



## The Risk Game: Environmental Litigation Isn't All Chance

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There is no magic formula to prevent an industrial source from becoming the target of a costly third-party administrative or legal environmental challenge. These legal actions from environmental non-governmental entities (eNGO) may come in the form of objections to permit changes or renewals, citizen suit civil claims, or intervention in public service commission proceedings. Coal ash and other groundwater claims are particularly popular at present.

Environmental compliance information made available by industry to the public should be limited to what is required, while ensuring that it is accurate. Consider the following suggestions:

1. Monitor the Content on the Company's Internet Site, in Press Releases, in the Company's SEC 10K, and in Publicly Posted Company Newsletters.

The internet is fertile ground for eNGOs to obtain information concerning environmental compliance about a Company. Many companies maintain internet sites that report facility specifications, facility operation details, and environmental compliance information. While a company might be proud of a successful installation of an air pollution control device or expansion of manufacturing operations, regulators and eNGOs use the internet as a tool to identify whether the facility is in compliance with environmental laws. Examples of possible information of interest may include: New emission unit installations, details concerning closure of emission units and their waste streams, facility outage improvements, air emission source life extension projects, and future operation expansion plans.

eNGOs and regulators also review public information such as SEC 10Ks and company newsletters. In a lawsuit against Dynegy Midwest Generation, the eNGO that sued the utility for impacts to groundwater from coal ash disposal identified statements in Dynegy's 10K in which the company admitted that coal ash disposal at its Vermilion plant impacted groundwater that had migrated off-site to the river. It is unclear whether these statements directly led the eNGO to choose its target; however, the statement was included in the notice letter that the eNGO provided Dynegy prior to filing the lawsuit.

We recommend that environmental professionals and public relations professionals within a company coordinate and develop a protocol for review of information that could bear on environmental liability.

## 2. Monitor Government and eNGO Information Concerning the Company.

eNGOs and EPA host internet sites with environmental compliance information for specific companies. Examples of these sites include SourceWatch, SierraClub.org, EPA.gov, ashtracker.com, and ECHO. The sites may have inaccurate data. A company should be aware of the information that is publicly available concerning the facility. Inaccuracies may be corrected, particularly for government-hosted websites.

## 3. Critically Review all Required Environmental Filings and Postings.

Regulators base environmental compliance on a company's required filings, such as compliance tests and reports required by a facility's permits. eNGOs are also requesting this information through FOIA. It is critical to have a peer-reviewed quality review of key compliance reports and certifications. EPA rounding policies and permit exclusions can become crucial if an emissions result is close to a permitted limit. A company will want to ensure it avails itself of all applicable relief that could negate or otherwise forgive an issue of concern, such as an upset condition or equipment malfunction. Since some compliance reports have compliance certifications, these reports can easily be used as evidence of an event of noncompliance in litigation. It is harder for a company to backtrack from such a certification.

## 4. Control How Contractors Can Use and Disseminate Information About The Company.

Contractors and consultants are an integral part of a facility's operational and environmental success. However, these third parties' communications with the company are not confidential. Third parties may post photographs or details concerning work on projects at a facility on their website, use company information in marketing materials, or discuss the projects with prospective clients. In addition, a facility may want to conduct a study to identify environmental compliance options that could be sensitive. Depending on the nature of the work to be done, the company should consider protecting the information through a confidentiality agreement, at the least, or by attorney-client privilege if the study is being performed at the direction of an attorney.

**Letter from EarthJustice to Dynegy Midwest Generation, LLC, January 31, 2018 (60-Day Notice of Intent to File Citizen Suit).**

***Prairie Rivers Network v. Dynegy Midwest Gen., LLC, Case No. 18-CV-2148 (C. D. Ill. Nov. 14, 2018).***

## **Related People**

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## Related Services

- Environment & Natural Resources