Texas Environmental Update

BEVERIDGE & DIAMOND PC

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Texas Developments

Texas Legislative Session Ends; Governor To Call Special Session

The 81st Texas Legislative Session, notable for the low percentage of bills filed that were actually passed, ended on June 1. Governor Perry has now announced that he will call a special session. Reportedly, at a minimum, lawmakers will be called upon to address the reauthorization of the Texas Department of Transportation and other state agencies that became necessary after the failure of the so-called Sunset safety net bill.

Environmental bills of note that were passed include:

- HB 1433 (Lucio III) relating to the annual water quality fee for wastewater discharge permit holders and water right users. This legislation raises the maximum annual fee from $75,000 to $100,000 for each permit. In subsequent years, the statutory cap will increase based on the Consumer Price Index until it reaches a final maximum of $150,000;
- HB 1796 (Chisum) relating to the offshore geologic storage of carbon dioxide. This legislation also includes provisions from SB 16 (Averitt) relating to the New Technology Implementation Grant Program; and
- HB 3206 (Edwards) and HB 3544 (Lucio III), both of which include amendments to the Proposition 2 program that allows property tax exemptions for pollution control equipment and provide for the creation of an advisory committee.

Among the bills that were passed by the Legislature but were vetoed by the Governor is HB 821 (Leibowitz et al.). This bill would have established a mandatory television recycling program in Texas. However, the Governor vetoed the bill noting that the although it "attempted to make it easier to recycle old televisions, it does so at the expense of manufacturers, retailers and recyclers by imposing onerous new mandates, fees and regulations."

Highlights of additional legislation passed are included in the attached chart.

Federal Clean Air Act Failure to Attain (Section 185) Draft Rule Language

On June 10, 2009, TCEQ staff made available draft rule language to implement the Federal Clean Air Act (FCAA) Failure to Attain (Section 185) rule for the Houston/Galveston/Brazoria (HGB) area. Section 185 of the FCAA requires each State Implementation Plan (SIP) for ozone nonattainment areas classified as severe or extreme to include a requirement for the imposition of a penalty fee for major stationary sources of volatile organic compounds (VOC) located in the area if the area fails to attain the ozone NAAQS by the applicable attainment date. The HGB area was required to attain the one-hour ozone NAAQS by November 2007. Section 182(f) of the FCAA extends the Section 185 requirements to emissions of NOx.

The proposed new rules would be created in 30 TAC Chapter 101, Subchapter B. TCEQ staff have drafted the proposed rules in two divisions. The first division outlines the fee

portion of the rule, including source applicability determination, emission baseline calculation methodology for each source and pollutant, determination of fee required, and due dates for fee payment. The fee is statutorily set at $5,000 per ton, as adjusted by the consumer price index, in excess of 80% of the stationary source's baseline emissions of VOC or NOx (calculated as the lower of the average actual or average allowable emissions). The second division of proposed new rules provides an emissions-based alternative to the Section 185 fee obligation.

TCEQ staff accepted stakeholder comments on the proposed language through June 26, 2009. They currently project a November 18, 2009 Commission Agenda to propose the rule for publication, a public comment period at the end of 2009, and a Commission Agenda rule adoption date of May 5, 2010. The draft rule can be found at http://www.tceq.state.tx.usassets/public/implementation/air/ie/pseiforms/draftrule062009.pdf.

TCEQ Issues Updated Texas Audit Act Guidance

TCEQ has prepared updated guidance for conducting environmental audits pursuant to the Texas Environmental, Health, and Safety Audit Privilege Act ("Audit Act"). Dated June 2009, TCEQ's "Guidance on the Texas Environmental, Health, and Safety Audit Privilege Act" (TCEQ Publication No. RG-173) very closely tracks the text of the agency's September 1997 Audit Act guidance document. New information is provided about the content and suggested form of a Disclosure of Violation ("DOV"). Specifically, the guidance document notes the importance of including in the DOV the duration of each violation and a copy of the permit requirements that have been violated, and includes as new Appendix E a "Model Addendum to Disclosure of Violations" -- consisting of a suggested table format for disclosing violations.

TCEQ Considers HRVOC Cap & Trade Program Changes

At TCEQ's June 10, 2009 Highly-Reactive Volatile Organic Compound ("HRVOC") Stakeholder Group meeting, agency staff discussed possible changes to the methodology pursuant to which HRVOC Emission Cap and Trade ("HECT") Program allowances are allocated, and a possible reduction of the cap on the total allocation for the HECT Program. 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 agency is also considering a 25% reduction in the overall cap based upon the results of photochemical modeling of measures that would contribute to attainment of the eight-hour ozone National Ambient Air Quality Standard.

TCEQ will hold another HRVOC stakeholder meeting in Houston on July 2, 2009. At that meeting, TCEQ plans to present specific potential allowance allocation methodology alternatives for consideration. The agency will accept written comments until July 15, 2009 regarding proposed alternatives for revising the allowance allocation methodology and regarding a proposed 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 information about past and upcoming meetings, is available on TCEQ's website at http://www.tceq.state.tx.us/implementation/air/sip/hrvoc_stakeholders.html.

Railroad Commission Updates Guidelines for Processing Minor Permits

Earlier this month, the Railroad Commission of Texas (RRC) published an update to its Guidelines for Processing Minor Permits Associated with Statewide Rule 8 ("Minor Permit Guidelines"). The updated Minor Permit Guidelines address the application and permit requirements for minor permits for land farming water base drilling fluids and cuttings and land treating oily waste.

Among other things, the application requirements for land farming water base mud and land

treating oily waste have been amended to clarify that minor permits may only be issued to the generator of the waste and that no more than one minor permit will be issued for one disposal site. Additional application content requirements are established. The updated Minor Permit Guidelines also include analytical guidelines and notice and protest guidelines.

For additional information about the Minor Permit Guidelines, please see the RRC website at http://www.rrc.state.tx.us/.

TCEQ Conducting Clean Air Studies Using HAWK Equipped Helicopters

TCEQ recently announced that it has begun conducting air quality monitoring using helicopters equipped with infra-red cameras designed to remotely image Volatile Organic Compounds (VOCs) and other hydrocarbon emissions. Surveys to capture both "unreported and under-reported emissions" have been are being conducted near the Texas Gulf Coast (Houston Ship Channel), the Dallas Ft. Worth area and Tyler/Longview/Marshall area. In the Houston area, benzene emissions were specifically targeted through use of the DIAL (Differential Absorption Light Detection and Ranging) technology. The monitoring should be completed by the beginning of July.

TCEQ Releases Proposed 2009 Annual Ambient Air Monitoring Network Review

TCEQ has announced issuance of its proposed 2009 Annual Ambient Air Monitoring Network Review. Comments will be taken until June 20, 2009. The Review documents the current Texas network of ambient air monitors for which there are National Ambient Air Quality Standards (NAAQS), as well as a number of proposed changes to the network. The annual review is required under 40 C.F.R. Part 58 Subpart B and must be submitted to EPA each year by July1, 2009. The Review and its supporting appendices are available at http://www.tceq.state.tx.us/compliance/monitoring/air/monops/network_review.html.

ESL Developments

TCEQ's Toxicology Division has announced that a panel of experts will conduct an external peer review of the scientific approaches used by the agency in its draft Development Support Document ("DSD") for arsenic. The DSD outlines the hazard assessment and dose-response process used to derive Effects Screening Levels ("ESLs"). ESLs are chemical-specific air concentrations set to protect human health and welfare the agency uses in the evaluation of air permit applications as well as proposed rules and regulation (e.g. Permits by Rule). The upcoming peer review will focus on the chronic and acute noncarcinogenic portion of the DSD. The Toxicology Division is planning to conduct a separate review of the cancer assessment sometime in the fall of 2009. The review is being organized by Toxicology Excellence for Risk Assessment (TERA), which will prepare questions to guide the panel's review. The panel is expected to submit its comments in early June. TERA will then conduct a conference call in late June or early July to discuss the panel's comments and any technical comments submitted by the public. More information about the review, including how to participate in the conference call or submit technical comments, is available at http://www.tera.org/Peer/arsenic/index.html.

The deadline to submit public comments for several other DSDs (chromium III, hydrogen chloride, hydrogen fluoride, and methacrolein) and the agency's Interim Guidelines for Setting Odor-Based Effects Screening Levels ("Interim Guidelines") is July 9, 2009. The Interim Guidelines set out the selection criteria the Toxicology Division proposes to use for setting an odor-based ESL (acuteESLodor) until the Toxicology Division revises its 2006 regulatory guidance document, Guidelines to Develop Effects Screening Levels, Reference Values, and Unit Risk Factors (RG-442) (TCEQ 2006). Further information about those items is available at http://www.tceq.state.tx.us/implementation/tox/dsd/dsds_about.html.

Water Utility Rates and Board Training Seminar

TCEQ will be sponsoring a free Water Utility Rates and Board Training seminar on July 7 - 8, 2009 at the McAllen Convention Center, in McAllen, Texas. The purpose of the seminar is to provide the latest information on utility rates, including CCN issues, maintaining compliance, and responsibilities of water utility board members. Registration information and agenda details are available at http://www.tceq.state.tx.us/permitting/water_supply/utilities/Water_Rates_Seminar.html.

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

Science at EPA Is Changing Quickly, With Big Potential Consequences

Science at the Environmental Protection Agency ("EPA") has attracted a lot of criticism. EPA assessment and regulation of chemicals under the Toxic Substances Control Act ("TSCA") and other statutes has been limited by slow, expensive, resource-intensive, and at times politicized scientific procedures and programs, many of which were intensely criticized during the Bush Administration. Procedures for testing chemicals for potential human toxicity, utilizing that information in risk assessments, and meaningfully communicating risk information have proven too cumbersome to meet the increasing information needs of regulators and other policy makers. The perception of a large gap between the information EPA needs to adequately manage chemical risks and the information EPA can obtain through its existing programs has led to calls for legislative action to fundamentally revise TSCA.

But things are changing, and fast. In response to these pressures, the Obama Administration is building on work begun in the last few years of the Bush Administration to build new science capabilities. EPA is working to implement recommendations from recent reports by the National Research Council and others to incorporate revolutionary new toxicity testing science and technology into a refined risk assessment paradigm. In addition, the Obama Administration has reversed course on a number of Bush Administration policies. It has taken steps to rein in White House Office of Management and Budget ("OMB") reviews of agency scientific and regulatory decisions. It has also significantly increasing federal funding for EPA and its science programs. Moreover, EPA under the Obama Administration has dramatically streamlined the process for conducting chemical assessments under the Integrated Risk Information System ("IRIS").

What does this mean? The implications of these new capabilities, which mostly are still under development, may include faster and more accurate assessment of chemical risks to health and the environment. That, in turn, may in some cases reduce the level of regulatory scrutiny for particular chemicals. In other cases, EPA is likely to have a stronger evidentiary basis for regulating particular chemicals more stringently, and to be more nimble in taking regulatory actions. Furthermore, these developments may signal EPA's new ability to move from the laborious chemical-by-chemical approach that has hindered EPA's ability to prioritize large numbers of chemicals. With the new science capabilities, EPA may be able to follow the lead of Canada in prioritizing chemicals for regulatory action under an amended TSCA.

These developments and their potential significance are explained in the following four reports:

- Developments in Chemical Toxicity Testing
- Developments in EPA Risk Assessment

- Developments in Hazard and Risk Communication: The Integrated Risk Information System (IRIS)
- Developments in Promoting Scientific Integrity at EPA and Their Impacts on Chemicals Management

These reports, also available at http://www.bdlaw.com/news-599.html, were written by Mark N. Duvall and Alexandra M. Wyatt. For more information, please contact Mr. Duvall at mduvall@bdlaw.com, (202) 789-6090.

Mounting Pressure to Expand Ingredient Disclosure Requirements for Consumer Products

Executive Summary

Consumer product labels often do not disclose all the ingredients of the products. The reasons are simple -- there are few regulatory requirements to do so, and ingredient identities may be confidential business information. Increasingly, however, pressure is building on Congress, federal agencies, and states to enact ingredient disclosure requirements for consumer products. This article explains these developments and what they may mean for consumer products companies.

To read the full article, please visit http://www.bdlaw.com/news-595.html.

Congress Focuses Attention on OSHA Penalties and Enforcement Processes

Introduction

In recent years House and Senate committees regularly criticized the Occupational Safety and Health Administration ("OSHA") under the Bush Administration. This year, however, with the Democrats in charge both in Congress and at OSHA, Congress appears to be focusing on how it can help a revitalized OSHA. Two recent Congressional hearings illustrate this change. Rather than complain that OSHA was not promulgating standards or properly enforcing its requirements, the hearings largely left those matters to the agency itself to manage. Instead, they concentrated on limitations in the statute OSHA administers, the Occupational Safety and Health Act of 1970 ("OSH Act") that may be preventing OSHA from doing a better job protecting workers. A third hearing, on the Bush Administration's Enhanced Enforcement Program, encouraged OSHA to improve its enforcement targeting.

On April 28, 2009, the 20th anniversary of Workers Memorial Day honoring those who have lost their lives in the workplace, the House and Senate held concurrent hearings on how to help OSHA improve worker safety protection. The House Education and Labor Committee hearing focused on the Protecting America's Workers Act ("PAWA"), H.R. 2067, introduced April 23 by Rep. Lynn Woolsey (D-Cal.) with 29 co-sponsors. The full Committee hearing was followed by a Workforce Protections Subcommittee hearing two days later which revisited many of the same themes. The April 28 hearing of the Senate Committee on Health, Education, Labor and Pensions ("HELP") Subcommittee on Employment and Workplace Safety emphasized the need to incorporate the views of victims and their families in addressing specific workplace incidents in the OSHA enforcement process, an aspect of PAWA.

These hearings took place in a context of increasing attention from lawmakers to workplace safety and health. As a Senator, Barack Obama advocated for more labor protections and a "reinvigorated" OSHA. Notably, Obama was a co-sponsor of the Senate counterpart to the PAWA bill in the last Congress, and then-Representative Hilda Solis, now Secretary of Labor, co-sponsored prior House versions. As a Representative, Hilda Solis was a vocal champion of workers and workplace safety. Accordingly, many are anticipating increased pressure on OSHA from both the White House and Congress.

House Committee Hearing, April 28: "Are OSHA Penalties Adequate to Deter Health and Safety Violations?"

Background: Overview of the "Protecting America's Workers Act"

PAWA has been introduced with minor revisions several times since 2005. In the current version, H.R. 2067, the bill would amend the OSH Act to, among other things:

- Apply federal safety standards to federal, state, and local public employees;
- Increase anti-discrimination and procedural protections for whistleblowers by
  - Expanding protections for refusal to perform work due to a "reasonable apprehension" of serious injury or impairment,
  - Expanding the employee complaint period from 30 to 180 days after an alleged violation,
  - Mandating OSHA investigations of complaints within 60 days, and
  - Offering employees greater opportunities to request a hearing, have other procedural rights, and obtain temporary reinstatement after a preliminary finding by OSHA;
- Require inspections of incidents involving two or more hospitalizations;
- Add "victims' rights" provisions, allowing workers or their families to, *inter alia*,
  - Contest violation classifications or proposed penalty amounts,
  - Receive reports and other information, and be informed of any notice of contest,
  - Obtain a hearing, prior to OSHA's decision to issue a citation or take no action, regarding OSHA's investigations, and
  - Object to proposed settlements on the grounds that they "fail[] to effectuate the purposes of this Act," allegations to which OSHA must respond with particularity;
- Increase, and index for inflation, maximum civil penalties
  - For willful or repeat violations, from $70,000 to $120,000, and up to $250,000 for fatalities, and
  - For serious violations or violations resulting in fatalities, from $7,000 to $12,000, and up to $50,000 for fatalities, and
- Impose new felony penalties for willful violations causing death, with a maximum of 10 years in prison.

These provisions are similar to those that appeared in previous versions of the bill. New to the 2009 version are provisions to:

- Require OSHA's recordkeeping rules to prohibit employer practices that "discourage" employee reporting of injuries and illnesses,
- Require the abatement of alleged serious hazards while an employer contest to a citation is pending, and
- Expressly permit criminal sanctions against "any responsible corporate officer."

Opening Statements

House Education and Labor Committee Chairman George Miller (D-Cal.) lamented what he perceived to be an erosion of workplace protections and a failure to issue needed standards, particularly during the later years of the Bush Administration. Noting that his committee had held fifteen hearings regarding OSHA since the Democrats took the majority in 2006, Rep. Miller expressed confidence that Secretary of Labor Hilda Solis would bring about substantial improvements, but also urged reforms to the OSH Act, particularly regarding penalties. Rep. Lynn Woolsey (D-Cal.), Chairwoman of the Subcommittee on Workforce Protections, agreed, outlining PAWA (which she sponsored) and characterizing OSHA penalties as "shockingly low" and ineffective as deterrents.

Ranking Member Rep. Buck McKeon (R-Cal.), on the other hand, focused his remarks and comments throughout the hearing on his strong preference for a preventative and cooperative, rather than punitive, approach to minimizing risks to workers. He pointed to statistics showing significantly declining rates of workplace deaths and injuries during the Bush Administration to illustrate that a more cooperative approach could be more effective while reducing complexity and litigation.

Witness Statements

Three proponents of OSHA penalty reform testified at the hearing. The stepmother of a worker killed on the job set the tone with her tearful testimony about how her stepson had died of strangulation at his workplace when a machine that had been modified in violation of OSHA requirements had caught his shirt; the company was ultimately fined $2,250. Other people apparently affiliated with the group United Support Memorial for Workplace Fatalities lined the front rows behind her, holding posters showing others who had died in workplace incidents.

Peg Seminario, Director of Safety and Health for the AFL-CIO, testified next, telling the Committee that in 2007, an average of 15 people died every day from workplace injuries and millions of workplace injuries occurred. She also stated that the average penalty for a serious violation of the OSH Act is less than $1,000 and the average penalty involving worker deaths is $11,300, with extreme variability and few criminal prosecutions—71 since the enaction of the OSH Act in 1970 (resulting in a total of 42 months of prison time).

Finally, David Uhlmann, an environmental law professor and a former Chief of the Environmental Crimes Section of the Justice Department, argued that OSHA's standards themselves are fairly strong and manageable and that the main flaw in worker safety protection is the lack of consequences for violations. He told a story of one case that he prosecuted against a notorious violator of worker protections: the defendant received 17 years in prison under environmental laws, but did not commit a criminal violation of the OSH Act.

Lawrence Halprin, an environmental health and safety attorney, offered the opposing view that the current penalty scheme is generally effective and well balanced, as evidenced, in part, by the declining level of workplace casualties and the low level of workplace risk compared to risks in the home or in vehicles. Mr. Halprin emphasized that perfection will never be achieved since management and workers are human and make mistakes, and blamed any continuing problems on low levels of OSHA funding leading to over-worked inspectors. He argued that penalties should not be enhanced because the OSHA requirements can be so complex and difficult for employers, especially smaller ones, to understand.

Questions and Observations

Ranking Member McKeon and Rep. Bill Cassidy (R-La.) reiterated Rep. McKeon's earlier theme that a return to an adversarial rather than cooperative model would erase the gains in worker safety that have been made since 2001. Ms. Seminario, however, disputed the accuracy of the injury reporting showing those gains and argued that most of the decreases in worker deaths were in the area of transportation. Rep. McKeon also expressed concern about the feasibility of distinguishing between employer problems and genuine accidents. Rep. Tom Price (R-Ga.) focused much of his questioning on whether the definition of "willful" for imposing penalties was overbroad; Mr. Halprin agreed with this concern, but Mr. Uhlmann argued that in the OSH Act it is actually a much higher standard than in other environmental laws.

Both sides appealed to economic arguments. Rep. Carolyn McCarthy (D-N.Y.) stated that the country spends $200 billion per year treating injured workers annually, making a taxpayer-oriented argument for some measure of OSH Act reform. However, Ranking Member McKeon and Rep. Tom Price (R-GA) cautioned against unintended economic consequences from emotionally-driven but under-analyzed Congressional revisions to the law. Mr. Halprin made the point that while environmental penalties are indeed higher than workplace safety and health penalties, that may indicate that the former are too high, rather

than that the latter are too low.

Other Democrats, who greatly outnumbered their Republican counterparts in attendance at the hearing, made a range of other arguments and appeals for greater worker protections and employer penalties. A number of workplace incident anecdotes were raised to illustrate the need for greater penalties as credible threats. Many Representatives focused on the rarity of criminal prosecutions under the OSH Act; Mr. Uhlmann explained that this was because the law lacks felony provisions and also because the criminal misdemeanors only apply to willful actions resulting in deaths, not serious injuries.

The hearing touched on other issues besides penalty levels, as most Representatives asked about ways to improve PAWA. Rep. Holt, for example, argued for a resurgence in standard-setting and in inspection funding under the Obama Administration. Rep. Dina Titus (D-Nev.) inquired into state-run OSHA programs, noting that a series of investigative articles on construction worker deaths at Nevada worksites recently won a Pulitzer Prize. Ms. Seminario replied that OSHA had not kept up with monitoring state plans after implementation, and welcomed that PAWA would increase federal authority over states. Mr. Uhlmann also suggested possibly adding citizen suit provisions in PAWA. Relatively few questions to the panel focused on the treatment and involvement of victims and their families under the OSH Act after workplace incidents. Chairman Miller closed by noting his intention to report PAWA from the Committee.

The opening statements by Rep. Miller and Rep. Woolsey and the witness statements are available at the Committee's website at http://edlabor.house.gov/hearings/2009/04/are-oshas-penalties-adequate-t.shtml.

House Subcommittee Hearing, April 30: Improving OSHA's Enhanced Enforcement Program

A subsequent hearing of the House Education and Labor Committee's Workforce Protections Subcommittee echoed many of the themes of the earlier full Committee hearing, urging the Obama Administration to improve on the prior Administration's practices. The Subcommittee hearing was spurred by an OSHA Office of Inspector General ("OIG") audit of the agency's Enhanced Enforcement Program ("EEP"), a Bush Administration program which began in 2003. The EEP was designed to identify recalcitrant employers and target them for heightened enforcement actions. The OIG audit report, available at http://www.oig.dol.gov/public/reports/oa/2009/02-09-203-10-105.pdf, found that OSHA did not fully comply with the program's requirements (designation of EEP cases, inspecting related worksites, follow-up, or enhanced settlement) in 97% of studied cases, possibly leading to dozens of subsequent fatalities. Elliot Lewis, the U.S. Department of Labor Assistant Inspector General for Audits, testified about the audit.

The opening statements were again illustrative. While Chairwoman Woolsey focused her statement on the EEP, its origins, and its flaws in design and implementation as shown by the OIG report, Ranking Member Tom Price very closely hewed to the Republicans' main theme in the earlier hearing: the benefits of a cooperative approach as evidenced by the declines in recent years in workplace deaths, injuries, and illnesses.

One prominent difference between the hearings was that a representative from OSHA, Jordan Barab, the Acting Assistant Secretary of Labor for Occupational Safety and Health (and a former senior staffer for the Education and Labor Committee), was invited to speak. Mr. Barab's testimony, the last of the day, generally stated agreement with the OIG report, and his responses to questions talked largely about the task forces that had been set up at OSHA to look into increasing penalties and improving statistics. Rep. Woolsey and Rep. Bishop (D-N.Y.) asked about increasing the severity of OSHA penalties. Ranking Member Price reiterated his optimism that the cooperative approach of the past Administration had worked well, but Mr. Barab, like Ms. Seminario in the earlier hearing, said that the injury and illness statistics were too low by as much as 200%.

The other panel of witnesses consisted of Mr. Lewis; a relative of a mechanic who was killed in a workplace accident; Eric Frumin, Health and Safety Coordinator for a partnership of seven unions called Change to Win and former chair of the labor advisory committee

in the Bureau of Labor Statistics; and Jason Schwartz, an employment and labor attorney speaking on behalf of the U.S. Chamber of Commerce. Mr. Frumin characterized EEP's enforcement as inadequate, asking for expanded investigatory capacity, more national alerts, more corporate-wide reporting, greater requirements for employer follow-up investigations following incidents, and higher penalties, especially criminal sanctions. Mr. Schwartz highlighted the potential of the EEP to properly focus resources and attention on the highest-risk employers if criteria were clarified and improved, resources for the program were increased (at the expense of less effective enforcement programs such as the main Site-Specific Targeting system), and "creative" enforcement and settlement tools continued to be used.

Rep. Woolsey's opening statement and the witness statements are available on the Subcommittee's website at http://edlabor.house.gov/newsroom/2009/04/troubled-worker-safety-program.shtml.

Senate Subcommittee Hearing, April 28: "Introducing Meaningful Incentives for Safe Workplaces and Meaningful Roles for Victims and Their Families"

The Subcommittee on Employment and Workplace Safety of the Senate HELP Committee held a hearing to address increased OSHA penalties as an incentive to prevent workplace fatalities and injuries, and the need to better engage the families of injured or deceased workers in the OSHA process. There is as yet no Senate counterpart to PAWA, but the hearing was clearly intended to set the stage for introduction of a Senate bill later this year.

Present at the hearing was the Subcommittee Chairwoman Sen. Patty Murray (D-Wash.), Ranking Member Sen. Johnny Isakson (R-Ga.), and Sen. Sherrod Brown (D-Ohio). Sen. Murray stated in her opening statement that "OSHA has not lived up to its mission," and that "[m]any of us have been truly concerned about an enforcement strategy that relied too heavily on voluntary employer compliance programs and watered down fines against bad actors." The tone of the Senators was critical towards OSHA under the Bush Administration throughout the remainder of the hearing, and sent a clear message to the agency to make changes. No witness from OSHA itself appeared.

The witnesses before the Subcommittee all testified that incentives for employers to maintain safe workplaces need to be more meaningful. Echoing PAWA's emphasis on willful and repeat violators, the testimony concentrated on the need for OSHA to focus enforcement penalties on employers who flagrantly violate safety standards, so as not to deter "good" employers from reporting or seeking the advice of OSHA.

Dr. Celeste Monforton, Professor in the Department of Environmental and Occupational Health at George Washington University's School of Public Health and Health Services, emphasized that prevention should be a priority for OSHA's regulatory program. She stated that one aspect of prevention—penalties—are currently too weak to compel "bad actors" to comply with OSHA's standards. Dr. Monforton also advocated for penalties that result in reputational damage to violators, such as publication on the OSHA website of worker fatalities and nationwide inspection histories.

James Fredrick, Assistant Director of Health, Safety and Environment at United Steelworkers Union, testified that many employer safety programs provide prizes and awards to workers based on the absence of injuries, which in effect creates disincentives to properly report workplace hazards and injuries.

Warren Brown, President of the American Society of Safety Engineers, testified that many employers fail to implement appropriate safety programs out of fear of OSHA assessing penalties or criminal prosecution. Mr. Brown said that OSHA should target its inspection and compliance program towards those employers known to maintain unsafe workplaces in order to help dispel this fear. Upon questioning by Sen. Murray, Mr. Brown reiterated that higher penalties alone are insufficient, and that OSHA should aim penalties at the most serious offenders.

The other focus of the Subcommittee hearing was the idea of incorporating the families of injured workers in the OSHA enforcement process -- providing strong support for PAWA's

victims' rights provisions. Panelists testified that this is necessary because families often have no one from which to seek answers, and because family members often prove to be very knowledgeable about the particular workplace and can be invaluable during an investigation. Tammy Miser, founder of United Support Memorial for Workplace Fatalities, testified on behalf of the families of injured or deceased workers that OSHA's current policies shut family members out of the process. She also testified that the current average fine for a serious violation is $900, and families believe that a higher penalty should be instituted to be an effective deterrent. Finally, Ms. Miser stated that OSHA currently collects only half of the fines it initially proposes, which, she asserted, further encourages employers to violate safety standards.

The witness statements are available on the subcommittee's website at http://help.senate.gov/Hearings/2009_04_28/2009_04_28.html.

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Eleventh Circuit Defers to EPA's Water Transfers Rule In Bellwether Case

On June 4, 2009, the United States Court of Appeals for the Eleventh Circuit held that Florida water managers did not violate the Clean Water Act ("CWA") when they pumped pollutant-laden water from runoff canals into Lake Okeechobee without a permit. *Friends of the Everglades v. So. Fla. Water Mgmt. Dist.*, No. 07-13829 (11th Cir. June 4, 2009) ("Friends I"). The opinion is the first to have considered a challenge to a permit-less water transfer in light of a controversial EPA-issued Rule that exempts certain water transfers from regulation under the National Pollutant Discharge Elimination System ("NPDES") permitting program. The court's deference to EPA's rationale stands in marked-contrast to a number of prior court opinions that the CWA requires permits for water transfers. Although EPA's Final Rule remains subject to pending litigation, the court's decision in Friends I has the potential to influence subsequent judicial analyses.

Water Transfers and the Clean Water Act

The CWA prohibits the "discharge of any pollutant by any person" unless authorized by statute. 33 U.S.C. § 1311. The Act defines "discharge of a pollutant" broadly as "any addition of any pollutant to navigable waters from any point source." Id. § 1362. NPDES permits are the regulatory centerpiece by which discharges may be authorized. Id. § 1342. Water transfers, which route waters from one jurisdictional water body to another through tunnels, channels, pumps or other diversion systems, often carry pollutants from the first water (the donor water) to the second (the receiving water). The debate over whether water transfers require NPDES permits stems from the CWA's failure to more specifically define "addition of a pollutant." Under EPA's "unitary waters" theory, water transfers do not trigger the NPDES permit requirement because even though pollutants are carried from one water to another through a point source, the transfer does not result in an "addition" of pollutants. According to EPA, "Congress generally did not intend to subject water transfers to the NPDES program and . . . there is no 'addition' of a pollutant which would trigger the requirement to obtain an NPDES permit because the pollutants are already in the waters being transferred and are not being added from the outside world." *See* NPDES Water Transfers Final Rule Fact Sheet. On the other hand, environmental organizations and others concerned about the impacts of unregulated water transfers on water quality and drinking water have long argued that the CWA unambiguously requires a permit when pollutants are added from one distinct water body to another.

In the past, EPA's unitary water theory has endured harsh treatment from the courts. In 2001, the United States Court of Appeals for the Second Circuit dealt a significant blow to the theory when it held that "the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a 'discharge' that demands an NPDES permit." Catskill Mountains Chapter of Trout Unltd., Inc. v. City of New York, 273 F.3d 481, 491 (2d Cir. 2001) (Catskill I). In 2005, after the U.S. Supreme Court expressly declined to decide whether the "unitary waters" theory was a permissible interpretation of the CWA, (*See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*,

541 U.S. 95 (2004)), EPA released an interpretive memorandum articulating the Agency's policy that water transfers are exempt from the NPDES permitting program and subject only to state regulation. In 2006, EPA issued a proposed water transfer rule that closely tracked the interpretive memorandum. 71 Fed. Reg. 32887 (June 7, 2006). However, just six days after publication of the proposed rule, the Second Circuit again undermined the legal basis of EPA's interpretation when it reaffirmed its decision in Catskill I and concluded that the interpretive memorandum, "simply overlook[ed the] plain language" of the CWA. *Catskill Mountains Chapter of Trout Unltd., Inc. v. City of New York*, 451 F.3d 77 (2d Cir. 2006) (Catskill II).

The unitary waters theory suffered yet another setback by the district court's holding in *Friends I. Friends of the Everglades, Inc. v. S. Fla*.

Water Mgmt. Dist., 2006 U.S. Dist. LEXIS 89450 (S.D. Fla. 2006). Since the 1970's, the South Florida Water Management District pumped canal waters polluted by agricultural runoff into Lake Okeechobee without an NPDES permit. Environmental organizations brought suit, claiming the water transfer violated the CWA as an unauthorized discharge of a pollutant. In its decision, the court considered EPA's proposed water transfer rule but ultimately rejected the Agency's position, holding "it is evident that 'addition . . . to the waters of the United States' contemplates an addition from anywhere outside of the receiving water, including from another body of water. 2006 U.S. Dist. LEXIS 89450 at *131. The U.S. Government, which had intervened in Friends I on behalf of EPA, appealed the decision to the U.S. Court of Appeals for the Eleventh Circuit. Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist., No. 07-13829 (11th Cir. filed Aug. 20, 2007).

On June 9, 2008, with Friends I awaiting the Eleventh Circuit's review, EPA published the Final Water Transfers Rule exempting from the permit requirement "activity that conveys or connects waters of the United States without subjecting the transferred water to any intervening industrial, municipal, or commercial use." 73 Fed. Reg. 33697 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)). Like its predecessor 2005 interpretive memorandum and 2006 proposed rule, the Final Rule is based on EPA's unitary waters theory that water transfers do not require NPDES permits because any pollutants conveyed to the receiving water already exist in the waters of the United States, and therefore no pollutants are added.

Eager to challenge EPA's regulatory proclamation of the unitary waters theory once and for all, environmental groups initiated an onslaught of lawsuits against EPA in federal district courts and circuit courts around the country. Lawsuits filed in the circuit courts of appeals were consolidated and randomly assigned to the Eleventh Circuit. See Friends of the *Everglades v. U.S. EPA*, No. 08-13652-CC (11th Cir. consolidated Sept. 10, 2008) (Friends II). Challenges filed at the District Court level were consolidated in the Southern District of New York, *Catskill Mountains Chapter of Trout Unltd., Inc. v. EPA*, No. 08-cv-05606-KMK (S.D.N.Y. consolidated Oct. 8, 2008) (Catskill III), and in the Southern District of Florida, Friends of the *Everglades v. United States*, No. 08-cv-21785-CMA (S.D. Fla. consolidated Sept. 18, 2008). Each of the three consolidated petitions was stayed pending the Eleventh Circuit's disposition of the appeal of Friends I. In granting the stay, the U.S. District Court for the Southern District of New York explained that "[a]lthough [Friends I] does not involve a direct challenge to the [Final Rule], it involves a direct challenge to the [proposed rule] which is virtually identical to the [Final Rule]. Particularly given that the legality of the [Final Rule] 'has not [yet] been the subject of a ruling federal court,' the Eleventh Circuit's review of the [proposed rule] will be instructive as to the underlying merits of the instant actions. *See* Order at 19, Catskill III, No. 08-cv-05606-KMK (S.D.N.Y. docketed April 29, 2009).

The Eleventh Circuit's Decision in Friends I

Friends I did not involve a direct challenge to the Final Rule as the case was decided by the District Court before the Rule was officially promulgated. However, without much analysis, the court stated that it "does not matter that the regulation was proposed and issued well after the beginning of this lawsuit." Friends, Slip Op. at 16. The court then went on to express appreciation for its position as "the first court to address the 'addition . . . to navigable waters' issue in light of the regulation—to decide whether the regulation is due . . . deference." *Id*. at 15. Thus, in deciding Friends I on appeal, a three-judge panel of the Eleventh Circuit squarely confronted EPA's rationale for the Final Rule.

The court held that the statutory meaning of "addition of any pollutant" is ambiguous, and that EPA's "unitary waters theory is a reasonable, and therefore permissible, construction of the [CWA]." *Id.* at 40. The Eleventh Circuit panel declined to follow the trend of earlier judicial opinions that rejected the unitary waters theory, finding instead that promulgated as a regulation under notice and comment rulemaking procedures, the unitary waters theory was now entitled to greater deference than when expressed in the interpretive memorandum or proposed rule. *Id*. at 15. Reversing the district court, the court held that in light of the new Rule, the South Florida Water Management District could transfer the water without an NPDES permit. *Id*. at 40.

Conclusion

Now that the Eleventh Circuit has issued its opinion in Friends I, the consolidated challenges to the Rule in the Southern District of New York, the Southern District of Florida, and the Eleventh Circuit will reopen. The direct effect of Friends I on the consolidated challenges is unclear. While the courts hearing those challenges are not required to follow Friends I's deference to EPA's interpretation, they will need to account for this new case, either as guidance to be followed or as a background against which to contrast their own decisions.

At a minimum, however, Friends I marks a significant victory for EPA's unitary waters theory, and petitioners challenging the Final Rule will face an uphill battle to convince the courts that the Eleventh Circuit panel's decision was erroneous. Environmental groups are likely to continue their opposition to the unitary waters theory through appeals, petitions for rehearing, and potentially by seeking review by the U.S. Supreme Court. Stakeholders are well-advised to stay tuned for new developments in the near future.

To read the Eleventh Circuit's decision in Friends I, click here. To read EPA's Final Water Transfers Rule, click here. For further information, please contact Karen Hansen at (202) 789-6056, khansen@bdlaw.com or Richard Davis at (202) 789-6025, rdavis@bdlaw.com. This alert was prepared with the assistance of Graham St. Michel.

EPA Schedules Public Meeting on Definition of Solid Waste Rule

EPA recently announced that it will hold a public meeting on possible revisions to the October 30, 2008 final rule that redefined "solid waste" under RCRA. The rule provides a conditional exclusion for certain hazardous secondary materials destined for reclamation under the control of the generator ("generator-control exclusion") and at third party reclamation facilities ("transfer-based exclusion"). 73 Fed. Reg. 64,668 (2008) ("DSW Rule"). EPA will conduct the public meeting on June 30, 2009 and give members of the public an opportunity to present oral statements and submit written comments on the need for changes to the rule. 74 Fed. Reg. 25,200 (May 27, 2009).

The DSW Rule went into effect on December 29, 2008, and is the most recent step in a lengthy rulemaking process. Previous EPA rules were repeatedly struck down by the U.S. Court of Appeals for the D.C. Circuit. An in-depth discussion of the rule is available at http:www.bdlaw.com/assets/attachments/DSW_Rule_RCRA_Alert.pdf.

On January 29, 2009, the Sierra Club filed a petition for administrative review of the DSW Rule. Specifically, the Sierra Club asked EPA Administrator Lisa Jackson to "reconsider and repeal" the rule. On May 27, 2009, EPA announced that it "does not plan to repeal the rule in whole or stay its implementation" but, through the public meeting, "is interested in receiving comments on possible revisions to the rule." 74 Fed. Reg. at 25,200, 25,202.

EPA is particularly interested in comments on the following:

- Developing a definition of "contained"; the DSW Rule requires that hazardous secondary materials be "contained" as a condition of the new exclusions without defining "contained"
- Requiring as a condition of the exclusion that persons taking advantage of the exclusion notify EPA, rather than the existing notice requirement in the final rule that was promulgated under RCRA's record authority

- Clarifying how criteria for legitimate recycling should operate:
  - Codifying a single legitimacy standard that would apply to all recycling, rather than the current standard in the final rule that applies only to the DSW Rule exclusions
  - Further restricting discretion in how legitimacy criteria operate with respect to the DSW Rule exclusions; specifically, whether all four legitimacy criteria should be mandatory (currently two criteria are mandatory while two more are to be considered)
- Approaching the transfer-based exclusion in alternative ways:
  - Repealing the exclusion and returning to the prior standards under which most hazardous secondary materials sent to third parties for recycling were considered hazardous wastes
  - Returning to the approach outlined in the 2003 proposed rule (64 Fed. Reg. 61,558 (October 28, 2003)) and excluding materials reclaimed "in a continuous industrial process within the generating industry," to be defined in reference to NAICS codes
- Limiting the exclusion to situations where the hazardous secondary material is sold by the generator to a third party for reclamation
- Allowing intermediate facilities to store hazardous secondary materials prior to reclamation
- Requiring an approved closure plan for intermediate facilities and reclamation facilities

74 Fed. Reg. at 25,202-04.

Because EPA is not currently planning to repeal the entire rule or stay its implementation, States may continue to adopt the DSW Rule during the Agency's review process. EPA explained that if the Agency revises the DSW Rule in a way that makes the revised rule more stringent than the October 2008 rule (e.g., by repealing the transfer-based exclusion), States that have adopted the October 2008 rule must modify their programs to include the more stringent requirements in order to retain authorization. Id. at 25,205.

A copy of the Federal Register notice announcing the public meeting is available at http://www.bdlaw.com/assets/attachments/74_Fed__Reg__25200_(May_27_2009)_(DSW_Public_Meeting_Notice).pdf. Additional details from EPA about the meeting are available at http://www.epa.gov/waste/hazard/dsw/publicmeeting.htm.

For more information about these and other RCRA developments, please contact Don Patterson at dpatterson@bdlaw.com, (202) 789-6032, or Beth Richardson at erichardson@bdlaw.com, (202) 789-6066.

Congress Considers Restrictions on E-Waste Exports

Representative Gene Green (D-TX) and four co-sponsors have introduced a bill, H.R. 2595, that would ban shipments of listed electronic waste to countries that are not members of the Organization of Economic Cooperation and Development ("non-OECD countries"), subject to several exceptions. Shipments of restricted electronic waste destined for recycling operations in non-OECD countries would be prohibited. The Bill would allow exports of "used electronic equipment" for refurbishment and subsequent reuse, provided the exporter met a number of requirements. Additional exemptions to the export ban would include, for example, warranty returns and exports of used equipment or parts for reuse that meet testing requirements. The Bill defines the scope of covered equipment, but a number of other details are left for future development by the EPA Administrator.

Covered Equipment

The Bill would ban shipments (subject to certain exceptions) of "restricted electronic waste," which is defined as items of covered electronic equipment, whole or in fragments, that

include, contain, or consist of --

- circuit boards, lamps, switches, or other parts, components, assemblies, or materials derived therefrom containing mercury or polychlorinated biphenyls;
- circuit boards, lamps, switches, or other parts, components, assemblies, or materials derived therefrom containing --
  - antimony in concentrations greater than 1.0 mg/L;
  - beryllium in concentrations greater than 0.007 mg/L;
  - cadmium, in concentrations greater than 1.0 mg/L;
  - chromium in concentrations greater than 5.0 mg/L; or
  - lead in concentrations greater than 5.0 mg/L;
- circuit boards, lamps, switches, or other parts, components, assemblies, or materials derived therefrom containing any other toxic material identified by the Administrator;
- cathode ray tubes or cathode ray tube glass in any form; or
- batteries containing lead, cadmium, mercury, or flammable organic solvents.

The Bill defines "covered electronic equipment" as "used personal computers, servers, monitors, televisions, other video display products, printers, copiers, facsimile machines, video cassette recorders, digital video disc players, video game systems, digital audio players, personal digital assistants, telephones, image scanners, and other used electronic products the Administrator determines to be similar."

Scope of the Proposed Ban

The Bill would have implications for the following exports from the U.S. to non-OECD countries:

- Shipments for Recycling: Any shipment of "restricted electronic waste" would be subject to the export ban.
- Shipments for Reuse: Shipments of "used electronic equipment or parts" ("used equipment") for use or reuse would only be permitted if (i) the shipment is destined to a country that will permit trade in such equipment, and (ii) the equipment has been tested prior to export and found to be functional for at least one primary purpose. In addition, the Bill would permit shipments of furnace-ready cathode ray tube glass, cleaned of phosphors, to be used as feedstock without further processing, provided the competent authority in the importing country has stated it is not a waste.
- Shipments for Refurbishment (and subsequent reuse): Shipments of used equipment for refurbishment can proceed, provided:
  - the Administrator confirms the country will permit the import;
  - the export is made by an original equipment manufacturer or its contractual agent that meets an independent standard, to be developed by the Administrator;
  - the exporter submits an annual notification to the Administrator prior to shipment that includes information as required in the Bill; and
  - the exporter meets certain recordkeeping requirements.
- Warranty returns: Warranty shipments are not subject to the export ban.

Additional Provisions

The Bill would amend Subtitle C of the Solid Waste Disposal Act (42 U.S.C. 6921 *et seq.*) by adding a new Section 3024. Significant implementation details have been left to the EPA Administrator, including development of: (i) testing protocols for equipment destined for reuse; (ii) procedures for identifying additional restricted materials; (iii) a survey (updated annually) of all non-OECD countries to determine which countries' laws will permit trade in equipment covered under the Bill; and (iv) provisions for an export control regime to ensure proper enforcement (in consultation with other key federal agencies). The Bill also would impose criminal penalties for "knowingly" exporting restricted electronic waste in violation of

the requirements in the Bill.

Next Steps

The lead sponsor, Representative Green, and co-sponsor Mike Thompson (D-CA), are the primary drafters of this initial Bill. Additional co-sponsors include Mary Bono Mack (R-CA), Anna Eshoo (D-CA) and Sheila Jackson-Lee (D-TX). The Bill has been referred to the House Energy and Commerce Committee for consideration. It is likely that the Bill will also prompt some further consideration within Congress and the Administration over the need for legislation to implement the Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal, which is the international legal regime governing shipments of hazardous wastes.

For more information, please contact Paul Hagen at (202) 789-6022 (phagen@bdlaw.com) of Jackson Morrill at (202) 789-6030 (jmorrill@bdlaw.com).

A copy of H.R. 2595 is available at www.bdlaw.com/assets/attachments/Congress_Considers_Restrictions_on_E-Waste_Exports.pdf.

Firm News & Events

Benjamin F. Wilson Receives Major Civil Rights Awards from *Washington Lawyers Committee for Civil Rights and Urban Affairs*

We are pleased to announce that Benjamin F. Wilson, Managing Principal of Beveridge & Diamond, P.C. received an award for outstanding achievement in civil rights law by the Washington Lawyers Committee for Civil Rights and Urban Development (WLC) at its annual awards lunch on June 16, 2009.

Mr. Wilson, along with Congressman John Lewis of Georgia, received the Wiley Branton Award, which is given to a member of the legal community whose lifetime efforts on behalf of civil rights advocacy exemplify civil rights lawyer Wiley Branton's deep commitment to civil rights issues. It is a major award in the civil rights community and reflects not only Mr. Wilson's long standing commitment to pro bono work, but his hands on undertaking of such work for many years.

To view a video montage (in two parts) by the WLC honoring four civil rights champions with a passion for justice, including Mr. Wilson, please click here for Part 1, and here for Part 2.

Separately, Beveridge & Diamond received an award for our work and highly successful outcome in which we sued the City of Manassas in connection with its unlawful efforts to drive immigrant residents from the City. The suit resulted in a settlement providing for major legal reform in the City and damages to our clients, the Equal Rights Center and 11 individual plaintiffs.

These two awards reflect Mr. Wilson's and the Firm's long standing commitment to pro bono work and our many achievements in our civil rights cases. For additional information about the pro bono program at Beveridge & Diamond, please see: http://www.bdlaw.com/practices-probono.html.

Previous Issues of Texas Environmental Update

To view all previous issues of the Texas Environmental Update, please go to http://www.bdlaw.com/publications-93.html.

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