ("Secretary") arbitrarily and capriciously certified a Final Environmental Impact Report ("EIR") and vacated the Secretary's certification. The court found that the Secretary's certification lacked the "necessary rational basis" and failed to analyze "any 'worst case' scenario'" associated with the placement of a Biolab near the Boston Medical Center. The Biolab was unique in that would house medical research on the "most dangerous disease-causing organisms and toxins known to mankind." The court took issue with the fact that the Final EIR failed to answer "two questions that virtually anyone learning of the proposed Biolab would ask: (i.) [w]hat is the worst that could happen if a laboratory worker were infected with a contagious pathogen he was studying; (ii.) [w]ould the impact be significantly less if the Biolab were located outside of a city?" In addition, the court discussed the fact that Plaintiffs also complained that the Final EIR failed to consider "alternative locations further removed from what they refer to as an 'environmental justice' population, which appears to be essentially a euphemism for a population that is poor or working class and largely minority." The court understood the "complaints of poor and minority

communities that governments tend to place in their communities the projects that wealthier communities do not want, perhaps because wealthier communities possess greater political clout or know better how to delay and burden these projects. This issue of fairness is not a sufficient basis for the Secretary to direct a proponent to consider alternative sites, because alternative sites should be considered only if they may have a different *environmental* impact than the proposed site. However, the environmental impact of this Project on a poorer community may be different from that of a wealthier community of similar density, because, for instance, if there is a need to act quickly to evacuate an area or impose a quarantine, the poor may be less able to evacuate (since fewer have access to vehicles) and less easy to quarantine (since fewer have access to personal computers that may allow them to obtain public safety information via the Internet). Differences in environmental impact among alternative sites, caused in part by the economic differences among communities, is fair game for an EIR."

3. <u>Regulatory/Legislative/Policy</u>.

The following items were most noteworthy:

A. <u>Federal Congressional Bills and Matters</u>.

- **H.R. 6028, introduced on September 6, 2006 by Congressman Major R. Owens (D-N.Y.).** ***Status: Referred to House Committee on Education and the Workforce on September 6, 2006.*** The Bill amends the Elementary and Secondary Education Act of 1965 to establish a new Title X, "School Construction, Modernization, And Infrastructure Improvement." The Bill directs the Secretary of Education to make grants to state educational agencies for elementary and secondary school construction, reconstruction, renovation, or modernization for information technology. In addition, it sets forth wage requirements for such projects, including Davis-Bacon Act compliance and overtime; however, it allows exceptions for certain workers who voluntarily donate their services without full compensation. The Bill stemmed from various findings, including the fact that "[a]cording to a study conducted by the General Accounting Office in 1995, most schools are unprepared in critical areas for the 21st century. Most schools do not fully use modern technology and lack access to the information superhighway. Schools in central cities and schools with minority populations above 50 percent are more likely to fall short of adequate technology elements and have a greater number of unsatisfactory environmental conditions than other schools."

- No noteworthy ***"Miscellaneous House and Senate Congressional Record Mentions of Environmental Justice"*** were identified for this time period**.**

- ***Federal Register* Notices.**

  — **EPA, Methods for Measurement of Visible Emissions, 71 *Fed. Reg.* 55,119 (Sept. 21, 2006).** EPA announced that it finalized Methods 203A, 203B, and 203C "for determining visible emissions using data reduction procedures that are more appropriate for State Implementation Plan ("SIP") rules than Method 9, the method currently used." The States requested this action, which is required for special data reduction requirements in their rules. The action should provide States with more data reduction procedures to determine compliance with their SIP opacity regulations. The rule took effect on September 21, 2006. With regard to environmental justice considerations pursuant to Executive Order 12898, EPA noted that the rule's optional test procedures did not impose disproportionate human health or environmental effects on minority or low-income communities.

  — **EPA, Clean Air Act Operating Permit Program; Petition for Objection to State Operating Permit for Onyx Environmental Services, 71 *Fed. Reg*. 54,814 (Sept. 19, 2006).** EPA announced that its Administrator "responded to a citizen petition asking [EPA] to object to a [Clean Air Act ("CAA") Title V] operating permit proposed by the Illinois Environmental Protection Agency ("IEPA"). Specifically the Administrator has partially granted and partially denied the petition submitted by the Sierra Club and American Bottom Conservancy to object to the proposed operating permit for Onyx Environmental Services." Among other things, the petition alleged that the proposed permit violated EPA's commitment to address environmental justice issues. The current action supplements EPA's original response in a February 6, 2006 order. It strikes out the section, "VI. Monitoring" and replaces it with new language. The remainder of the order remained unchanged.

  — **EPA, National Pollution Prevention and Toxics Advisory Committee; Notice of Public Meeting, 71 *Fed. Reg.* 54,480 (Sept. 15, 2006).** EPA announced that a two-day meeting of the National Pollution Prevention and Toxics Advisory Committee will be held on October 4-5, 2006 to "provide advice and recommendations to EPA regarding the overall policy and operations of the programs of the Office of Pollution Prevention and Toxics. According to EPA, the meeting may particularly interest, among others, "individual groups concerned with environmental justice."

  — **DOI, Proposed Water Service Contract, El Dorado County Water Agency, El Dorado County, CA, 71 *Fed. Reg.* 54,519 (Sept. 15, 2006).** The Bureau of Reclamation ("Bureau") of the United States Department of the Interior ("DOI") announced its

intent to prepare a joint Environmental Impact Statement/Environmental Report ("EIS/EIR") for a Municipal and Industrial water service contract from the Central Valley Project in California. The proposed project includes "a long-term water supply contract under which [the Bureau] would provide up to 15,000 acre-feet per annum to the [El Dorado County Water Agency] for diversion from Folsom Reservoir." Included among the issues that the EIS/EIR will assess are those related to environmental justice. Written comments on the proposal are due by October 11, 2006.

— **EPA, National Environmental Justice Advisory Council; Notice of Charter Renewal, 71 *Fed. Reg.* 53,093 (Sept. 8, 2006).** EPA announced that the Charter for its National Environmental Justice Advisory Council ("NEJAC") will be renewed for two more years, in accordance with provisions of the Federal Advisory Committee Act. The NEJAC provides advice and recommendations to EPA's Administrator on various environmental justice issues. The notice concluded by asserting that the "NEJAC is in the public interest in connection with the performance of duties imposed on [EPA] by law."

— **EPA, Approval and Promulgation of State Implementation Plans; Texas; Discrete Emission Credit Banking and Trading Program, 71 *Fed. Reg.* 52,703 (Sept. 6, 2006).** EPA announced its finalization of conditional approval of revisions to the Texas State Implementation Plan ("SIP") with regard to the Discrete Emission Credit Banking and Trading Program ("Program"). The rule will take effect on October 6, 2006. In addressing its responses to the comments received, EPA noted that while it did not receive comments regarding environmental justice, it reevaluated its interpretation of the definition of environmental justice as found in Executive Order 12898. Specifically, in its proposed approval of the Program, it stated that "'environmental justice concerns arise when a trading program could result in disproportionate impacts on communities populated by racial minorities, people with low incomes, or Tribes.' On further review, [EPA believes] the following description is more consistent with Executive Order 12898: '[e]nvironmental justice concerns can arise when a final rule, such as a trading program, could result in disproportionate burdens on particular communities, including minority or low-income communities.' This revised language does not alter [EPA's] determination that the [Program] does not raise environmental justice concerns."

— **EPA, Approval and Promulgation of State Implementation Plans; Texas; Emission Credit Banking and Trading Program, 71 *Fed. Reg.* 52,698 (Sept. 6, 2006).** EPA announced its approval of revision to the Texas SIP with regard to the Program (see related

proceeding entry). In addition, EPA approved differing sections and subsections of the Texas Administrative Code. The rule will take effect on October 6, 2006. In addressing its responses to the comments received, EPA noted that while it did not receive comments regarding environmental justice, it reevaluated its interpretation of the definition of environmental justice as found in Executive Order 12898. Specifically, in its proposed approval of the Program, it stated that "'environmental justice concerns arise when a trading program could result in disproportionate impacts on communities populated by racial minorities, people with low incomes, or Tribes.' On further review, [EPA believes] the following description is more consistent with Executive Order 12898: '[e]nvironmental justice concerns can arise when a final rule, such as a trading program, could result in disproportionate burdens on particular communities, including minority or low-income communities.' This revised language does not alter [EPA's] determination that the [Program] does not raise environmental justice concerns.'"

— **EPA, Approval and Promulgation of State Implementation Plans; Texas; Revisions for the Mass Emissions Cap and Trade Program for the Houston/Galveston/Brazoria Ozone Nonattainment Area, 71 *Fed. Reg.* 52,664 (Sept. 6, 2006).** EPA announced, among other things, its approval of revisions to the Texas SIP with regard to the Mass Emissions Cap and Trade ("MECT") program for emission of nitrogen oxides ("NOx") in the Houston/Galveston/Brazoria ozone nonattainment area. The rule will take effect on October 6, 2006. In the preamble, EPA addressed a comment that the "MECT lacks a formal mechanism sufficient to address potential environmental justice concerns." Specifically, the commenter expressed concern "about the scenario in which large amounts of NOx MECT allowances could be traded into Harris County and combine with the large amounts of reactive [volatile organic compounds ("VOC")] emissions in the same area. This could result in higher ozone levels than predicted by current modeling. EPA should also consider requiring TCEQ to establish a separate trading zone for Harris County to address environmental justice concerns." In response, EPA disagreed "that an additional formal oversight mechanism for Harris County NOx levels is needed to protect the region from environmental justice concerns." Rather, "the use of VOC reductions in place of NOx allowances under the MECT can only drive VOC emissions lower. That is, because the only involvement of VOCs in the MECT program is the substitution of VOC decreases for NOx increases, there is no scenario under which this program could allow higher VOC emissions than would otherwise occur. Moreover, NOx (the focus of the MECT program) is an area-wide pollutant present

throughout the HGB area, and therefore the trades of NOx emissions pursuant to the MECT would not disproportionately impact a local community. Therefore, the [MECT] does not have the potential to cause environmental justice concerns . . . and will not lead to a disproportionate impact on communities of concern."

— **EPA, Approval and Promulgation of State Implementation Plans; Texas; Highly Reactive Volatile Organic Compound Emissions Cap and Trade Program for the Houston/Galveston/Brazoria Ozone Nonattainment Area, 71 *Fed. Reg.* 52,659 (Sept. 8, 2006).** EPA announced its approval of revisions to the Texas SIP with regard to the Highly Reactive Volatile Organic Compound Emissions Cap and Trade ("HECT") Program ("Program") for the Houston/Galveston/Brazoria ozone nonattainment area. The rule will take effect on October 6, 2006. In footnote 1 of the preamble, EPA discussed the fact that it reevaluated its interpretation of the definition of environmental justice as found in Executive Order 12898. Specifically, in its proposed approval of the Program, it stated that "'environmental justice concerns arise when a trading program could result in disproportionate impacts on communities populated by racial minorities, people with low incomes, or Tribes.' On further review, [EPA believes] the following description is more consistent with Executive Order 12898: '[e]nvironmental justice concerns can arise when a final rule, such as a trading program, could result in disproportionate burdens on particular communities, including minority or low-income communities.' This revised language does not alter [EPA's] determination that the [Program] does not raise environmental justice concerns."

— **DOT, Finding of No Significant Impact, 71 *Fed. Reg.* 52,603 (Sept. 6, 2006).** The Federal Aviation Administration ("FAA") of the United States Department of Transportation ("DOT") announced that the issuance of experimental permits to Blue Origin, LLC to construct and operate a commercial space launch site "would not significantly affect the quality of the human environment within the meaning of the National Environmental Policy Act ("NEPA") . . . [and thus] the preparation of an Environmental Impact Statement is not required," due to the Finding of No Significant Impact. In discussing its findings, FAA addressed, among other things, environmental justice. Specifically, it articulated, "[b]ecause construction and operations impacts would not significantly impact the surrounding population, and no minority or low-income population would be disproportionately affected, no disproportionately high and adverse impacts would be expected on minority or low-income populations."

— **DOI, Notice of Intent to Prepare a Resource Management Plan for the Malta Field Office and Associated Environmental Impact Statement, 71 *Fed. Reg.* 52,572 (Sept. 6, 2006).** DOI's Bureau of Land Management announced its intent to prepare a Resource Management Plan and its associated Environmental Impact Statement for the area in Blaine, Choteau, Glacier, Hill, Liberty, Phillips, Toole, and Valley Counties, Montana. Formal scoping comments are due within 60 days of the publication date; however, public collaboration will occur throughout the process. Included among the items that will be considered is environmental justice.

— **EPA, Notice of Intent to Provided Internet Publication of Proposed Penalties under the Clean Water Act and Safe Drinking Water Act, 71 *Fed. Reg.* 51,193 (Aug. 29, 2006).** EPA announced its intent to use the Internet to issue notices of proposed penalty orders that it issued under the Clean Water Act and Safe Drinking Water Act. In addition, EPA encouraged the Regions to use the Internet, which EPA believes will "likely reach a larger audience than has the past practice of publishing a notice in a newspaper," to provide such notices. EPA noted that since circumstances may exist "in which the lack of access to computers in low-income communities may raise environmental justice issues, Regions may consider providing supplemental notice."

— **DOD, Notice of Intent to Prepare an Environmental Impact Statement ("EIS")/Overseas Environmental Impact Statement ("OEIS") for a Proposal to Enhance Training, Testing and Operational Capability Within the Hawaii Range Complex and to Announce Public Scoping Meetings, 71 *Fed. Reg.* 51,188 (Aug. 29, 2006).** The Department of the Navy of the United States Department of Defense ("DOD") announced its intent to prepare an EIS/OEIS, which would evaluate the "potential environmental effects of increasing usage and enhancing the capability of the Hawaii Range Complex to achieve and maintain Fleet readiness and to conduct current, emerging, and future training and research, development, test, and evaluation . . . operations." Two action alternatives, as well as the No Action Alternative will be considered. Environmental justice represents one of the key environmental issues that the EIS/OEIS will address.

— **EPA, Environmental Impact Statements and Regulations; Availability of EPA Comments, 71 *Fed. Reg.* 50,410 (Aug. 25, 2006).** EPA announced the availability of its comments pursuant to the Environmental Review Process ("ERP"), as CAA § 309 and NEPA § 102(2)(c) require. With regard to the draft Environmental Impact Statements, EPA expressed environmental concerns with the "Ohio River Mainstem System Study, System Investment Plan for Maintaining Safe, Environmentally Sustainable and Reliable

Navigation on the Ohio River." Specifically, EPA expressed concerns "about how implementation of the System Investment Plan would influence the ecologic future of the Ohio River System, and requested additional information regarding adaptive management, institutional arrangements, environmental justice, cumulative impact analysis, mitigation, and water quality."

— **EPA, Review of New Sources and Modifications in Indian Country, 71 *Fed. Reg.* 48,696 (Aug. 21, 2006).** EPA proposed to promulgate a Federal Implementation Plan ("FIP") under the CAA for tribes in Indian country. The FIP included two basic air quality regulations to protect communities in Indian country: (1) a rule for minor stationary sources and minor modifications at major stationary sources in Indian country; and (2) a rule that would apply to all new major stationary sources and major modifications in area that are designated as not attaining the National Ambient Air Quality Standards. Comments must submitted by November 20, 2006. EPA asserted its belief that the "two preconstruction air quality regulations proposed in this FIP should not raise any environmental justice issues. These regulations would provide regulatory certainty and fill a regulatory gap in Indian Country and result in emissions reductions from sources complying with these regulations. Consequently, the regulations should result in some health benefits to persons living in Indian Country, many of whom live in low-income and minority communities. Therefore, we believe that these regulations would not have a disproportionate adverse effect on the health or safety of minority or low-income populations."

— **EPA, Environmental Impact Statements and Regulations; Availability of EPA Comments, 71 *Fed. Reg.* 47,807 (Aug. 18, 2006).** EPA announced the availability of its comments pursuant to the ERP, as required by CAA § 309 and NEPA § 102(2)(c). With regard to the draft Environmental Impact Statements, EPA expressed environmental concerns with the "Interstate 73 Southern Project, Construction from I-95 to the Myrtle Beach Region, Funding, NPDES Permit, U.S. Coast Guard Permit." Specifically, EPA expressed concerns "about potential impacts to wetlands and the Little Pee Dee River Heritage Preserve, as well as noise impacts and environmental justice issues."

B. **<u>State Congressional Bills and Matters.</u>**

- **California, Assembly Concurrent Resolution 142, introduced on April 6, 2006 by Assemblywoman Jenny Oropeza (D-District 55). *Status: Senate Amendments Concurred In. To Enrollment on August 28, 2006.*** The Bill proposed to designate the Interstate 5 and Interstate 710 interchange in Los Angeles as the Marco Antonio Firebaugh Interchange.

In addition, the Bill requests that the Department of Transportation determine the cost of appropriate signs that reflect this designation and, subsequently, to erect those signs. According to the Bill, Mr. Firebaugh passed away at the age of 39, while running for election to the California State Senate. He had previously served the State Assembly from 1998 to 2004 for the 50th Assembly District in Southeast Los Angeles County, after being elected at the age of 32. Mr. Firebaugh was particularly recognized for his "impressive legislative and advocacy record on behalf of California's working families and their children" and was a champion for the Latino community. In addition, Mr. Firebaugh "demonstrated outstanding leadership in introducing legislation aimed at improving the lives of immigrants and low-income communities." Finally, the Bill acknowledged Mr. Firebaugh's recognition of the importance of environmental justice issues," which led him to author "air quality legislation that provides funding for the State's most important air emissions reduction programs" and "ensures that state funding be targeted to low-income communities that are most severely impacted by air pollution."

- **California, Senate Bill 757, introduced on February 22, 2005 by Senator Christine Kehoe (D-District 39).** ***Status: Enrolled. To the Governor on September 8, 2006.*** The Bill, the "Kehoe Oil Conservation, Efficiency, and Alternative Fuels Act," would declare that state agencies shall take all cost-effective and technologically feasible action required to reduce the growth of petroleum consumption and to increase the use of alternative fuels. The Bill requires that California EPA to consult with others entities to carry out specified actions, such as the submission of certain reports or assessments. The Bill would require the development of incentives that and advanced transportation technologies that accounts for, among other things, public health and environmental benefits.

- **California, Senate Bill 1205, introduced on January 25, 2006 by Senator Martha M. Escutia (D-District 30).** ***Status: Read Third Time in Assembly on August 31, 2006. Refused Passage.*** This Bill, the "Children's Breathing Right's Act," would increase the maximum penalties for specified violations of air pollution laws. The Bill seeks to improve the statutes penalizing violations of air quality laws and "ensure that penalties are not so low as to be a minor inconvenience to a serious air polluter, [the State's] children's right to clean and healthy air can be better protected, as can the right to environmental justice." In addition, the Bill would mandate the posting of air quality violations on the State's website.

- **California, Senate Bill 1379, introduced on February 21, 2006 by Senator Don Perata (D-District 9).** ***Status: Enrolled. To the Governor on September 14, 2006.*** The Bill requires the California Department of Health Services to establish the California Environmental Contaminant

Biomonitoring Program ("Program") to monitor the presence and concentration of designated chemicals in Californians. The Program establishes a Scientific Guidance Panel, with 16 members. One of the 16 members shall have expertise in environmental justice.

- **California, Senate Bill 1505, introduced on February 23, 2006 by Senator Alan S. Lowenthal (D-District 27).** ***Status: Enrolled. To the Governor on September 6, 2006.*** This Bill declares the Legislature's intent that when the California Hydrogen Highway Network Blueprint Plan is implemented, it will be done in a clean and environmentally responsible and advantageous manner. The Bill would require the State Air Resources Board to adopt regulations that will ensure that state funding for the production and use of hydrogen contributes to the reduction of greenhouse gas emissions, criteria air pollutants and toxic air contaminants. The Bill includes, among other things, a requirement that the California Environmental Protection Agency's Environmental Justice Advisory Committee meet at least once annually to discuss the production and distribution of hydrogen fuel in the State.

- **California, Assembly Bill 32, introduced on December 6, 2004 by Congressman Fabian Nunez (D-District 46).** ***Status: Enrolled and to the Governor on September 5, 2006.*** This Bill enacts the California Global Warming Solutions Act of 2006 and would create the California Greenhouse Gas Council ("Council"). The Council would coordinate the development and implementation of the State Agency Greenhouse Gas Emission Plan. The Bill requires the Council to consult with, among others, the environmental justice community, and the Council should conduct "its activities that substantially affect human health or the environment in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations, and low-income populations of the State." In addition, the Bill requires the California Air Resources Board ("CARB") to adopt regulations by January 1, 2008 and establish a program to report and verify statewide greenhouse gas emissions. In addition, the Bill authorizes CARB to adopt, on or before January 1, 2008, a statewide greenhouse gas emissions limit to be achieved by 2020.

- **California, Assembly Bill 1101, introduced on February 22, 2005 by Assemblywoman Jenny Oropeza (D-District 55).** ***Status: Status: Passed Assembly and Sent to Senate on January 31, 2006. Read Third Time on August 31, 2006. Passage Refused.*** AB 1101 would require the "state board, on or before July 1, 2007, in consultation with the air districts, to prepare and make available to the public a list of diesel magnet sources." By July 1, 2009, the districts should prepare and maintain a list of available strategies for diesel magnet sources to reduce emissions. The state board shall also consult with its environmental justice stakeholders

group on numerous issues, such as the identification of pollution prevention measures.

- **California, Assembly Bill 1430, introduced on February 22, 2005 by Assemblywoman Jackie Goldberg (D-District 45).** ***Status: Enrolled and to Governor on August 28, 2006.*** The Bill amends the existing law that "requires the State Air Resources Board to develop and adopt, at a public hearing, a methodology for use by air pollution control districts and air quality management districts to calculate the value of credits issued for emissions reductions from stationary, mobile, indirect, and areawide sources . . . when those credits are used interchangeably, with certain requirements." In addition, the law mandated that the State Air Resources Board periodically update the methodology. AB 1430 would "require the state board's environmental justice advisory committee to review each updated methodology."

- **California, Assembly Bill 2144, introduced on February 21, 2006 by Assembly Member Cindy Montanez (D-District 39).** ***Status: Enrolled and to the Governor on September 8, 2006.*** The Bill amends certain sections of California's Health and Safety Code, while adding a section to the State's Water Code. Specifically, the Bill requires a bona fide purchaser, innocent landowner, or contiguous property owner, who seeks immunity from response costs or damage claims relating to a site in an urban landfill area, to enter into an agreement with an agency to perform a site assessment and, if necessary, prepare and implement a response plan. The Bill defines "agency" to mean the Department of Toxic Substances Control, the State Water Resources Control Board, or a California regional water quality board. Included among other Bill requirements was the mandate that the agency consider environmental justice issues for the most-impacted communities, including low-income and racial minority populations, and provide certain information regarding the site decision process.

- **New York, Senate Bill 8491, introduced on August 18, 2006 by Senator Kevin S. Parker (D-District 21).** ***Status: Referred to Senate Rules Committee on August 18, 2006.*** The Bill provides for siting major electric generating facilities. Among other things, the Bill requires that any person who proposes to site a facility to submit a preliminary scoping statement that describes the proposed facility and its environmental setting and provide, among other things, a "determination of whether the proposed facility is to be located in a potential environmental justice area, as defined by the Department of Environmental Justice Policy Directive CP-29, 'Environmental Justice and Permitting.'" In addition, the applicant must submit studies of the environmental impact and safety of the facility, which describes, among other things, existing emissions sources if the facility is proposed for a potential environmental justice area. The Bill

also provides that if a proposed facility will be located in a potential environmental justice area, "an environmental justice specialist shall be designated by the Department of Environmental Conservation prior to the date set for commencement of the public hearing. The environmental justice specialist shall attend all hearings as scheduled by the presiding and associate examiners and shall assist the presiding and associate examiners in inquiring into and calling for testimony concerning relevant and material matters."

- **North Carolina, Senate Bill 353, introduced on March 2, 2005 by Senator Daniel G. Clodfelter (D-District 37).** ***Status: Signed by Governor on August 14, 2006.*** The Bill would, among other things, impose a moratorium on the consideration of permit applications, as well as on the issuance of permits to construct new Landfills in the State for one year beginning on August 1, 2006. The moratorium would be subject to certain exceptions. The moratorium on permit applications and issuance of permits would allow the State to "study solid waste disposal issues . . . to protect public health and the environment." Among the reasons listed as for why the moratorium was necessary were that "economic and other factors may cause landfills to be concentrated in minority and low-income communities in the State; and . . . minority and low-income communities may be at particularly high risk for potential threats to human health and the environment from the siting of landfills in these areas." In addition, the Bill established a 12-member Joint Select Committee on Environmental to study various issues related to the siting of landfills in relation to low-income and minority communities.

- **State Regulatory Alerts.**

  — **Pennsylvania, Notices, 39 PA Bull. 5742 (Sept. 9, 2006).** The notice announced that the November 2, 2006 meeting of the Environmental Justice Advisory Board was rescheduled to October 19, 2006. In addition, the meeting announced that the agenda and related meeting materials would be available through the State's Department of Environmental Protection's website at www.depweb.state.us.