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ERISA, LIFE, HEALTH & DISABILITY INSURANCE LITIGATION
GAMING
GOVERNMENT RELATIONS
HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION
INTELLECTUAL PROPERTY & E-COMMERCE
INTERNATIONAL
LABOR RELATIONS & EMPLOYMENT
MEDICAL PROFESSIONAL & HOSPITAL LIABILITY
MERGERS & ACQUISITIONS
PRODUCTS LIABILITY
PROFESSIONAL LIABILITY
PROJECT DEVELOPMENT & FINANCE
PUBLIC FINANCE
REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
TAX (INTERNATIONAL, FEDERAL AND STATE)
TELECOMMUNICATIONS & UTILITIES
TRUSTS, ESATES & PERSONAL PLANNING
VENTURE CAPITAL & EMERGING COMPANIES
WHITE COLLAR CRIME

Fifth Circuit Restores Private Party's Right to Recover Contribution Under CERCLA Relating to Voluntary Cleanup: *Availl Services, Inc. v. Cooper Industries, Inc.*, U.S. Court of Appeal for the Fifth Circuit, Number 00-10197, slip opinion November 14, 2002, 2002, U.S. App. Lexis 23574 (5th Cir. 2002).

In 2001, the U.S. Fifth Circuit caused a major stir among persons responsible for contaminated properties by ruling, contrary to long-standing practice, that a potentially responsible party (PRP) could not pursue a CERCLA contribution claim against other PRPs when voluntarily engaging in a cleanup plan, even if state regulatory agencies approved the cleanup plan. *See Availl Services, Inc. v. Cooper Industries, Inc.*, 263 F.3d 134 (5th Cir. 2001) (holding that contribution claims under the CERCLA allow a PRP to seek contribution from other PRPs for environmental clean-up costs only when a civil action or administrative order has been brought against the contribution-seeking PRP under CERCLA Sections 106 or 107(a)). In other words, under the Fifth Circuit's 2001 *Availl* decision, clean-up volunteers could not sue for contribution from other PRPs under federal law. The Fifth Circuit granted en banc rehearing in *Availl* on December 19, 2002, and recently reversed the original panel decision.

The underlying facts involved Availl's purchase from Cooper of Texas property, which was contaminated with various hazardous substances. After prompting from the Texas Natural Resources Conservation Commission (TNRCC, now the Texas Commission of Environmental Quality), Availl started cleaning up the property. TNRCC had sent letters to Availl to undertake various investigations or remedial activities. The U.S. EPA never contacted Availl nor designated the property as contaminated. To recover some of the millions of dollars it incurred in clean-up expenses, Availl sued Cooper in the federal district court seeking contribution under CERCLA and damages under state law. Cooper filed counter-claims. Both Cooper and Availl conceded that they were PRPs under CERCLA because they each had contributed to the contamination of the property.

The question presented in the case was whether Section 113(f)(1) of CERCLA allows a PRP to seek contribution from other PRPs when no administrative order or civil action has been brought against them under CERCLA Sections 106 or 107(a). The Fifth Circuit on rehearing held that Section 113(f)(1) does allow such contribution actions whether or not an action has been brought or is pending against the PRP under CERCLA.

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BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
BUSINESS & COMMERCIAL LITIGATION
COMMERCIAL LENDING & FINANCE
CONSTRUCTION
CORPORATE & SECURITIES
EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
ENERGY
ENVIRONMENTAL & TOXIC TORTS
ERISA, LIFE, HEALTH & DISABILITY INSURANCE LITIGATION
GAMING
GOVERNMENT RELATIONS
HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION
INTELLECTUAL PROPERTY & E-COMMERCE
INTERNATIONAL
LABOR RELATIONS & EMPLOYMENT
MEDICAL PROFESSIONAL & HOSPITAL LIABILITY
MERGERS & ACQUISITIONS
PRODUCTS LIABILITY
PROFESSIONAL LIABILITY
PROJECT DEVELOPMENT & FINANCE
PUBLIC FINANCE
REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
TAX (INTERNATIONAL, FEDERAL AND STATE)
TELECOMMUNICATIONS & UTILITIES
TRUSTS, ESATES & PERSONAL PLANNING
VENTURE CAPITAL & EMERGING COMPANIES
WHITE COLLAR CRIME

The Fifth Circuit en banc focused on the plain language of Section 113(f)(1) of CERCLA, in light of its legislative history and purpose, to allow a party that encounters contamination for which it may be liable to clean up and seek contribution costs against another PRP, even if the EPA or another PRP has not brought a cost recovery action or issued an abatement order to the plaintiff PRP. Before Congress added Section 113 (f)(1) to CERCLA in 1986, CERCLA had no express contribution provision, but federal courts applied federal common law to allow contribution actions between PRPs under Section 107. On rehearing, the Fifth Circuit did not resolve whether a PRP may seek contribution only under Section 113(f)(1) or whether it may seek an implied contribution remedy under Section 107. The distinction may be important because there are procedural differences between two sections; liability under Section 107 is joint and several (although some courts have apportioned liability anyway), whereas liability under Section 113(f)(1) is equitable in nature. Contribution actions under Section 113(f) also have a potentially longer statute of limitations period.

The dissent continued to insist that its interpretation of Section 113 (f)(1) was a straightforward reading of the statute that bars contribution claims unless a Section 106 or 107 action has been completed or is pending. The dissent further argued that state law contribution rights would suffice in lieu of a federal cause of action.

The majority noted that some circuit courts of appeal have held that CERCLA preempts state law claims for contribution for environmental clean-up costs. The Fifth Circuit in *Availl*, however, expressed no view on the preemption question.

Thus, *Availl* clarified that a PRP need not be subject to an action under Sections 106 or 107 of CERCLA; CERCLA entitles a PRP, who voluntarily cleans up and incurs response costs, to bring a contribution action directly against other PRPs. By failing to resolve whether both Sections 107 and 113 (f)(1) – rather than merely Section 113(f)(1) alone – entitle a PRP to seek contribution, the Fifth Circuit's decision may lead to future inconsistent decisions on a PRP's right to seek contribution under CERCLA. The decision also leaves open the issue of whether CERCLA preempts private contribution actions under state law (La. R.S. 30:2276 in Louisiana).

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ENERGY
ENVIRONMENTAL & TOXIC TORTS
ERISA, LIFE, HEALTH & DISABILITY INSURANCE LITIGATION
GAMING
GOVERNMENT RELATIONS
HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION
INTELLECTUAL PROPERTY & E-COMMERCE
INTERNATIONAL
LABOR RELATIONS & EMPLOYMENT
MEDICAL PROFESSIONAL & HOSPITAL LIABILITY
MERGERS & ACQUISITIONS
PRODUCTS LIABILITY
PROFESSIONAL LIABILITY
PROJECT DEVELOPMENT & FINANCE
PUBLIC FINANCE
REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
TAX (INTERNATIONAL, FEDERAL AND STATE)
TELECOMMUNICATIONS & UTILITIES
TRUSTS, ESATES & PERSONAL PLANNING
VENTURE CAPITAL & EMERGING COMPANIES
WHITE COLLAR CRIME

Fifth Circuit Affirms Criminal Conviction Under Clean Air Act Asbestos Removal Program: *U.S. v. HO*, 311 F 3rd 589 (5th Cir. 2002)

Eric Ho, the owner of a produce supply company, was convicted of violating the Clean Air Act for failing to comply with asbestos work practice standards when performing renovations to an abandoned hospital in Houston. Ho appealed his conviction and challenged the constitutionality of the Clean Air Act's asbestos work practice standards. On appeal, the U.S. Fifth Circuit held that the Clean Air Act provisions violated were valid exercises of Congress' Commerce Clause authority and remanded the case for re-sentencing under a higher level sentence enhancement after finding that Ho's activities supported a finding that he was "an organizer or leader of criminal activity."

In 1997, Ho purchased an abandoned hospital and building in Houston, Texas. During the negotiations, Ho learned that a 1994 environmental site assessment revealed extensive asbestos in the fireproofing and signed a Commercial Property Condition Statement acknowledging that the property contained asbestos. Rather than using a licensed asbestos abatement company to remove the fireproofing, Ho initiated his own hospital renovation project. Ho hired his handyman to supervise the work, who in turn, hired ten Mexican nationals, untrained in asbestos removal, to perform the renovations. Ho did not give advance notice to the EPA or the Texas Department of Health of his intent to renovate the building.

The renovation project required the workers to remove the fireproofing material located in the hospital. In performing the renovations, the workers did not seal the hospital, left several windows and doors open, and left exposed a large hole in the second floor exterior wall. Ho did not inform the workers that the material contained asbestos, did not instruct the workers on the proper removal techniques for asbestos containing products and did not provide the workers with the requisite safety equipment for asbestos removal. Against customary abatement practices, the workers scraped off the fireproofing using putty knives without water. This method created large amounts of dust inside the hospital. After removing the fireproofing, the workers placed the refuse in plastic bags. On at least one occasion, a worker placed several bags in an outside dumpster.

In response to a complaint of renovation work without a city permit, an inspector for the City of Houston visited the hospital. The inspector issued a stop-work order. Ho obtained an estimate from a licensed asbestos abatement company but chose to renew his own renovation pro-

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AVIATION
APPELLATE LITIGATION
BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
BUSINESS & COMMERCIAL LITIGATION
COMMERCIAL LENDING & FINANCE
CONSTRUCTION
CORPORATE & SECURITIES
EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
ENERGY
ENVIRONMENTAL & TOXIC TORTS
ERISA, LIFE, HEALTH & DISABILITY INSURANCE LITIGATION
GAMING
GOVERNMENT RELATIONS
HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION
INTELLECTUAL PROPERTY & E-COMMERCE
INTERNATIONAL
LABOR RELATIONS & EMPLOYMENT
MEDICAL PROFESSIONAL & HOSPITAL LIABILITY
MERGERS & ACQUISITIONS
PRODUCTS LIABILITY
PROFESSIONAL LIABILITY
PROJECT DEVELOPMENT & FINANCE
PUBLIC FINANCE
REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
TAX (INTERNATIONAL, FEDERAL AND STATE)
TELECOMMUNICATIONS & UTILITIES
TRUSTS, ESATES & PERSONAL PLANNING
VENTURE CAPITAL & EMERGING COMPANIES
WHITE COLLAR CRIME

ject. In an attempt to avoid the stop-work order, Ho required the workers to work at night.

After the asbestos removal was complete, an explosion occurred at the facility blowing a hole in the exterior of the building and injuring several of the workers. As a result, the Texas Department of Health inspected the site finding holes in the exterior walls, fireproofing dust covering the floors and over 100 open bags of fireproofing and sheetrock residue. Laboratory results revealed the residue contained 2% to 20% chrysolite asbestos. (A material with more than 1% is subject to federal and state regulations).

The Occupational Safety and Health Administration initiated an administrative enforcement action. An administrative law judge upheld the citations and assessed administrative penalties against Ho and his companies in excess of one million dollars.

Additionally, the grand jury issued a nine-count indictment against Ho and his handyman for various violations of the Clean Air Act. The jury convicted Ho based on his failure to give notice of intent to renovate a facility involving the removal of asbestos and his failure to comply with asbestos work practice standards.

On appeal, Ho argued that the laws under which he was convicted exceeded congressional authority under the Commerce Clause. The Court evaluated the relevant sections of the Clean Air Act and its implementing regulations in light of the principles of the Commerce Clause. The Court reasoned that Congress had authority under the Commerce Clause to enact the challenged work practice standards of the Clean Air Act because similar violations, when aggregated, had the potential to affect the interstate market for asbestos removal services and commercial real estate.

Ho also challenged the jury instruction on the count for failure to give notice of intent to remove asbestos. Ho argued that the law requires two elements- knowledge of the presence of asbestos and knowledge of the Clean Air Act's notice requirement. The Fifth Circuit, referring to the venerable maxim "ignorance of the law is no defense," determined that the district court's jury instruction was correct. Under the Fifth Circuit's ruling, it is only necessary for the government to prove that the defendant actually knew of the notice requirement. After so concluding, the Fifth Circuit affirmed Ho's conviction.

The Fifth Circuit also faced a cross-appeal by the government chal-

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APPELLATE LITIGATION
BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
BUSINESS & COMMERCIAL LITIGATION
COMMERCIAL LENDING & FINANCE
CONSTRUCTION
CORPORATE & SECURITIES
EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
ENERGY
ENVIRONMENTAL & TOXIC TORTS
ERISA, LIFE, HEALTH & DISABILITY INSURANCE LITIGATION
GAMING
GOVERNMENT RELATIONS
HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION
INTELLECTUAL PROPERTY & E-COMMERCE
INTERNATIONAL
LABOR RELATIONS & EMPLOYMENT
MEDICAL PROFESSIONAL & HOSPITAL LIABILITY
MERGERS & ACQUISITIONS
PRODUCTS LIABILITY
PROFESSIONAL LIABILITY
PROJECT DEVELOPMENT & FINANCE
PUBLIC FINANCE
REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
TAX (INTERNATIONAL, FEDERAL AND STATE)
TELECOMMUNICATIONS & UTILITIES
TRUSTS, ESATES & PERSONAL PLANNING
VENTURE CAPITAL & EMERGING COMPANIES
WHITE COLLAR CRIME

lenging the district court's refusal to apply two sentencing enhancements. The Fifth Circuit held that the district court erred in finding that the defendant did not commit "ongoing, continuous, or repetitive discharge" and further found that it was necessary to remand for determination of the extent of enhancement based on Ho's role as an "organizer or leader of criminal activity."

The Court determined that the district court clearly erred in its conclusion that the government did not prove that Ho's activities resulted in a discharge of asbestos. The Court focused the facts that supported the government's argument that asbestos *must have escaped* the hospital. Specifically, the court keyed in on the failure to seal the hospital, the failure to shut doors and windows, and the explosion that blew a hole in the side of the exterior wall. Accordingly, the Court concluded that asbestos escaped the unsealed hospital continuously and repeatedly throughout the project.

Additionally, the Court held that, Ho was an "organizer or leader of criminal activity that involved five or more participants or was otherwise extensive," warranting application of a sentence enhancement for Ho. In so holding, the court concluded that "otherwise extensive" requires consideration of all persons involved in the commission of the offense, even if the participants were unknowing. The only matter to be considered by the court is the number of persons involved, not the nature of the criminal activity.

The Fifth Circuit affirmed Ho's conviction, vacated the sentence imposed and remanded the case for new sentencing.

Challenge to EPA CERCLA Remediation Plan Based on Plan's Failure to Provide for Relocation of Housing Complex Disallowed by U.S. Eleventh Circuit: *Broward Gardens Tenants Ass'n v. U.S. Envtl Prot. Agency*, 311 F.3d 1066 (11th Cir. 2002)

The Eleventh Circuit Court of Appeals recently dismissed claims brought against the EPA, the Department of Housing and Urban Development, various federal officials and the City of Fort Lauderdale based on the alleged inadequacy of a remedial action under CERCLA for its failure to include a relocation plan as part of the cleanup. The challenge, brought by residents of a housing complex who lived one-fourth (1/4) mile from a Superfund site, came after initiation of the cleanup pursuant to a remedial

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APPELLATE LITIGATION
BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
BUSINESS & COMMERCIAL LITIGATION
COMMERCIAL LENDING & FINANCE
CONSTRUCTION
CORPORATE & SECURITIES
EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
ENERGY
ENVIRONMENTAL & TOXIC TORTS
ERISA, LIFE, HEALTH & DISABILITY INSURANCE LITIGATION
GAMING
GOVERNMENT RELATIONS
HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION
INTELLECTUAL PROPERTY & E-COMMERCE
INTERNATIONAL
LABOR RELATIONS & EMPLOYMENT
MEDICAL PROFESSIONAL & HOSPITAL LIABILITY
MERGERS & ACQUISITIONS
PRODUCTS LIABILITY
PROFESSIONAL LIABILITY
PROJECT DEVELOPMENT & FINANCE
PUBLIC FINANCE
REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
TAX (INTERNATIONAL, FEDERAL AND STATE)
TELECOMMUNICATIONS & UTILITIES
TRUSTS, ESATES & PERSONAL PLANNING
VENTURE CAPITAL & EMERGING COMPANIES
WHITE COLLAR CRIME

plan developed by the EPA and adopted in a consent decree. The plaintiffs alleged that the cleanup plan was deficient because it failed to include a relocation plan for their complex and because it gave rise to due process constitutional violations, as well as civil rights violations.

Section 113(h) of CERCLA generally prohibits federal judicial review of challenges to remedial and removal actions until completion of the planned cleanup. 42 U.S.C. Sect. 9613(h). Attempting to circumvent this prohibition, plaintiffs argued that their claims were not a “challenge” to the cleanup within the meaning of Section 113(h) and that the prohibition did not extend to constitutional claims. After noting that a suit “challenges” a remedial action for purposes of Section 113(h) if it interferes with the implementation of a CERCLA remedy, the court found that plaintiffs’ claims clearly interfered with the remedy chosen by EPA because plaintiffs, in essence, asked the district court to modify or replace the remedial plan. The court also decided that: 1) the assertion that a remedial plan was inadequate or deficient on the basis that it did not include a plan for relocation constituted a challenge to the plan for purposes of Section 113(h); and 2) Section 113(h) equally bars constitutional and statutory claims, even those alleging *de jure* segregation.

Although EPA can include relocation as part of remedial plans, it did not in this plan. Relocation continues to be a contentious issue among communities, regulatory agencies and operating industrial facilities. Here, once EPA had finalized the CERCLA cleanup plan, the court refused to allow a community to reopen it to require relocation. The residents, however, will still be able to challenge the adequacy of the cleanup after it is completed.

EPA Announces Controversial Revisions to Clean Air Act New Source Review Requirements

On November 22, 2002, the EPA announced a final rule to relax compliance requirements for refineries, power plants and other large sources under the Clean Air Act’s New Source Review (NSR) provisions. The final rule was published in the *Federal Register* on New Years Eve at 67 *FR* 80186 (December 31, 2002) and will become final on March 3, 2003. Attorneys general from at least nine states, however, have announced their intent to file suit challenging the new rule on the basis that it will gut the Clean Air Act.

Long anticipated, the rule changes were a major focus of the Bush

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BUSINESS & COMMERCIAL LITIGATION
COMMERCIAL LENDING & FINANCE
CONSTRUCTION
CORPORATE & SECURITIES
EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
ENERGY
ENVIRONMENTAL & TOXIC TORTS
ERISA, LIFE, HEALTH & DISABILITY INSURANCE LITIGATION
GAMING
GOVERNMENT RELATIONS
HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION
INTELLECTUAL PROPERTY & E-COMMERCE
INTERNATIONAL
LABOR RELATIONS & EMPLOYMENT
MEDICAL PROFESSIONAL & HOSPITAL LIABILITY
MERGERS & ACQUISITIONS
PRODUCTS LIABILITY
PROFESSIONAL LIABILITY
PROJECT DEVELOPMENT & FINANCE
PUBLIC FINANCE
REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
TAX (INTERNATIONAL, FEDERAL AND STATE)
TELECOMMUNICATIONS & UTILITIES
TRUSTS, ESATES & PERSONAL PLANNING
VENTURE CAPITAL & EMERGING COMPANIES
WHITE COLLAR CRIME

Administration's Energy Plan. While technically the changes are a culmination of rule-making initiated by EPA in 1996, in large measure, the EPA adopted them in response to criticisms of the Clinton Administration EPA's NSR enforcement efforts against refineries and power generation plants, in which EPA alleged failure to comply with NSR in plant expansion or production increases. These enforcement efforts led to a series of consent decrees between EPA, several states and major oil refiners requiring the refiners to install new pollution control technologies to reduce emissions and adopt other program enhancements. Despite the criticisms, the Bush Administration EPA has not abandoned the NSR enforcement initiative and, indeed, has finalized additional NSR consent decrees. The NSR rules have long been considered confusing, costly and time consuming in application. Opponents have argued that the review process under the existing NSR rule discourages plant expansions and increases operating inefficiencies. EPA maintains that the new rule will provide more flexibility under the NSR program for plants while allowing for plant expansions and a reduction in overall plant emissions.

New Source Review basically requires facilities that are major sources of air pollutants to undergo extensive analyses and obtain complex operating permits to control their air emissions. The New Source Review program covers more than 17,000 facilities. The rule changes could provide relief for a substantial number of them.

The new rule creates a series of exemptions from requirements to install pollution control equipment when a plant modernizes or expands. The EPA still maintains that the new rule will lower air emissions.

Key elements of the rule as finalized include the following:

- Plant-Wide Applicability Limits ("PALs"). This change will apply a single emission cap to an entire facility. Facilities will be able to make plant changes without triggering new source review as long as they do not exceed the plant-wide cap. Currently, new source review applies to each emission unit within a plant. A single plant can comprise hundreds of emission units.

- Clean Unit Exclusion. This change will exempt an emission unit from additional new source review requirements for ten years after receiving a permit that requires installation of best available control technology or the equivalent. Plants with these new source review permits will be able to make additional modifications to the facility

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ANTITRUST & TRADE REGULATION
AVIATION
APPELLATE LITIGATION
BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
BUSINESS & COMMERCIAL LITIGATION
COMMERCIAL LENDING & FINANCE
CONSTRUCTION
CORPORATE & SECURITIES
EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
ENERGY
ENVIRONMENTAL & TOXIC TORTS
ERISA, LIFE, HEALTH & DISABILITY INSURANCE LITIGATION
GAMING
GOVERNMENT RELATIONS
HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION
INTELLECTUAL PROPERTY & E-COMMERCE
INTERNATIONAL
LABOR RELATIONS & EMPLOYMENT
MEDICAL PROFESSIONAL & HOSPITAL LIABILITY
MERGERS & ACQUISITIONS
PRODUCTS LIABILITY
PROFESSIONAL LIABILITY
PROJECT DEVELOPMENT & FINANCE
PUBLIC FINANCE
REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
TAX (INTERNATIONAL, FEDERAL AND STATE)
TELECOMMUNICATIONS & UTILITIES
TRUSTS, ESATES & PERSONAL PLANNING
VENTURE CAPITAL & EMERGING COMPANIES
WHITE COLLAR CRIME

without having to obtain a new permit as long as they do not exceed the emission limits in the permit.

- Emission Baseline Change. Under this change, EPA or the states will be less likely to determine that a plant upgrade will automatically increase emissions triggering new source review. Currently, calculation of projected emissions are based on projected potential emissions. The new rule allows calculation of projected emissions to be based on actual emissions. Projected actual emissions are likely to be lower than potential emissions and less likely to trigger new source review. Additionally, plants will be able to determine current emission baselines using any two-year period in the previous ten years as a baseline, rather than the most current two-year period, as required under the existing rule.

- Pollution Control Project Exemption. This change excludes from new source review requirements projects that result in a net overall reduction in air pollution. Companies are allowed to commence these pollution control projects without having to go through the new source review process.

The fate of this new rule likely will be decided by the courts. In the meantime, EPA appears to be continuing its NSR enforcement initiative.

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COMMERCIAL LENDING & FINANCE
CONSTRUCTION
CORPORATE & SECURITIES
EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
ENERGY
ENVIRONMENTAL & TOXIC TORTS
ERISA, LIFE, HEALTH & DISABILITY INSURANCE LITIGATION
GAMING
GOVERNMENT RELATIONS
HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION
INTELLECTUAL PROPERTY & E-COMMERCE
INTERNATIONAL
LABOR RELATIONS & EMPLOYMENT
MEDICAL PROFESSIONAL & HOSPITAL LIABILITY
MERGERS & ACQUISITIONS
PRODUCTS LIABILITY
PROFESSIONAL LIABILITY
PROJECT DEVELOPMENT & FINANCE
PUBLIC FINANCE
REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
TAX (INTERNATIONAL, FEDERAL AND STATE)
TELECOMMUNICATIONS & UTILITIES
TRUSTS, ESATES & PERSONAL PLANNING
VENTURE CAPITAL & EMERGING COMPANIES
WHITE COLLAR CRIME

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