

January 15, 2009

Countries, therefore, when lawmaking falls exclusively to the lot of the poor cannot hope for much economy in public expenditure; expenses will always be considerable, either because taxes cannot touch those who vote for them or because they are assessed in a way to prevent that.

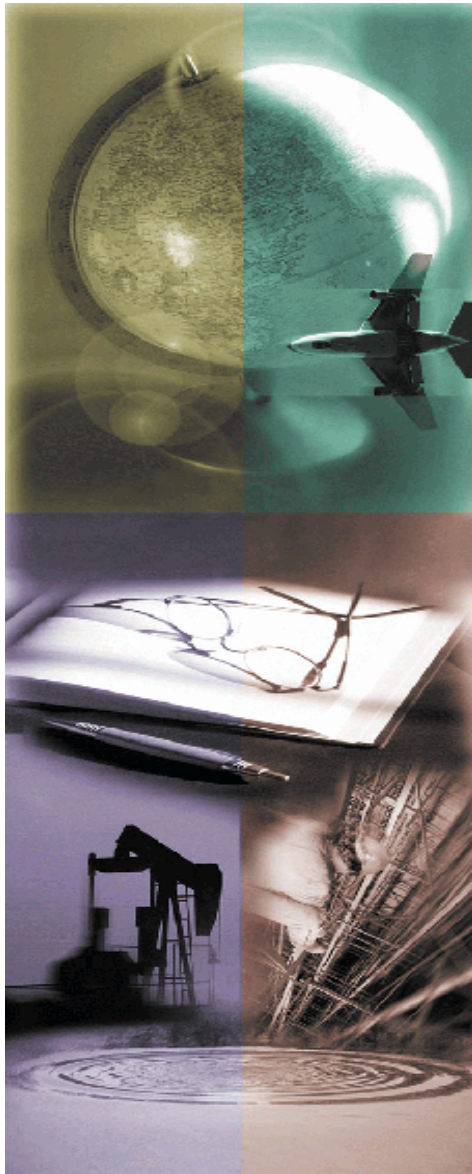
Alex de Tocqueville (1805-59)

Environmental Law – Company Fined \$1.25M for Unregistered Fuel Additives

A Nevada company, Biofriendly Corporation, has been fined \$1.25 million by the Environmental Protection Agency (EPA) for manufacturing and selling an unregistered fuel additive. The company claimed its additive, Green Plus, reduced diesel fuel emissions. The sales took place in Texas and California between September 2002 and May 2006. Biofriendly stopped selling the additive domestically when it discovered it was in violation. The Clean Air Act requires that, before they can be sold in the U.S., fuels and fuel additives meet stringent environmental standards. These standards ensure that the fuels and additives do not increase emissions of harmful air pollutants or interfere with vehicle emission-control devices.

Environmental Law – Amended FIFRA Rules Go Into Effect

On December 29, 2008, amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) went into effect. The EPA made the following amendments to the pesticide container and containment storage regulations: extended labeling compliance date from August 17, 2009 to August 17, 2010; changed the phrase “sold or distributed” to “released for shipment” with respect to all the compliance dates; provided exception to the label



requirements; allowed waivers for certain label requirements; defined “released for shipment” in 40 CFR § 152; and made various minor editorial changes. These amendments provide for the safe storage and disposal of pesticides and are meant to protect human health and the environment. Among those that might be affected are pesticide formulators, agrichemical dealers, independent commercial blenders and custom blenders.

Litigation – Arbitration’s e-discovery Conundrum

As reported in *The National Law Journal*, the litigation avoidance advantages often associated with arbitration are dwindling due to an increased use of litigation discovery techniques. Arbitrators, commonly having the discretion to decide the scope and breadth of discovery, are pressured to submit to broad discovery techniques, similar to litigation under the federal rules, in the face of not being selected for a future case. In an age of electronics, the immense volume of e-materials potentially discoverable in a particular case can quickly defeat the traditionally cited purposes of arbitration, such as reduced cost, increased efficiency, and less time consumption. This has led many to outline in detail the scope of discovery in their arbitration agreements, adopt new arbitration protocols, and even switch to mediation settings.

Environmental Law – ExxonMobil to Invest in Cleaner Diesel, Pay Fines

The January edition of *Environmental Protection News* reported that ExxonMobil will increase the supply of cleaner-burning diesel by 6 million gallons per day. This will be accomplished through a \$1 billion investment in three refineries in Baton Rouge, Louisiana; Baytown, Texas; and Antwerp, Belgium. The announcement, made December 16, noted that improvements at the refineries are expected to be completed by 2010.

On December 17, the U.S. Department of Justice made its own announcement, reporting that ExxonMobil has agreed to pay \$6.1 million in civil penalties stemming from the violation of a 2005 court-approved Clean Air Act agreement. This is in addition to the settlement’s existing requirements of civil penalties totaling \$7.7 million and Supplemental Environmental Projects totaling \$6.7 million.

Environmental Law – What is the Status of the Clean Air Interstate Rule?

As reported in the *Burns & McDonnell Benchmark*, on July 11, the entire Clean Air Interstate Rule (“CAIR”), 70 Fed. Reg. 25,165 (May 12, 2005), was vacated and remanded to the Environmental Protection Agency (EPA), leaving utilities in a state of uncertainty regarding emissions controls. CAIR would have required affected states to reduce NO_x and SO₂ levels under a system of cap-and-trade provisions, but its absence may require some 400 would be CAIR-affected electric generating units to use a best available retrofit technology (BART) analysis to achieve emissions reductions as required under previously promulgated rules. In the absence of CAIR, the NO_x State Implementation Plan Call and Trading program will continue.

Carl Weilert, *What is the Status of the Clean Air Interstate Rule?*, BURNS & MCDONNELL BENCHMARK, 2008 No. 4, at 3.

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Environmental Law – Water Pollution – Bad For the Environment, Bad For the Pocketbook

Polluted water is not only bad for the environment, it is also bad for your pocketbook. In a report published in the November 12 online issue of *Environmental Science & Technology*, researchers at Kansas State University say that water pollution costs government agencies, drinking water facilities, and individual Americans approximately \$4.3 billion annually. This represents the increased cost to treat drinking water, lost revenue from recreation areas at polluted lakes, and drops in home values at waterfront property, among others. The researchers found that the majority of the pollution came from nitrogen and phosphorous. Both of these are used in fertilizers and enter lakes and streams as runoff from fields.

Environmental Law – New Changes to Spill Prevention Regulation, Highlights

The Environmental Protection Agency (EPA) has amended the Spill Prevention, Control, and Countermeasure (SPCC) rule, effective February 3, 2009. 73 Fed. Reg. 74236 (Dec. 5, 2008). Specifically, the SPCC final rule:

- exempts hot-mix asphalt (HMA), pesticide application equipment and related mix containers, and heating oil containers at single-family residences from the SPCC rule;
- amends the definition of “facility” to clarify the existing flexibility associated with describing a facility’s boundaries and amends the facility diagram requirement to provide additional flexibility;
- defines “loading/unloading rack” to clarify the equipment subject to the provisions for facility tank car and tank truck loading/unloading racks, as well as amends the provisions for this equipment;
- provides streamlined requirements for a subset of qualified facilities;
- amends the general secondary containment requirement to provide more clarity;
- exempts non-transportation-related tank trucks from the sized secondary containment requirements; amends the security requirements;
- amends the integrity testing requirements to allow greater flexibility in the use of industry standards;
- amends the integrity testing requirements for containers that store animal fats or vegetable oils and meet certain criteria;
- streamlines a number of requirements for onshore oil production facilities; and
- exempts underground oil storage tanks at nuclear power generation facilities.

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EPA's stated goal in formulating the SPCC amendments is to increase clarity, to tailor requirements to particular industry sectors, and to streamline certain requirements for those facility owners or operators subject to the rule in the hope of providing greater protection to human health and the environment. In general, those facilities subject to the SPCC regulation could be *any* facility having an aggregate oil (petroleum and non-petroleum based) storage capacity greater than 1,320 U.S. gallons in above-ground containers or greater than 42,000 U.S. gallons in completely buried tanks.

Subject facilities have until **November 20, 2009** to amend their spill-prevention plans. **Farms** have until **November 20, 2010** and *certain oil producers* have until **November 20, 2013**.

Estate Planning Resolutions for 2009

This time of year most people experience a burst of motivation to improve themselves or their lives. Losing weight, getting in shape, quitting smoking and spending more time with family and friends are common list toppers. Sadly, due to a lack of willpower, resolutions are notoriously short lived, if not completely forgotten by February. If you are finding it hard to stay on that new diet or exercise regime, here are some simple estate planning resolutions that *will* improve your life, your family's life and give you peace of mind. Best of all, these goals are easily attainable with the help of a qualified attorney, CPA and insurance agent.

- 1. Do you have a trust and a will and a nomination of guardians for your young children?** Get one of each. Contact a qualified attorney and get the ball rolling. It is painless.
- 2. If you have a trust and a will, review your choice of fiduciaries.** Your fiduciaries are the various people you named to be the trustee of your trust, executor of your will, and guardian of your children. Take a look at your documents and see if these people are still appropriate to carry out the duties required of them. If your documents are two years old or older, chances are you may be more comfortable with different choices.
- 3. If you have a trust, have you transferred the title of your assets into the name of the trust?** You should deed any real estate, including mineral interests, into the trust, and change the name on your bank and brokerage accounts to the name of the trust. If you have not done this you will be losing one of the most important benefits of a trust – avoiding probate. If you don't have the time or knowledge to do these things, hire your attorney to do it.
- 4. Have you thought about who will run your business after you?** If you are the owner and you don't know, you are not doing your job. Establish a plan to have the business appraised, have your attorney create a buy/sell agreement for you and your partner(s), and/or purchase a life insurance policy for your family so they are taken care of upon your death. This is essential if the business will be worthless without you.
- 5. When did you last review your life insurance coverage?** You need to consider how your family will replace your income. For larger estates, the life insurance should be in an irrevocable trust for the benefit of your family so the life insurance proceeds are both income tax free and estate tax free. If you feel your insurance agent only tries to sell

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insurance products and does not understand estate planning, get a new agent. Or, ask your attorney or CPA, professionals with no vested interest in the advice, for their views on proper coverage.

6. **How about your disability coverage?** Statistics show that during your working years you are more likely to be disabled than you are to die. Check your company's policy and if it is not adequate, talk to your life insurance agent about disability coverage.
7. **Speaking of disability, do you have an Advanced Directive for Health Care?** Not only does this document outline your wishes upon your end of life, it also gives a trusted person the power as your agent to make health care decisions if you are not able to do so.
8. **Are you making annual gifts to your children and grandchildren?** Thirteen thousand dollars a year can be given away by each person to any other person. The person need not be a family member. So, a husband and wife can give \$26,000 a year to each child, in-law, and grandchild. That adds up, and if you need to reduce your estate for estate tax purposes, annual gifts should be one of your tools.
9. **If you make gifts to charity, make the gifts with appreciated stock.** That gives you a double benefit – a full tax deduction for the value of the stock, and no capital gains tax on the appreciation.
10. **Have you written out directions to your loved ones regarding the distribution of your personal property?** You may think it would never happen in your family, but you would be surprised how many people, in the midst of grief, get out of joint about grandmother's diamond ring, or dad's desk. Save your family the pain and spell out your wishes.

Remember, an estate plan is not a once in a lifetime experience. It must be reviewed and modified as your life changes. Births, deaths, divorces, increases or decreases in net worth – all these things and more are relevant in evaluating your plan. So keep that resolution to become physically fit. Just also resolve to get your life affairs in order. It will provide you with peace of mind and is a great service to your family and business associates.

For additional information on the above, please contact Leanne Barlow.

Environmental Law – Vapor Intrusion: What You Don't See Can Hurt You

As reported in the *Burns & McDonnell Benchmark*, gases traveling through soil may also travel through the foundation of buildings and homes, potentially causing harm to inhabitants. Toxic substances such as diesel fuel, metal-finishing chemicals, pesticides, and dry cleaning solvents contain volatile organic compounds (VOC) or metals that can contaminate soil, groundwater, and building air if not handled properly after their useful life is over. Depending on the specific materials, volumes and concentrations, vapor plumes from these contaminants can travel considerable distances, entering buildings through cracks or leaks in the foundation. There are no federal regulations governing vapor intrusion to date, but some states have issued regulations.

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The good news is that testing and, if necessary, treatment of vapor intrusion can be practical and cost-effective.

What You Don't See Can Hurt You, BURNS & MCDONNELL BENCHMARK, 2008 No. 4, at 17.

Environmental Law – New Rules For Feedlots

The Environmental Protection Agency (EPA) has finalized a new rule aimed at preventing runoff from concentrated animal feeding operations (CAFO), or feedlots, a rule that the EPA is calling a “zero-discharge” standard. The rule will require CAFOs to submit a nutrient management plan (NMP) as part of its Clean Water Act permit application. In the past CAFOs were required to have a NMP in place for safely managing manure and other waste, but did not have to submit the plan with its application. Under the new rule, once the plan is reviewed, it will be incorporated as enforceable terms of the permit.

The rule not only applies to new applicants, but also to CAFO owners and operators that discharge to streams, lakes, and other waters. CAFOs that do not discharge or propose to discharge and who demonstrate their commitment to pollution prevention can apply for certification as zero-dischargers.

Nanotechnology – Two Nanoparticles Require Notice

Two nanoparticles have been included in a new Environmental Protection Agency (EPA) rule that will impose significant restrictions of their use. These substances will be listed under the Toxic Substances Control Act (TSCA) and will be subject to premanufacture notices (PMN). The two substances are: siloxane modified silica nanoparticles and siloxane modified alumina nanoparticles.

Under the PMN, the generic use of both substances is as an additive and, as such, the EPA has not determined that the proposed manufacture, processing, or use of the substances may present an unreasonable risk. However, the EPA says that manufacture, processing, or use of the substances as a powder, or their use other than described in the PMN, requires the use of impervious gloves or a NIOSH-approved respirator and may cause serious health effects. Anyone who intends to manufacture, import, or process any regulated substance for any activity that is designated as a significant new use must notify the EPA at least 90 days before beginning that activity.

Environmental Law – EPA Issues First RMP Fine

The Environmental Protection Agency (EPA) has issued its first Risk Management Program (RMP) fine. The Hershey Creamery Co., a central Pennsylvania ice cream manufacturer, pled guilty to a felony violation of the Clean Air Act (CAA), was fined \$100,000, and given one year of probation. All of this stems from Hershey's failure to develop and implement a RMP for its use and storage of anhydrous ammonia. Hershey had twice certified to the EPA that it had developed such a plan.

The CAA requires that companies that use or store certain types of chemicals develop a RMP plan. The EPA says that RMP plans are an essential aspect of a company's environmental

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stewardship. The plans protect worker safety, minimize the risk of chemical releases, and provide prevention and emergency response plans.

According to a disclaimer on its website, Hershey Creamery is not affiliated with Hershey Chocolate. But who would have ever thought that the first RMP crime would be by a foods company? A broad look at compliance should be on every organization's menu.

Environmental Law – Independent Scientific Reviews and the Endangered Species Act

On December 11, 2008, the Bush administration released a final rule eliminating the requirement of independent scientific reviews of proposed federal projects. Such reviews were formerly required to determine whether proposed projects would imperil protected plants and animals. Many have criticized this rule as a back-door method to secure permission to drill in Alaska and ignore the polar bear, due to the administrative procedures employed. The proposed version of the rule was released on August 15. Initially only 30 days were allotted for public comment; however, this was extended a further 30 days. President-elect Obama has indicated he would reverse the final rule, but that requires a lengthy rule-making process.

The final rule, which will take effect on **January 15, 2009**, clarifies several definitions, provides assistance as to when consultation under Section 7 (which pertains to interagency consultations) is necessary, and establishes time frames for the informal consultation process. Federal agencies must consult NOAA Fisheries, a federal agency under the Department of Commerce, before conducting any activities that may affect a listed species. Federal agencies are required under Section 7 to carry out programs with regard to the conservation of threatened and endangered species and to ensure that their activities do not threaten the existence of a listed species or modify or destroy their habitat. The final rule alters the informal consultation process in Section 7(a)(2) by adding the language “if a federal agency terminates consultation at the end of the 60-day period, or if the Service’s extension period expires without a written statement whether it concurs with a federal agency’s determination provided for in paragraph (a) of this section, the consultation provision in Section 7(a)(2) is satisfied.” *See 73 Fed. Reg. 76272.*

In addition to changes to Section 7, the definition of “biological assessment” was modified to require federal agencies to provide a guide or statement of the relevant consultation information submitted in lieu of a biological assessment. The final rule also further clarifies the distinction between direct and indirect effects, noting that only direct effects with a causal connection are significant for formal consultation requirements. The drafters wish to make clear that although the final rule removes the independent review process, it in no way allows for agencies to adversely affect listed species or critical habitats.

For more information on this Final Rule, see 73 Federal Register 76272.

Litigation – Some Companies Still Lacking Crucial E-Discovery Policies

As reported in *The National Law Journal*, a study conducted by Deloitte Financial Advisory Services (FAS) has indicated that 30% of companies still have no policies for preserving evidence for litigation discovery, even though it has been two years since new federal e-discovery rules

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were promulgated. Jeff Seymour, a principal at FAS, commented that it is surprising that many companies have not yet developed policies for preserving documents subject to e-discovery, since the process is relatively inexpensive.

This is a huge issue, with implications not only in litigation, but in compliance, and failure to meet the requirements may result in adverse actions in civil litigation as well as the potential for criminal violations.

The cost of preparing a policy and implementing and maintaining a vibrant records program is significantly less than the cost of not preparing one.

Environmental Law – Homeowner Death Linked to Pesticide Use

An Administrative Complaint has been issued by the Environmental Protection Agency (EPA) to Swanson's Pest Management, Inc. (Swanson) relating to the use of the pesticide Conquer Residential Insecticide Concentrate and ULD BP-100 Contact Insecticide. In the complaint, the EPA notes its review of Swanson's actions showed that Swanson "failed to properly ventilate the homes prior to the occupants re-entering, improperly applied Conquer as a space spray, and improperly applied Conquer at nearly three times the allowable rate." The victim, a woman in Florence, Oregon, passed away after she entered her home two and a half hours after the pesticides were applied by Swanson. Despite the seriousness of the offense, federal pesticide law limits the penalty sought by the EPA to \$4,550.

Employment Law – New Form I-9 Released

The federal government has released new Form I-9 requirements, which employers must comply with for every new hire to verify identity and eligibility for employment in the United States. Employers may no longer accept expired documents to verify employment eligibility, and the types of documents permissible for verification have been reduced.

Employers should be aware that risk of audit has increased due to a renewed emphasis on illegal immigration, and that failure to comply with new Form I-9 requirements could result in substantial legal and financial consequences.

Employers must use the new form for any individual hired or re-verified on or after February 2, 2009. Note that the new form is not yet available on the IRS website, but we hope that it will be in advance of the February 2nd start-of-use date.

Litigation – "Tweets" Could be Trouble

As reported in *The National Law Journal*, "tweets" or short, social blog responses on a free blogging service known as Twitter can be subpoenaed in a lawsuit. In other words, "tweets" are subject to e-discovery rules in the same fashion as letters, e-mails, or text messages.

Treat all electronic communications, including responses or posts on any blog or free website such as Facebook or MySpace, as discoverable.

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Environmental Law – WWI Smelter Due \$6.6M Cleaning

The Environmental Protection Agency (EPA) and the Oklahoma Department of Environmental Quality (ODEQ) have chosen a \$6.6 million plan for the cleanup of waste from the Tulsa Fuel and Manufacturing zinc smelter, which operated from 1914-1925. Tulsa Fuel and Manufacturing is west of old U.S. 169 about 1-1/4 miles south of Collinsville. The cleanup involves the removal of roughly 200,000 cubic yards of smelter waste from the land and is expected to take many years.

Environmental Law – Johnson Matthey Gets \$3M Fine

Pennsylvania corporation Johnson Matthey, Inc. (JMI) must pay \$3 million in a criminal fine for its felony violation of the Clean Water Act at its Salt Lake City precious metals refining facility. The corporation violated the Clean Water Act by knowingly rendering inaccurate a reporting method required to be maintained. The former general manager and plant manager of the facility have each pled guilty and have been sentenced for a felony violation of making false statements to government officials.

Environmental Law – Entergy Corp. v. Riverkeeper: Meaning of “Best”

On December 2, 2008, the Supreme Court heard the appeal of *Entergy Corp. v. Riverkeeper*. This case involves interpretation of section 316(b) of the Clean Water Act (CWA) which provides that the location, design, construction, and capacity of cooling-water intake structures reflect the “best technology available” (BTA). The BTA standard is not defined. Initially, in 1976, the Environmental Protection Agency (EPA) did not use cost-benefit analysis when applying the section. In 2004, the EPA provided existing facilities with compliance alternatives to BTA after conducting a cost-benefit analysis of compliance options. In 2006, Entergy Corp. raised arguments regarding the EPA’s use of cost-benefit analysis. Entergy Corp. asserted that the language used in the CWA illustrated that the BTA was to be adopted regardless of the costs associated. This has raised other arguments regarding the practicality of such a finding.

In oral arguments, several analogies were used. Chief Justice Roberts noted if one were talking about purchasing the best television available, the best television could be the “fanciest.” The attorney representing the petitioners noted that if one wanted to use the BTA to winterize a \$400 lawnmower, the BTA would not be a \$500 chemical. Justice Alito provided another analogy relating to the purchase of a home, noting that the best home available may be outside the price range of the buyer, but it would still be available. It will certainly be interesting to see how the Supreme Court rules when their final decision becomes available.

A full transcript of oral arguments is available at -

http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-588.pdf

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