Texas Environmental Update

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Texas Developments

Texas Legislature Moves Up Sunset Review for TCEQ

On July 10, 2009, Governor Perry signed Senate Bill (SB) 2 adjusting the review schedule for various state agencies subject to the Texas Sunset Act. As a result, TCEQ's Sunset review date has been moved up from 2013 to 2011. The review cycles for other natural resource agencies, including the Railroad Commission of Texas and the Texas Water Development Board, have also been moved up to 2011.

Sunset review creates an opportunity for the Texas legislature to take a close look at the agency and make fundamental changes to its operations or functions. There are certain statutory criteria that must be evaluated by the Sunset Advisory Commission and its staff during review of an agency. Among others, these criteria include: (i) an assessment of the authority of the agency relating to fees, inspections, enforcement and penalties; (ii) the extent to which the jurisdiction of the agency and the programs administered by the agency overlap or duplicate those of other agencies; and (iii) an assessment of the agency's rulemaking process.

As a result of the last Sunset review of TCEQ (then known as TNRCC), the 77th Texas legislature made a number of changes affecting TCEQ. For example, a performance-based regulatory structure tied to compliance history was established, environmental complaint procedures and policies were changed and various permitting procedures were amended.

TCEQ Holds Follow-Up Meeting About Potential HRVOC Cap & Trade Program Changes

On July 2, 2009, TCEQ held a Highly-Reactive Volatile Organic Compound (HRVOC) Stakeholder Group meeting as a follow-up to the agency's June 10, 2009 Stakeholder Group meeting regarding potential HRVOC Emission Cap and Trade (HECT) Program allowance reallocation concepts. TCEQ is considering changes to the allowance allocation methodology to address concerns that the current allocation system does not equitably distribute allocations among the Houston area sites that participate in the HECT Program. The Executive Director also plans to propose a 25% reduction in the overall HRVOC allocation cap.

At the July 2, 2009 gathering, TCEQ presented three potential reallocation options: Option No. 1 (Uncontrolled Emissions Based Reallocation); Option No. 2 (Standard Controlled Emissions-Based Reallocation); and Option No. 3 (Permit Allowable Sector Share with Uncontrolled Emissions Based Reallocation). For each of these options, TCEQ provided defined formulas and details regarding the allowance reallocation that would result. Agency staff also indicated that the reallocation methodology elements under consideration include a proposed emissions event set-aside pool of 250 tons, and an increase of the minor source allocation minimum from five tons to ten tons.

The agency accepted written comments until July 15, 2009 regarding the proposed alternatives for revising the allowance allocation methodology and regarding a proposed

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reduction of the overall HRVOC emissions cap. TCEQ anticipates proposing HECT Program rule revisions at the September 23, 2009 Commissioners agenda meeting, and adopting HECT Program rule revisions in March 2010.

Information about the HRVOC Stakeholder Group, including the background information that TCEQ provided at the July 2, 2009 meeting about the three potential reallocation options referenced above, is available on TCEQ's website at http://www.tceq.state.tx.us/implementation/air/sip/hrvoc_stakeholders.html#topic2.

Texas NetDMR Now Available

TCEQ recently announced that the new Texas Pollution Discharge Elimination (TPDES) water quality discharge monitoring report (DMR) reporting system, NetDMR, is online and available for use. NetDMR replaces the STEERS eDMR reporting system. To ease the transition from STEERS eDMR to NetDMR, TCEQ announced on July 13, 2009 that it will exercise temporary enforcement discretion to allow late DMRs for the monitoring period ending June 30, 2007. Those reports, routinely due by July 20, 2009, will be due by August 1, 2009.

NetDMR, a web-based tool, allows permittees to electronically sign and submit DMRs to TCEQ. It is available for data submission for a variety of TPDES permits, including industrial and domestic wastewater discharge individual permits and several TPDES wastewater general permits (discharges from concrete production facilities, discharges of concentrated aquatic-animal production facilities and certain related activities, discharges contaminated with petroleum fuel or petroleum substances, and discharges of wastewater and contact storm water from petroleum bulk stations and terminals). The system is not available for monthly effluent report data or annual reports required under the TPDES CAFO general permit. Permittees must still transmit several other reports in paper form, including:

- pretreatment semiannual and annual reports required in a permit or pretreatment program;
- biomonitoring quarterly, semiannual, and annual reports required in a permit;
- sludge beneficial-land-use quarterly and annual reports (domestic permits and sludge disposal);
- benchmark testing under the multi-sector general permit;
- groundwater reports required in a permit;
- other reports that relate to compliance activities specified in your permit (for example, a construction schedule); and
- notices of noncompliance.

Because none of the STEERS eDMR subscriber information is transferable, permittees that have been using that system will need to sign up for a NetDMR account. STEERS eDMR subscribers will, however, have access to copies of records for past data they have submitted to STEERS eDMR. Further information about the new system is available at http://www.tceq.state.tx.us/compliance/netdmr/netdmr.html.

TCEQ Accepting Comment on Upstream Oil & Gas Storage Tank Emissions Study

TCEQ is accepting informal public comment on the results of a study the agency conducted to evaluate volatile organic compound emissions from oil and gas storage tanks. The purpose of the study is to evaluate and improve methods and models for estimating flashing emissions from oil and gas storage tank batteries. Information obtained from the study includes flow measurements that were conducted over a six-month period (July through September 2008) at sites in West Texas and North Texas. Measured flashing emissions were compared to emissions determined by conventional emissions estimation methods to assess the accuracy of those methods. A copy of the July 16, 2009 report, entitled

"Upstream Oil and Gas Storage Tank Project -- Flash Emissions Models Evaluation," is available at http://www.bdlaw.com/assets/attachments/TCEQ%20Final%20Report%20Oil%20Gas%20Storage%20Tank%20Project.pdf. Comments on the report must be submitted to TCEQ by August 31, 2009.

TCEQ Commissioners To Consider Mercury-Impaired Waters Advisory Group Information and Recommendations

On August 12, 2009, TCEQ Commissioners will consider the information and recommendations of the Mercury-Impaired Waters Advisory Group. This advisory group was formed to provide input to the TCEQ Commissioners on the course of action needed to address the state's surface water bodies that are listed as impaired due to elevated mercury in fish tissue. There are currently 17 Texas water bodies that are listed as impaired on this basis.

The agenda backup material filed by TCEQ staff for this matter concludes that "additional coordination and cooperation is needed to determine the most effective way to reduce mercury impairments in Texas." Information about the input received from the Mercury-Impaired Waters Advisory Group is available at http://www.tceq.state.tx.us/implementation/water/planning/mercurygroup/index.html.

TCEQ Taking Public Comment on Municipal Solid Waste Landfill General Operating Permit

TCEQ is taking public comment on the renewal of, and proposed amendments reflecting changes to federal and state rules to, the Title V Municipal Solid Waste Landfill General Operating Permit (GOP). The proposed major changes include changes to the terms of the GOP, associated tables and certain monitoring provisions. As a result of the pending revisions and depending on their operations, permit holders may need to modify their GOP applications.

Comments on the proposed amendment, as well as suggestions for additional changes, may be submitted no later than September 30, 2009. For additional information about the proposed amendments or submitting comments, please see TCEQ's website at http://www.tceq.state.tx.us/permitting/air/announcements/tv_announce_6_26_09.html.

Texas Railroad Commission Voices its Opposition to Climate Change Bill

On June 30, 2009, the Commissioners of the Railroad Commission of Texas sent a letter to Senators Hutchison and Cornyn urging them to vote against passage of the Waxman-Markey climate change legislation (the American Clean Energy and Security Act of 2009). The letter, signed by each of the three Commissioners, follows the themes Governor Perry set out in his response to EPA's proposed framework for regulating greenhouse gas emissions through the federal Clean Air Act (see Beveridge & Diamond, P.C. Texas Environmental Update, January 2009, available at http://www.bdlaw.com/assets/attachments/January_2009_Texas_Environmental_Update.pdf).

Consistent with Governor Perry's message, the Commissioners assert that passage of the legislation would increase energy costs across the nation and weaken America's energy security. They argue the cap and trade provisions of the legislation would likely result in the largest tax increase in U.S. history. They also point to the disproportionate impact the Texas economy would suffer under the legislation, due to the state's substantial role in providing the nation with energy and petrochemicals. Ultimately, the Commissioners assert that the legislation "would be profoundly bad for the nation, but in particular, our own Texas economy."

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TCEQ Removes Two Chemicals from Air Pollutant Watch List in Houston and Beaumont Areas

Following on proposals from earlier this year, TCEQ has removed two toxic air pollutants from two areas of concern in the Air Pollutant Watch List (APWL). Specifically, 1-3, butadiene was removed from the Port Neches and Houston areas of concern and hydrogen sulfide was removed from the Beaumont area of concern. The APWL is a list of geographic areas in Texas where TCEQ has determined that specific air pollutant levels have been measured at levels of concern. The APWL serves a number of purposes, including to heighten awareness of such areas for interested persons (including TCEQ personnel, industry representatives and private citizens), and to encourage efforts and focus resources to reduce emissions in these areas. For additional information about the APWL, see http://www.tceq.state.tx.us/implementation/tox/AirPollutantMain/APWL_index.html#consideration.

Texas Rules Updates

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

National Developments

New SEC Investor Advisory Committee Discusses Environmental, Climate Change and Sustainability Disclosures

The Securities and Exchange Commission's newly established Investor Advisory Committee met for the first time on Monday, July 27, 2009. The Committee's objective is to provide to the SEC the views of a broad spectrum of investors on their priorities concerning the SEC's regulatory agenda. Included on the Agenda for this first meeting was a discussion of possible refinements to the SEC's disclosure requirements for publicly held companies, including enhanced environmental, climate change, and sustainability disclosures.

Currently, SEC regulations do not specifically address climate change and sustainability disclosures, although companies must disclose all material information necessary to make the required disclosures not misleading. In addition, there are four requirements in SEC Regulation S-K that either explicitly require environmental disclosures, or provide the basis for a disclosure requirement due to materiality:

- Item 101 (Description of Business), requiring disclosure of material effects of compliance with governmental requirements relating to the protection of the environment on the capital expenditures, earnings and competitive position of the company, including disclosure of any material estimated capital expenditures for environmental control facilities;
- Item 303 (Management's Discussion and Analysis), requiring disclosure of material events, known trends, and uncertainties that could cause financial information not to be necessarily indicative of the company's future financial condition, including matters that could have a material impact on liquidity, revenues or income;
- Item 103 (Legal Proceedings), requiring disclosure of pending or contemplated administrative or judicial proceedings arising under environmental laws if certain materiality or other criteria are met; and
- Item 503(c) (Risk Factors), requiring disclosure of material risks that could impact the company's business, financial condition, or future results.

A number of investor and environmental advocacy groups have actively promoted greater disclosures in the environmental, climate change, and sustainability areas for years, and have urged the SEC to issue guidance to improve the quality of such disclosures. Legislative initiatives also have been introduced in Congress from time to time. In 2007, the State of New York initiated inquiries into the adequacy of disclosures of the expected impact of climate change and the regulation of GHG emissions made by five energy companies. Likely in response to increased pressure from advocacy groups, in early 2009 the National

Association of Insurance Commissioners began requiring insurance companies to make certain climate change-related disclosures to state insurance commissions. In June 2009, Ceres and other advocacy groups increased the pressure when they released two reports, one covering trends in climate risk disclosure from 1995 to the present, and a second analyzing climate risk disclosures in 2008 Form 10-K filings by companies in selected industries. These reports generally concluded that disclosure of climate change risks by public companies in these industries is weak or non-existent, and the groups reiterated their calls for SEC action. Additionally, initiatives such as the Carbon Disclosure Project have drawn attention to climate-related disclosures in various business sectors.

Due, in part, to this increasing level of interest in environmental, climate change, and sustainability disclosures, the SEC Staff's briefing paper for the Investor Advisory Committee meeting included the following questions:

Do investors consider environmental compliance, climate change and sustainability issues important in making investment or voting decisions?

Are current disclosure practices with respect to environmental compliance, climate change and sustainability issues sufficient for investors to make informed investment and voting decisions, or do investors need expanded disclosure in any of these areas?

If additional disclosure in these areas would be useful to investors, should the Commission require additional disclosure on these matters by revising its forms and regulations? Alternatively, should the Commission highlight how its current forms and regulations require disclosure in these areas?

Recent press reports cite statements from SEC officials indicating that the level of interest at the Commission in these issues is quite high, although the same officials suggest that it is far too speculative to predict when, or if, new disclosure standards will be proposed. At least one SEC official has cited the lack of climate experts at the Commission, suggesting that discussions with knowledgeable stakeholders is important. Future meetings of the Investor Advisory Committee (which will be announced in the Federal Register) may provide opportunities for the regulated community to provide their perspectives on these issues.

For more information, please contact Holly Cannon at dcannon@bdlaw.com or Chris McKenzie at cmckenzie@bdlaw.com.

Mandatory Reporting Deadline Approaching Under California's Safe Cosmetics Program

Cosmetic manufacturers, packers and distributors must soon report to the California Department of Public Health (CDPH) if any of their products sold in California contain a chemical ingredient identified as causing cancer or reproductive toxicity. This requirement was established by the California Safe Cosmetics Act of 2005 (the Act),[1] and requires certain reports by October 15, 2009. The Act applies to any cosmetic product subject to regulation by the federal Food and Drug Administration[2] and sold in California on or after January 1, 2007. Persons named on a product label pursuant to 21 C.F.R. § 701.12 (including product manufacturers, packers and distributors, generally referred to herein as "cosmetic companies") are required to report if their aggregate sales of cosmetic products within and outside of California total one million dollars or more.

A list of chemicals subject to reporting under the Act is available at http://www.cdph.ca.gov/programs/cosmetics/Documents/chemlist.pdf. The list includes all Proposition 65-listed chemicals plus chemicals identified by other authoritative scientific bodies including the National Toxicology Program (NTP), the International Agency for Research on Cancer (IARC), and the U.S. Environmental Protection Agency (EPA).[3] The list currently contains 783 chemicals and includes several common cosmetic ingredients such as titanium dioxide and phthalates. CDPH plans to review and update the list annually.

Cosmetic companies reporting under the Act must include the name of the listed chemical, its Chemical Abstract Service (CAS) number, and the product or products in which the

chemical is contained. There is no de minimis threshold for reporting under the Act, and unlike federal law, the Act does not include exemptions for chemicals used as fragrances or flavoring.[4] Chemical ingredients determined to be trade secrets (e.g., those chemicals listed on a product labels as "other ingredients") must be reported if they are listed chemicals under the Act, although their identities will not be disclosed by CDPH. Incidental ingredients that are present in a cosmetic at insignificant levels and that have no technical or functional effect do not need to be declared under the Act.[5]

The California Safe Cosmetics Program launched an online system for reporting under the Act on June 15, 2009.[6] To access the Program's webpage, go to http://www.cdph.ca.gov/programs/cosmetics/Pages/CosmeticsCompanies.aspx. Cosmetic companies subject to reporting under the Act must submit information for all reportable cosmetic products by October 15, 2009. For any new products that become subject to reporting after that date, cosmetic companies will have one month to report. CDPH is requiring filings for all reportable products sold in California on or after January 1, 2007, even if the product is no longer being manufactured. CDPH plans to post an online list of non-confidential product data for consumers. CDPH will not release the identities of any product ingredients claimed as trade secrets, but it will flag the associated products as containing a reportable ingredient.

Beveridge & Diamond, P.C. has a broad environmental practice including representation of consumer products companies with regard to chemical regulation (such as Proposition 65, California Green Chemistry, the federal Toxic Substances Control Act, EU REACH, nanotechnology), consumer product safety laws, market access, and transactional issues. For additional information or guidance regarding the California Safe Cosmetics Program, please contact Gary Smith (gsmith@bdlaw.com) or Laura Duncan (lduncan@bdlaw.com).

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[1] California Health & Safety (H&S) Code §§ 111791 - 111793.5.

[2] The Federal Food, Drug, and Cosmetic Act defines cosmetics as "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 the appearance," including articles for use as components of cosmetics but excluding soap. 21 U.S.C. § 321(i).

[3] See California H&S Code § 111791.5(b).

[4] This may present compliance difficulties for companies that do not know the full chemical composition of their products (e.g., fragrances obtained from other suppliers).

[5] See 21 C.F.R. § 700.3(l) for additional details and examples of incidental ingredients.

[6] Although the Act took effect on January 1, 2007, there was no mechanism for companies to report until the electronic system came online in June 2009.

EPA Issues Guidance to Regulated Community on Startup/Shutdown/Malfunction Vacatur

Note: *On July 30, 2009, the D.C. Court of Appeals denied the motions for rehearing without mentioning the EPA interpretive guidance or brief (see http:www.bdlaw.com/assets/attachments/SSM%20Order%20panel.pdf.) Presumably, the mandate should be issued soon.*

On July 22, 2009, the U.S. Environmental Protection Agency (EPA) issued guidance clarifying which startups, shutdowns, and malfunctions (SSM) are exempt from applicable Maximum Achievable Control Technology (MACT) standards in the wake of *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008). The MACT standards have long contained language in the general provisions of Part 63, Subpart A, exempting SSM events from compliance with MACT emission limits. See 40 C.F.R. § 63.6(f) and (h) (the "SSM Exemption"). In its December 2008 decision in *Sierra Club*, however, the U.S. Court of Appeals vacated the SSM Exemption. The vacatur has not yet taken effect, pending the procedural issuance of a mandate by the Court.

The ruling in the *Sierra Club* decision was based upon a reading of Section 112(d) of the Clean Air Act that requires MACT standards to assure continuous emission reduction, and a conclusion that the blanket exemption for SSM events found in the SSM Exemption did not comport with this requirement because it allowed periods of operation during SSM events when no MACT emissions standards apply. Consequently, the Court ordered vacatur of the

SSM Exemption provision.

The *Sierra Club* decision has created substantial confusion and concern among the thousands of air emission sources that are subject to the MACT standards and that rely upon the SSM Exemption to ensure continuous compliance. The existing MACT standards were developed with the assumption that the SSM Exemption would address emissions during SSM events. Because technology is inherently fallible, facilities may not have the capability to maintain continuous compliance with strict MACT standards during non-steady state operating events. Many MACT emissions limits do not take this variability into account and are based on short-term steady state operating data that do not consider SSM emissions. For some source categories, the technological capability to maintain compliance with current standards during SSM events may not even exist. Consequently, the vacatur of the SSM Exemption creates uncertainty and concern about how the MACT standards will be interpreted once the vacatur takes effect, assuming the Court denies a pending motion for rehearing *en banc* and issues a mandate for the vacatur.

By letter of July 22, 2009, Adam Kushner, the Director of the Office of Civil Enforcement at EPA, issued guidance on how EPA intends to interpret the *Sierra Club* vacatur in the short term (the "Kushner Letter.") The Kushner Letter states EPA's position that the SSM Exemption will immediately affect only those MACT standards that both (i) incorporate the SSM Exemption by reference and (ii) contain no other text that provides SSM protections. For now, EPA believes that because many MACT standards that contain separate source-specific SSM exemption language were not at issue in *Sierra Club*, they will not be affected by the vacatur of the general SSM Exemption provision in Subpart A. The Kushner Letter identifies in two tables which MACT standards EPA believes will be immediately affected by the vacatur (See Kushner Letter, Table 1), and which standards EPA believes will not be affected (See Kushner Letter, Table 2).

The Kushner Letter contains an important caveat. EPA recognizes that the source category-specific SSM protections may be challenged separately. The Agency states that it intends to further evaluate its position and that its initial analysis is therefore subject to change.

The Kushner Letter also provides some important insight into the manner in which EPA intends to evaluate excess emission cases under this new guidance. Recognizing that some sources will not be able to comply with MACT standards during SSM events, the Kushner Letter states that EPA intends to determine its enforcement response "based on, among other things, the good faith efforts of the source to minimize emissions during SSM periods, including preventive and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions, and whether the source has developed and implemented an SSM plan to minimize such emissions." In reviewing such defenses, EPA intends to closely scrutinize claims that a standard could not be achieved due to malfunctions, by considering whether events actually meet the definition of malfunction in the MACT rule (i.e., "sudden, infrequent, not reasonably preventable" and not "caused in part by poor maintenance or careless operation"). In light of the Agency's trend towards adopting a narrow view of what constitutes a malfunction, facilities may want to carefully evaluate the strength of such a defense.

Finally, the Kushner Letter states that EPA is evaluating which MACT standards should be revised, and in particular which should be revised on an expedited schedule. EPA offers that it intends to give the highest priority to revising those standards where technological limitations make continuous compliance difficult.

For further information on the SSM Exemption and EPA's interpretation of the *Sierra Club* vacatur, please contact Stephen Richmond at SRichmond@bdlaw.com; Laura McAfee at LMcAfee@bdlaw.com; David Friedland at DFriedland@bdlaw.com; or Madeleine Kadas at MKadas@bdlaw.com.

Congress Poised to Defer Permanent Chemical Plant Security Legislation Until 2010

As Congress considers the latest proposal to establish a permanent regulatory framework on chemical plant security (see client alert at http://www.bdlaw.com/news-611.html,)[1] recent

developments indicate that this debate will likely last into 2010 while the existing, temporary program continues under a one-year extension.

The Chemical Facility Anti-Terrorism Standards (CFATS) program of the Department of Homeland Security (DHS) began under temporary authority inserted into a DHS appropriations bill in 2006. That authority, which is set to expire on October 4, 2009, appears likely to be extended in similar fashion, as both the House and Senate have included provisions to prolong CFATS authority for one year in their current appropriations bills. The extension seems likely to pass, as it has significant support in both houses of Congress and the Obama Administration, and would solve the short-term problem of the looming deadline of October 4.

Chemical plant security has been on the legislative agenda since soon after the terrorist attacks of September 11, 2001, but disagreement on key issues--particularly proposals to require that facilities adopt "inherently safer technology" (IST)--has thus far prevented the passage of permanent legislation. IST refers to technical or methodological changes that reduce a plant's potential for a hazardous chemical release, in contrast to security measures that may leave existing processes as they are, but harden the plant's defenses against sabotage.

In 2006, after four years of gridlock on chemical plant security, legislators compromised on a temporary solution, a short provision requiring DHS to develop CFATS, a program that requires plants that use certain hazardous chemicals above threshold quantities to conduct security vulnerability assessments and respond with site security plans. Section 550 of the 2007 DHS appropriations act, included a three-year sunset clause under which the authority expires in October 2009.[2] While the IST debate continued in a diminished form as DHS began implementing CFATS, the issue of chemical plant security recently began to regain its former urgency with the approach of this deadline. (For more background information on the IST debate, see http://www.bdlaw.com/news-559.html.)[3]

The leading current proposal for a permanent CFATS program authority, H.R. 2868, would retain the core components of the current program but would add, among other things, a strong IST requirement and a citizen suit provision, a form of enforcement that critics argue can be appropriate in environmental legislation, but unworkable in a security program.[4] The House Homeland Security Committee approved H.R. 2868 on June 23, but another House committee with jurisdiction, Energy and Commerce, has not yet held its hearings on the bill.[5] (A client alert on this bill can be found at http://www.bdlaw.com/news-611.html.)[6] The Senate as yet lacks a concrete proposal to debate and remains "some weeks away" from the introduction of an equivalent bill.[7] According to a lawyer for the Senate Homeland Security and Governmental Affairs Committee, "it is unrealistic to expect, and it is not likely that we will have a permanent reauthorization bill in place by the end of September."[8]

Both houses appear prepared to extend the status quo for another year, which would allow the debate on H.R. 2868 and any other proposals to continue for most of 2010, if necessary. The House has already passed a DHS appropriations bill, H.R. 2892, that includes a one-year extension of the CFATS authority.[9] Meanwhile, the Senate's own DHS appropriations bill, S. 1298, also contains the extension, although this bill has thus far been approved only by the Appropriations Committee.[10] The Obama Administration actively supports the extension, having included a request in its proposed 2010 budget,[11] as well as asking for the extension in recent hearings.[12] Thus, the political forces appear to be aligned to maintain CFATS in its current form for another year while Congress continues its work toward a definitive statute that ultimately resolves the long-standing dispute over IST.

For more information, please contact Mark Duvall at mduvall@bdlaw.com.

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[1] Beveridge & Diamond, P.C., Chemical Plant Security Legislation: On the Move (July 2, 2009), http://www.bdlaw.com/news-611.html.

[2] 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).

[3] Beveridge & Diamond, P.C., Chemical Plant Security Legislation: Where We've Been, Where We Are, Where We're Going (Apr. 29, 2009), http://www.bdlaw.com/news-559.html.

[4] H.R. 2868, 111th Cong. § 2111 (2009). Note that this bill, like some of its predecessors, avoids the IST label, replacing it with "Methods to Reduce the Consequences of a Terrorist Attack." Id.

[5] ICIS News, New U.S. Site Security Bill Unlikely to Be Finished This Year, (June 30, 2009), available at http://www.icis.com/Articles/2009/06/30/9228869/new-us-site-security-bill-unlikely-to-be-finished-this-year.html (subscription required).

[6] Beveridge & Diamond, P.C., Chemical Plant Security Legislation: On the Move (July 2, 2009), http://www.bdlaw.com/news-611.html.

[7] Id.

[8] Id (remarks of Holly Idelson, majority counsel to the Committee).

[9] H.R. 2868, 111th Cong. § 548 (2009).

[10] S. 1298, 111th Cong. § 547 (2009).

[11] Office of Mgmt. & Budget, Appendix, Budget of the U.S. Government, Fiscal Year 2010, 566 (2009), available at http://www.whitehouse.gov/omb/budget/fy2010/assets/appendix.pdf.

[12] The Chemical Facility Antiterrorism Act of 2009: Hearing on H.R. 2868 Before the H. Comm. on Homeland Security, 111th Cong. (2009) (statement of Philip Reitinger, Deputy Under Secretary, National Protection and Programs Directorate, Department of Homeland Security), available at http://homeland.house.gov/SiteDocuments/20090616103415-93293.pdf.

The Waxman-Markey Bill State Preemption Exception: A California-Sized Hole in the Proposed Federal Allowances Bucket?

ISSUE

- The Waxman-Markey Bill (H.R. 2454) is commonly represented as striking a compromise on the question of state preemption: states would be permitted to impose more stringent controls on GHG emissions, including implementation of a state-wide cap such as that adopted in California, but the states may not "interfere" with the operation of the federal cap-and-trade program for a five-year period from 2012-2017.
- Upon closer inspection, however, the Bill appears to cede expansive authority to states to adopt measures that would directly impact the nature and scope of the federal cap-and-trade program, including the availability of allowances and their cost in the new carbon marketplace.
    - Although states would not be permitted to establish their own cap-and-trade programs as such, they would be permitted to require stationary sources to surrender and retire federal emission allowances and offsets under state programs. Those requirements could be imposed above and beyond the compliance requirements established by Congress under the federal program, including during the "five year moratorium period."
    - A sufficiently large enough state (i.e., California) or group of states that takes advantage of this authority would therefore be able to reduce the total amount of federal allowances available in the national cap-and-trade program. Because the number of allowances in the system directly affects their market value, a state could take unilateral actions that could significantly raise the price of allowances and offset credits throughout the entire country (in effect, increasing the taxing effect of cap-and-trade across the country).
    - Put differently, the Bill establishes a bucket of allowances available to covered entities each year, tied to a 2005 baseline. Those allowances are to be reduced to a specific level in the bucket on a schedule intended by Congress to achieve a given target of emissions reductions, with assumptions about the related cost of those reductions throughout the economy.
    - But the Bill effectively allows California (and other states) to poke a hole in the bottom of that bucket and drain federal allowances out of the national program by forcing them to be surrendered by sources within the state. Indeed, the Bill gives states the express authority to adjust the size of that hole without regard to any national allowance budget set by Congress.

- For example, California could require sources in the state to return to 1990 (Kyoto) emissions levels. To do so, those sources would need to acquire allowances from the federal pot, draining them from the available national allowance bucket. Given its size, the aggressiveness of the non-reviewable regulatory targets decided upon by California, not Congress, would effectively determine the level of allowances in the national bucket.
- There is no dispute that the level of available allowances in the bucket determines the price of each allowance within the bucket. And because the price of allowances will in turn flow throughout the entire economy, all sectors of the national economy could be dramatically affected by a large state's policy choices on emissions targets.

TEXTUAL ANALYSIS

- Section 335 of the Bill sets out the preemption language that precludes a state from implementing or enforcing a cap and trade program during the years 2012-2017. The provision narrowly defines the term "cap-and-trade," however, to encompass only those programs in which "a State .. issues ... emission allowances."
- Section 334 of the Bill, by contrast, expressly permits a State to "require surrender to the State .... of emission allowances or offset credits established or issued under this Act [i.e., the new federal program]," and to "require the use of such allowances or credits as a means of demonstrating compliance with requirements established by a State."
- These provisions appear to be designed intentionally to give the states the ability to adjust the level of federal emission allowances or credits available within the federal program, based on controls that they impose on stationary source emissions at the state level.

RELEVANT EXCERPTS FROM WAXMAN-MARKEY BILL (H.R. 2454)

SEC. 334. STATES.

Section 116 of the Clean Air Act (42 U.S.C. 7416) is amended by adding the following at the end thereof:

''For the purposes of this section, the phrases 'standard or limitation respecting emissions of air pollutants' and 'requirements respecting control or abatement of air pollution' shall include any provision to: cap greenhouse gas emissions, require surrender to the State or a political subdivision thereof of emission allowances or offset credits established or issued under this Act, and require the use of such allowances or credits as a means of demonstrating compliance with requirements established by a State or political subdivision thereof.''

SEC. 335. STATE PROGRAMS.

Title VIII of the Clean Air Act, as added by section 331 of this Act and amended by several sections of this Act, is further amended by adding after part E (as added by section 333(c) of this Act) the following new part:

> **"PART F—MISCELLANEOUS**
>
> **"SEC. 861. STATE PROGRAMS.**
>
> ''Notwithstanding section 116, no State or political subdivision thereof shall implement or enforce a cap and trade program that covers any capped emissions emitted during the years 2012 through 2017. For purposes of this section, the term 'cap and trade program' means a system of greenhouse gas regulation under which a State or political subdivision issues a limited number of tradable instruments in the nature of emission allowances and requires that sources within its jurisdiction surrender such tradeable instruments for each unit of greenhouse gases emitted during a compliance period. For purposes of this section, a 'cap-and-trade program'

does not include a target or limit on greenhouse gas emissions adopted by a State or political subdivision that is implemented other than through the issuance and surrender of a limited number of tradable instruments in the nature of emission allowances, nor does it include any other standard, limit, regulation, or program to reduce greenhouse gas emissions that is not implemented through the issuance and surrender of a limited number of tradeable instruments in the nature of emission allowances. For purposes of this section, the term 'cap and trade program' does not include, among other things, fleet-wide motor vehicle emission requirements that allow greater emissions with increased vehicle production, or requirements that fuels, or other products, meet an average pollution emission rate or lifecycle greenhouse gas standard."

Update on EPA's Regulation of Carbon Nanotubes under the Toxic Substances Control Act

A number of recent developments at EPA demonstrate EPA's interest in ensuring that manufacturers of carbon nanotubes meet their TSCA obligations.[1] EPA officials have indicated that they plan to follow through on their previously announced plan to take enforcement action against companies manufacturing or importing carbon nanotubes that have not submitted premanufacture notices (PMNs) as required by the Toxic Substances Control Act (TSCA). Along with this threat of enforcement, EPA has issued Significant New Use Rules (SNURs) for a single- and a multi-walled carbon nanotube.[2] EPA has also indicated that it may issue a section 4(a) test rule for multi-walled carbon nanotubes.[3]

EPA Threatens to Enforce PMN Requirements

In January 2008, EPA issued a policy document announcing that, for purposes of the TSCA Inventory, EPA would classify a nanomaterial as a new chemical substance if the nanomaterial has a molecular identity that is not identical to the molecular identity of a chemical substance already on the TSCA Inventory.[4] As we noted in a previous client alert, on October 31, 2008, EPA clarified that carbon nanotubes regulated under TSCA may be new chemicals with molecular identities distinct from graphite or other allotropes of carbon already listed on the TSCA Inventory.[5]

In the last several years, companies have submitted PMNs to EPA for various nanomaterials, including dendrimers, carbon nanotubes, and fullerenes. According to a recent statement by Jim Willis, Director of EPA's Chemical Control Division, EPA has received 11 PMNs and 8 Low Release and Exposure (LoREX) exemption applications for carbon nanotubes.[6] Jim Willis indicated that when reviewing PMNs for carbon nanotubes, EPA is focusing on the particular characteristics of each carbon nanotube, such as shape, length, and wall thickness. EPA may consider a carbon nanotube to be a "new chemical" if, for instance, a carbon nanotube has a different spatial arrangement of atoms than the carbon nanotubes on the TSCA Inventory. Despite the PMNs for nanomaterials that it has received, EPA remains convinced that there are nanomaterials subject to the premanufacture requirements for which PMNs have not been submitted.

In its October 2008 Federal Register notice, EPA threatened to begin enforcing the PMN requirements against manufacturers of carbon nanotubes some time after March 2009. To date, EPA has not announced any enforcement actions. Nonetheless, EPA officials have stated recently that they intend to begin enforcing the PMN requirements against manufacturers of carbon nanotubes. Although EPA has highlighted carbon nanotube manufacturers as likely subjects of enforcement actions, section 5 applies to all nanomaterials that are considered new chemical substances, not just carbon nanotubes.

Violations of the premanufacture requirements can result in civil penalties for both manufacturers and importers. Recently, EPA increased the maximum penalties for violations of statutes it enforces, including TSCA.[7] As a result, the maximum penalty for a violation of the premanufacture requirements is $37,500 per violation. Moreover, section 15 makes it unlawful for anyone -- not just manufacturers or importers -- to use for commercial purposes a chemical substance that a person knows or has reason to know was manufactured, processed, or distributed in violation of the premanufacture requirements.[8] Violating the

premanufacture requirements may subject a company to liability in excess of any penalties imposed by EPA. For example, if a company needs to halt manufacture or importation of a substance in order to go through the PMN process, the company may face supply chain problems. Approaching EPA about potential violations may lead EPA to waive a percentage of the gravity-based component of a penalty[9] and may make EPA more willing to exercise its discretion so as to minimize potential supply chain disruptions.

SNURs for Carbon Nanotubes

If concerns about a substance's risks arise during the PMN review process, EPA may issue a Section 5(e) order imposing limitations on the PMN submitter's activities and subsequently promulgate a SNUR to impose the same limitations on others. Persons other than the PMN submitter are prohibited from manufacturing, importing, or processing the substance for a significant new use unless they submit a Significant New Use Notice (SNUN) to EPA 90 days prior to engaging in the new the use.[10] Manufacturers, importers and processors that do not engage in the new use, but distribute the substance in commerce must submit a SNUN unless they can document that the recipient of the substance meets certain requirements.[11] When submitting a SNUN, an entity must submit all test data related to the health or environmental effects of the substance that are in the entity's possession or control.[12] However, test data need not be developed. Nonetheless, EPA recommends that an entity submitting a SNUN conduct the same tests, if any, required by a section 5(e) consent order negotiated with the PMN submitter.

On June 24, 2009, EPA issued a direct final rule promulgating SNURs for the single-walled and multi-walled carbon nanotubes for which EPA had received PMNs and negotiated section 5(e) consent orders.[13] The Federal Register notice states that EPA negotiated the consent orders out of a concern that both the single-walled and multi-walled carbon nanotubes may cause "lung health effects" and health effects from skin exposure. EPA issued SNURs for multi-walled carbon nanotubes (generic), PMN P-08-177, and single-walled carbon nanotubes (generic), PMN P-08-328. For both the single-walled and multi-walled carbon nanotubes, EPA designated the following uses as significant new uses: (1) use in the workplace without certain personal protective equipment, including gloves, full body chemical protective clothing, and a NIOSH-approved respirator; (2) use "other than" a use listed in the PMN submitted for the substance; and (3) manufacture or import of the substance in excess of the volume listed in the section 5(e) consent order for the substance. The SNURs go into effect on August 24, 2009, unless EPA receives adverse comments or a notice of intent to submit adverse comments before July 24, 2009.

Jim Willis, Director of EPA's Chemical Control Division, recently stated that EPA anticipates issuing SNURs for other PMNs which it has received for carbon nanotubes.[14] EPA expects that future SNURs will include workplace protections similar to those required in the SNURs issued on June 24, 2009 -- although EPA has emphasized that it is focusing on the particular characteristics of each carbon nanotube and will tailor SNURs to protect against the particular risks of each carbon nanotube.

Section 4(a) Test Rule for Carbon Nanotubes

In its Spring 2009 Regulatory Agenda, EPA announced that a "TSCA section 4(a) test rule may be needed to determine the health effects of multiwall carbon nanotubes."[15] In public remarks, EPA officials have echoed this statement.[16] Under section 4(a), EPA may issue a rule requiring entities to develop and submit data on the health and environmental effects of a substance.[17]

If EPA issues a section 4(a) test rule for carbon nanotubes, the Agency will specify whether manufacturers (including importers) or processors or both are subject to the rule. It remains an open question whether EPA will require the participation of small-volume manufacturers and manufacturers solely for research and development (R&D) purposes. Typically, entities that manufacture/import less than 500 kg of a chemical substance annually (i.e., a "small volume") must comply with a test rule only if the test rule specifically so states, or EPA publishes a notice in the Federal Register that no entity has submitted a notice of intent to conduct a required test.[18] The same limitations usually apply to the participation of R&D manufacturers. Since many manufacturers of carbon nanotubes manufacture less than 500 kg annually, and others manufacturer solely for R&D, EPA may specifically require that such

manufacturers comply with a test rule. Persons subject to a test rule must submit a notice of intent to conduct the required testing, or submit an application for an exemption, within 30 days of the effective date of the test rule.[19]

For more information, please contact Philip Moffat at pmoffat@bdlaw.com or Mark Duvall at mduvall@bdlaw.com. This alert was prepared with the assistance of Matthew Gerhart.

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[1] In addition, EPA has taken enforcement action under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) against companies claiming to manufacture nanoscale antimicrobials. For example, EPA reached a settlement with ATEN Technology, Inc. over allegations that the company's subsidiary sold computer keyboards and mice that claimed to have nanoscale antimicrobial coatings. EPA alleged that the company had not registered these coatings as pesticides under FIFRA. See Press Release, *EPA, U.S. EPA Fines Southern California Technology Company $208,000 for "Nano Coating " Pesticide Claims on Computer Peripherals* (Mar. 5, 2008), available at http://yosemite.epa.gov/opa/admpress.nsf/2dd7f669225439b78525735900400c31/16a190492f2f25d585257403005c2851!OpenDocument

[2] EPA, Significant New Use Rules on Certain Chemical Substances, 74 Fed. Reg. 29,982 (June 24, 2009).

[3] EPA, Semiannual Regulatory Agenda, Spring 2009, at p. 105, available at http://www.epa.gov/lawsregs/documents/regagendabook-spring09.pdf

[4] EPA, TSCA Inventory Status of Nanoscale Substances - General Approach (Jan. 23, 2008), available at http://www.epa.gov/oppt/nano/nmsp-inventorypaper2008.pdf.

[5] EPA, Toxic Substances Control Act Inventory Status of Carbon Nanotubes, 73 Fed. Reg. 64,946 (Oct. 31, 2008).

[6] Pat Rizzuto, *EPA Official Says Carbon Nanotubes Will Continue to Be Regulated Case-By-Case*, BNA Daily Environment Report, July 9, 2009, available at http://news.bna.com/deln/DELNWB/split_display.adp?fedfid=13768683&vname=dennotallissues&fcn=14&wsn=496461000&fn=13768683&split=0. The LoREX rule allows an entity to apply for an exemption from the PMN requirements if the entity manufactures a small quantity of the substance or manufactures the substance in a way that will not result in significant environmental releases and human exposures. See 40 C.F.R. § 723.50.

[7] EPA, Civil Monetary Penalty Inflation Adjustment Rule, 73 Fed. Reg. 75,340 (Dec. 11, 2008), codified at 40 C.F.R. § 19.4.

[8] See TSCA § 15(2), 15 U.S.C. § 2614(2).

[9] EPA, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000).

[10] TSCA § 5(a)(1), 15 U.S.C. § 2604(a)(1).

[11] An entity that distributes in commerce a substance subject to a SNUR is not required to submit a SNUN if the entity can document that: (1) the distributor notified the recipient in writing of the SNUR applicable to the substance; or (2) the recipient knows of the SNUR applicable to the substance; or (3) the recipient cannot undertake any of the significant new uses designated by the SNUR. See 40 C.F.R. § 721.5(a)(2).

[12] See 40 C.F.R. § 721.25.

[13] 74 Fed. Reg. 29,982. The SNUR for multi-walled carbon nanotubes (generic) will be codified at 40 C.F.R. § 721.10155. The SNUR for single-walled carbon nanotubes (generic) will be codified at 40 C.F.R. § 721.10156.

[14] Pat Rizzuto, *EPA Official Says Carbon Nanotubes Will Continue to Be Regulated Case-By-Case*, BNA Daily Environment Report, July 9, 2009, available at http://news.bna.com/deln/DELNWB/split_display.adp?fedfid=13768683&vname=dennotallissues&fcn=14&wsn=496461000&fn=13768683&split=0.

[15] EPA, Semiannual Regulatory Agenda, Spring 2009, at p. 105, available at http://www.epa.gov/lawsregs/documents/regagendabook-spring09.pdf

[16] See, e.g., Pat Rizzuto, *EPA to Enforce Premanufacture Reviews For Carbon Nanotubes Beginning March 1*, BNA Chemical Regulation Reporter, February 23, 2009, available at http://ehscenter.bna.com/pic2/ehs.nsf/id/BNAP-7PJH3D?OpenDocument

[17] See TSCA § 4(a), 15 U.S.C. § 2603(a). Particular test rules appear at 40 C.F.R. Part 799.

[18] See 40 C.F.R. § 790.42(a)(4).

[19] See id. § 790.45.

Proving Antimicrobial Efficacy - A Continuing Controversy

Executive Summary

Antimicrobial pesticide products include sterilants, disinfectants, and sanitizers. Because of their importance to public health, they must be shown to be effective in order to be registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). However, EPA's programs for ensuring antimicrobial efficacy have been strongly criticized on several fronts. This memorandum discusses this longstanding issue and reports on recent developments.

EPA's antimicrobial pesticide registration review process has been faulted for failure to

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assure the quality of efficacy data. In particular, one of EPA's required test protocols for disinfectants and fungicides, the Association of Official Analytical Chemists (AOAC) Use-Dilution Test Method, has been criticized for decades as an unreliable and unfair test of product performance. Indeed, despite the agency's efforts to respond to these criticisms by attempting to improve the test and by increasing post-registration testing and enforcement actions, EPA's Office of Inspector General (OIG) has repeatedly faulted the agency's Antimicrobial Division for, among other issues, a continuing high failure rate of registered antimicrobial pesticides using the prescribed testing methods. Conflicts and confusion regarding efficacy testing methods and guidelines have become a significant source of controversy regarding EPA's proposed revisions to the antimicrobial pesticide registration regulations, which do not revise the existing product performance data requirements.

Developments expected this year include finalization of the proposed registration regulations and the anticipated publication of new guidance on testing procedures. They should be monitored closely in light of political pressures on EPA under the Obama Administration to increase enforcement, to take a more precautionary approach for public health protection, and to improve the healthcare system. If the issues with the efficacy testing methods are not resolved, increased testing and enforcement could cause effective antimicrobial products to be removed from the market as a result of test failures due to flaws in the test procedure, rather than in the products themselves.

To read the full report, please visit http:www.bdlaw.com/news-news-622.html.

Chemical Plant Security Legislation - On the Move

The House Homeland Security Committee has reported out a chemical plant security bill and sent it on to the House Energy and Commerce Committee. Two controversial provisions are attracting most of the attention: inherently safer technology (IST) and a citizen suit provision. This client alert reports on the bill and the hearing on the bill held June 16, 2009.

Background

Following September 11, 2001, and concerned about the threat of terrorist attacks, Congress began debating legislation to strengthen security at chemical plants across the nation. Despite broad consensus over the need to address this vulnerability, Congress repeatedly failed to pass a free-standing bill.[1] Instead, in a 2007 appropriations bill for the Department of Homeland Security (DHS), Congress gave DHS temporary authority to implement what have become known as the Chemical Facility Anti-Terrorism Standards (CFATS).[2] This legislative authority is set to expire in October. For more information, see our previous client alert, Chemical Plant Security Legislation: Where We've Been, Where We Are, Where We're Going (Beveridge & Diamond, P.C., April 29, 2009).[3]

2009 Legislation

Congress is now considering H.R. 2868, "The Chemical Facility Antiterrorism Act of 2009," to codify DHS authority for CFATS and to include additional provisions.[4] The House Committee on Homeland Security held a hearing on June 19, 2009, to discuss the bill, introduced by Rep. Bennie Thompson (D-MS) with Reps. Henry Waxman (D-CA) and Sheila Jackson-Lee (D-TX) as co-sponsors. The hearing focused on the continuing need for chemical regulation and the content of the proposed bill.[5]

Although Congress, the Administration, and the chemical industry are all in agreement that chemical plant security regulation should continue, there are issues of contention. First, some members of the Committee are pressing for a free-standing bill by October, but the Administration is urging a one-year extension of the previous legislative authority so that DHS can fully implement CFATS as adopted before making decisions about new regulatory requirements. Second, there is vigorous debate over the inclusion of provisions for citizen suits and mandatory IST rules. IST refers to technological and procedural steps to reduce the potential for a hazardous chemical release and conflict exists over whether government should mandate these operational processes.[6] In spite of the disagreement, the proposed bill as amended retains these provisions.

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Provisions of the "Chemical Facility Antiterrorism Act of 2009"

The Secretary of DHS was first given authority to regulate chemical facilities in regard to security under section 550 of the Department of Homeland Security Appropriations Act, 2007 (P.L. 109-295). H.R. 2868 would give permanent status to CFATS and include additional provisions. The most significant additions provide for mandatory IST at the highest-risk facilities if certain conditions are met,[7] citizen suits by any person to order performance and assess civil penalties,[8] and regulation over wastewater treatment plants[9]. Additionally, the proposed legislation requires compliance with CFATS by facilities already covered under the Maritime Transportation Safety Act (MTSA),[10] protection of whistleblowers,[11] broad sharing of information between DHS and covered facilities,[12] provision of security vulnerability assessments (SVAs) and site security plans (SSPs) to "employee representatives,"[13] and personnel clearances for individuals with access to restricted areas.[14]

The IST provision would specifically require that all covered facilities assess "methods to reduce the consequences of a terrorist attack" as part of their SSPs. This assessment would include substitution of chemicals, changes in processes, storage or use of less of a designated substance, and improvements in inventory control and handling. The Secretary of DHS could require implementation of IST at Tier 1 or 2 facilities upon a determination that IST: (1) would significantly reduce the risk of serious adverse effects to human health from an attack; (2) would not result in another facility being placed into a high-risk tier (risk-shifting); (3) is technically and economically feasible; and (4) would not significantly impair the ability of the facility to sustain operations at its current location.

Although there are numerous new provisions beyond what is now in the CFATS regulations, the bill maintains the basic structure of the CFATS program. Covered facilities and tier placement would still be determined through a risk-based tiering process that accounts for the presence of threshold quantities of designated "substances of concern."[15] DHS would then have to develop risk-based standards, protocols, and procedures for mandatory SVAs and SSPs that are increasingly stringent for each tier.[16] DHS would have to approve all SVAs and SSPs, but facilities would have flexibility to choose a combination of measures and to develop alternate security plans (ASPs) that meet security performance standards.[17] Enforcement would occur through security verifications and inspections[18] with authority to DHS to assess civil penalties for noncompliance, commence a civil suit to force compliance, or issue a cease and desist order.[19] Finally, state and local governments would be able to establish standards that are more stringent than the federal statute.[20]

June 16, 2009 Hearing

On June 16, 2009, the Homeland Security Committee held a hearing entitled "The Chemical Facility Antiterrorism Act of 2009" and heard testimony from federal and state officials, and industry representatives.[21]

Opening Statements

House Homeland Security Committee Chairman Bennie G. Thompson opened by stating that this legislation was the product of collaboration between the Committee, key stakeholders, and the House Energy and Commerce Committee. He stated his belief that new legislation needed to focus on averting threats, provide for citizen suits, and ensure whistleblower protection. He further expressed hope for a Republican sponsor and bipartisan support as the bill moves forward.

Ranking Member Peter T. King (R-NY) expressed his belief that the committee was rushing to pass legislation, and instead urged his fellow members to abide by the wishes of the Administration and extend CFATS for one year before passing a free-standing bill. He further asserted that the inclusion of a citizen suit provision is improper in legislation dealing with security issues.

Witness Statements

Initial testimony came from two DHS officials responsible for implementation of the current and future legislation. Philip Reitinger, Deputy Under Secretary for National Protection and Programs Directorate, urged the Committee to provide adequate time and resources to DHS in implementing any new legislation. He stated that enacting permanent legislation by

October is premature because DHS has not yet completed all of the steps under the original CFATS regulations. Mr. Reitinger suggested that future legislation should extend CFATS to drinking water and wastewater facilities, harmonize efforts between CFATS and MTSA, improve the enforcement process, and continue the collaborative relationship between DHS, Congress, and the chemical industry. Finally, he stated his concern that the citizen suit provision could result in disclosure of sensitive information.

Sue Armstrong, National Protection and Programs Infrastructure Protection Security Division Director, echoed the sentiments of her DHS colleague, answered questions about the specifics of CFATS implementation, and reiterated that CFATS is primarily about safety in relation to terrorism.

Further testimony consisted of representatives of state and industry interests. Mr. Paul Baldauf, the Assistant Director for Radiation Protection and Release Prevention at New Jersey's Department of Environmental Protection, testified on the experience of chemical regulation in New Jersey. His testimony provided an important comparison between New Jersey's program and the proposed legislation. Mr. Baldauf explained that New Jersey's Toxic Catastrophe Prevention Act requires an IST analysis from high-risk facilities, but does not mandate implementation of identified IST measures.[22] Overall, he said, the chemical industry has collaborated with New Jersey and has not found regulation to be overly burdensome.

Marty Durbin, Vice President of Federal Affairs at the American Chemistry Council, stated that CFATS encourages facilities to consider all possible risk reduction options and therefore IST is an unnecessary infringement on flexibility. He added that CFATS, unlike the environmental statutes, does not mandate prescriptive standards that are readily ascertainable to a citizen or judge, and therefore citizen suits are an improper form of enforcement.

Dr. Neal Langerman, Principal Scientist and CEO at Advanced Chemical Safety (a safety, health, and environmental protection consulting firm) testified that industry already seeks to optimize safety of its products and operations and implements IST when appropriate. Mandatory IST rules, he argued, would result in improper micromanaging of facilities by the government. He instead encouraged other measures to promote IST, such as grants and tax incentives, instead of a mandate. Martin Jeppeson, Director of Regulatory Affairs at California Ammonia Company, testified that many sectors will potentially be subject to CFATS. He noted that IST would have a significant impact on farmers and that there is no proper substitute for the substances that farmers must keep on site.

Questions and Observations

Chairman Thompson, supported by Rep. Jackson-Lee, questioned whether a one-year extension was truly necessary, given that legislation this year would cause no apparent disruption to the CFATS program. Ranking Member King, Rep. Michael T. McCaul (R-TX), and Rep. Daniel E. Lungren (R-CA), on the other hand, commented that an extension would provide DHS time to fully implement the current CFATS regulations and determine necessary improvements.

The issue of citizen suits also divided the members of the Committee. Ranking Member King , along with Rep. Christopher P. Carney (D-PA), Rep. Pete Olson (R-TX), and Rep. Mark E. Souder (R-IN), asserted that citizen suits may disproportionately divert the scarce resources of DHS and add costs to already struggling industries. Rep. Lungren and Rep. McCaul added that allowing these suits may upset the collaborative relationship between the chemical industry and DHS, especially in light of the potential for disclosure of protected information. Chairman Thompson, with support from Rep. Yvette D. Clarke (D-NY), responded that the language of the bill prevents frivolous suits and there is no basis for believing that DHS will be flooded with unfounded citizen suits. Chairman Thompson further emphasized the importance of citizen suits as a method for public participation.

The final point of contention was the provision to require IST in certain circumstances. Many members, including Rep. Charles W. Dent (R-PA), Rep. Mark E. Souder, and Rep. Lungren pointed to the potentially staggering costs to industry if product substitution were required and the danger of unintended consequences when the federal government engages in

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micromanaging industry. Rep. Paul C. Broun (R-GA) further lamented that these measures would severely impact small businesses and shift the risk from chemical facilities to other sectors (e.g., the transportation sector because smaller amounts of a chemical would have to be shipped more frequently to reduce storage onsite). Finally, Rep. McCaul stated that the collaborative approach over the past few years has been successful and should be allowed to continue.

Rep. Laura Richardson (D-CA) countered that the federal government is responsible for preventing terrorism and that IST is only required at facilities in limited circumstances. Rep. Emmanuel Cleaver (D-MO) added that the federal government would also bear most of the blame should an attack occur as a result of the failure to regulate chemical plants adequately. Rep. Bill Pascrell (D-NJ) stated that chemical regulation in New Jersey has actually benefited the industry by encouraging efficiency. Chairman Thompson continually reminded the Committee that specific methodologies are not imposed in the bill and that industry would have flexibility to meet the safety standards.

The Chairman's prepared statement and the witness testimony are available at the Committee's website at http://homeland.house.gov/hearings/index.asp?ID=199.

Amendments

The Committee considered various amendments and held final markup on June 23, 2009. The most notable amendments adopted in the markup were: the inclusion of an IST appeals process before an administrative law judge (Rep. Lungren); a modification to the IST provision to require consideration of effects on employment levels (Rep. Dent) and surface transportation (Rep. Souder) when making an implementation decision; and a requirement that DHS analyze and report on the security issues surrounding an exemption for small businesses (Rep. Pascrell, perfecting an amendment by Rep. Austria). The other amendments include: an increase for citizen suit action time to 120 days; a requirement that DHS hire additional CFATS inspectors and establish a tip line; and a requirement that facilities fire employees found to be illegal aliens during background checks.

A video recording of the markup, a prepared statement by Chairman Thompson, and the outcome of each amendment are available at the Committee's website at http://homeland.house.gov/hearings/index.asp?ID=200.

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[1] S. 1602, 107th Cong. (2001) (introduced shortly after Sept. 11, 2001, by Sen. Jon Corzine (D-NJ)); H.R. 5300, 107th Cong. (2002) (introduced by Reps. Frank Pallone (D-NJ) and Marge Roukema (R-NJ)); H.R. 1861, 108th Cong. (2003) (introduced by Reps. Frank Pallone (D-NJ) and Marge Roukema (R-NJ)); S. 994, 108th Cong. (2003) (introduced by Sen. Inhofe (R-OK); H.R. 2901, 108th Cong. (2003) (introduced by Rep. Vito Fosella (R-NY) as the companion to Sen. Inhofe's bill). In spite of these numerous bills, stand-alone chemical plant safety regulation did not pass.

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

[3] Also available at http://www.bdlaw.com/news-559.html.

[4] The Chemical Facility Antiterrorism Act of 2009, H.R. 2868, 111th Cong. (2009), available at http://homeland.house.gov/press/index.asp?ID=460&SubSection=5&Issue=0&DocumentType=0&PublishDate=0.

[5] A video recording of the entire hearing is available at the Committee's website at http://homeland.house.gov/hearings/index.asp?ID=199.

[6] For a brief history of IST, see Center for Chemical Process Safety ("CPSS"), *Inherently Safer Chemical Process: A Life Cycle Approach* (2d ed. 2008), § 1.4, available at http://www.wiley.com/WileyCDA/WileyTitle/productCd-0471778923.html. See also testimony by Dennis C. Hendershot and Scott Berger, CCPS, before the Senate Environment and Public Works Committee, 109th Cong. (June 21, 2006), available at http://epw.senate.gov/109th/Hendershot_Testimony.pdf.

[7] The Chemical Facility Antiterrorism Act of 2009, H.R. 2868, § 2111, 111th Cong. (2009).

[8] Id. § 2116.

[9] Id. § 2112 (removing wastewater treatment plant exemption).

[10] Id. § 2103.

[11] Id. § 2108.

[12] Id. § 2106.

[13] Id. § 2015.

[14] Id. § 2115.

[15] Id. § 2102.

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[16] Id. § 2103.

[17] Id.

[18] Id. § 2104.

[19] Id. § 2107.

[20] Id. § 2109.

[21] A video recording of the entire hearing is available at the Committee's website at http://homeland.house.gov/hearings/index.asp?ID=199.

[22] See Toxic Catastrophe Prevention Act, N.J. Stat. Ann. § 13:1K-19 et seq. (1985). The IST rules are under the Toxic Catastrophe Prevention Act Program, N.J. Admin. Code § 7:31-1.1 et seq. (2003).

Chemical Safety Board Requests Information on Chemical Release Reporting Rule

The U.S. Chemical Safety and Hazard Investigation Board (CSB) has requested initial comments on developing a reporting rule for accidental chemical releases. 74 Fed. Reg. 30,262 (June 25, 2009). Comments are due on August 4, 2009. A copy of the advance notice of proposed rulemaking is available at http:www.bdlaw.com/assets/attachments/74_Fed_Reg_30262_Jun_25_2009.pdf.

Section 112(r) of the Clean Air Act provides the CSB with authority to investigate and report on the circumstances surrounding accidental chemical releases that result in fatalities, serious injuries, or substantial property damage. 42 U.S.C. §§ 7412(r)(6)(C)(i)-(ii). Section 112(r) also requires the CSB to issue reporting requirements for accidental releases and provides the Environmental Protection Agency with the enforcement authority. Id. at (r)(6)(C)(iii), (r)(6)(O). The CSB has not yet issued such regulations. For years, it had taken the position that such reporting requirements were unnecessary. However, in 2004, the EPA Inspector General recommended that the CSB fulfill its statutory obligation. More recently, the Government Accountability Office did so as well. The CSB now agrees that a reporting rule would help to improve the "timeliness, completeness, and accuracy" of the information that it collects on chemical releases. 74 Fed. Reg. at 30,260.

In the Notice, the CSB identifies and asks for comment on four possible approaches for implementing the requirement: (1) a comprehensive approach requiring reporting of all accidental releases subject to the CSB's investigatory jurisdiction; (2) a more targeted approach, requesting basic information for incidents that meet "significant consequences thresholds" (e.g., death, evacuations); (3) requiring reporting only upon notification by the CSB, with the CSB continuing to rely on existing sources to learn about incidents; and (4) reporting based on the presence or release of specified chemicals and specified thresholds. Id. at 30,262.

The CSB specifically requests information and feedback on the following:

- existing federal or other accident-reporting programs that could serve as models;
- whether initial reports should go to the CSB or the National Response Center;
- what information should be reported;
- how soon after an event reporting should occur;
- whether to design the rule with distinct requirements for "high-consequence" events as opposed to other incidents;
- what factors the CSB should consider (such as lists of chemicals or specific consequences);
- how to gather information on incidents that may not involve specifically listed chemicals (such as combustible dust explosions);
- how to avoid duplicating existing regulations; and
- how to target compliance education efforts. *Id.*

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Firm News & Events

Henry Diamond Joins Bipartisan Call for Overhaul of U.S. Land and Water Conservation Policies

The Outdoor Resources Review Group (ORRG) has issued a wide-ranging review of how Americans engage with and value the nation's land and water resources and related outdoor recreation assets. The bipartisan group has called for a comprehensive overhaul of programs and policies to safeguard these resources for future generations.

Henry Diamond co-chaired the ORRG along with Gilbert Grosvenor (chairman of the board of the National Geographic Society) and Patrick Noonan (chairman emeritus of The Conservation Fund). Mr. Diamond joined Senators Jeff Bingaman (D-New Mexico) and Lamar Alexander (R-Tennessee), who served as honorary co-chairs, in a Capitol Hill briefing to Secretary of the Interior Ken Salazar earlier this week.

A key proposal in the report, which is flagged for further study, is the development of an independent conservation trust within the federal establishment, with dedicated and substantial funding reaching $5 billion annually. One potential funding source identified is a percentage of royalties and revenues collected from development of new renewable and conventional energy resources and transmission capacity on public lands and on the outer continental shelf. The ORRG also recommends full funding of the Land and Water Conservation Fund (LWCF) at $3.2 billion a year -- its highest level of authorization adjusted for inflation.

Mr. Diamond has long been a leading voice in the development of federal and state public land policies related to wildlife, parks, forests and open space. Mr. Diamond served as the lead editor of the landmark 1962 report of the Outdoor Recreation Resources Review Commission (ORRRC) which, under the leadership of Laurance S. Rockefeller, took the first and most comprehensive review of U.S. outdoor recreation and the policies needed to ensure that parks and public lands would be protected for future generations. The Outdoor Recreation for America report was presented to President John F. Kennedy on January 31, 1962 and is credited with reframing the national debate over conservation to include greater consideration of the public's outdoor recreational interests and needs. In 1987, the President's Commission on Americans Outdoors undertook a similar review.

"Henry Diamond continues to shape our nation's thinking on how we can best protect the public lands, parks and waters that are critical to our economy, personal health and quality of life" observed Benjamin F. Wilson, the Managing Principal at Beveridge & Diamond, P.C. "The firm is honored to see his continued engagement on these important issues now before the new Administration."

Mackenzie Schoonmaker, an Associate with the Firm assisted with the preparation of the report, on a pro bono basis.

A full copy of the report can be downloaded at http://www.orrgroup.org/.

A copy of the press release announcing the public release of the report is available at http://www.orrgroup.org/documents/Press%20Release_ORRG_Report_Final.pdf.

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