Texas Environmental Update

March 2009

Texas Office
98 San Jacinto Boulevard
Suite 1420
Austin, TX 78701
(512) 391-8000

Laura LaValle
llavalle@bdlaw.com

Peter Gregg
pgregg@bdlaw.com

Lydia G. Gromatzky
lgromatzky@bdlaw.com

Maddie Kadas
mkadas@bdlaw.com

For more information about our firm, please visit www.bdlaw.com

If you do not wish to receive future issues of Texas Environmental Update, please send an e-mail to: jmilitano@bdlaw.com

Texas Developments

Texas Legislative Update - Bill Filing Deadline Passes

With March 13th as the bill filing deadline, a flurry of new bills were filed including those addressing environmental issues such as toxic air pollutants, cumulative effects, desalination, environmental flows, dam safety and recycling as well as a host of other permitting, enforcement, alternative energy and energy efficiency matters. Highlights of environmental bills of interest are reflected in the chart located at http://www.bdlaw.com/assets/attachments/Texas_Legislative_Update_-_Environmental_Bills_of_Interest.pdf.

8-Hour Ozone Standard Designations Submitted to EPA

On March 10, 2009, Texas Governor Rick Perry submitted the state's recommendation for designations under the federal 2008 eight-hour ozone standard (of 0.075 parts per million) to the EPA. The following are the counties in Texas that the TCEQ recommends should be designated nonattainment:

Austin Area
Travis

Beaumont-Port Arthur Area
Hardin; Jefferson; Orange

Dallas-Fort Worth Area
Collin; Dallas; Denton; Ellis; Hood; Johnson; Kaufman; Parker; Rockwall; Tarrant

El Paso County with the exception of tribal lands, i.e., Ysleta Del Sur Reservation or Trust Lands

Houston-Galveston-Brazoria Area
Brazoria; Chambers; Fort Bend; Galveston; Harris; Liberty; Montgomery; Waller

San Antonio Area
Bexar

Tyler Area
Gregg; Rusk; Smith

The TCEQ determined that all other counties in Texas should be designated Attainment/unclassifiable. The recommendation is based on monitoring data for all areas in Texas from the 2005 - 2007 period. A copy of the Governor's designation letter can be found at www.tceq.state.tx.us/assets/public/implementation/air/rules/eight_hour/gov_letter_031009.pdf.

PST Program Updates

On March 17th, the TCEQ released a "TCEQ Update Bulletin" outlining new action levels

to be used with the amended 30 TAC 334 rules. The Commission adopted the amended Chapter 334 rules on February 25th to remove Leaking Petroleum Storage Tank (LPST) sites from the Texas Risk Reduction Program. The adopted revisions eliminate language in Chapters 334 requiring compliance with Chapter 350 for the assessment, response actions, and post-response action care for releases of regulated substances from LPSTs. The new action levels set out in the bulletin are applicable to all releases reported to the agency on or after March 19, 2009. Attached is a link to the bulletin. The applicable TCEQ guidance - Investigating and Reporting Releases from Petroleum Storage Tanks (PSTs) (RG-411) - is being revised to include the new action levels and to remove all reference to TRRP requirements. Investigation and sampling requirements established in that guidance will remain the same. The Agency has also revised its Release Determination Report Form (TCEQ-0621) in response to the amended Chapter 334 rules. The revised form should be used for the results of all release determination activities. Attached is a link to the revised form.

TCEQ Receives Comment for FCAA Section 185 Fee Rulemaking

TCEQ held a public meeting in Houston on March 4, 2009 and accepted informal written public comment related to Section 185 of the Federal Clean Air Act (FCAA), which requires each state implementation plan for ozone nonattainment areas classified as severe or extreme to impose a penalty fee upon major stationary sources of volatile organic compounds located in the area if the area fails to attain the ozone national ambient air quality standard (NAAQS) by the applicable attainment date. TCEQ requested comment about baseline determinations for fee calculation and potential alternatives to a fee-based system. A December 2006 decision by the United States Court of Appeals for the District of Columbia Circuit vacated EPA's rule that allowed areas not to implement the fee penalty requirement for the one-hour standard. *South Coast Air Quality Management District v. EPA*, 472 F.3d 882 (D.C. Cir. 2006). As a result of that ruling, TCEQ is moving forward to adopt a rule will apply to the Houston-Galveston-Brazoria (HGB) one-hour ozone nonattainment area, and will later develop a rule applicable to eight-hour ozone standard nonattainment areas.

TCEQ has indicated that it plans to issue a draft rule by April 15, 2009, and will accept comments on the draft rule through May 1, 2009. The agency's schedule provides for preparation of a staff draft rule by June 1, 2009, and consideration of a proposed rule at a the TCEQ commissioners' agenda meeting on August 12, 2009. Pursuant to TCEQ's projected schedule, the rule would be considered for adoption by the commissioners on February 3, 2010, and would be effective on February 25, 2010.

Information about the Section 185 fee is available on TCEQ's website at: http://www.tceq.state.tx.us/implementation/air/industei/psei/sipsection185.html#schedule.

Texas Environmental Trade Fair and Conference and Texas Environmental Excellence Awards

The TCEQ is hosting its annual Environmental Trade Fair and Conference from May 12-14, 2009 at the Austin Convention Center. Registration is now available online until May 1, 2009. The trade fair is well-attended and considered to be one of the best of its kind in the nation.

On May 13, 2009, the TCEQ will host a banquet where the 2008 Texas Environmental Excellence awards will be given. For more information, please visit http://www.tceq.state.tx.us/assistance/events/etfc/etf.html.

Upcoming TCEQ Meetings and Events

Flare Task Force Stakeholder Group Meeting will be held in Austin on April 2, 2009. For further information, please see TCEQ's website at http://www.tceq.state.tx.us/implementation/air/rules/flare_stakeholder.html.

Oil and Gas Pollution Prevention Workshop will be held in Hebbronville on April 2, 2009. For further information, please see TCEQ's website at http://www.tceq.state.tx.us/assistance/P2Recycle/oil-gas-p2.html.

Drinking Water Advisory Work Group meeting will be held in Austin on April 28, 2009. For further information, please see TCEQ's website at http://www.tceq.state.tx.us/permitting/water_supply/ud/awgroup.html.

Texas Rules Updates

For new the TCEQ rule developments, including the proposed rules increasing water fees, please see the TCEQ website at http://www.tceq.state.tx.us/rules/whatsnew.html.

National Developments

RMP Inspections Likely to Increase and Become More Targeted Due to OIG Critique

Companies with facilities that are subject to the Environmental Protection Agency ("EPA") Risk Management Program ("RMP") requirements under Section 112(r) of the Clean Air Act should expect to see heightened enforcement activity by EPA and states later this year as a result of a recent critique of the RMP inspection program by EPA's own Office of Inspector General. Greater numbers of inspections are likely, and they are increasingly likely to be targeted at:

- Non-filers of risk management plans;
- Initial filers of risk management plans that did not update those plans after five years;
- Filers of risk management plans that do not report on RMP compliance in their Title V reports; and
- High-risk facilities.

Companies with facilities likely to be targeted may want to review their compliance status before the heightened inspection activity gets underway.

I. Background

Congress enacted Section 112(r) of the Clean Air Act in 1990 to prevent releases of airborne chemicals that could harm the public and to mitigate the consequences of such releases to the surrounding community.[1] In 1996, EPA issued the RMP rule, creating a comprehensive program to meet the requirements of Section 112(r).[2] Under the RMP, any stationary source that has more than the threshold quantity of any of 140 regulated substances in a process must implement a risk management program and submit a risk management plan to EPA. The risk management plan must describe and document the facility's hazard assessment and its prevention and response programs. Facilities must update and resubmit these plans at least every 5 years and when there are changes to the regulated substances or processes at the facility. EPA is primarily responsible for oversight of the RMP, as only 9 states and 5 local agencies have accepted delegation of the RMP.

On February 10, 2009, the EPA Office of the Inspector General ("OIG") issued a report evaluating EPA's implementation and oversight of the RMP.[3] The OIG found that there were large numbers of facilities that are subject to the RMP requirements and have not filed or re-filed a risk management plan with EPA; that some permitting agencies did not correctly incorporate RMP requirements into Title V operating permits; and that many high-risk facilities have not been audited or inspected to ensure compliance with the RMP. Based on these findings, the OIG recommended that EPA take measures to identify facilities that are subject to the RMP; ensure that covered facilities comply with the RMP's requirements and re-file risk management plans as necessary; and create a more rigorous inspection program

targeting high-risk facilities. As a result of the OIG report and recommendations, EPA has indicated that it will make changes to improve its implementation and enforcement of the RMP.

II. The OIG's Findings

The OIG evaluated EPA's implementation and oversight of the RMP program by: (1) collecting and analyzing data about facilities that may be subject to the RMP from the RMP National Database, EPA regions and delegated states and local agencies, and the Toxics Release Inventory; and (2) interviewing staff and managers from EPA headquarters, EPA regions, and 4 states about their implementation of the RMP. The OIG's first finding was that EPA has not provided regions and states with guidance or procedures to identify facilities that are subject to the RMP. As a result, several facilities that are subject to the RMP have not implemented risk management programs or submitted a risk management plan to EPA. In the OIG's limited review of existing chemical data for 5 states, it identified 48 facilities in 3 states that stored large amounts of covered chemicals on-site but had not filed risk management plans.

The OIG's second finding was that EPA has not provided regions and states with timelines for assessing the status of facilities that have not re-filed their risk management plans after 5 years.[4] As a result, as of March 2008, there were 664 facilities covered by the RMP that had failed to re-file their risk management plans within the RMP's 5-year deadline.

The OIG's third finding was that permitting agencies have failed to properly address RMP requirements during the Title V operating permit process. Approximately 16 percent (2,222) of the risk management plans filed with EPA were for Title V facilities. Although Title V facilities are a small part of the overall universe of RMP facilities, over half of the facilities identified by EPA's Office of Emergency Management ("OEM") as high-risk facilities are subject to Title V. Although 40 C.F.R. § 68.215(a) requires Title V permits to include the RMP requirements as a condition of a permit when a facility is subject to the RMP, permits in only 3 of the 8 states reviewed by the OIG complied with this requirement. The permits in the other 5 states only contained conditional language, providing that the facility was required to comply with the RMP "when and if" the requirements of the RMP were applicable. Additionally, although 40 C.F.R. § 68.215(e) requires permitting agencies to verify that a facility has submitted a risk management plan to EPA if the facility is subject to the RMP, the permitting agencies in the 8 states reviewed by OIG did not independently verify whether covered facilities had submitted a risk management plan. The OIG emphasized that Title V permitting can be used as a management control for identifying facilities subject to the RMP and ensuring their compliance, and that the permitting agencies' failure to properly implement RMP requirements into Title V permits eliminated this control.

The OIG's fourth finding was that EPA and the delegated state and local agencies have failed to audit or inspect many high-risk facilities. Specifically, the OIG reported that EPA had not inspected or audited over half (296 of 493) of the high-risk facilities identified by OEM. Since most states have not accepted delegation of the program, EPA is responsible for ensuring compliance for over 84 percent of facilities nationwide. Of the 296 uninspected high-risk facilities managed by EPA, 151 could each impact 100,000 people or more in a worst-case accident. Another 10 such facilities are managed by states. The report noted that accident data suggest that uninspected high-risk facilities are more than five times as likely to have an accident than uninspected lower-risk facilities. The OIG also found that EPA has only conducted audits or inspections at 39% of the facilities that have reported accidents.

According to the OIG's report, there are three factors that have led to this low inspection rate: (1) the fact that few state or local agencies have accepted delegation of the RMP; (2) the low number of EPA inspectors that are available to conduct audits and inspections; and (3) limited training.

III. The OIG's Recommendations

The OIG report contains several recommendations to address the shortcomings in EPA's implementation and oversight of the RMP. First, the OIG recommended that EPA strengthen

controls to identify facilities that have not filed risk management plans by:

(1) Revising Headquarters guidance to the regions and the states to specify how often they should conduct reviews to identify covered facilities that have not filed risk management plans;

(2) Issuing new Headquarters guidance to regions and states that incorporates the Toxics Release Inventory methodology and other effective methodologies used by regions to identify facilities that are subject to the RMP and have not filed risk management plans;

(3) Updating the RMP National Database to de-activate closed facilities; and

(4) Ascertaining whether the facilities identified through EPA's Toxics Release Inventory are subject to RMP requirements, and if so, taking appropriate action to ensure that those facilities comply with the RMP requirements.

Second, the OIG recommended that EPA establish milestones for reviewing whether facilities have re-filed their risk management plans as required by the RMP.

Third, the OIG recommended that EPA instruct Title V permitting agencies on the proper procedures for identifying facilities that are subject to the RMP and including RMP requirements in their Title V operating permits. The OIG emphasized that any guidance to the permitting agencies should include instructions on how to verify whether facilities have submitted risk management plans and how to monitor implementation of the RMP requirements.

Fourth, the OIG recommended that EPA establish a more rigorous risk-based approach to inspecting and auditing facilities. The OIG recommended that the Office of Enforcement and Compliance Assurance ("OECA"):

(1) Develop and implement a risk-based inspection strategy that incorporates regional input on high-risk facilities to prioritize facilities for inspection based on risk and other priority measures;

(2) Revise the performance expectation for the RMP to incorporate the inspection of the high-risk facilities; and

(3) Track which high-risk facilities have been inspected and develop procedures to provide expeditious inspection coverage for those high-risk facilities that have not yet been inspected.

The OIG also recommended that the Office of Solid Waste and Emergency Response ("OSWER") provide RMP training courses for RMP inspectors and explore strategies to provide additional resources to regions with high facility-to-inspector ratios.

IV. EPA's Response

EPA has concurred with each of the OIG's recommendations and plans to take a series of actions to improve its implementation and oversight of the RMP. First, EPA plans to provide guidance to the regions by December 2009 that will specify when the regions should conduct reviews to detect covered facilities, what methodologies they should use for those reviews, and a timeline for reviewing and removing inactive facilities from the RMP National Database.

Second, several EPA regions have started to review the facilities that the OIG identified in its Toxics Release Inventory searches to determine if they are subject to the RMP requirements and need to submit a risk management plan. EPA anticipates that this review will be completed by September 2009.

Third, EPA plans to remind regional Air Directors about EPA's 1999 Title V permitting guidance, which instructs permitting agencies about their responsibilities with respect to the RMP. EPA will also instruct the regional Air Directors to inform the state Title V program managers about the guidance and their RMP responsibilities.

Fourth, EPA plans to take several actions to establish a more rigorous risk-based approach to inspecting and auditing facilities. OECA is working with OSWER to develop a more rigorous definition of a high-risk facility, is developing a mechanism to track which high-risk facilities have not been inspected, and is revising the performance expectation for the RMP to incorporate the inspection of high-risk facilities. Additionally, OSWER has scheduled additional RMP training courses for inspectors and is beginning to explore options for providing additional resources to EPA regions with large numbers of high-risk facilities.

V. Conclusion

As a result of the OIG's report, it is likely that EPA's emphasis in implementing the RMP will turn to identifying facilities that are subject to the RMP and have not filed or re-filed risk management plans, and conducting inspections at facilities that it deems to be high-risk. Both EPA and state inspections are likely to increase in number and will tend to be focused on those areas. Companies that are subject to the RMP requirements should be prepared for when state or federal RMP inspectors appear at their plant gate.

For more information, please contact Mark N. Duvall at mduvall@bdlaw.com. This alert was prepared with the assistance of Jayni Lanham.

---

[1] 42 U.S.C. § 7412(r), as added by Section 301 of the Clean Air Act Amendments of 1990.

[2] 40 C.F.R. Part 68.

[3] U.S. Environmental Protection Agency Office of Inspector General, E*valuation Report: EPA Can Improve Implementation of the Risk Management Program for Airborne Chemical Releases*, Report No. 09-P-0092 (Feb. 10, 2009), *available at* www.epa.gov/oig/reports/2009/20090210-09-P-0092.pdf.

[4] *See* 40 C.F.R. § 68.190.

EPA Proposes Mandatory GHG Reporting Rule

The U.S. Environmental Protection Agency recently made available a pre-publication draft of its proposed rule imposing mandatory greenhouse gas (GHG) reporting requirements on large emission sources in the United States. Under the proposed rule, suppliers of fossil fuels or industrial greenhouse gases, manufacturers of vehicles and engines, and all facilities that emit 25,000 metric tons per year of GHG or greater will be required to submit annual reports to EPA. The first annual report would be due in 2011 for the calendar year 2010, except for vehicle and engine manufacturers, which would begin reporting for model year 2011. The gases covered by the proposed rule are carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFC), perfluorocarbons (PFC), sulfur hexafluoride (SF_6), and other fluorinated gases including nitrogen trifluoride (NF_3) and hydrofluorinated ethers (HFE).

Congress directed EPA to publish a mandatory greenhouse gas reporting rule in the Fiscal Year 2008 Consolidated Appropriations Act (H.R. 2764; Public Law 110-161). The rulemaking relies upon the Agency's existing authority under the Clean Air Act. Congress has directed EPA to finalize the rulemaking by June 2009. The EPA proposal is available at http://www.epa.gov/climatechange/emissions/ghgrulemaking.html.

The proposed rule has not yet been published in the *Federal Register*, but a public comment period will be open until at least May 10, 2009. Please contact David Friedland at (202) 789-6047 or dfriedland@bdlaw.com or Max Williamson at (202) 789-6084 or dwilliamson@bdlaw.com for additional information.

Congress Repeals Controversial 2006 TRI Amendments

On March 11, 2009, President Obama signed into law the Omnibus Appropriations Act, 2009, H.R. 1105, which rolls back the Toxics Release Inventory Burden Reduction Rule (the "TRI Rule") issued by the Environmental Protection Agency ("EPA") in 2006. *See* 71 Fed. Reg. 76932 (Dec. 22, 2006). The much-criticized Bush Administration TRI Rule raised the reporting threshold for chemical releases from 500 pounds to 2,000 pounds and set a first-

time threshold of 500 pounds for reporting persistent bioaccumulative toxins. The Omnibus Appropriations Act (1) blocks all funding implementing the TRI Rule; (2) provides that the TRI Rule "shall have no force or effect"; and (3) by operation of law reverts the text of the TRI regulations to its pre-2006 state. It states in § 5, Division E, Title IV, § 425:

> TOXICS RELEASE INVENTORY REPORTING. Notwithstanding any other provision of law--
>
> > (1) none of the funds made available by this or any other Act may, hereafter, be used to implement the final rule promulgated by the Administrator of the Environmental Protection Agency entitled `Toxics Release Inventory Burden Reduction Final Rule' (71 Fed. Reg. 76932); and
> >
> > (2) the final rule described in paragraph (1) shall have no force or effect. The affected regulatory text shall revert to what it was before the final rule described in paragraph (1) became effective, until any future action taken by the Administrator.

EPA is currently party to an ongoing suit challenging the TRI Rule in a New York district court. *New York v. Johnson*, No. 1:07 cv 10632 (BSJ) (DCF) (S.D.N.Y. filed Nov. 28, 2007). EPA will now likely move to dismiss the lawsuit on the basis of mootness. Further, EPA can be expected to publish a Federal Register notice withdrawing the 2006 changes and restoring the TRI rules to their pre-change state, i.e., doing administratively what Congress did legislatively.

For more information, go to http://www.bdlaw.com/news-news-515.html for our previous client alert on this topic, or contact Mark Duvall at 202-789-6090, mduvall@bdlaw.com.

Mercury in the News: Recent Developments

Mercury has been long recognized as a hazardous substance, and efforts to reduce human and environmental exposure to the toxin are commonly on the agendas of state, federal, and foreign governmental bodies. The U.S. Environmental Protection Agency ("EPA"), in particular, continues to play an active role in addressing mercury issues. In 2008, and already in 2009, mercury has become an important priority in a wide variety of regulatory contexts. This article summarizes those recent developments. It covers international developments; U.S. and state legislation; EPA measures under several statutes; and developments related to mercury in food.

Mercury is used primarily in manufacturing processes and products. Common mercury-containing products include batteries, fluorescent lamps (i.e., light bulbs), dental amalgam, thermometers, and other medical devices. Legislatures and agencies have expressed concern for potential exposure to mercury through the use and/or disposal of these products, inhalation of mercury vapor, or, most commonly, consumption of mercury-contaminated fish. With recent developments touching on all of mercury's various forms, mercury issues will be worth monitoring in the coming year.

International Developments

Mercury Treaty Negotiations

International efforts to reduce mercury releases and uses have surfaced over the last several years, the most recent of which is a proposed binding international mercury treaty. The treaty would likely include provisions to control the use of mercury in products, as well as the production processes that use or emit mercury, such as coal-fired power generation or certain chlor-alkali production, and other matters such as trade in elemental mercury and mercury mining.

At the February 16-20, 2009 United Nations Environment Programme ("UNEP") Governing Council meeting in Nairobi, the U.S. delegation endorsed negotiations for a new global mercury treaty. The endorsement marked a stark reversal of the Bush Administration position favoring voluntary measures as opposed to a binding international agreement. Subsequently, the environment ministers from over 140 countries decided to launch

negotiations on an international mercury treaty, and called on the Executive Director of UNEP to convene an International Negotiating Committee ("INC") to begin work on a treaty. An Open-Ended Working Group will meet in late 2009 to prepare for the first INC meeting in 2010. The INC has set a goal of 2013 to have the treaty completed. The scope of the treaty's mandate is extremely broad, covering all uses and potential sources of mercury emissions. The treaty negotiations will develop a strategy to "reduce the demand for mercury in products and processes" and to "address mercury-containing waste." The INC is directed to consider, among other things, the "technical and economic availability of mercury-free alternative products and processes, recognizing the necessity of the trade of essential products for which no suitable alternatives exist."

The environmental ministers also agreed that accelerated action under a voluntary Global Mercury Partnership is needed while the treaty is being finalized. The Partnership plan includes, among other points, reducing mercury use in products and processes and raising awareness of mercury-free alternatives. The initial meeting of the Partnership Advisory Group will take place in Geneva from March 31 - April 2, 2009. More information on the results of the Governing Council meeting is available at http://www.chem.unep.ch/MERCURY/.

The international process will likely be a significant new driver for mercury issues in the U.S. -- compounding the existing attention that mercury is already receiving by NGOs, regulators, and legislators at the federal and state levels.

Foreign Regulation of Mercury

In Canada, Environment Canada is currently considering the comments it received from the 2008 consultation on a December 2007 proposed regulation prohibiting the "import, manufacture, and sale of all mercury-containing products with the exception of dental amalgam and fluorescent lamps" under the Canadian Environmental Protection Act 1999. Although fluorescent lamps would be excluded from the prohibition, they would be subject to mercury content restrictions.

In Argentina, the head of the Environment Committee in the Argentine Senate presented a bill that incorporates both the European Union Directives on Restriction of Hazardous Substances ("RoHS"), Directive 2002/95/EC, and on Waste Electrical and Electronic Equipment ("WEEE"), Directive 2002/96/EC, with a new concept of "Extended Individual Producer Responsibility" (Bill S-3532-08). The bill would require, among other things, that producers and importers design devices that reduce to a minimum or totally eliminate the six RoHS substances, which include mercury, and any other substances determined to be contaminants. Currently, the bill remains in committee for consideration.

In China, the Ministry of Industry and Information Technology promulgated the "Development Procedures for the Priority Management Catalogue for Pollution Control and Management of Electronic Information Products" ("Procedures"). The Procedures, among other things, set forth general criteria the Chinese government will consider in selecting Electronic Information Products ("EIPs") for inclusion in the China RoHS Catalogue (a list of specific products or product categories). Ultimately, the EIPs listed in the China RoHS Catalogue must comply with China's substance restrictions as defined by China's maximum concentration value requirements. China's version of RoHS targets mercury as well as other substances.

U.S. Legislative Developments

Mercury Legislation: Federal

On October 14, 2008, President Bush signed into law the Mercury Export Ban Act of 2008, Public Law 110-414 ("Export Ban"), introduced by then-Senator Barack Obama. By amending the Toxic Substances Control Act, the Export Ban prohibits the sale, distribution, and transfer of elemental mercury by federal agencies immediately, and prohibits the exportation of elemental mercury effective January 1, 2013. It also charges the Department of Energy with the responsibility for long-term management and storage of elemental mercury generated within the United States. Key findings of the Export Ban include, among others, that: (1) releases from products commonly known to contain mercury remain

substantial in developing countries, and (2) the European Commission has proposed a regulation to ban elemental mercury exports from the European Union by 2011.

The Export Ban, a bipartisan effort, passed with overwhelming majorities from Democrats and Republicans. It was also met with collaborative industry support, including that of the American Chemistry Council, the Natural Resources Defense Council, the Environmental Council of the States, the Chlorine Institute, and the National Mining Association.

Mercury Legislation: States

Many states have enacted legislation focused on reducing the release and use of mercury in products and waste. One way in which states are working to achieve this goal is by banning or burdening the sale and/or distribution of numerous mercury-added products -- products containing intentionally-added mercury compounds. Common examples of such products include thermometers, fluorescent lamps, automotive switches, manometers, switches and relays, and measuring devices. Other common provisions of state mercury legislation include prohibitions on the sale of mercury-containing packaging materials, phase-outs of mercury in various products over a pre-determined timeline, labeling of mercury-containing products, mandatory take-back requirements for mercury-containing products, and reporting of all products containing mercury sold in the state.

Particular state legislative developments of 2008 included New Hampshire's enactment of a new law concerning mercury-added thermostats.[1] Specifically, manufacturers of such products sold in New Hampshire now are required to establish and maintain a department-approved collection and recycling program for out-of-service mercury-added thermostats from contractors, service technicians, and residents. The Act also prohibits the installation of mercury-added thermostats beginning July 1, 2008. Also in 2008, Vermont passed a law that requires original equipment manufacturers of mercury thermostats to provide a $5 cash incentive for residential and commercial thermostats that are turned in for collection.[2]

Mercury legislation has continued to proliferate at the state level in 2009. There are bills relating to mercury in products in 12 states: California, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, Montana, New York, Rhode Island, Vermont, and Washington.

Many of the pending bills aim to ban or limit the sale and/or distribution of mercury-added products. For example, bills imposing requirements on manufacturers, distributors and/or retailers of mercury-containing thermostats and/or thermometers are pending in Connecticut (H.B. 6113), Illinois (H.B. 2415; S.B. 1690), Massachusetts (H.D. 2226), Montana (S.B. 424), New York (A.B. 707), and Rhode Island (H.B. 5794).

Other pending bills impose disposal restrictions. For example, a Washington bill (H.B. 1799) would require all commercial, industrial, retail and state facilities, including learning institutions, to recycle their mercury-added general purpose lights. Similarly, a Vermont bill (H.B. 94) would require manufacturers of mercury-added lamps to establish a comprehensive recycling program for such lamps.

In addition, state legislatures have proposed bills in 2009 that would impose packaging and labeling requirements on mercury-added products. For example, an Illinois bill (H.B. 2429) would require manufacturers of mercury-containing compact florescent lamps and mercury-containing compact florescent bulbs to display certain information on the packaging of those products. A Michigan bill (H.B. 4278) would require manufacturers of mercury-added products to label each product intended for sale so as to inform the purchaser that the product contains mercury or a mercury compound.

State-by-state listings of mercury-related bills and legislation are available at the following websites:

- EPA mercury website: State Legislation and Regulations, http://www.epa.gov/osw/hazard/tsd/mercury/laws.htm;
- The Northeast Waste Management Officials' Association's Interstate Mercury

Education & Reduction Clearinghouse, http://www.newmoa.org/prevention/mercury/modelleg.cfm;

- Lowell Center for Sustainable Production, Chemicals Policy Initiative, http://www.chemicalspolicy.org/uslegislationsearch.php.

According to the Lowell Center for Sustainable Production, there are 130 state laws related to mercury in products in effect today. States will likely continue to actively address mercury-reduction issues throughout 2009.

EPA Developments

ChAMP Developments

In November 2008, EPA initiated two efforts addressing mercury under its Chemical Assessment and Management Program ("ChAMP"). ChAMP is designed to fulfill U.S. commitments made under the Security and Prosperity Partnership of North America to help ensure the safe manufacture and use of chemicals. Under ChAMP, EPA issued interim evaluations of certain mercury-containing products and the availability of mercury-free alternatives. The evaluations addressed switches, relays/contactors, flame sensors, button cell batteries, measuring devices, toys, jewelry, and novelty items. EPA's evaluation concluded that mercury in products is of special concern and that further analysis for action is a high priority.

In addition, in an effort to promote the use of mercury-free alternatives, EPA developed a searchable database of publicly-available information on consumer and commercial products that contain mercury and their potential mercury-free alternatives. More information on ChAMP is available at http://www.epa.gov/CHAMP/.

Clean Air Act Developments

On February 23, 2009, the U.S. Supreme Court dismissed EPA's petition for certiorari in the case of *EPA v. State of New Jersey*, following the Obama Administration's request to withdraw the petition. As a result, the 2008 D.C. Circuit's ruling vacating EPA's Delisting Rule and Clean Air Mercury Rule ("CAMR") stands firm.[3] The history of this case involves EPA's promulgation of two final rules: (1) removing coal and oil-fired electric utility steam generating units from the list of regulated sources under section 112 of the Clean Air Act ("CAA"); and (2) among other things, establishing total mercury emissions limits for new coal-fired plants. In 2005, EPA removed coal and oil-fired power plants from the list of sources regulated under section 112. Thereafter, EPA promulgated CAMR under section 111. The D.C. Circuit held that EPA's removal of these power plants from the section 112 list violated the CAA, which requires EPA to make specific findings before removing a listed source. EPA never did so. As a result, because section 111 cannot be used to regulate sources listed under section 112, the CAMR regulations for such sources failed as well. According to the request to withdraw the certiorari petition, EPA will "develop appropriate standards to regulate power plant emissions under section 112."

On February 3, 2009, Rep. Johnson (D-Texas) introduced the "Mercury Emissions Reduction Act" (H.R. 821), which would require EPA to promulgate standards under section 112(c)(6) of the CAA for mercury emissions from electric utility steam generating units, to be effective within one year after enactment of the bill. The bill cites the 2008 D.C. Circuit decision.

CERCLA Developments

Another mercury-related development concerns the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). In December 2008, the Agency for Toxic Substances and Disease Registry included mercury, methylmercury, and mercuric chloride on a proposed list of substances that will be evaluated for toxicological profile development. The list concerns hazardous substances that are most commonly found at facilities on the CERCLA National Priorities List, and identifies those determined to pose the most significant potential threats to human health.

Water Developments

On December 29, 2008, EPA's Office of Water entered an agreement with the American Dental Association and the National Association of Clean Water Agencies to promote best management practices for mercury-containing dental amalgam. According to the National Association of Clean Water Agencies, dental clinics are the main source of mercury discharges to publicly owned wastewater treatement plants -- contributing as much as 50% of the mercury entering such wastewater treatment plants. In response, the parties executed a Memorandum of Understanding which commits them to establish and monitor a Voluntary Dental Amalgam Reduction Program. The Program recommends the installation and maintenance of amalgam separators and the recycling of the amalgam waste. Through this collaborative effort, the parties will strive to build awareness and effect change at all levels.

In January 2009, EPA published its final Guidance for Implementing the Methylmercury Water Quality Criterion. EPA published recommendations in 2001 for methylmercury ambient water quality criterion for the protection of people who eat fish and shellfish. The recommended criteria are EPA's first to be expressed as a fish and shellfish tissue value rather than as an ambient water common value. As states and tribes develop methylmercury water quality standards, the 2009 guidance document offers technical advice on how to implement the new fish-based criteria. At this time, the guidance document, which was issued in the final days of the Bush Administration, is under review by the Obama Administration.

Developments Related to Mercury in Food

Mercury Warnings

On January 27, 2009, the California Court of Appeals heard arguments in the case of *People v. Tri-Union Seafoods*, a tuna mercury warning case. The case began with a 2004 lawsuit filed by the Attorney General of California against three major tuna companies: Tri-Union Seafoods LLC, maker of Chicken of the Sea; Del Monte Corp., maker of Starkist; and Bumble Bee Seafoods LLC, maker of Bumble Bee Tuna. Based on Proposition 65, a voter-approved state law requiring warnings on products that contain chemicals that can cause reproductive harm or cancer, the California Attorney General sought injunctive and civil penalties for the companies' alleged failure to warn consumers that their tuna products contain potentially harmful mercury compounds. In response, the U.S. Food and Drug Administration ("FDA") argued that its prior regulatory actions preempted the State's lawsuit. In 2006, the Superior Court of California agreed with FDA's position and found, in this context, Proposition 65 was preempted by federal law.[4] On appeal, the State argued that the state law supplements, not conflicts with, the federal advisory and that Proposition 65 "has its own set of rules." The companies, however, were of the opinion that "FDA has the power to and authority to regulate this issue." Having now heard the appellate arguments, the appeals court has until April 27, 2009 to issue a written ruling.

A similar mercury warning case, *Fellner v. Tri-Union Seafoods*, is based on New Jersey product liability law. In that case, a woman sued Tri-Union Seafoods for physical and emotional injuries resulting from mercury poisoning, based on the alleged failure of Tri-Union Seafoods to warn of the potential risks involved with consuming its products. In 2007, a federal district court granted Tri-Union Seafoods' motion to dismiss the case, holding that FDA's regulatory scheme regarding mercury in fish preempts the woman's state law claims.[5] On August 19, 2008, the Court of Appeals for the Third Circuit reversed and remanded the district court's judgment. The appeals court found FDA's 2004 advisory and other supporting documents to be insufficient as federal law to preempt contrary state law. According to the court, FDA had not promulgated a regulation, adopted a rule, or taken any action that could constitute a federal legal standard giving rise to conflict preemption. As a result, on January 13, 2009, Tri-Union Seafoods petitioned the Supreme Court of the United States for a writ of certiorari to review the Third Circuit decision.[6]

Resolution of both these cases may be influenced by the Supreme Court's recent decision finding no preemption of state tort law by reason of FDA's approval of drug labeling.[7]

Mercury in Fish

Consumption of fish is said to be the most significant source of mercury exposure to humans in the United States. On January 21, 2009, FDA released two draft reports assessing the risks and benefits associated with the consumption of fish species. The first report is a draft risk and benefit assessment, and the second is a companion document to the risk assessment summarizing published research on the beneficial effects of fish consumption. In assessing the risks of mercury exposure against the benefits of eating fish, FDA concluded that consumption of fish species that are low in methylmercury has significantly greater probability of resulting in a net benefit, as measured by verbal neurodevelopment.

FDA's reports have been met with significant opposition, particularly from EPA. As a part of an interagency review process, EPA commented on an earlier draft of the report by strongly criticizing the report as lacking in scientific, statistical, and methodological analysis. The difference of opinions came as a surprise to many considering the joint-agency advisory issued by the two agencies in 2004 setting forth specific fish-consumption recommendations for groups at the highest risk of detrimental mercury exposure. However, FDA's Federal Register notice emphasizes that the reports are not a departure from, or modification of, the 2004 advisory. Rather, they are "intended to add to the growing body of scientific literature investigating the . . . health impacts linked to consumption of fish." Currently, the draft is available for public comment, as well as secondary comments by earlier peer reviewers, including EPA. Comments must be submitted by April 29, 2009.

Mercury in High Fructose Corn Syrup

Two reports released in January 2009 indicate the presence of mercury in high fructose corn syrup -- a product not commonly associated with the chemical. Both reports are premised on the fact that, under some circumstances, high fructose corn syrup is made using mercury-grade caustic soda.

The report by Dufault et al. that appeared in Environmental Health sampled high fructose syrup from three different manufacturers, analyzed them for total mercury, and found traces of mercury in 9 of 20 samples. Recognizing that individuals are not likely to consume high fructose corn syrup directly, the Institute for Agriculture and Trade Policy sampled commercial products containing high fructose corn syrup and analyzed them for mercury. Their results showed traces of mercury in popular brands, such as Quaker Oatmeal, Hershey's Chocolate Syrup, Pop-Tarts, Smucker's Strawberry Jelly, and Nutri-Grain Strawberry Cereal Bars. The report does not claim to be a full-scale safety assessment, but rather evidence to suggest that the FDA should conduct its own investigation.

Policy recommendations proposed by the reports include the phasing out of mercury cell technology and banning the use of mercury-containing ingredients in foods and beverages. Phasing out mercury cell technology could see progress under the Obama Administration. In 2007, then-Senator Barack Obama introduced the "Missing Mercury in Manufacturing Monitoring and Mitigation Act" (S. 1818), aimed toward phasing out the use of mercury in, among other uses, the manufacture of chlorine and caustic soda by January 2012. The House version of the bill was introduced in March 2008 and both bills were referred to Committee, where no further action occurred.

For more information on the domestic developments of this topic, please contact Mark Duvall (mduvall@bdlaw.com). For more information on the international developments of this topic, please contact Russ LaMotte (rlamotte@bdlaw.com).

---

[1] N.H. Rev. Stat. Ann. § 149-M:53.

[2] Vt. Stat. Ann. tit. 10, § 7116.

[3] *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), cert. denied, 77 U.S.L.W. 3467 (U.S. Feb. 23, 2009) (No. 08-352).

[4] *People v. Tri-Union Seafoods*, 2006 WL 1544384 (Cal. Super. Ct. May 11, 2006), appeal docketed, No. A116792 (Cal. Ct. App. 1st Dist. Feb. 20, 2007).

[5] *Fellner v. Tri-Union Seafoods, L.L.C.*, No. 06-cv-0688, 2007 U.S. Dist. LEXIS 1623 (D.N.J. Jan. 8, 2007).

[6] *Fellner v. Tri-Union Seafoods*, L.L.C., 539 F.3d 237 (3rd Cir. 2008), petition for cert. filed, (U.S. Jan. 13, 2009) (No. 08-889).

[7] *Wyeth v. Levine*, No. 06-1249 (U.S. Mar. 4, 2009), 2009 U.S. LEXIS 1774.

Eighth Circuit Upholds OSHA's Multi-Employer Citation Policy in Summit Contractors

A vexing issue for employers in the area of occupational safety and health is what regulatory obligations, if any, they may owe to the employees of other employers. Putting it differently, the issue is to what extent they may be cited for the unsafe practices of employees of other employers. The Occupational Safety and Health Administration ("OSHA") has addressed this issue in its Multi-Employer Citation Policy.[1] In 2007, the Occupational Safety and Health Review Commission ("OSHRC") held that policy to be invalid to the extent that it seeks to hold a general contractor liable for violation of the construction industry standards by a subcontractor's employees where the general contractor did not create the hazard and its own employees are not exposed to the hazard, but it has contractual authority over the subcontractor (and therefore presumably has power to control the subcontractor so as to make it comply with the standards; in terms of the Multi-Employer Citation Policy, it is a "controlling employer").[2] OSHA appealed that decision almost two years ago.

In a much-anticipated decision, on February 26, 2009, the U.S. Court of Appeals for the Eight Circuit held in *Solis v. Summit Contractors, Inc*. that OSHA regulations do not preclude OSHA from issuing citations to a general contractor in that situation.[3] The majority's opinion upholds OSHA's Multi-Employer Citation Policy, making it clear that controlling employers can be liable for OSHA violations at their places of employment regardless of whether or not they created the hazard or their own employees are exposed to the hazard.[4] The majority acknowledged that its holding places a large burden on general contractors to have knowledge of all of the regulatory requirements affecting its worksite and to monitor all of the employees of the worksite, but suggested that any concerns about the Multi-Employer Citation Policy should be addressed by Congress or OSHA itself.[5]

1. Facts and Prior Decisions

In June 2003, an OSHA Compliance Safety and Health Officer ("CSHO") inspected the construction site of a college dormitory in Little Rock, Arkansas. Summit Contractors, Inc. ("Summit") was the general contractor at this site, supplying a project superintendent and three assistant superintendents. During the inspection, the CSHO observed employees of Summit's subcontractor, All Phase Construction, Inc. ("All Phase"), working on scaffolds without fall protection or guardrails in violation of 29 C.F.R. § 1926.451(g)(1)(vii). The CSHO issued a citation to Summit for this violation (as well as to All Phase), even though Summit's employees were never exposed to the hazard created by the scaffold violation.

In the terms of the Multi-Employer Citation Policy, the CSHO regarded Summit as a "controlling employer", a term which the policy defines as:

> An employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them.

The policy explains:

> Control can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice ....
>
> A controlling employer must exercise reasonable care to prevent and detect violations on the site. The extent of the measures that a controlling employer must implement to satisfy this duty of reasonable care is less than what is required of an employer with respect to protecting its own employees. This means that the controlling employer is not normally required to inspect for hazards as frequently or to have the same level of knowledge of the applicable standards or of trade expertise as the employer it has hired.

The Multi-Employer Citation Policy gives an example similar to the facts in *Summit Contractors*. In the example, a controlling employer observes a subcontractor violate OSHA's fall protections standards, points out the violations to the subcontractor, but takes no further actions. According to the example, the controlling employer "failed to take reasonable steps" to require the subcontractor to correct the hazards "since it lacked

a graduated system of enforcement. A citation to [the controlling employer] for the fall protection violations is appropriate."

Summit contested the citation before an Administrative Law Judge ("ALJ") on the basis that 29 C.F.R. § 1910.12(a), the regulation prescribing occupational safety and health standards for construction work, only places a duty on an employer to protect its own employees and not those of a subcontractor. Section 1910.12(a) provides in relevant part that:

> Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph.

The ALJ rejected Summit's argument and upheld the citation. OSHRC vacated the citation (2-1) on the basis that § 1910.12(a) only requires an employer to protect "his" own employees and thereby precludes application of the Multi-Employer Citation Policy where, as here, an employer did not create the hazard and its employees are not exposed to the hazard.

2. Majority and Dissenting Opinions

In the 2-1 Eighth Circuit decision vacating the OSHRC order, Judge Gruender wrote for the majority that the plain language of § 1910.12(a) "does not preclude an employer's duty to protect the place of employment, including others who work at the place of employment, so long as the employer also has employees at that place of employment."[6] The court closely examined the plain language and grammatical construction of § 1910.12(a) and emphasized that it unambiguously places a duty on an employer to protect (1) "his employees" and (2) "the places of employment where the employer actually has employees."[7] The court rejected OSHRC's and Summit's interpretation of § 1910.12(a), explaining that the duty to protect "places of employment" would be superfluous and redundant if it only required the employer to protect his own employees at their places of employment.[8]

In addition, the majority emphasized that, even if 29 C.F.R. § 1910.12(a) were ambiguous, the court would defer to OSHA's interpretation that the provision does not preclude application of the Multi-Employer Citation Policy to controlling employers.[9] The court rejected on two grounds Summit's argument that, because the Secretary has not had a consistent Multi-Employer Citation Policy since enacting § 1910.12(a) in 1971, the Secretary's interpretation of § 1910.12(a) was not entitled to deference. First, the court explained that OSHA has never interpreted § 1910.12(a) as limiting an employer's responsibility to its own employees.[10] Second, the court explained that it was irrelevant that OSHA altered the Multi-Employer Citation Policy over time in response to OSHRC and court decisions because those alterations "do not provide insight into the Secretary's interpretation of § 1910.12(a)."[11]

Further, the court rejected each of Summit's alternative arguments. First, it rejected the argument that the Multi-Employer Citation Policy is based on an expansive definition of "employer" and "employee" in violation of the Supreme Court's reliance on the common law definition of the term "employee" in *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318, 322–25 (1992). The court rejected this argument on the basis that § 1910.12(a) and the Multi-Employer Citation Policy do not impose liability on the basis of an employer-employee relationship.[12] Second, the court rejected the argument that the OSHA does not have statutory authority for the Multi-Employer Citation Policy, because the Eight Circuit held in *Marshall v. Knutson Constr. Co.*, 566 F.2d 596. 599 (8th Cir. 1977), that Section 5(a)(2) of the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. § 654(a)(2), provides statutory authority for the policy.[13] Third, the court rejected the argument that the Multi-Employer Citation Policy violates Section 4(b)(4) of the OSH Act, 29 U.S.C. § 653(b)(4), because it increases employer's liability at common law, on the basis that the policy does not create a private cause of action or preempt state law. *Id.* at 21.

Finally, the court acknowledged the policy implications of its decision. The court explained that:

> It is uncertain what potential benefits are gained in citing both a subcontractor and

> a general contractor for a single OSHA violation when the general contractor had informed the subcontractor of the violation on prior occasions.[14]

The court further explained that the "policy places an enormous responsibility on a general contractor to monitor all employees and all aspects of a worksite."[15] Nevertheless, the court explained that these concerns should be addressed by Congress or OSHA itself.[16]

Judge Beam dissented, holding that § 1910.12(a) does not authorize the Multi-Employer Citation Policy where the general contractor did not create the hazard and its employees are not exposed to the hazard, and that the policy implications of the Multi-Employer Citation Policy "should serve as an interpretative guide to a logical reading of § 1910.12(a)."[17]

3. Discussion

The issue addressed in Summit Contractors, the significance of § 1910.12(a) in limiting the scope of the Multi-Employer Citation Policy as applied to the construction standards of Part 1926, has been awaiting judicial review for years. That regulation's language closely resembles that of the General Duty Clause, Section 5(a)(1) of the OSH Act, 29 U.S.C. § 654(a)(1), which OSHA concedes operates to preclude citation of employers for hazards to which their own employees are not exposed. Section 5(a)(1) provides that each employer--

> shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm **to his employees**. [Emphasis added.]

Section 5(a)(2), sometimes called the Specific Duty Clause, lacks the highlighted language. It provides that each employer--

shall comply with occupational safety and health standards promulgated under this Act.

Almost all courts have agreed with OSHA's position that Section 5(a)(2) does allow citation of employers for violations that create hazards to the employees of other employers, the one exception being the Fifth Circuit.[18] However, there has long been a debate about whether with § 1910.12(a) OSHA voluntarily limited its authority under Section 5(a)(2) in the construction context where an employer's own employees are not exposed, as § 1910.12(a) reads in part:

> Each employer shall protect the employment and places of employment of **each of his employees** engaged in construction work by complying with the appropriate standards prescribed in this paragraph [i.e., Part 1926]. [Emphasis added.]

The D.C. Circuit has twice questioned the viability of the Multi-Employer Citation Policy in light of § 1910.12(a) where the controlling employer did not create the hazard and its employees are not exposed to the hazard. In both cases, however, the issue was not directly presented for decision.[19] Only a state court, construing the state counterpart to § 1910.12(a), has ruled that its words permit citation of a controlling employer under these circumstances.[20]

Both opinions in *Solis v. Summit Contractors* engaged in an extended grammatical exegesis of § 1910.12. The majority concluded:

> Hence, grammatically reconstructed, the language of the regulation requires: (1) that an employer shall protect the employment of each of his employees ("part (1)") and (2) that an employer shall protect the places of employment of each of his employees ("part (2)").
>
> Because the term "of each of his employees" limits the term "employment," part (1) provides that an employer shall protect only the employment of his employees. Stated differently, part (1) provides that an employer shall protect only his employees. However, this is not the end of the analysis. In part (2), the term "of each of his employees" limits the term "places of employment" such that the employer shall protect the places of employment where the employer actually has employees. Unlike part (1), part (2) of the regulation does not limit the employer's duty to protect only

> the employer's own employees. Therefore, the plain language of part (2) does not preclude an employer's duty to protect the place of employment, including others who work at the place of employment, so long as the employer also has employees at that place of employment ....
>
> To give some independent meaning to the term "place of employment" would require the employer to protect others who work at that place of employment so long as the employer also has employees at that place of employment. Therefore, we reject Summit's interpretation and conclude that § 1910.12(a) is unambiguous in that it does not preclude OSHA from issuing citations to employers for violations when their own employees are not exposed to any hazards related to the violations.[21]

This difference in wording arguably distinguishes § 1910.12(a) from the General Duty Clause, which requires an employer to provide "to his employees employment and places of employment", i.e., the obligation even with respect to places of employment is limited "to his employees."

The dissent disagreed with the majority's interpretation, stating:

> This statement is epiphytic -- it draws no nourishment from the words of § 1910.12(a). The issue here is, of course, not what duty an employer may decide to impose upon himself but rather what an employer is required to do to avoid an OSHA sanction. Part (2) unambiguously requires Summit to protect the places of employment of Summit's employees engaged in construction work for Summit. Nothing more, nothing less.[22]

An issue which the majority did not resolve, because not raised by the parties directly, concerned whether OSHA could lawfully apply the Multi-Employer Citation Policy without first adopting it through rulemaking. The majority observed that:

> This argument may have some merit .... Therefore, the Secretary may be required to submit its multi-employer worksite policy to the informal rulemaking process, unless the multi-employer worksite policy is an interpretive rule or a statement of policy. However, we decline to consider this issue because it was raised to this court by the amici and not by the parties.[23]

The state appeals court in Weekley Homes considered the same issue and concluded that the Multi-Employer Citation Policy is an interpretive rule exempt from the need for promulgation through rulemaking, noting that it does not impose sanctions for failure to comply with the policy, but only describes who can be cited.[24]

That state court opinion also addressed the concern about excessive burden being placed on a general contractor who does not create a hazard and whose employees are not exposed to the hazard. Adopting the approach of the Safety and Health Review Board of North Carolina, it limited the general contractor's obligations:

> However, as stated in Romeo Guest, the duty is a reasonable duty and the general contractor is only liable for violations that its subcontractor may create if it could reasonably have been expected to detect the violation by inspecting the job site.[25]

If the court had upheld the OSHRC decision and concluded that § 1910.12(a) does limit the scope of the Multi-Employer Citation Policy, OSHA would only have needed to revise that regulation through informal rulemaking under the Administrative Procedure Act. While such a rulemaking might have disrupted enforcement for a period of time, the Obama Administration would likely regard such a rulemaking as a priority.

Summit Contractors has until April 13, 2009 to file for reconsideration *en banc* (a possibility since the decision was not unanimous), or until May 27, 2009 to file a petition for certiorari with the Supreme Court. If the latter course is taken, it could cite the dicta in the two D.C. Circuit decisions as suggestive of a conflict between the circuits.

For more information, contact Mark Duvall at 202-789-6090, mduvall@bdlaw.com, or Maddie

Kadas at 512-391-8010, mkadas@bdlaw.com. This article was prepared with the assistance of Jayni Lanham.

---

[1] OSHA Directive CPL 2-0124 (1999), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2024

[2] *Summit Contractors, Inc.*, OSHRC Docket No. 03-1622, 21 BNA OSHC 2020 (2007).

[3] No. 07-2191, 8th Cir. Feb. 26, 2009, 2009 U.S. App, LEXIS 3755.

[4] *Summit Contractors*, Slip Op. at 14.

[5] *Id*. at 21–22.

[6] *Id*. at 14.

[7] *Id.*

[8] *Id*. at 14–15.

[9] *Id*. at 15.

[10] *Id.* at 16–17.

[11] *Id*. at 17–18.

[12] *Id.* at 19.

[13] *Id.* at 20.

[14] *Id*. at 21–22.

[15] *Id*. at 22.

[16] *Id.*

[17] *Id.* at 29.

[18] *See Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 710-11 (5th Cir. 1981).

[19] *See Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1306 (D.C. Cir. 1995); IBP, Inc. v. Herman, 144 F.3d 861, 865-66 (D.C. Cir. 1998).

[20] *Comm'r of Labor v. Weekley Homes*, L.P., 169 N.C. App. 17, 26–28, 609 S.E.2d 407, 414-15 (N.C. Ct. App. 2005).

[21] *Summit Contractors*, Slip op. at 21-24 (footnote and citations omitted).

[22] *Id*. at 41–42 (footnote omitted).

[23] *Id*. at 29–30 (citations omitted).

[24] *Weekley Homes*, L.P., 169 N.C. App. at 30, 609 S.E.2d at 416.

[25] *Id*., 169 N.C. App. at 28, 609 S.E. 2d at 415 (citation omitted).

Lacey Act Amendments Update

The Lacey Act is a U.S. wildlife protection statute designed to combat illegal trafficking in wildlife, fish and certain plants. Recent amendments to the Lacey Act, aimed in part at curbing illegal logging, expand its protections to include any wild member of the plant kingdom (including trees from natural or planted forest stands), and any products made thereof. Thus provisions of this statute now apply to a broad range of plant products such as wood, pressed wood, furniture, wood pulp, paper and paperboard, books and printed materials, wood items, plant based resins, pharmaceuticals and textiles, among others.

The substantive prohibition on commerce in illegally sourced plants and plant products is in effect and enforceable now. In addition, new import declaration provisions were slated to take effect December 15, 2008; however, agencies with enforcement authority agreed not to begin enforcing the import declaration requirements until April 1, 2009.

Ban on Commerce in Illegally Sourced Plants and Plant Products; False Labeling

The amended Lacey Act makes it unlawful, as of May 22, 2008, to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant or plant product that was illegally sourced from a U.S. state or tribal land or any foreign country. Illegally sourced plants may include trees or wild plants that were: (1) stolen; (2) taken from officially protected areas such as parks and reserves; (3) taken without or contrary to required authorization; (4) taken without payment of the applicable taxes, royalties or fees; or (5) shipped in violation of governing export or transshipment laws, such as log export bans.

The Lacey Act also makes it unlawful to falsely identify or label any plant or plant product covered by the Act.

New Declaration Requirement for Imported Plants and Plant Products

Additional provisions will make it unlawful to import covered plants and plant products without filing an import declaration. The declaration must include: (1) scientific names of all plant species; (2) country of harvest; (3) quantity (including unit of measure); and (4) value of imported plants or plant products. Under the statute, new import declaration provisions were slated to take effect December 15, 2008; however, prior to the availability of an electronic filing system (anticipated by April 1, 2009) the requirement to file a declaration will not be enforced. Until April 1, 2009, filing of the paper declaration form is voluntary.

If the plant species or country of origin cannot be determined conclusively for a plant product, the declaration must include a list of possible plant species found in the product and/or a list of each country from which the plant may have been harvested. Declarations for paper and paperboard products made of recycled content do not need to name the species and source of the recycled material. For these products, an importer is obligated to list the average percent of recycled content as well as species and origin information for any non-recycled plant material contained in the products. Packaging material used exclusively to support, protect, or carry another item will not require an import declaration, unless the packaging material itself is being imported.

1. Proposed Phase-In Schedule for Import Declaration Enforcement

Although the substantive prohibitions on commerce in illegally sourced plant products is already in effect and enforceable, enforcement of the import declaration requirement will be phased in according to the following revised schedule (published in 73 Federal Register 5911- 5913):

Beginning on April 1, 2009, enforcement will begin for import declarations on specified wood and articles of wood from Chapter 44 of the Harmonized Tariff Schedule (HTS), including fuel wood (HTS 4401), wood in the rough (HTS 4403), wood poles, piles, or stakes (HTS 4404), railway sleepers (HTS 4406), wood sawn or chipped lengthwise (HTS 4407), wood sheets for veneering (HTS 4408), wood, continuously shaped (HTS 4409), tools, tool handles & broom handles (HTS 4417) and builders' joinery and carpentry of wood (HTS 4418).

Beginning approximately October 1, 2009, import declaration enforcement is anticipated with regard to wood pulp from HTS Chapter 47 and additional items from HTS Chapter 44 such as wood charcoal (HTS 4402), particleboard (HTS 4410), fiberboard (HTS 4411), plywood (HTS 4412), densified wood (HTS 4413), wooden frames (HTS 4414), packing cases, boxes, and crates that are not holding a separate product (HTS 4415), casks, barrels and vats (HTS 4416), wood table and kitchen items (HTS 4419), and wood marqentry (HTS 4420).

On or after April 1, 2010, enforcement of the declaration requirement will be phased in for wooden furniture and furniture parts from Chapter 94 or the HTS, paper and paper articles from chapter 48 of the HTS, and articles of wood from HTS section 4421.

Exemptions and Exclusions

As referenced above, packaging material used exclusively to support, protect, or carry another item will not require import certification, unless the packaging material itself is being imported. (Packaging material includes manuals, tags, labels and warranty cards.) Other items are excluded from the definition of plants, including (1) live plants or trees intended for replanting, unless listed on the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Endangered Species Act or a state endangered species list; (2) scientific specimens to be used only for research, unless they are listed as in item 1, above; and (3) common cultivars and food crops (to be defined via a joint rulemaking by USDA and the Department of the Interior).

2. Opportunities to Comment

APHIS is accepting public comments on the revised plan to phase in enforcement of the import declaration requirements until April 6, 2009. Opportunities to comment are also anticipated with regard to the joint rulemaking on common cultivar and common food crop definitions.

To view the amendments to the Lacey Act go to: http://www.aphis.usda.gov/plant_health/lacey_act/downloads/background--redlinedLaceyamndmnt--forests--may08.pdf.

For additional information or guidance regarding the Lacey Act amendment, please contact Laura Duncan (lduncan@bdlaw.com) or Paul Hagen (phagen@bdlaw.com).

Supreme Court Toughens Standing Requirements for Environmental Plaintiffs

On March 3, 2009, the United States Supreme Court held in *Summers v. Earth Island Institute* that five conservation groups lacked standing to challenge U.S. Forest Service ("USFS") regulations that exempt small timber sales from the notice, comment, and appeal process used in more significant land management decisions. 2009 U.S. LEXIS 1769, Slip Op. No. 07-463 (U.S. March 3, 2009). The majority's opinion reinforces the Court's jurisprudence limiting standing to sue for generalized grievances, and makes clear that claims based on a deprivation of procedural rights require "a concrete interest" that is affected by the deprivation in order to meet the minimum threshold for constitutional standing. *Summers*, Slip Op. at 8. *Summers* provides potent precedent to challenge the standing of environmental plaintiffs in citizen suits, Administrative Procedure Act cases, and other federal litigation, requiring them to provide sworn evidence particularizing harm from the precise action challenged.

The case arose out of the September 2003 USFS approval of the Burnt Ridge Project, a salvage sale of timber on 238-acres of fire-damaged federal land. The project was approved consistent with USFS regulations that exempted small sales from formal notice-and-comment procedures and an appeals process. Earth Island Institute, Sierra Club, and other conservation organizations brought a facial challenge to the regulations and to the Burnt Ridge project itself, arguing the exemption violated the 1992 Appeals Reform Act, which requires the USFS to provide a notice, comment, and appeals process for all land and resource management plans. The District Court granted a preliminary injunction as to the sale, and the parties then settled over the Burnt Ridge dispute. However, despite the settlement, the District Court proceeded to hear the merits of the plaintiffs' challenges and invalidated the USFS regulations, issuing a nationwide injunction. The Ninth Circuit affirmed this portion of the District Court ruling.

In the 5-4 decision, Justice Scalia wrote for the majority that the plaintiffs lacked standing because, "after voluntarily settling their portion of their lawsuit relevant to Burnt Ridge, respondents and their members are no longer under threat of injury from that project." *Summers*, Slip Op. at 2. The Court emphasized that "[w]e know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action . . . but has settled that suit, he retains standing to challenge the basis for that action . . . apart from any concrete application that threatens imminent harm to his interests. Such a holding would fly in the face of Article III's injury-in-fact requirement." *Id*. at 6. The majority also rejected plaintiffs' affidavits claiming planned future visits to National Forests as too vague to show the threat of imminent harm. *Id*. at 6-8. Specifically, the Court the wrote that "we are asked to assume that not only will [affiant] stumble across a project tract unlawfully subject to the regulations, but also that the tract is about to be developed by the Forest Service in a way that harms his recreational interests, and that he would have commented on the project but for the regulation." *Id*. at 7.

Importantly, *Summers* refused the Sierra Club's efforts to establish organizational standing based on a claimed statistical likelihood that many of its members would use forests impacted by the exceptions to the regulations for large timber sales. The Court rejected "the organizations' self-descriptions of their membership" and insisted on timely affidavits wherein "plaintiff-organizations makes specific allegations establishing that at least one identified member had suffered or would suffer harm." *Id*. at 9-10.

Finally, the Court held that the Burnt Ridge settlement precluded the plaintiffs' standing based on procedural injury -- the allegation that they had been denied the ability to file comments on some Forest Service actions. Justice Scalia wrote that Congress' grant of a procedural right under the Appeals Reform Act does not loosen the standing requirement of a concrete injury. *Id*. at 8.

Because the claims were dismissed on standing issues, the Court did not reach the important issue briefed in the case of whether the District Court exceeded its powers in issuing a nationwide injunction. The holding nonetheless sharply limits standing in citizen suits based on a procedural deprivation absent a showing of an affected concrete interest, and requires heightened scrutiny of claims of organizational standing.

For further information, please contact Jimmy Slaughter at (202) 789-6040, jslaughter@bdlaw.com or Hal Segall at (202) 789-6038, hsegall@bdlaw.com. This alert was prepared with the assistance of Bina R. Reddy.

To read the full court opinion, go to http//:www.bdlaw.com/assets/attachments/Supreme_Court_Opinion_Summers_v_Earth_Island_Institute.pdf.

Firm News & Events

Environmental Leadership Program Honors Benjamin Wilson

In remembrance of Dr. Martin Luther King Jr.'s contributions to the struggle for environmental, social, and economic justice, the Environmental Leadership Program's (ELP) Mid-Atlantic Network will honor the work of Benjamin F. Wilson, Managing Principal of Beveridge & Diamond, P.C. On April 2, 2009, ELP will host an evening called "A Celebration of Leadership: Remembering Dr. King's Environmental Legacy with Benjamin Wilson.

The Celebration will take place at The Wilderness Society located at 1615 M Street, NW , Washington, DC. To learn more about ELP and the Celebration of Leadership event, or to purchase tickets, please go to: http://www.elpnet.org/midatlanticnetwork/marn_col.php.

Beveridge & Diamond, P.C. Attorney Recognitions for 2009

Beveridge & Diamond, P.C., is proud to announce that the following attorneys have been recognized in a number of guides that, through research of the U.S. legal profession, identify the leading lawyers and law firms in the country.

Chambers USA
Karl Bourdeau, Stephen Gordon, Paul Hagen, and Christopher McKenzie will be recognized in Chambers USA 2009 (in June) as "Leaders in their Fields".

The firm will be ranked for environment in Massachusetts and the District of Columbia. The firm will also be recognized nationally for environment and climate change, but our office and firm wide rankings will not be available until the book is launched in June.

Best Lawyers 2009
Karl Bourdeau, Henry Diamond, Peter Gregg, and Paul Hagen are recognized in Best Lawyers 2009 for Environment, and Edward West is recognized in Best Lawyers 2009 for Real Estate.

Best of the Best USA
Paul Hagen will be recognized in Best of the Best USA, an Expert Media Guide published by Legal Media Group in the U.K., which is the legal publishing arm of Euromoney Institutional Investor, one of the world's leading financial publishers. The guide identifies Paul as one of the 25 best environmental lawyers in the United States.

The International Who's Who of Environmental Lawyers
Karl Bourdeau, Holly Cannon, Paul Hagen, and Chris McKenzie will be featured in the International Who's Who of Environmental Lawyers 2009.

Superlawyers 2009
Karl Bourdeau and Paul Hagen have been named by Washington, DC Super Lawyers magazine as two of the top attorneys in Washington, DC for 2009. Only five percent of the lawyers in the district are named by Super Lawyers.

Super Lawyers can be found online at www.superlawyers.com, where lawyers can be searched by practice area and location.

Martindale-Hubbell AV Rated
An AV® certification mark is a significant rating accomplishment - a testament to the fact that a lawyer's peers rank him or her at the highest level of professional excellence. A lawyer must be admitted to the bar for 10 years or more to receive an AV® rating. The following attorneys are AV rated:

Albert Beveridge; Karl Bourdeau; Robert Brager; Holly Cannon; Edward Ciechon; Thomas DiBiagio; Henry Diamond; David Friedland; Kenneth Finney; Stephen Gordon; Peter Gregg; John Guttmann; Paul Hagen; John Hanson; Harold Himmelman; Steven Jawetz; John Kazanjian; Brian Levey; Cindi Lewis; Christopher McKenzie; Donald Patterson; Stephen Richmond; James Slaughter; Gary Smith; Kathryn Szmuszkovicz; Edward West; Benjamin Wilson.

Martindale-Hubbel BV Rated
The BV® certification mark is an excellent rating for a lawyer; this is the maximum rating a lawyer can receive who has been admitted to the bar from 5-9 years.

Richard Davis; Aaron Goldberg; Nicholas van Aelstyn; Fred Wagner.

Beveridge & Diamond a Primary Source of Information for Recently Published LMA Report "How Green Is My Law Firm?"

Beveridge & Diamond, P.C. lawyers were a primary source of information for the Legal Marketing Association's recently published report, "How Green Is My Law Firm?" The LMA interviewed Beveridge & Diamond Principal David Friedland and Associate Daniel Eisenberg regarding their efforts to organize and implement the American Bar Association-Environmental Protection Agency Law Office Climate Challenge, and B&D Principal Daniel Krainin regarding his role as Chair of Beveridge & Diamond's Green Team. The input provided by these three Beveridge & Diamond attorneys, as well as attorneys and staff from other firms taking a lead role in environmental sustainability for law firms, helped provide the LMA with important insights and content for this valuable report. The report provides an overview of what leading law firms are doing to implement environmental sustainability policies, and offers advice on how firms looking to develop their own sustainability policies and programs can get started.

For more information about environmental sustainability at B&D or law firms generally, please contact David Friedland (dfriedland@bdlaw.com), Daniel Krainin (dkrainin@bdlaw.com) or Daniel Eisenberg (deisenberg@bdlaw.com).

To view a copy of the LMA report, "How Green Is My Law Firm?" go to http://www.bdlaw.com/assets/attachments/How_Green_is_My_Law_Firm.pdf.

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.

Office Locations:

Washington, DC

Maryland

New York

Massachusetts

New Jersey

Texas

California