Texas Environmental Update

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Texas Developments

Agency Deliberations Continue on Texas Flexible Permits & Title V Permits

The Texas Commission on Environmental Quality ("TCEQ") and the U.S. Environmental Protection Agency ("EPA") deliberations on how to resolve EPA's issues with Texas' flexible permitting program and Title V federal operating permit program continued during August 2010. Representatives of both agencies discussed their entities' positions and ongoing dialogue on these issues during presentations and panel discussions at the State Bar of Texas' Environmental Superconference in Austin on August 5 and 6, 2010. A few days later, by letter dated August 9, 2010 (available at http://www.bdlaw.com/assets/attachments/Comr%20Rubinsteins%20Ltr%20dtd%208-9-10.pdf), EPA Region 6 Administrator Dr. Al Armendariz presented to TCEQ Commissioner Carlos Rubinstein an outline of ideas that he had considered subsequent to a meeting they attended on July 27, 2010 meeting.

The letter expresses Dr. Armendariz's optimism that EPA's concerns about the incorporation by reference of requirements in Texas Title V permits will be promptly resolved. Options noted in the letter as acceptable to EPA include using additional narrative information such as that used in Louisiana Title V permits, or a detailed pollutant-specific/unit-specific table with monitoring, reporting and recordkeeping links. Regarding flexible permits, Dr. Armendariz addressed the "two-step deflex" process proposal that TCEQ Executive Director Mark Vickery sent to EPA by letter dated May 24, 2010 (available at http://www.bdlaw.com/assets/attachments/TCEQ%20Deflex%20Letter%20to%20EPA.pdf). Dr. Armendariz discouraged continued consideration of the Texas New Source Review ("NSR") permit alteration as a mechanism for transitioning out of flexible permits, and noted that EPA was finalizing a voluntary federal audit program for such transitions. The letter also includes a summary of nine key concepts regarding how to "deflex" permits. Additionally, in response to numerous stakeholder inquiries, Dr. Armendariz stated that the process of transitioning out of flexible permits will not itself trigger applicability of the major NSR permitting requirements for greenhouse gasses, even if the transition of a permit occurs after January 2, 2011.

Absence of State/Federal Harmony on EPA Greenhouse Gas Regulation in Texas

Beyond the continuing activity in August over longstanding disagreements about Texas' New Source Review and Title V air permitting programs, EPA and TCEQ each took actions in keeping with their opposing positions on EPA regulation of greenhouse gas ("GHG") emissions in Texas. On August 2, 2010, the State of Texas filed a Petition for Review in the United States Court of Appeals for the District of Columbia Circuit alleging that EPA's GHG tailoring rule is arbitrary and capricious and contrary to the Clean Air Act, and reserving the right to request that the Tailoring Rule be stayed pending resolution of the Petition (available at http://www.bdlaw.com/assets/attachments/Petition%20for%20Review.pdf). On that same date, the TCEQ Chairman and the Texas Attorney General co-signed a very strongly-worded letter to EPA to "inform you that Texas has neither the authority nor the intention of interpreting, ignoring, or amending its laws in order to compel the permitting of greenhouse gas emissions." The letter (available at http://www.bdlaw.com/assets/attachments/Letter%20to%20EPA%20-%20August%202.pdf) was in direct response to EPA's request that states inform EPA by August 2, 2010 whether their individual state laws and regulations provide authority to implement New Source Review ("NSR") permitting requirements for GHG

emissions from new and modified stationary sources. These actions by Texas followed EPA's July 29, 2010 announcement of dismissal of ten petitions, including one filed by the State of Texas, (see http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/56eb0d86757cb7568525776f0063d82f!OpenDocument)(75 Fed. Reg. 49,556, August 13, 2010) that challenged the validity of the science that EPA used as the basis for finding that vehicle GHG emissions endanger public health and welfare. The actions preceded EPA's August 12, 2010 announcement of proposed rules (see http://www.epa.gov/nsr/actions.html#aug10) that would require thirteen states, including Texas, to revise their regulations to allow for federal NSR permitting of GHG emissions at new and modified stationary sources, and would temporarily allow EPA to issue permits in states that are unable to submit state implementation plan revisions that would allow for GHG permitting before the Tailoring Rule becomes effective in 2011.

TCEQ Presents Proposed Revised Air Permits for Oil & Gas Production Facilities and Pollution Reduction Projects

Based upon TCEQ's ongoing, comprehensive evaluation of standardized air emissions authorizations and the results of recent ambient air monitoring in the Barnett Shale region, TCEQ has proposed updates to the permit by rule ("PBR") and the standard permit for oil and gas production facilities. These proposed new permitting mechanisms include operating specifications and emissions limitations for typical equipment during normal operation, which includes production and planned maintenance, startup and shutdown ("MSS") activities. They would also address the appropriateness of using multiple authorizations at one contiguous property and would reference new EPA-promulgated federal standards. TCEQ published proposed revisions to the PBR for such operations in 30 TAC §106.352 in the August 13, 2010 Texas Register (35 Tex. Reg. 6,937)(see http://texinfo.library.unt.edu/texasregister/html/2010/aug-13/PROPOSED/30.ENVIRONMENTAL%20QUALITY.html#145). In a concurrent action, TCEQ issued a proposed non-rule standard permit for the construction and modification of oil and gas facilities that would replace the standard permit in 30 TAC §116.620 (Installation and/or Modification of Oil and Gas Facilities) (see http://www.tceq.state.tx.us/permitting/air/announcements/nsr_announce_3_25_10.html).

The proposed standard permit contains significant new requirements that include a single site-wide authorization, and requirements for emissions control and best management practices to ensure that emissions do not threaten human health. The proposed permit would also provide for variable emission limits based on the height above ground of emission release points and distance from those release points to off-property receptors such as residences, institutions, and public areas. Facilities operating pursuant to the current standard permit would have to comply with the requirements of the new standard permit relating to MSS emissions starting in January 5, 2012. Upon renewal and as of January 1, 2015, the facility would be required to comply with all of the requirements in the new standard permit.

TCEQ will host a public hearing on the proposed standard permit and related revisions to the permit by rule for oil and gas sites on September 14, 2010 in Austin. Written comments must be submitted to TCEQ by September 17, 2010.

TCEQ Issues Air Program Guidance

TCEQ recently published three air program documents that provide guidance on the new nitrogen dioxide ("NO_2") and sulfur dioxide ("SO_2") national ambient air quality standards ("NAAQS") and on air pollution control requirements.

The July 22, 2010 "Interim NAAQS Guidance on Nitrogen Dioxide" provides guidance on the new one-hour NO_2 standard that became effective on April 12, 2010. It references EPA guidance and provides supplemental TCEQ guidance. This document along with additional information about the new NO_2 standard is available on TCEQ's website at http://www.tceq.state.tx.us/permitting/air/memos/interim_guidance_naaqs.html.

The August 4, 2010 "Interim NAAQS Guidance on Sulfur Dioxide" addresses implementation of the primary one-hour NAAQS for SO_2 that became effective on August 23, 2010. The document covers numerous topics, among which are monitor source applicability, best available control technology ("BACT"), impacts evaluation, and modeling. The document is available on TCEQ's website at http://www.tceq.state.tx.us/permitting/air/nav/nsr_news.html.

The August 10, 2010 draft document entitled "Air Pollution Control: How to Conduct a Pollution Control Evaluation" provides a process for TCEQ staff to evaluate and determine air pollution control requirements, and addresses specific issues encountered in the permitting process. While TCEQ designed the document to be a reference guide for permit reviewers, the agency has made the document available to the regulated community and the public to provide information about the air permitting process and requirements. TCEQ is seeking stakeholder comments on the draft document, and has requested that such comments be submitted by September 10, 2010. The document and instructions for submitting comments are available at http://www.tceq.state.tx.us/permitting/air/nav/nsr_news.html.

DFW Environmental Speed Limit Control Strategy Converted to Transportation Control Measure

On August 25, 2010, TCEQ's Commissioners approved revisions to the Dallas-Fort Worth nonattainment area State Implementation Plan ("SIP") for the 1997 eight-hour ozone standard to convert the SIP's environmental speed limit ("ESL") requirements into a transportation control measure ("TCM"). The conversion allows local air quality planners the flexibility to change environmental speed limits in the Dallas-Fort Worth area without TCEQ having to undertake a SIP revision for each change. Instead, the change can be made through the TCM substitution process. The change was proposed by the North Central Texas Council of Governments ("NCTCOG") and the North Texas Tollway Authority to provide flexibility in the NCTCOG transportation planning process. Information about this proposal is available on TCEQ's website at http://www.tceq.state.tx.us/implementation/air/sip/Hottop.html.

TCEQ Creates Rural Ombudsman Position

TCEQ recently announced the creation of the position of rural ombudsman in the agency's Small Business and Local Government Assistance Section. The agency created the position in recognition of the unique interests and needs of rural communities. The rural ombudsman will help small, local governments access TCEQ's assistance programs, regulators, and other associations and state agencies, and will facilitate rural interests' communications with agency leaders and rule makers. Jason Robinson, former director of public works for the City of Ovilla in Ellis County, was selected to serve as the first rural ombudsman effective August 2, 2010. More information about the new position is available at http://www.tceq.state.tx.us/comm_exec/communication/media/080510RuralOmbudsman.

Upcoming TCEQ Meetings and Events

- The South Texas Chapter of the Health Physics Society will host the ***2010 Texas Radiation Regulatory Conference*** in Austin on September 2-3, 2010. The event will provide information about recent developments affecting the handling of radioactive materials in Texas, and will include presentations by TCEQ and other state and federal agencies. Information about this conference is available at http://www.tceq.state.tx.us/permitting/radmat/texas-radiation-conference.

- TCEQ will host its annual ***Water Quality/Storm Water Seminar*** in Austin on September 23-24, 2010. The seminar will cover the application process and technical review of municipal, industrial, storm water, confined animal feeding operation ("CAFO") and sludge permits. Additional information about this seminar is available at http://www.tceq.state.tx.us/assistance/events/stormwater.html.

- TCEQ will host its annual ***Advanced Air Permitting Seminar*** and the ***Oil and Gas Facilities Workshop*** in Austin on October 5-6, 2010. The Advanced Air Permitting Seminar on October 5 will include updates on air permitting rules, requirements, and issues for a variety of industries. The Oil and Gas Facilities Workshop on October 6 will focus on air permitting issues as they relate to oil and gas facilities. Information about the event is available at http://www.tceq.state.tx.us/assistance/events/air-permitting.html.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in August can be found on the TCEQ website at http://www.tceq.state.tx.us/comm_exec/communication/media/08-10Agenda8-25 and http://www.tceq.state.tx.us/comm_exec/communication/media/8-10Agenda8-11.

Recent Texas Rules Updates

For information on recent TCEQ rule developments, please see the TCEQ website at http://www.tceq.state.tx.us/rules/whatsnew.html.

National Developments

Chemical Plant and Water Facility Security Legislation in the Senate

Faced with an October 4, 2010 deadline, the Senate is still grappling with legislative authorization for the Department of Homeland Security ("DHS") program on chemical plant security, the Chemical Facility Anti-Terrorism Standards ("CFATS"). The original 2006 authorization was for three years, but last year Congress extended the authority for another year while it considered comprehensive legislation. Since then, the House has passed a bill addressing both chemical plant security and water facility security with a controversial provision requiring use of "inherently safer technology" ("IST"). The one-year extension expires in October. The Senate is considering three different approaches: a Senate counterpart to the House bill, a three-year extension of current authority with minor additional provisions, and a simple one-year extension.

On July 28, 2010, two Senate committees discussed bills to regulate the security of chemical and water treatment facilities. In a morning mark-up session, the Homeland Security and Government Affairs Committee approved an amended House bill that would reauthorize the existing CFATS program for three years. In the afternoon, the Environment and Public Works Committee held a hearing to consider proposed security measures for water treatment facilities. The morning vote brought an apparent shift in momentum away from the approach taken by the House in the fall of 2009, as the Senate Homeland Security and Government Affairs Committee unanimously adopted an amendment that would replace the House's comprehensive chemical and water facility security program with a simple extension of the current, narrower CFATS program limited to chemical facilities. The amendment, which has not been published, reportedly would eliminate the controversial provisions authorizing government mandates of IST which were the primary focus of attention in the House.

This client alert discusses the recent Senate activity in context of the ongoing legislative debate over chemical plant security regulation.

Background

Congress has been debating chemical plant security proposals since soon after the terrorist attacks of September 11, 2001. The issue most often in dispute has been whether to empower the government to require IST, forcing chemical facilities to change their industrial processes to reduce the potential for releases of hazardous chemicals, or whether instead to rely exclusively on more traditional security concepts. In 2006, legislators reached a

temporary compromise, inserting a brief provision into a DHS appropriations bill that granted authority for three years to DHS to establish CFATS.[1] The temporary authority enabled DHS to establish the framework of a chemical facility security program, but did not address issues such as IST.

The CFATS program that DHS has developed under this temporary authority requires facilities to report their actual or planned use of any listed "chemicals of interest" at or above certain quantities. DHS then sorts the facilities into four tiers based on the level of risk they are thought to present. All facilities in the program are required to prepare security vulnerability assessments for DHS review. Those that DHS confirms as belonging in the higher-risk tiers then must submit and implement site security plans to address their vulnerabilities.

DHS's temporary authority was originally set to expire on October 4, 2009, which presented a deadline for Congress to agree on a permanent program. During the first half of 2009, Congress worked toward the deadline, debating bills to reauthorize CFATS.[2] Unable to pass permanent legislation by the deadline, Congress extended the CFATS authority by another year to allow the debate to continue into 2010. [3]

The House Bill

In November 2009, the House passed H.R. 2868, the "Chemical and Water Security Act of 2009."[4] As passed by the House, H.R. 2868 would retain the structure and principal elements of CFATS essentially intact, but would also expand the program both in its scope and in many of its substantive authorities. Most significantly, the House bill would authorize DHS to require chemical facilities deemed to be high-risk to adopt IST under some circumstances.

During its debate, the House narrowed the IST mandate to the highest risk facilities and restricted DHS's authority to require implementation only if the proposed IST would not merely shift the risk outside the facility. The House softened its approach by providing procedural protections to affected facilities, requiring DHS to consider the economic impact of IST, and making DHS's IST authority discretionary.

In addition, the House version would provide two avenues for citizens to participate in enforcing the law: (1) citizen suits to challenge DHS's implementation of CFATS; and (2) citizen petitions, by which any person could effectively compel DHS to investigate any alleged violation of CFATS requirements.

The version of H.R. 2868 that ultimately passed the House would establish similar security programs for drinking water and wastewater treatment facilities, filling what the Obama Administration has described as a "critical gap" in chemical security regulation.[5] The water facility programs would be administered by the Environmental Protection Agency ("EPA") and state environmental agencies, instead of DHS.

The Collins Bill and the Collins Amendment

Sen. Susan Collins (R-ME), a co-author of the 2006 compromise provision that created CFATS and a vocal opponent of mandatory IST, introduced her own CFATS reauthorization bill in February 2010.[6] The Collins bill, S. 2996, the "Continuing Chemical Facility Antiterrorism Security Act of 2010," co-sponsored by two Democrats, would extend CFATS for five years with only minor modifications of the program. It would require DHS and other agencies to establish a voluntary chemical security training program and a voluntary chemical security exercise program. It did not address the wastewater, drinking water, and port exemptions in the current program that the House bill does address. Senator Collins has been unable to bring her bill to a vote.

On the other hand, when the Senate Homeland Security and Government Affairs Committee considered H.R. 2868 on July 28, 2010, she successfully proposed an amendment that, in effect, essentially substitutes her bill for the House bill. The negotiations were not public, and the Committee has not released its report containing the text of the amendment. According to public statements during the mark-up, the Collins amendment would extend the CFATS authority intact for three years. It would also include provisions on a voluntary

chemical security training program, a chemical security best practices clearinghouse, and a private sector advisory board. The Committee voted 13 to 0 to approve the amended version of H.R. 2868. Committee Chairman Joseph Lieberman (I-CT) praised the unanimity of the vote, but acknowledged that disagreements remained on key issues, and voiced his hope that the full Senate would revisit the issue of IST and coverage of water facilities when it considers H.R. 2868.[7]

The Lautenberg Bills

Four hours after the mark-up of H.R. 2868 on July 28, Sen. Frank Lautenberg (D-NJ) presided over a hearing of the Environment and Public Works Committee to take up the matter of security regulations for water treatment facilities.[8] The hearing was officially concerned with oversight of water facility security, but was scheduled soon after Lautenberg's introduction of two bills, S. 3598 and S. 3599, that would create permanent security regulations for water and chemical facilities, respectively.[9] Lautenberg's bills closely resemble the major divisions of the House version of H.R. 2868, including mandatory IST provisions for both sets of facilities, and would effectively reinstate the House version of H.R. 2868.

The bulk of the hearing focused on the advisability of requiring IST for water facilities, but the tone was generally conciliatory in that both witnesses and senators on either side of the issue acknowledged the potential legitimacy of the opposing view. Much of the testimony was devoted to presentations of practical alternatives to storage of chlorine gas, the principal "chemical of concern" in use at many water treatment facilities.

At the hearing Cynthia Dougherty, Director of EPA's Office of Ground Water and Drinking Water, presented the Obama Administration's guiding principles for the reauthorization of CFATS and the creation of a related program for water utilities.[10] First, the Administration supports permanent chemical facility security legislation. Second, "CFATS reauthorization presents an opportunity to promote the consideration and adoption of inherently safer technologies (IST) among high risk chemical facilities." Third, the process should "close the existing security gap for wastewater and drinking water treatment facilities by addressing the statutory exemption of these facilities."

The DHS Appropriations Bill

Senator Lautenberg has also introduced a bill that would address the upcoming expiration of CFATS authority by extending that authority for another year. Introduced July l9, 2010, the DHS appropriations bill, S. 3607, would simply extend current authority until October 4, 2011.

Facing the October Deadline

Once it returns from the August recess, the full Senate may take up the amended version of H.R. 2868. It may consider amendments to address security at water facilities; it may restore the IST provisions of the House bill; but with the current CFATS authorization due to expire on October 4, 2010, a simple extension may prove once again to be the most expedient solution to chemical plant security.

For further information on these legislative developments, please contact Mark Duvall, mduvall@bdlaw.com, or Russell Fraker, rfraker@bdlaw.com.

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[1] Department of Homeland Security Appropriations Act, 2007, § 550, Pub. L. No. 109-295, 120 Stat. 1355, 6 U.S.C. § 121 note (enacted October 4, 2006).

[2] *See* Beveridge & Diamond, P.C., "Chemical Plant Security Legislation: Where We've Been, Where We Are, Where We're Going," April 29, 2009, *available at* http://www.bdlaw.com/news-559.html.

[3] Department of Homeland Security Appropriations Act, 2010, Pub. L. No 111-83, § 550 (2009).

[4] For a more complete account of the major features of H.R. 2868, see Beveridge & Diamond, P.C., "House of Representatives Passes Chemical Plant and Water Utility Security Legislation," November 17, 2009, *available at* http://www.bdlaw.com/news-727.html.

[5] Chemical Security: Assessing Progress and Charting a Path Forward Before the S. Comm. on Homeland Security and Governmental Affairs, 111th Cong. (2010) (statement of Peter S. Silva, Asst. Admin. For Water, U.S. Envt'l

Protection Agency), *available at* http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=c6d95188-01c3-4f64-bfb9-c8b27d8dbcb8.

[6] *See* Beveridge & Diamond, P.C., "Debate over Chemical Plant Security Moves to the Senate," April 21, 2010, *available at* http://www.bdlaw.com/news-847.html

[7] Press Release, Homeland Security & Government Affairs Committee, Lieberman Says IST Should Be Included in Chemical Security Bill (July 28, 2010), *available at* http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MajorityNews&ContentRecord_id=42e8bd74-5056-8059-76df-026238ddfab7&Region_id=&Issue_id=.

[8] Protecting America's Water Treatment Facilities Before the S. Comm. on Environment and Public Works, 111th Cong. (2009), *available at* http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=ff9bc763-802a-23ad-4837-1524c43831fd.

[9] S. 3598, the "Secure Water Facilities Act," and S. 3599, the "Secure Chemical Facilities Act."

[10] Supra, note 8. (statement of Cynthia C. Dougherty, Director, Office of Ground Water and Drinking Water, EPA).

OSHA Legislation Gets Boost From Mine Safety Bill

Legislation introduced last year to amend the Occupational Safety and Health Act of 1970 ("OSH Act"), that has languished since then, has received new life by being incorporated in coal mine safety legislation. Recent coal mine disasters such as the April 5, 2010 Upper Big Branch mine explosion in West Virginia have increased the likelihood of passage for mine safety legislation and, along with it, OSH Act legislation.

On July 1, 2010, Representative George Miller (D- Cal) introduced the Miner Safety and Health Act of 2010 (H.R. 5663), in an effort to improve compliance with mine safety and health and occupational safety and health laws. The bill, which was subsequently renamed the Robert C. Byrd Miner Safety and Health Act of 2010, contains some key provisions of the Protecting America's Workers Act (H.R. 2067 and S. 1580), which would have extensively amended the OSH Act.[1] It was approved by the House Committee on Education and Labor on July 21, 2010 and is expected to be passed by the entire House.

Shortly thereafter, on July 29, 2010, a companion bill (S. 3671) was introduced in the Senate by Senators Jay Rockefeller (D-WV) and Carte Goodwin (D-WV). Although the bill is less likely to gain approval by the Senate, there is some speculation that it may pass due to the recent coal mine disasters and the public outcry for mine safety reform.

I. OSH Act Amendments

Both the House and Senate bills would amend the OSH Act by incorporating several provisions of the Protecting America's Workers Act. The Protecting America's Workers Act was introduced by Rep. Lynn Woolsey (D-Cal.) on April 23, 2009, but remains in committee in both the House and the Senate. The provisions would increase civil penalties up to as much as $250,000, increase maximum imprisonment terms to 10 years for criminal violations of the Act, enhance whistleblower protections, expand the rights of family members of injured workers to participate in settlement negotiations, and require the abatement of hazardous conditions as soon as an employer is cited for any serious, willful, or repeat OSH Act violation.

The House and Senate bills differ from the Protecting America's Workers Act in two major respects. First, the bills contain a provision that would allow for the accrual of interest on penalties starting from the date that an employer contests a citation, creating a disincentive for cited employers to use the contest period to delay payment. Second, unlike the Protecting America's Workers Act, the bills would not extend the OSH Act to public employees.

Pursuant to an amendment that was proposed by Rep. Dina Titus (D-Nev.) and approved by the Committee, the House bill would also authorize OSHA to identify state plan programs that are not functioning properly and compel remedies, instead of terminating the program. The OSH Act currently only authorizes OSHA to terminate such programs.

II. Coal Miner Provisions

With respect to mine safety, both bills contains provisions for additional inspection and

investigation authority, enhanced enforcement authority, increased penalties, and increased whistleblower protections. Specifically, they would authorize the Mine Safety and Health Administration ("MSHA") to issue subpoenas in order to investigate unsafe mines, require training for miners in unsafe mines, seek court orders to close unsafe mines, and provide for independent investigations of serious mine accidents. Civil penalties for violations of the Federal Mine Safety and Health Act of 1977 ("FMSHA") would increase to up to $150,000 for each violation and criminal penalties would increase to as much as $1,000,000 and imprisonment for not more than five years.

The Senate bill contains additional provisions, that are not found in the House bill, that authorize an evaluation of whether MSHA has the experts it needs, require the General Accountability Office to evaluate the new "pattern of violations" criteria to ensure that it is preventing repeated violations, require greater coordination with the Department of Justice in investigating criminal violations of mine safety law, and require MSHA to improve its online database of safety records.

III. Increased Whistleblower Protections

The bills would enhance the current employee discrimination provisions and add whistleblower protection provisions in the OSH Act and FMSHA. These provisions are very similar to the whistleblower protections that were adopted in the Consumer Product Safety Improvement Act of 2008 ("CPSIA")[2] and the recent health care law.[3] They are also similar to worker protection provisions in the House bill to amend the Toxic Substances Control Act ("TSCA") introduced July 22, 2010.[4]

These provisions would protect mine employees from being discharged or discriminated against for the refusal to perform a duty that would pose a safety or health hazard. They would also protect employees covered by the OSH Act from being discharged or discriminated against for refusing to perform a duty that would result in serious injury to, or serious impairment of the health of, the employee or other employees. The whistleblower protections in the CPSIA and House TSCA bill similarly prohibit discrimination where an employee refuses to perform duties reasonably believed to be in violation of those Acts.

IV. Stakeholder Reactions

The bills have generally been met with support from the Department of Labor and labor groups. Secretary of Labor Hilda Solis called the House bill's passage in committee "an important step forward," and OSHA Administrator David Michaels has repeatedly expressed support for the increased whistleblower protections in the House and Senate bills, stating that the current protections are "very, very weak."[5] Among labor groups, the bills have been applauded as a smart strategy for advancing OSHA and MSHA reforms by the AFL-CIO, the United Mine Workers of America, and the American Industrial Hygiene Association.[6]

Despite the widespread support from labor, there has been some criticism for the failure to extend the OSH Act to public employees. For example, Jonathan Rosen, the director of occupational safety and health for the New York State Public Employees Federation, stated that he was "fairly outraged" that the bill did not address public employees and remarked that "[t]o say that public employees don't deserve the rights and protections that the rest of society has is irrational."[7] Similarly, Darryl Alexander, the director of health and safety at the American Federation of Teachers, expressed that the failure to address public employees was "terribly crushing and disappointing" because "[a]ll workers need these protections."[8]

In contrast, among industry stakeholders, the bills have been widely criticized for the approach that they take to mine safety reform and for incorporating amendments to the OSH Act. On July 26, 2010, the Coalition for Workplace Safety, a group of industry associations including the U.S. Chamber of Commerce and the National Association of Manufacturers, sent a letter to all House members, criticizing the expansion of whistleblower rights, the bill's mandatory abatement provisions, and the increase in civil and criminal penalties.[9] This letter was signed by 240 trade groups and corporations, including the American Trucking Association, National Association of Home Builders, National Grain and Feed Association, National Retail Federation, and Society of Chemical Manufacturers and Affiliates.[10]

In addition, Keith Smith, the director of labor policy for the National Association of

Manufacturers, commented that the "proposals are simply not the right approach to assist both employers and employees in maintaining safe workplaces. Instead of promoting a cooperative approach toward workplace safety, the provisions laid out in the Miner Safety and Health Act of 2010 take a punitive approach."[11] He further stated that "the proposal would actually hinder the safety efforts by manufacturers by promoting an adversarial relationship between the Occupational Safety and Health Administration and employers."[12] Likewise, Marc Freedman, a director of labor law policy at the U.S. Chamber of Commerce, commented that "[t]acking the OSH Act provisions [to the bills] is just recognizing that this will be [the Democrats'] only opportunity to move a bill dealing with OSHA, and trying to take advantage of the momentum for moving something they think the backdrop of Upper Big Branch will give them."[13]

Conclusion

Although the Miner Safety and Health Act is being widely criticized by industry stakeholders, it has a reasonable chance of passage due to recent coal mine disasters. If the OSH Act amendments are passed along with it, stakeholders should expect future OSHA enforcement to be significantly affected.

For more information on this topic, please contact Mark Duvall, mduvall@bdlaw.com, or Jayni Lanham, jlanham@bdlaw.com.

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[1] For information on the Protecting America's Workers Act, see Beveridge & Diamond, P.C., "Congress Focuses Attention on OSHA Penalties and Enforcement Process" (June 8, 2009), available at http://www.bdlaw.com/assets/attachments/BD%20Client%20Alert%20-%20Congress%20Focuses%20on%20OSHA%20Penalties%20Enforcement%20Processes.pdf.

[2] Pub. L. 110-314, § 219(a).

[3] Patient Protection and Affordable Care Act, Pub. L. 111-148, § 1558, adding § 18C to the Fair Labor Standards Act.

[4] Toxic Chemicals Safety Act of 2010, H.R. 5820, § 22, amending TSCA § 23.

[5] Stephen Lee, Republicans, Industry Groups Continue to Push Back Against OSHA Reform Bill, 40 OSHR 632 (Jul. 29, 2010).

[6] Stephen Lee, Industry Criticizes OSHA Reform Bill; Groups on Both Sides Expect House Passage, 40 OSHR 571 (Jul. 8, 2010); Stephen Lee, OSHA Reform Provisions to be Part of Bill to Strengthen Mine Safety Act, 40 OSHR 554 (Jul. 1, 2010); Cecil E. Roberts, President, United Mine Workers of America, Testimony before the House Committee on Education and Labor on H.R. 5663 (Jul. 13, 2010).

[7] Stephen Lee, Worker Groups Criticize Mining Bill for Omitting Public Sector Employees, 40 OSHR 572 (Jul. 8, 2010).

[8] *Id.*

[9] Stephen Lee, Republicans, Industry Groups Continue to Push Back Against OSHA Reform Bill, 40 OSHR 632 (Jul. 29, 2010).

[10] *Id.*

[11] Stephen Lee, Industry Criticizes OSHA Reform Bill; Groups on Both Sides Expect House Passage, 40 OSHR 571 (Jul. 8, 2010).

[12] *Id.*

[13] *Id.*

APHIS Proposes Definitions for Lacey Act Exemptions - "Common Cultivar" and "Common Food Crop"

On August 4, 2010, the Animal and Plant Health Inspection Service ("APHIS") of the U.S. Department of Agriculture ("USDA") issued proposed regulations under the Lacey Act, 16 U.S.C. § 3371 et seq. The Lacey Act is a wildlife protection statute designed to combat illegal trafficking in wildlife, fish, and certain plants. The Food, Conservation, and Energy Act of 2008, Public Law 110-234, amended the Lacey Act by expanding its protections to a broader range of plants and plant products. It also exempted certain categories from the provisions of the Act, including common cultivars and common food crops. The amendments did not define "common cultivar" or "common food crop," but did direct USDA and the Department of the Interior ("DOI") to promulgate regulations defining these terms. The August 4, 2010 proposed rule would define those terms in a new Part 357 of the APHIS regulations in Title 7 of the Code of Federal Regulations. The preamble explains that the proposed definitions are designed to ensure that these exemptions do not place plants of

conservation concern at risk, while exempting plants of species grown commercially on a large scale.

APHIS is accepting public comments on the proposed definitions until October 4, 2010. A copy of the proposed rulemaking is available at http://edocket.access.gpo.gov/2010/pdf/2010-19098.pdf.

I. 2008 Lacey Act Amendments

The Lacey Act is the United States' oldest wildlife protection statute and its cornerstone is a prohibition on trafficking in illegal wildlife, fish, and plants. The 2008 amendments, designed in part to combat illegal logging, expanded the Lacey Act's protections to include a broader range of plants and extended its reach to encompass products that are derived from illegally harvested plants. Notably, the amended Lacey Act makes it unlawful to import, export, transport, sell, acquire, or purchase in interstate or foreign commerce any plant (with limited exceptions) taken in violation of any federal, state, tribal, or foreign law that protects plants. It is also unlawful under the Lacey Act to falsely identify or label any plant or plant product covered by the Act, and importers of certain plant products must file an import declaration that includes information on plant species and country of origin. The Act includes criminal and civil penalties for any person who knew, or in the exercise of due care should have known, that he or she engaged in a commercial transaction involving illegally sourced plant products.

The Act defines "plants" as any wild member of the plant kingdom, including roots, seeds, trees from either natural or planted forest stands, and any products thereof. Expressly excluded from this definition are "common cultivars" (except trees) and "common food crops." The definition also excludes scientific specimens of plant genetic material for research and any plants that are to remain planted or are to be replanted. The Lacey Act does not provide USDA and DOI with express authority to promulgate definitions for scientific specimens or plants that are to remain planted or are to be replanted; therefore, these exemptions are not addressed in the current rulemaking.

A full report on the 2008 Lacey Act Amendments and key requirements is available at http://www.bdlaw.com/news-516.html.

II. Proposed Definitions

APHIS and the Fish and Wildlife Service of the Department of the Interior developed the following proposed definitions of "common cultivar" and "common food crop":

> Common cultivar. A plant (except a tree) that:
>
> (a) Has been developed through selective breeding or other means for specific morphological or physiological characteristics;
>
> (b) Is a species or hybrid that is cultivated on a commercial scale; and
>
> (c) Is not listed:
>
> 1. In an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (27 UST 1087; TIAS 8249);
>
> 2. As an endangered or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.); or
>
> 3. Pursuant to any State law that provides for the conservation of species that are indigenous to the State and are threatened with extinction.
>
> Common food crop. A plant that:
>
> (a) Has been raised, grown, or cultivated for human or animal consumption;
>
> (b) Is a species or hybrid that is cultivated on a commercial scale; and
>
> (c) Is not listed:

1. In an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (27 UST 1087; TIAS 8249);

2. As an endangered or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.); or

3. Pursuant to any State law that provides for the conservation of species that are indigenous to the State and are threatened with extinction.

APHIS intends to supplement these definitions through guidance in the form of a non-exhaustive list of examples of plant taxa or commodities that are considered common cultivars and common food crops (and thus excluded from the Act).

For further information on the proposed rulemaking or other Lacey Act requirements, please contact Mark Duvall, mduvall@bdlaw.com; Laura Duncan, lduncan@bdlaw.com; or Lauren Hopkins, lhopkins@bdlaw.com.

Synthetic Biology – Biotechnology Takes a Big Step Forward

On May 20, 2010, the J. Craig Venter Institute announced that it had created the first self-replicating cell completely run by man-made genetic material – the world's first synthetic organism. This is a landmark in a field of biotechnology called synthetic biology. Other technical advancements in that field are being made rapidly. Like nanotechnology, synthetic biology is raising questions about how to regulate the products of emerging technologies. Recent activity by the Environmental Protection Agency, Animal and Plant Health Inspection Service, Department of Health and Human Services, and National Institutes of Health has highlighted the need for a clear regulatory approach for addressing synthetic biology.

For the full article, please visit www.bdlaw.com/news-936.html.

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Cosmetics Safety Bill Would Incorporate TSCA Bill Provisions

Regulation of cosmetics by the Food and Drug Administration ("FDA") would be thoroughly overhauled under a bill introduced on July 20, 2010, the Safe Cosmetics Act of 2010, H.R. 5786 ("SCA"). The bill would be a substantial change to the Federal Food, Drug, and Cosmetic Act ("FFDCA"). It is also noteworthy in that it would extend to cosmetics many of the provisions of another bill introduced two days later to amend the Toxic Substances Control Act ("TSCA"). In many ways, the Safe Cosmetics Act is an extension of the Toxic Chemicals Safety Act, H.R. 5820 ("TCSA"), introduced on July 22, 2010. Both were sponsored by Rep. Jan Schakowsky (D-IL).

Background on Existing Regulation of Cosmetics

FDA regulates the safety and effectiveness of cosmetic products through the FFDCA and its implementing regulations. "Cosmetic" is defined in the FFDCA as "(1) articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering appearance, and (2) articles intended for use as a component of any such articles; except that such term shall not include soap." By this definition, cosmetics encompass a broad range of products.

As compared to FDA's other regulated products, cosmetics are governed relatively lightly, and (except for color additives used in cosmetics) only after introduction to the market. The current regulatory framework does not require advance approval by FDA before a cosmetic is marketed. Cosmetic manufacturers, not a regulatory agency, bear the responsibility of ensuring that the safety of their product is "adequately substantiated." The industry standard for substantiation is through an independent ingredient safety assessment conducted by the Cosmetic Ingredient Review, an industry-funded but independent expert panel founded in 1976. While the FFDCA does not authorize FDA to require affirmative proof

from a manufacturer that any cosmetic or ingredient is safe, FDA is empowered to take regulatory action to remove cosmetic products deemed adulterated or misbranded from the marketplace.

In sum, industry-initiated assessments and voluntary reporting largely supplant FDA oversight of cosmetics under the current regulatory framework.

For the full article, please visit www.bdlaw.com/news-935.html.

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