Texas Environmental Update

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Texas Developments

TCEQ Announces Organizational Changes

TCEQ has announced the creation of a new Office of Air, headed by Steve Hagle, former Air Permits Division Director, and a new Office of Waste, headed by Brent Wade, former Remediation Division Director. With the creation of these two new Offices, TCEQ will return to a structure organized along media lines. The Office of Water was created in 2009. In addition, Richard Hyde, former Deputy Director for the Office of Permitting and Registration, has been appointed to the position of Deputy Director for the Office of Compliance and Enforcement. John Sadlier, Deputy Director for the Office of Compliance and Enforcement, has announced that he will be retiring from the agency. The organizational changes will be effective August 1, 2011.

Flare Task Force Update

TCEQ hosted a Flare Task Force Stakeholder Group meeting in Houston on June 1, 2011 to present the results of the flare research study conducted at the Zink flare test facility in Tulsa, Oklahoma during September 2010. That study was anticipated in the Flare Task Force Draft Report that TCEQ issued on September 3, 2009. The project involved field tests conducted to measure flare emissions and collect process and operational data in a semi-controlled environment to determine the relationship between flare design, operation, vent gas lower heating value and flow rate, destruction and removal efficiency ("DRE"), and combustion efficiency ("CE"). As we reported last month, the flare research study determined that existing assumed flare efficiency standards overestimate emissions reductions; including that a flare can be operated pursuant to 40 CFR §60.18 and not achieve 98% DRE. This and other findings could trigger proposed changes to programmatic and permitting requirements for flares.

TCEQ has added to its Flare Task Force Stakeholder Group's webpage the 86-page "Draft Final Report Summary" presented at the June 1st meeting, as well as the informal comments stakeholders submitted regarding the 2010 Flare Study Draft Final Report dated May 23, 2011. The Stakeholder Group's webpage is located at http://www.tceq.texas.gov/airquality/stationary-rules/flare_stakeholder.html.

Governor Signs Texas Hydraulic Fracturing Disclosure Bill Into Law

With Texas Governor Rick Perry signing House Bill ("HB") 3328 into law on June 17, 2011, Texas is poised to impose disclosure requirements relating to the oil and gas well stimulation process known as hydraulic fracturing. HB 3328 requires that the Texas Railroad Commission ("the Commission" or "the Agency") by July 1, 2012 adopt rules requiring that the owner or operator of a well on which hydraulic fracturing is performed post on a form on a specified publicly accessible Internet website the total volume of water used and certain chemical ingredients used in the hydraulic fracturing process. The law also provides that by July 1, 2013 the Commission must adopt rules requiring that well owners and operators provide to the Commission a list, to be made available on a publicly accessible website, of

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all other chemical ingredients not listed in the above-referenced form that were intentionally used in the hydraulic fracturing process. The rules must include provisions for claiming and challenging trade secret protection for information subject to disclosure.

The Agency's commissioners (Chairman Elizabeth Ames Jones and Commissioner David Porter) issued separate news releases in advance of the governor's signature, with Commissioner Porter announcing his desire that the Commission complete the entire rulemaking process by July 1, 2012 -- a year in advance of the required schedule. Consistent with that announcement, at their June 15, 2011 open meeting the commissioners granted approval to Agency staff to prepare a rulemaking timetable that allows for completion of HB 3328 rulemaking by July 1, 2012. The commissioners' news releases are available at http://www.rrc.state.tx.us/pressreleases/2011/060311.php and http://www.rrc.state.tx.us/commissioners/porter/press/060311.php.

Online Registration for Permit for Shale Oil and Gas Facilities in Barnett Shale Available

TCEQ has made available online registration for Level 1 and Level 2 facilities that qualify for the new oil and gas permit by rule ("PBR") in the Barnett Shale. Registration is submitted on the State of Texas Environmental Electronic Reporting System ("STEERS"). Additional information is available at http://www.tceq.texas.gov/permitting/air/announcements/nsr-announce-05-27-11.html.

Governor Signs Law Allowing Non-Compact Low-Level Radioactive Waste Disposal

The low-level radioactive waste disposal facility in Andrews County, Texas will soon be authorized to accept waste from non-compact states pursuant to Senate Bill ("SB") 1504, which Governor Perry signed into law on June 17, 2011. Without the authorization afforded by SB 1504, the facility has been limited to accepting waste generated in Texas and compact member states Maine and Vermont. SB 1504 allows limited domestic imports of Class A, B and C low-level wastes from non-compact states.

Waste from non-party states may not exceed more than 30 percent of the disposal and curie capacity, among other conditions. A 20 percent surcharge for non-party waste is assessed. SB 1504 prohibits the disposal of waste of international origin. TCEQ is directed to conduct a study on the surcharge as well as the impacts on the volume and curie capacity of the disposal site from acceptance of non-party waste. SB 1504, which will become effective on September 1, 2011, is available at http://www.bdlaw.com/assets/attachments/SB%201504%202011.pdf.

Texas State Implementation Plan Developments

On June 8, 2011, the TCEQ commissioners approved the proposal of a Houston-Galveston-Brazoria ("HGB") area Reasonably Available Control Technology ("RACT") analysis update state implementation plan ("SIP") revision for the 1997 eight-hour ozone standard. This proposal focuses on the seven Control Techniques Guidelines ("CTG") documents that the United States Environmental Protection Agency issued from 2006 through 2008 that were not addressed in the HGB attainment demonstration SIP revision adopted on March 10, 2010. It also incorporates concurrently proposed CTG-related rulemaking that would implement RACT for flexible package printing; industrial cleaning solvents; large appliance coatings; metal furniture coatings; paper, film, and foil coatings; miscellaneous industrial adhesives; and miscellaneous metal and plastic parts coatings operations in the HGB area. The public comment period for this proposal opened on June 24, 2011, and will end on July 25, 2011. Additional information about this proposed SIP revision is available at http://www.tceq.texas.gov/airquality/sip/hgb/hgb-latest-ozone#executive-director-s.

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At their June 8th meeting the commissioners also approved proposal of Dallas-Fort Worth ("DFW") attainment demonstration and reasonable further progress ("RFP") SIP revisions for the 1997 eight-hour ozone standard. The proposed attainment demonstration SIP revision provides photochemical modeling and weight of evidence analyses to show that the DFW nonattainment area will attain the 1997 ozone standard by the June 15, 2013 attainment deadline. The proposed revision includes a RACT analysis, a reasonably available control measures analysis, a motor vehicle emissions budget ("MVEB") for 2012, and a contingency plan. It also incorporates into the Texas SIP concurrently proposed revisions to 30 Texas Administrative Code Chapter 115. The proposed RFP SIP revision includes analyses of incremental reductions in ozone precursors from a 2002 base year out to attainment of the 1997 ozone standard, and updated emissions inventories and MVEBs for the 2011 and 2012 milestone years. This proposed SIP revision also incorporates concurrently proposed revisions to 30 Texas Administrative Code Chapter 115. The public comment period began on June 24, 2011, and will end on July 25, 2011. Additional information about these proposed SIP revisions is available at http://www.tceq.texas.gov/airquality/sip/dfw/dfw-latest-ozone.

On June 22, the commissioners approved proposal of the Collin County Attainment Demonstration SIP Revision for the 2008 lead national ambient air quality standard ("NAAQS"). This proposal includes air dispersion modeling demonstrating that the Collin County nonattainment area will attain the 2008 lead NAAQS by the December 31, 2015, attainment date. The proposal also includes a RACT analysis, a reasonably available control measures ("RACM") analysis, an RFP demonstration, an emissions inventory, and a contingency plan. The commissioners concurrently approved a proposed Agreed Order intended to support achieving compliance with the 2008 lead NAAQS in the area. The public comment period for this proposal commenced on June 24, 2011, and will end on August 8, 2011. Additional information about that proposal is available at http://www.tceq.texas.gov/airquality/sip/dfw/dfw-latest-lead.

The commissioners also approved on June 22 proposal of the Lead Infrastructure SIP Revision for the 2008 lead NAAQS. TCEQ has proposed this SIP revision to comply with federal Clean Air Act infrastructure requirements under the 2008 lead NAAQS. The revision would document how the Texas SIP now addresses each infrastructure element in Texas statutes and administrative rules. The public comment period for this proposal began on June 24, 2011, and will end on July 29, 2011. Additional information about that proposal is available at http://www.tceq.texas.gov/airquality/sip/criteria-pollutants/sip-lead.

TCEQ's Toxicology Division Finalizes Development Support Documents

TCEQ's Toxicology Division has finalized Development Support Documents ("DSDs") for Methylene Chloride, Nickel and Inorganic Nickel Compounds and Trichloroethane, 1,1,1. DSDs summarize how chemical-specific toxicity values were derived based on published guidelines. Fact sheets are available at http://www.tceq.texas.gov/toxicology/dsd/dsd/final.html. TCEQ's Toxicology Division has also updated the Air Monitoring Comparison Values ("AMCVs") List. AMCVs are chemical-specific air concentrations established to protect human health and welfare and are the values used by agency staff to review ambient air monitoring data. The updated AMCV List is available at http://www.tceq.texas.gov/toxicology/AirToxics.html.

Upcoming TCEQ Meetings and Events

- TCEQ will hold a Commission Worksession in Austin on July 5, 2011. Items currently scheduled for consideration include, among other things, discussion of TCEQ's Sunset Legislation and Implementation including revisions to the Commission's Penalty Policy and rulemaking for General Enforcement Policies. Additional information is available at http://www.tceq.texas.gov/assets/public/comm_exec/agendas/worksess/current/2011/070511.pdf.

- TCEQ will host a Water Quality Advisory Group Meeting in Austin on July 19, 2011. Tentative items scheduled for discussion include updates on: (i) Storm Water Multi-

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Sector General Permit; (ii) Implementation Procedures; (iii) Pesticides General Permit; (iv) Legislative/Sunset Review; (v) MS4 Storm Water General Permit Program; (vi) Chapter 210 (relating to Use of Reclaimed Water); and (vii) Drought Conditions. Additional information is available at http://www.tceq.texas.gov/permitting/wastewater/WQ_advisory_group.html.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in June can be found on the TCEQ website at http://www.tceq.texas.gov/news/releases/6-11Agenda6-22 and http://www.tceq.texas.gov/news/releases/6-10Agenda6-8.

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

Supreme Court to Decide When Landowners May Challenge Clean Water Act Jurisdiction

In an unexpected move, on June 28, the United States Supreme Court granted certiorari to consider whether landowners may obtain judicial review of an administrative compliance order ("ACO") without first being required to submit to an enforcement action by the Environmental Protection Agency ("EPA"). The case at issue, *Sackett v. EPA,* No. 10-1062 (U.S. June 28, 2011), focuses on an ACO arising from the assertion of federal jurisdiction over wetlands and other waters under the Clean Water Act ("CWA"), but the Court's decision could affect the availability of pre-enforcement judicial review under a wide range of federal environmental statutes.

Sackett addresses the crucial question of when can regulated entities and citizens sue the federal government to contest the assertion of CWA jurisdiction over their land or activities.

The dispute in *Sackett* began when an Idaho couple attempted to build a new home on a small parcel of land they own. Believing they did not have jurisdictional wetlands or waters on their property, the Sacketts began grading the site without obtaining a CWA Section 404 permit for discharges of dredged or fill material into waters of the United States. EPA, on the other hand, believed that there were jurisdictional wetlands on the Sacketts' property and issued an ACO prohibiting further work and ordering the couple to restore the wetlands.

The Sacketts sought review of the ACO in the U.S. District Court of Idaho, but the court dismissed their lawsuit, finding that the landowners had not been subjected to an enforcement action by EPA and, therefore, there was no final agency action to review. On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed, further holding that the Sacketts' due process rights were not violated by the unavailability of judicial review because parties subject to ACOs under the CWA have an opportunity to seek judicial relief if EPA ultimately commences an enforcement action against them. The Sacketts then petitioned the Supreme Court. The Court granted their petition and agreed to consider two questions: 1) May citizens seek pre-enforcement judicial review of an ACO pursuant to the Administrative Procedure Act, 5 U.S.C. § 704?; and 2) If not, does the citizens' inability to seek pre-enforcement judicial review of an ACO violate their rights under the Due Process Clause of the U.S. Constitution?

Sackett arguably will represent the most important CWA regulation case that the Supreme Court has considered since ruling on the reach of federal CWA jurisdiction in *United States v. Riverside Bayview Homes* in 1985. Under current federal court precedent, judicial review is available to landowners and developers only after EPA or the Army Corps of Engineers initiates an enforcement action for allegedly unlawful discharges of dredged or fill material

into wetlands and jurisdictional waters. As a result, a landowner faces a Hobson's choice of either encouraging the agencies to initiate an enforcement action against it – exposing one to potentially significant civil and/or criminal penalties – or submitting to CWA jurisdiction and obtaining costly, time-consuming Section 404 permits despite disagreeing that a project or activity is subject to federal jurisdiction.

Sackett could eliminate that dilemma and bring relief to landowners nationwide. Should the Court reverse the Ninth Circuit, landowners may be able to seek immediate judicial review of federal jurisdiction rather than having to apply for a permit authorizing activities that arguably are not subject to CWA jurisdiction or to instigate an enforcement action in order to secure court-reviewable final agency action. In short, a favorable ruling in *Sackett* could lead to significant cost savings and substantially less exposure to liability for regulated entities by providing a window of time in which they may raise their objections in court before EPA or the Corps takes enforcement action.

To discuss these issues further, please contact Gus Bauman, (202) 789-6013 (gbauman@bdlaw.com), or Parker Moore, (202) 789-6028 (pmoore@bdlaw.com).

U.S. Supreme Court Holds that States Cannot Use Federal Common Law to Limit Utilities' Greenhouse Gas Emissions

On June 20, 2011, the Supreme Court issued its decision in *Connecticut v. American Elec. Power Co.*, unanimously holding that, for now, the Clean Air Act (the "Act") and EPA rulemaking under the Act displace federal common law nuisance actions to limit greenhouse gas ("GHG") emissions from electric power plants.

The Supreme Court's decision overturned the Second Circuit, which had held that such public nuisance actions could currently be brought against private emitters of GHGs. *Connecticut v. American Elec. Power Co.*, 582 F.3d 309 (2009). At the time of the Second Circuit's decision, EPA had not promulgated any rules regulating GHGs. See the Beveridge & Diamond client alert regarding this the Second Circuit decision, available at http://www.bdlaw.com/news-669.html. The plaintiffs – six states, New York City and several land trusts – brought suit against private utilities operating fossil fuel-fired electric power plants to reduce GHG emissions by invoking federal "public nuisance" common law. They argued that the power companies are contributing to a public nuisance by releasing GHGs into the atmosphere.

The Supreme Court explained that the test to determine legislative displacement of federal common law is whether a federal statute speaks directly to the question at issue. Citing its previous opinion in Massachusetts v. EPA, 549 U.S. 497, 528-529 (2007), which held that GHGs qualify as air pollutants subject to regulation under the Clean Air Act, the Court concluded that the Act "speaks directly" to the carbon dioxide emissions from the defendants' power plants. Specifically, the Court determined that Section 111 of the Act provides a means to set limits on GHG emissions from power plants, and EPA's current efforts to complete a Section 111 rulemaking to set standards for GHG emissions from fossil-fuel power plants leave "no room for a parallel track" using the federal common law. The Court went on to state that EPA – and not the federal courts – is "best suited to serve as primary regulator of greenhouse gas emissions" due to its scientific, economic, and technological resources. And if the plaintiffs' were not satisfied with EPA's rulemaking efforts, the proper initial recourse would be to submit a petition for review of EPA's rulemaking under the Clean Air Act.

Notably, the Court rejected the plaintiffs' argument that federal common law is not displaced until EPA actually exercises its regulatory authority in adopting standards, holding that the legislative displacement test is "whether the field has been occupied, not whether it has been occupied in a particular manner."

While the holding that the Clean Air Act and current regulatory plan for controlling GHG emissions displaces federal common law was unanimous, the Court was split 4-4 on the issue of whether the plaintiffs have standing to bring the suit at all. The split means that the Second Circuit's finding that the plaintiffs do have standing survives, leaving open

the possibility of future lawsuits involving issues not displaced by the Act or the federal government's continued efforts to regulate GHG emissions (note, though, that the Second Circuit's ruling does not apply to other federal circuits). In addition, the Court remanded the question of whether the plaintiffs could proceed under state nuisance law, because the parties did not brief this issue. The Court stated, in dictum, that the availability of a state common law suit would, however, depend, in part, on the preemptive effect of the Clean Air Act.

The full Supreme Court opinion is available at: http://www.supremecourt.gov/opinions/10pdf/10-174.pdf.

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Chemical Plant Security Returns to the Congressional Agenda

Following a flurry of Congressional activity on chemical plant security legislation this spring, the House Energy and Commerce Committee has approved a bill that would extend the Chemical Facility Anti-Terrorism Standards (CFATS) program through Fiscal Year 2018. Two more House bills and one in the Senate, all similar in their effect, have also been proposed. So far, the 112th Congress has focused primarily on reauthorizing the program in its current form, unlike the previous Congress, in which contentious issues of "inherently safer technology" (IST) and eliminating exemptions of water treatment and certain other facilities from CFATS dominated the debate. However, a pair of new Senate bills raise those issues, indicating that the former debate may be revived later in the session.

Background

The current Congressional debate over chemical plant security legislation began soon after the terrorist attacks of September 11, 2001, with the widespread perception that stored chemicals could be an attractive target for future attacks. Despite that consensus, legislators have consistently divided on the question of whether to empower an agency to require IST, forcing chemical facilities to minimize their use of hazardous chemicals. In 2006, a compromise solution emerged in the form of a brief provision inserted into a Department of Homeland Security (DHS) appropriations bill, which granted DHS authority for to establish CFATS on a three-year timetable.[1] The temporary authority enabled DHS to create the framework of a chemical facility security program, but was silent on the contentious issue of IST.

The CFATS regulations require covered facilities to report to DHS their actual or planned use of any of 322 listed "chemicals of interest" at or above threshold quantities. Upon reviewing these "top-screen" reports, DHS preliminarily assigns each facility to one of four risk-based tiers, with Tier 1 being the highest risk category. Covered facilities are required to prepare security vulnerability assessments (SVAs) following a DHS protocol. The facilities that DHS confirms as belonging in the higher-risk tiers must submit and implement site security plans (SSPs) to address vulnerabilities identified in the SVAs.[2]

Initially, DHS's authority was set to expire on October 4, 2009, a deadline for Congress to act. During 2009 and 2010, Congress debated bills to permanently reauthorize CFATS,[3] but has yet to pass such legislation. Instead, it has met each successive deadline with extensions of the original, temporary CFATS authority.[4] Under the most recent extension, that authority is scheduled to expire on October 4, 2011.[5] The current Homeland Security appropriations bill, H.R. 2017, passed by the House on June 6, 2011, would extend the same authority for another year.

CFATS Reauthorization Bills

On March 3, 2011, House Republicans introduced three separate bills, each of which would reauthorize CFATS for several years without substantial changes to the program. Rep. Daniel Lungren (R-CA) introduced H.R. 901, the "Chemical Facility Anti-Terrorism Security Authorization Act of 2011," which would re-codify the original CFATS provisions as new

sections of the Homeland Security Act of 2002 and extend the program through September 30, 2018. Rep. Tim Murphy (R-PA) introduced H.R. 908, the "Full Implementation of the Chemical Facility Anti-Terrorism Standards Act" to keep the existing statute intact and revise the expiration date to October 4, 2017. Rep. Charles Dent (R-PA) introduced H.R. 916, the "Continuing Chemical Facilities Antiterrorism Security Act of 2011," which would extend CFATS to October 4, 2015 and add voluntary programs under which facilities could train personnel and test their readiness with assistance from DHS.

Of the three similar House proposals, H.R. 908 has advanced the farthest, gaining the approval of the Energy and Commerce Committee on May 26, 2011. In the mark-up prior to the vote, the Committee adopted two amendments by Rep. John Shimkus (R-IL), one limiting the use of employee background checks and the other extending the sunset date to October 4, 2018. The Committee rejected several amendments by Democrats aimed at tightening government and public oversight of chemical facilities, and ultimately approved H.R. 908 by a vote of 33 to 16. The bill's co-sponsor, Rep. Gene Green (D-TX), was the lone Democrat who voted with the Republican majority. As modified by the two Shimkus amendments, H.R. 908 awaits consideration by the full House.

Sen. Susan Collins (R-ME) also chose March 3, 2011 to introduce S. 473, which, like H.R. 916, is entitled the "Continuing Chemical Facilities Antiterrorism Security Act of 2011." It is nearly identical to legislation that Sen. Collins introduced in the previous Congress.[6] S. 473 would extend the current CFATS authority to October 4, 2015, add the same voluntary programs as in H.R. 916 plus a third voluntary program for technical assistance, and create a Chemical Facility Security Advisory Board to review the latter program. Her new bill has some level of bipartisan support, with co-sponsors Sen. Rob Portman (R-OH) and two Democrats, Sen. Mary Landrieu (D-LA) and Sen. Mark Pryor (D-AR).

CFATS Expansion and IST Bills

While the House Republican majority focuses on extending the existing CFATS authority, some Senate Democrats instead propose significant modifications to the program. Sen. Frank Lautenberg (D-NJ), with co-sponsor Sen. Robert Menendez (D-NJ), has introduced two bills that largely replicate the Democratic plans of the previous Congress.[7] They would impose IST requirements, enable legal actions by citizens, and extend chemical security regulations to certain classes of facilities that are currently exempt.

Sen. Lautenberg's first bill, S. 709, the "Secure Chemical Facilities Act," includes an IST mandate under the heading of "methods to reduce the consequences of a terrorist attack," as well as provisions for both citizen suits and a "citizen petition" process. This bill would require all covered facilities to conduct an assessment of IST methods, and would require facilities in the highest risk categories, Tiers 1 and 2, to implement any IST methods that "would significantly reduce the risk of death, injury, or serious adverse effects to human health resulting from a chemical facility terrorist incident" as long as the methods are technically and economically feasible and do not transfer the risks to other facilities.[8] The citizen suit provision would allow civil actions against any governmental entity for CFATS violations, and against DHS for failure to perform any non-discretionary CFATS duty.[9] In addition, DHS would be required to establish a formal petition procedure enabling citizens to allege a violation by any person of any requirement of the program, and compel DHS to investigate and report its findings to the petitioner.[10] S. 709 would also end the exemption from CFATS of facilities that are regulated under the Maritime Transportation Security Act ("MTSA").

Sen. Lautenberg's companion bill, S. 711, the "Secure Water Facilities Act," would establish a CFATS-like security program for water treatment facilities regulated under both the Safe Drinking Water Act and the Clean Water Act. Instead of DHS, the regulatory authorities would be the Environmental Protection Agency ("EPA") and the state agencies that administer existing water programs. This bill would require covered facilities to conduct assessments of IST "methods to reduce consequences of chemical releases from intentional acts" but, unlike S. 709, would not make implementation mandatory. The citizen action provisions of S. 709 are absent from S. 711.

The Obama Administration Position on CFATS Reauthorization and Expansion

Prior to the introduction of the current proposals, on February 11, 2011, the House Subcommittee on Cybersecurity, Infrastructure Protection and Security Technologies held a hearing on the status of chemical plant security under CFATS. DHS Under Secretary of National Protection and Programs Rand Beers provided an update on implementation of the program and presented the Administration's priorities for chemical plant security legislation.[11] Most prominently, the Administration supports permanent authorization of CFATS. Under Secretary Beers characterized the exemption of drinking water and wastewater treatment facilities from CFATS as a "critical gap in the U.S. chemical facility security regulatory framework."[12] As under Sen. Lautenberg's S. 711, the Administration prefers that EPA be granted authority to manage a CFATS-like security program for water treatment facilities. The Administration also supports a review of exemptions for facilities regulated under the MTSA and Nuclear Regulatory Commission.

According to the testimony of Under Secretary Beers, the Administration continues to "support[], where possible, using safer technology." He set forth the following Administration principles to guide the development of IST policy:

- Consistency of IST approaches regardless of sector;
- All high-risk facilities (Tiers 1-4) should assess IST methods and report the assessment in their SSPs;
- The regulatory agency should have the authority to require the highest-risk facilities (Tiers 1-2) to implement IST methods that demonstrably enhance overall security, are determined to be feasible, and, in the case of water sector facilities, consider public health and environmental requirements;
- For lower risk facilities (Tiers 3-4), the regulatory agency should review the IST assessment, but not with the authority to require implementation; and
- Flexible and staggered implementation of any new IST policy.

IST: A Fading Issue?

The view expressed by most speakers at the February 11 hearing was that, as a practical matter, facility owners and managers generally prefer safer technologies, that CFATS already provides an incentive to reduce risks, and that the chemical sector is, in effect, adopting IST without a mandate from Congress. Timothy Scott, representing The Dow Chemical Company and the American Chemistry Council, cited DHS as reporting a reduction of over 2,000 facilities from the high-risk categories.[13] Dr. Sam Mannan, a specialist in industrial process safety at Texas A&M University, testified that "[o]ver the past 15-20 years, and more so after 9/11, consideration of [IST] options and approaches has effectively become part of industry standards, with the experts ... assessing and implementing inherently safer options, without prescriptive regulations."[14] Finally, George Hawkins, General Manager of the District of Columbia Water and Sewer Authority, testified on the ongoing transition in the water treatment sector away from chlorine gas to various less hazardous alternatives. He cited an informal 2009 survey indicating that approximately two-thirds of such facilities had discontinued use of chlorine gas, and a majority of those remaining intended to change within two years.[15]

Prospects for Permanent CFATS Authorization

In the previous Congress, when Democrats controlled both houses, the House passed a CFATS reform package akin to Sen. Lautenberg's new bills, while a bipartisan group of senators supported Sen. Collins' proposal to extend the CFATS authority for three years without modifying the program.16 Ultimately the Senate failed to act on either proposal. With the balance of power having shifted toward the Republicans in the current Congress, the prospects for passage of CFATS reform incorporating IST are greatly diminished. At the same time, Congressional support for some form of multi-year extension of the existing program appears to have increased, although the strength of this consensus in the Senate remains untested.

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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] The CFATS regulations appear at 6 C.F.R. Part 27.

[3] *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; Beveridge & Diamond, P.C., "Chemical Plant Security Legislation – On the Move," July 2, 2009, *available at* http://www.bdlaw.com/news-611.html; Beveridge & Diamond, P.C., "Congress Poised to Defer Permanent Chemical Plant Security Legislation Until 2010," *available at* http://www.bdlaw.com/news-625.html; 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; Beveridge & Diamond, P.C., "Debate Over Chemical Plant Security Moves to the Senate", *available at* http://www.bdlaw.com/news-847.html; Beveridge & Diamond, P.C., "Chemical Plant and Water Facility Security Legislation in the Senate," August 18, 2010, *available at* http://www.bdlaw.com/news-945.html.

[4] Department of Homeland Security Appropriations Act, 2010, Pub. L. No 111-83, § 550 (2009); An Act Making Continuing Appropriations for Fiscal Year 2011, and for Other Purposes, Pub. L. No. 111-242, § 124 (2010); Continuing Appropriations and Surface Transportation Act, 2011, Pub. L. No. 111-322, § 1(a) (2010).

[5] Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1650 (2011).

[6] Continuing Chemical Facility Antiterrorism Security Act of 2010, S. 2996, 111th Cong. (2010).

[7] The principal Democratic proposal from the last Congress was the Chemical and Water Security Act of 2009, H.R. 2868, 111th Cong. (2009). For an account of the salient 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.

[8] S. 709, § 2111(c).

[9] *Id*. § 2116(a).

[10] *Id*. § 2117.

11 *Preventing Chemical Terrorism: Building a Foundation of Security at Our Nation's Chemical Facilities Before the H. Subcomm. on Cybersecurity, Infrastructure Protection and Security Technologies*, 112th Cong. (2011) (statement of Rand Beers, Under Secretary for Nat'l Protection & Programs, U.S. Dep't of Homeland Security), *available at* http://homeland.house.gov/sites/homeland.house.gov/files/Testimony%20Beers_1.pdf.

[12] *Id*.

[13] *Preventing Chemical Terrorism: Building a Foundation of Security at Our Nation's Chemical Facilities Before the H. Subcomm. on Cybersecurity, Infrastructure Protection and Security Technologies*, 112th Cong. (2011) (statement of Timothy J. Scott, Chief Security Officer & Corporate Director, Emergency Services & Security, The Dow Chemical Co.), *available at* http://homeland.house.gov/sites/homeland.house.gov/files/Testimony%20Scott_2.pdf.

[14] *Preventing Chemical Terrorism: Building a Foundation of Security at Our Nation's Chemical Facilities Before the H. Subcomm. on Cybersecurity, Infrastructure Protection and Security Technologies*, 112th Cong. (2011) (statement of Dr. M. Sam Mannan, Texas A&M University), *available at* http://homeland.house.gov/sites/homeland.house.gov/files/Testimony%20Mannan_2.pdf.

[15] *Preventing Chemical Terrorism: Building a Foundation of Security at Our Nation's Chemical Facilities Before the H. Subcomm. on Cybersecurity, Infrastructure Protection and Security Technologies*, 112th Cong. (2011) (statement of George S. Hawkins, General Manager, District of Columbia Water and Sewer Authority), available at http://homeland.house.gov/sites/homeland.house.gov/files/Testimony%20Hawkins_1.pdf.

[16] *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.

Firm News & Events

Henry Diamond Receives DOI's Lifetime Conservation Achievement Award

Beveridge & Diamond, P.C. is pleased to announce that Interior Secretary Ken Salazar has awarded the Secretary of the Interior's Lifetime Conservation Achievement Award to Henry L. Diamond. The award was presented in recognition of Mr. Diamond's dedication over the past 50 years to the conservation of lands and waters across the Nation and for his direct support to the mission of the Department of the Interior. The Lifetime Conservation Achievement Award is the Department's highest honor for a private citizen and was presented to Mr. Diamond at an event hosted by the Secretary on May 10.

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"Henry's mark on the American landscape is unmistakable and we are very proud to see his life-long commitment to land and water conservation recognized with this high honor from the Department of the Interior," said Ben Wilson, the firm's Managing Principal.

Mr. Diamond first attracted public attention in 1962 when he edited the report by the Outdoor Recreation Resources Review Commission for President Kennedy. The seminal report of this commission led to creation of the Land and Water Conservation Fund, the national system of wilderness areas and wild and scenic rivers. Twenty years later he chaired a task force that pressed for a timely review of land and water conservation, which prompted President Reagan to establish the President's Commission on Americans Outdoors.

Mr. Diamond was associated with the late Laurance S. Rockefeller over many years in his conservation efforts. Mr. Diamond served as Executive Director of the influential 1965 White House Conference on Natural Beauty, which Mr. Rockefeller chaired. He served as a member and then as chairman of the President's Citizens' Advisory Committees on Recreation and Natural Beauty and Environmental Quality. He also served Governor Nelson Rockefeller as the first environmental commissioner for the state of New York, leading the nation's first state environmental agency. As Commissioner, he led a 533 mile bicycle ride across New York State to successfully promote a $1.2 billion environmental bond issue. Mr. Diamond has served on more than 30 other boards and commissions, including Resources for the Future, Environmental Law Institute, The Woodstock Foundation, the Jackson Hole Preserve, Inc. and Americans for Our Heritage and Recreation.

Mr. Diamond's leadership continues presently as co-chair of the bipartisan Outdoor Resources Review Group, sponsored by Senators Jeff Bingaman and Lamar Alexander. The Group's Report, Great Outdoors America, was invaluable in forming the conclusions of the America's Great Outdoors initiative.

To read the Department of the Interior's press release, please go to http://www.doi.gov/news/pressreleases/Salazar-Presents-Lifetime-Conservation-Achievement-Award-to-Henry-L-Diamond.cfm.

Beveridge & Diamond Secures Preliminary Injunction for City of Los Angeles in Biosolids Case

Litigators from the Beveridge & Diamond, P.C. Washington, DC and San Francisco offices won a preliminary injunction in state court in California, blocking implementation of a county voter initiative that sought to halt biosolids recycling at a 4,700 acre farm in Kern County, California, owned by the City of Los Angeles.

Jimmy Slaughter, a Principal in the Firm's Washington, DC office is quoted in a Greenwire article regarding the case, Calif. judge allows L.A. sludge shipments to proceed. To read the article, please visit http://www.eenews.net/Greenwire/2011/06/13/23. (Copyright 2011 Environment and Energy Publishing LLC. Reprinted with permission.)

Mr. Slaughter is also quoted in a BNA Daily Environment Report article, Los Angeles Wins Stay of Kern County Ban On Spreading Biosolids on Public Farms. To read this article, please visit http://news.bna.com/deln/DELNWB/split_display.adp?fedfid=21056198&vname=dennotallissues&fn=21056198&jd=a0c8b5n9q2&split=0. (Reproduced with permission from Daily Environment Report, 114 DEN A-5 (June 14, 2011). Copyright 2011 by The Bureau of National Affairs, Inc. (800-372-1033), http://www.bna.com)

Beveridge & Diamond Gets High Marks from PAR

In a press release dated June 1, 2011, The Project for Attorney Retention (PAR) announced the results of a recent survey regarding promotion of women lawyers. Beveridge & Diamond received special mention for the greatest proportion of women in their new shareholder class of 2011; the Firm promoted six attorneys to shareholder, five of whom are women. Although the survey did not specifically measure the number of part-time attorneys who were promoted to shareholder, PAR acknowledged Beveridge & Diamond for its promotion of part-time attorneys in the 2011 shareholder class.

PAR is a non-profit organization that studies the advancement of women lawyers and work-life issues for all lawyers. Beveridge & Diamond is a Sustaining Member of PAR as part of the Firm's strong commitment to diversity in the profession and the advancement of women lawyers.

For more information on this special achievement, please read PAR's press release, available at www.bdlaw.com/assets/attachments/NewPartners2011_520Press20Release.pdf

Benjamin F. Wilson Featured in Diversity & the Bar Magazine

Beveridge & Diamond's Managing Principal, Benjamin F. Wilson, is featured in the May/June issue of Diversity & the Bar, in the front-page article entitled "Powering Up: A Look at the First Generation of Minority Managing Partners". The article features interviews with five managing partners of color. They each discuss their rise, how they balance managing and practicing, and the future of diversity in the profession.

Diversity & the Bar is a publication of the Minority Corporate Counsel Association (MCCA) that examines issues relating to the recruitment, retention, and promotion of minority attorneys in order to establish inclusiveness in the practice of law.

To read the current issue on the MCCA website, please visit http://www.mcca.com/index.cfm?fuseaction=Page.viewPage&pageId=2076&parentID=2061.

John Guttmann Featured in Law360's Top Litigators Q&A Series

To read the Q&A, visit: http://www.bdlaw.com/assets/attachments/291.pdf

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