Responding to Environmental Regulatory Uncertainty:

What Businesses Need to Know to Stay Ahead and Profit

April 18, 2018

By: Rick Porter, Chuck Helsten, Jeff Hoskins

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Presenters

- Chuck Helsten
  - Partner at Hinshaw where he has worked since 1984
  - Practice in Environmental Law for over 38 years
  - Illinois Governor Edgar's Environmental Task Force – Clean Break Program
  - Served as an Editorial Advisory Board Member Illinois for the Environmental Law and Regulation Report
  - DRI – Toxic Tort and Environmental Law Committee
  - Member of four ABA National Subcommittees on Environmental Matters.
  - Represents businesses and governmental entities on environmental regulation and litigation. Landfilling, contamination, brownfields revitalization, CERCLA, RCRA, EPCRA and due diligence.
  - Leading Lawyer Environmental Law

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Presenters

- Rick Porter
  - Partner at Hinshaw where employed since 1992
  - Over 20 years emphasizing Environmental Law and Land Use
  - Leading Lawyer Environmental Law
  - Representation of businesses and governmental entities in Environmental Litigation, due diligence, administrative hearings
  - Particular experience in controversial land uses wind turbines facilities, landfills, quarries, airports, heliports, etc
  - Oversee voluntary Site Remediation Program sites and non-voluntary sites. Coordinates Phase One and Phase Two ESA's and Environmental Audits and Environmental Management Systems.

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Presenters

- Jeff Hoskins
  - Partner at Hinshaw since 2017
  - Over 12 years of litigation experience representing both businesses and private individuals
  - Recognized in Leading Lawyer - Litigation
  - Representation of businesses and governmental entities in Environmental Litigation, due diligence, and administrative hearings
  - Representation of private individuals and municipal entities involving land use litigation in both circuit court as well as through administrative hearings
  - Particular experience in wind turbines facilities, landfills and quarries

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What We Will Cover Today

- Environmental law developments business and government entities can use to make or save money
  - VW Settlement
  - CWA and CAA developments
  - Recent executive orders
  - NEPA – fast tracking
  - CERCLA – recent amendments and Brownfield's grants and loans
  - Illinois' solar energy incentives
  - Tax Reform – environmental enforcement
  - RCRA – recent changes
  - EPCRA – reporting changes

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The Clean Air Act

BURGER

"NO PLASTIC BAGS, PLEASE. I DON'T WANT TO CONTRIBUTE TO GLOBAL WARMING!"

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The Volkswagen Settlement

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Components of VW Settlement

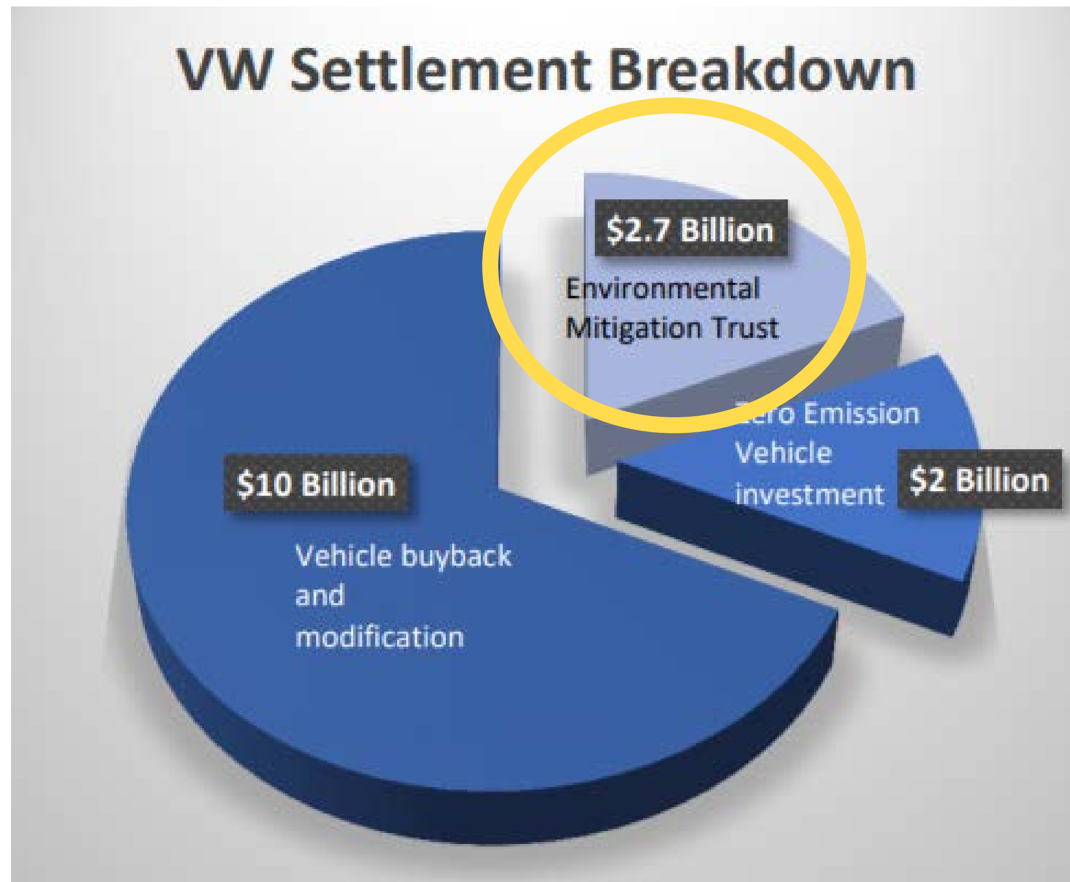

Image Source: http://www.naseo.org/Data/Sites/1/naseo-vw-beneficiary-mitigation-plan-toolkit-final.pdf

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Illinois' Allocation of VW Settlement

- $108 million total
  - Up to $36 million in 2018
  - No more than $72 million total in first 2 years
- Illinois might receive more money after year 10
- Brad Frost of IEPA is identified in BMP and spoke with us and stated agency will distribute funds in no less than 3 annual sessions
- **First Applications accepted late spring 2018**

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IL's ***Draft*** Beneficiary Mitigation Plan (BMP)

- Three "priority" areas
  - Priority Area 1: Cook, DuPage, Will, Lake, McHenry, Kane, and a few townships
  - Priority Area 2: Metro-East St. Louis
  - Priority Area 3: Champaign, DeKalb, LaSalle, McLean, Peoria, Sangamon, and Winnebago
- Priority does not really mean priority!!
- BMP not final yet – comments close **April 20, 2018 –** if want to add allowed projects need to comment

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WINNEBAGO
MCHENRY
LAKE
DEKALB
KANE
DUPAGE
COOK
KENDALL
LASALLE
WILL
GRUNDY
PEORIA
MCLEAN
CHAMPAIGN
SANGAMON
MADISON
ST. CLAIR
MONROE

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How to Improve Chances of Funding

Per Brad Frost of IEPA the selection process will likely entail:

- **Standardized** scoring system to be published soon
- Evaluated **within** category (*e.g.*, all applicants seeking funding for on-road projects)
- **Without** consideration of “priority area”
- Decisions expected **fall 2018**
- **The bigger % of applicant contribution the more likely funding will be awarded**
- After approval applicant will have **to front costs** of project and then get reimbursed
- Must be new project – not reimbursement of existing project

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The VW Settlement's 10 Eligible Mitigation Action Categories

- 10 eligible "mitigation action categories"
  1. **Class 8 Local Freight Trucks and Port Drayage Trucks**
  2. **Class 4-8 School, Shuttle, or Transit Buses**
  3. **Freight Switcher Locomotives**
  4. **Ferries/Tugs**
  5. Ocean Going Vessels Shorepower
  6. **Class 4-7 Local Freight Trucks**
  7. Airport Ground Support Equipment
  8. Forklifts and Port Cargo Handling Equipment
  9. Light Duty Zero Emission Vehicle (ZEV) Supply Equipment
  10. **Non-Federal Voluntary Matches Under the Diesel Emission Reduction Act (DERA) Option**

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IL’s *Draft* BMP - Selected Categories

3. Freight Switcher Locomotives
4. Ferries/Tugs
10. Locomotives under the DERA Option

1. Class 8 Local Freight Trucks and Port Drayage Trucks
2. Class 4-8 School, Shuttle, or Transit Buses
6. Class 4-7 Local Freight Trucks

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Primarily Replacing or Repowering Vehicles

- Repower: “to replace an existing engine with a newer, cleaner engine or power source that is certified by EPA and, if applicable, CARB, to meet a more stringent set of engine emission standards”
- Engine model must always be from **the year in which the mitigation action occurs or one year prior**
- Replacements must be “scrapped” by cutting 3-inch whole in engine block and (sometimes) cutting frame rails in half

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Most of Money for Off-Road Projects – Rail and River

- Off-Road Projects: **up to 65% (approx. $70.6 mil)**
  - Freight Switcher locomotives with engines installed before Jan. 1, 2015* that operate 1000 or more hours per year may be **repaired** or **replaced** with new diesel or Alternate Fueled or All-Electric engines.
  - Ferries and/or tugs with unregulated, Tier 1, or Tier 2 engines may be **repowered** or **upgraded** with one of several options
  - Locomotives under the **DERA Option**
  - **See** https://www.epa.gov/emission-standards-reference-guide/epa-emission-standards-nonroad-engines-and-vehicles - for description of Tier 1 and Tier 2
  - If want to object to 65% of money going to rail and river – need to submit comments by 4/20/18

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On Road Projects – up to 20% - $21.6M

- Class 8 Local Freight Trucks and Port Drayage Trucks
  - Large freight and port drayage trucks with (1) engine model years 1992-2009 and (2) GVWR over 33,000 pounds may be **repowered** or **replaced** with new diesel or alternate fueled or all-electric vehicles
  - Not Just Freight – Class Eight Freight Trucks “trucks used for port drayage and/ or freight/cargo delivery (**including waste haulers, dump trucks and concrete mixers)**”
  - “Drayage Trucks” means “trucks hauling cargo to and from ports and intermodal rail yards”

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On Road Projects – up to 20% - $21.6M - continued

- Class 4-8 School Buses, Shuttle Buses, and Transit Buses
  - Buses used for transporting people with (1) engine models **prior to 2009** and (2) GVWR **over 14,000 pounds** may be repowered or replaced with new diesel or alternate fuel or all-electric vehicles

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On Road Projects – up to 20% - $21.6M - continued

- Class 4-7 Local Freight Trucks
  - Medium freight trucks with (1) engine model years 1992-2009 and (2) GVWR between 14,001 and 33,000 pounds may be **repowered** or **replaced** with new diesel or alternate fuel or all-electric vehicles
  - If in a state that already requires replacement of these engines (Illinois is not one) then 2010-2012 trucks also eligible

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All-Electric School Bus Projects: up to 10% (approx. $10.8 mil)

- **Replace** (not repower) diesel school buses with all-electric school buses
- Buses over 14,000 pounds eligible for replacement

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IL’s ***Draft*** BMP – Contribution Amounts

- Cost sharing provisions
  - **Non-government– *at least 50%,*** *higher where specified by VW Settlement or DERA Option*
  - **Government– *at least 25%,*** *higher were specified by DERA Option*
- Pay for 100% of the project, upon completion IEPA issues “certification”, then reimbursed directly from the Trust

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Applications for Funding

- Per Brad Frost of IEPA Application will be released **late spring/early summer 2018**
- **Not** first-come, first-serve
- At least **three** application rounds

- Check IEPA's website: http://www.epa.illinois.gov
- Follow IEPA on Twitter: @ILEPA

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Content of Application

- Should be working on it now!
- Application will be simple and straight forward involve identifying project and **quantifying** likely NOx reduction.
- Identify type of mitigation action (i.e., which “bucket”)
- The vehicle will likely be required to stay/service the specific claimed priority area.
- Minimal external documentation – IEPA says they do not anticipate requiring any specific documentation, environmental studies, or proof of financial information

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What should I do now?

- Consider what type of projects and mitigation actions correspond with your business's needs
- Review cost-sharing provisions to determine whether the mitigation action is financially viable
- Consider pros and cons of repowering versus replacement.
- Visit: http://www.epa.illinois.gov/topics/air-quality/vw-settlement/index
  - Review draft BMP
  - Provide public input by April 20, 2018
  - **Take VW Settlement Survey***
- **Consult with your Hinshaw attorney**

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Stream Lining National Environmental Policy Act

NEPA

NATIONAL ENVIRONMENTAL POLICY ACT

http://conservefish.org/2015/11/02/americas-fish-need-nepa/

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"Expediting Environmental Reviews and Approvals For High Priority Infrastructure Projects"

- 1/24/2017 Executive Order - Governors or the heads of any state executive departments may **request "high priority" status** to expedite environmental reviews and approvals
- Decision must be made **within 30 days of the request**
- If designated high priority, all environmental agencies have to use all necessary and appropriate means to complete reviews and approvals.
- EO did not mention interplay with FAST-41 process, an Obama era infrastructure law which expedited environmental review and authorization of "covered projects"

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Aug. 15, 2017 EO – "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure"

- Clarified Jan. 24, 2017 EO regarding "high priority"
  - "covered projects" under FAST-41 **automatically** "high priority"
  - Now "high priority" = improvements to electrical grids, port facilities, airports, pipelines, bridges, and highways **and**
    - construction of infrastructure for renewable or conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, and manufacturing**.**
    - and any other sector determined by the Federal Improvement Council + requests by state governors
  - <u>Thus almost every infrastructure project is now "high priority"</u>
- If every infrastructure project high priority how will the be expedited?

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August 15, 2017 EO, con’t

- EO also established “One Federal Decision” policy - one lead federal agency, which will work with others to complete environmental review and authorization process
- Set goal for processing environmental reviews and authorization decisions at two years
- Utilizes Obama’s “Permitting Dashboard” to track progress by requiring monthly updates https://www.permits.performance.gov/
- Revoked Obama EO/Federal Flood Risk Management Standard federally funded projects near floodplains no longer have to conduct eight-step decision making process

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NEPA Guidance Amended

- Feb. 12, 2018 – Trump directed CEQ to rewrite the NEPA guidance. Here is the result:
  - Allows utility relocation *before* NEPA process is complete
  - Reinforce need for "One Agency, One Decision" structure, now with **"firm deadline of 21 months"** for lead Federal agency to complete review
  - Limits holds on projects under NEPA facing a legal challenge to exceptional circumstances
  - **Establish a uniform 150-day statute of limitations for legal challenges to permitting decisions** (current Federal is 6 years, could be 2 years if state elected NEPA substitution program)

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Amendments to CERCLA in Build Act of 2018

- 3/23/18 - massive appropriations bill signed into law which included at Division N “Brownfields, Utilization, Investment and Local Development Act of 2018”
- Strengthens BFPP defense for tenants – now even if landlord loses it BFPP status the tenant retains the status as long as loss by landlord not tenant’s fault
- Governmental exclusion from definition of owner clarified that taking of the property need not be “involuntary” by government – but must still be part of “function as sovereign”
- Makes more Brownfields funding available

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CERCLA/Build Act – Brownfields Funds

- A government owner no longer needs to be BFPP for federal Brownfields grants or loans as long as did not cause or contribute to the release
- Certain non-profits and community development entities now eligible for grants and loans
- More funding opportunities:
  - Orphan (no PRP) petroleum sites added to Brownfields program
  - Caps on grants raised from $200K to $500K (with possible waiver to $650K)
  - Creates multipurpose grant program with awards up to $1M and may address multiple sites together
  - Removes ban on using funds for admin costs up to 5%
  - Prioritizes water body, flood plain and renewable/efficient sites
  - Funds $1.7M/ year small community technical assistance program with $20K cap.
  - Re-funds $200M/yr Brownfields program through 2023 and $50M/yr for Sec. 128(a) state response program

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Illinois' Solar and Energy Incentives

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IL Property Assessed Clean Energy (PACE) Act

- Enables units of local government (Counties, cities, villages) to establish PACE programs to provide low cost 100% financing via bond sale for approved energy efficiency projects (e.g., solar panels, HVAC improvements, vehicle charging stations, certain roof repairs LED lighting etc.)
- Repayment occurs through assessments against via tax bill, so the lien stays with the property.
- Requires any existing mortgagees to agree to be subordinate to municipality issuing financing
- **Hinshaw can draft the policy for units of local government**
- Good revenue source for government and low cost financing for commercial – governmental entities can team up with themselves or private

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President Trump's Executive Orders

TWEET

LOOKS LIKE SIX MORE WEEKS OF CHAOS.

EXECUTIVE ORDERS

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Clean Water Act

- The Clean Water Act was passed in 1972 in order to protect the quality of our water and by regulating the discharge of pollutants into navigable waters, or **“waters of the United States”**
  - “What are the ‘waters of the United States’? As it turns out, defining that statutory phrase—a central component of the Clean Water Act—is a contentious and difficult task.” - Justice Sotomayor

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Clean Water Act

- In 2015, the Obama administration issued the WOTUS Rule which redefined and broadened the scope of the Act over waters – generally rule provided ditches, tributaries etc. were WOS if hydrologically connected to navigable waters.
- Rule's implementation halted by litigation
- Based on Trump's Feb. 28, 2017 EO, the EPA announced its intent to repeal the WOTUS Rule and revise the definition of "waters of the United States" to "only those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes,'" that are connected to navigable-in-fact waters

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Clean Water Act

- On Jan. 31, 2018, the EPA officially postponed implementation of the WOTUS Rule for two years and reinstituted the pre-2015 definition of “waters of the United States,” which includes:
  - Traditional navigable waters
  - Wetlands adjacent to traditional navigable waters
  - Non-navigable tributaries of traditional navigable waters that are relatively permanent
  - Wetlands that directly abut such tributaries
- Does not include:
  - Swales or erosional features, such as gullies
  - Ditches without a relatively permanent flow of water

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Clean Water Act

- Feb. 12, 2018 – Legislative Framework for Rebuilding Infrastructure in America
  - Grant Secretary of the Army the authority to define WOTUS
  - Remove EPA's authority to veto Section 404 Permits
  - Change statutory time-period requirements for States to issue Section 401 Certification
  - Lengthen term of NPDES Permits and provide automatic renewal option

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CWA - Conduit Theory Case

- 4/12/18 – *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No 17-1640 – held that CWA regulates point source discharges through groundwater with a "direct hydrologic connection" to the surface water
- Thus liability can arise under CWA for waste water collection basins, impoundments, wells and pipelines that result in groundwater contamination
- "Discharge need not be channeled by a point source until it reaches navigable waters"
- Fact specific inquiry of time, distance, geology, flow and slope
- Facts of case were groundwater discharge less than 1000 feet from surface water which is "direct hydrologic connection"
- This conclusion is similar to 9th Circuit (Hawaii) case that held if groundwater is "fairly traceable" to a navigable body of water (by use of dye injected into wells) then regulated under CWA

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Clean Air Act

http://www.momscleanairforce.org/girl-scouts-for-clean-air/

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Clean Air Act

- Jan. 25, 2018 – EPA Guidance Memorandum withdrawing “once in, always in” policy
- Under “once in, always” facilities with potential to emit **certain levels of toxins** were dubbed “major sources” and thus subject to strict control standards <u>forever</u>
  - ≥ 10 tons per year of any single hazardous air pollutant, or
  - ≥ 25 tons per year of any combination of hazardous air pollutants
- Now, these “major source” facilities can seek reclassification if their emissions fall below the specified levels and, if granted, no longer have to use “maximum achievable control technology” to reduce pollution

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Clean Air Act

- Pending legislation that would eliminate the use and production of HFCs
  - Most commonly used in refrigeration and air-condition equipment
- Despite legal regulation hiccups, appliance industry still actively moving towards using HFC alternatives

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Migratory Bird Treaty Act

- December 22, 2017 – accidental bird deaths are **legal**
  - Impacts **Migratory Bird Treaty Act**
  - Incidental deaths will no longer be considered a "taking" or migratory birds
  - Beneficial to oil, wind, and natural gas companies – possibly resulting in less federal prosecutions

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Tax Reform & Government Environmental Enforcement

- Public Law 115-97, commonly known as Tax Cuts and Jobs Act (TCJA)
- Former text of Internal Revenue Code 26 USC 162(f) provided that any "fine" or "similar penalty" paid to the U.S. Government for any "violation of law" was non-deductible as a business expense
- TCJA eliminated this language and made any costs paid to or at the direction of the Government in connection with the resolution of "non-compliance" with the law non-deductible as a business expense (or otherwise) ***with two exceptions*:**
  - (1) **"constitutes restitution"** – an amount that "constitutes restitution" (including remediation of property) for damage or harm which was or may be caused by the violation of any law or the potential violation of any law; and
  - (2) **"compliance"** – an amount that is paid to come into "compliance" with any law which was violated or otherwise involved
- Must expressly identify the amount that falls within the two exception areas

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Tax Reform & Government Environmental Enforcement, con't

- Further imposes an obligation on **every** governmental agency engaged in a "enforcement action" or "investigation" to file an information return with the IRS regarding any resolution with an aggregate amount exceeding $600, with that return including:
  - (i) the total amount to be paid;
  - (ii) the amount to be paid that constitutes "restitution" and
  - (iii) the amount to be paid that constitutes "compliance with the law"
- **CHANGES ARE EFFECT AS OF DECEMBER 22, 2017**
- IRS has yet to issue regulations clarifying and implementing statutory changes

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Tax Reform & Government Environmental Enforcement, con't

- **What does this mean for you?**
  - Establish with enforcement entities which amounts being paid (i.e., whether paid directly to the government or simply incurred by a party for remedial costs pursuant to a settlement) qualify as "restitution" or "compliance"
  - Be aware that what constitutes "restitution" is still unsettled, but we know it includes "remediation of property"
  - Consider how TCJA will effect voluntary clean-up proceedings, and further its impact on the deductibility of Supplemental Environmental Projects and environmental mitigation settlements?
  - Note that government investigation and litigation costs **are not** "restitution" or a cost of "compliance"
  - Unknowns:
    - How will the legislation apply to Unilateral Administrative Orders and other forms of involuntary judicial orders, where "restitution" or "compliance with the law" may not be identified?
    - Will the IRS regulations require more information regarding specific "restitution" or "compliance" costs?

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Recent Changes to RCRA

Several controversial developments:

- EPA has proposed that any **"meaningful deviation"** could change the regulatory status of a facility from a **"Generator"** to **"Treatment Storage and Disposal Facility"** (TSDF)
  - "Generator" status to TSDF carries substantial increase in regulatory obligations
- Law now provides that a person who generates a solid waste must make an **"accurate determination"** as to whether a waste is a hazardous waste
  - Addition of word "accurate" gives rise to new obligations on covered facilities
- Requirements for hazardous waste determinations now include the phrase **"in the course of management"**
  - Question as to whether this (1) creates a need for additional analysis of waste, record keeping requirements, etc., or (2) an avenue for heightened regulatory inquiry aimed at verifying that waste characteristics were "accurately" determined

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Recent Changes to RCRA, con't

Favorable developments:

- New provision for Very Small Quantity Generators (VSQGs) and Small Quantity Generators (SQGs), now may maintain regulatory status when generating hazardous waste as a result of random **"episodic"** events
  - SQGs and VSQGs (previously "Conditionally Exempt Small Quantity Generators") would be allowed one planned or unplanned "episodic" event per year (i.e., a tank cleaning, maintenance activities, short term projects, an accident or spill)
  - ***Additional conditions sure to come with this new "safe harbor"***
- Generator of waste may designate one central "unit", with various ancillary "satellite" accumulation designations, instead of maintaining separate discrete waste management "units"
  - ***Subject, again, to certain specific conditions***

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Recent Changes to RCRA, con't

More developments:

- As of May 30, 2017, labels on waste accumulation containers must contain dates of accumulation and the contents, ***in additional to any hazardous "characteristics" of the contents (i.e., ignitability, corrosively, reactivity, and/or toxicity)***
  - Note: Reliance on hazardous waste codes is insufficient for this requirement because those codes are not considered "plain language"
- Addition of certain additional "exemptions" for "Very Small Quantity Generators"

Friendly reminders:

- "waste minimization" certification requirements still apply, with different standards for VSQGs and SQGs
- Both must maintain adequate "records of compliance" to support certificate

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EPCRA Reporting Changes

- Effective January 1, 2018, five existing “hazard categories” replaced with “specific hazard classes”
- NOW:

Physical Hazard	Health Hazard
Flammable (gases, aerosols, liquids, or solids)	Carcinogenicity
Gas under pressure	Acute toxicity (any route of exposure)
Explosive	Reproductive toxicity
Self-heating	Skin Corrosion or Irritation
Pyrophoric (liquid or solid)	Respiratory or Skin Sensitization
Pyrophoric Gas	Serious eye damage or eye irritation
Corrosive to metal	Specific target organ toxicity (single or repeated exposure)
Oxidizer (liquid, solid or gas)	Aspiration Hazard
Organic peroxide	Germ cell mutagenicity
Self-reactive	Simple Asphyxiant
In contact with water emits flammable gas	Hazard Not Otherwise Classified (HNOC)
Combustible Dust	
Hazard Not Otherwise Classified (HNOC)	

- These MUST be reported on Tier II inventory form

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Increased Federal Fines & Costs for "Non-Compliance"

- Some penalties more than doubled
  - E.g., Clean Air Act maximum daily civil penalty from $37,500 to $93,750
- Other significant increases mandated by the Federal Civil Penalties Inflation Act of 1990 just went into effect
- Effective January 2, 2018, Occupational Safety and Hazard Administration (OSHA) increased its daily fines for respirable silica violations to $12,934, with "willful" or "repeated" violation now being subject to a $129,336 potential penalty assessment

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Per- and Polyfluoroalkyl Substances (PFAS)

- New “Contamination of Concern”
- Used in the manufacture of consumer-based products, like non-stick cookware
- Not biodegradable, found in low levels in the environmental and the bloodstream of virtually everyone in the developed world
- Poses a significant risk to the environment and human health ***“at a level yet to be determined”*** and ***“needs to be addressed quickly”***
- PFAS National Leadership Summit – May 22-23, 2018 in Washington, D.C.
  - Share information on ongoing efforts to characterize risks from PFAS and develop monitoring and treatment/cleanup techniques
  - Identify specific near-term actions, beyond those already underway, that are needed to address challenges currently facing states and local communities
  - Develop risk communication strategies that will help communities to address public concerns with PFAS
- **What should I do?** – Monitor federal and state regulatory developments

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West Coast “Super Tort” Suits

- “Unique” theories of recovery are emerging against product manufacturers, distributors and owners/operators of facilities that are perceived to have significant environmental impacts
- Based, in part, on public nuisance
  - Public nuisance = “an unreasonable interference with a **common right** to the general public”
  - **Common right** could include waterways for commerce, navigation and recreation, and other natural resources
- Claim both “general” injuries to the public at large **and** “special” injuries
- Cases in Oregon and Washington brought in “parens patriae” capacity
  - Parens patriae refers to a state’s power to sue to redress injuries to its “sovereign interests” such as health and well-being of their citizens
- “Super Tort” defense: unreasonably extend liability for the presence of chemicals generally found in the environment to manufacturers of chemicals, distributors, and users of chemicals, **whether or not those parties had any meaningful involvement in causing the damages being alleged**

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