

July 15, 2009

*The politicians don't just want your money. They want your soul. They want you to be worn down by taxes until you are dependent and helpless. When you subsidize poverty and failure, you get more of both.*

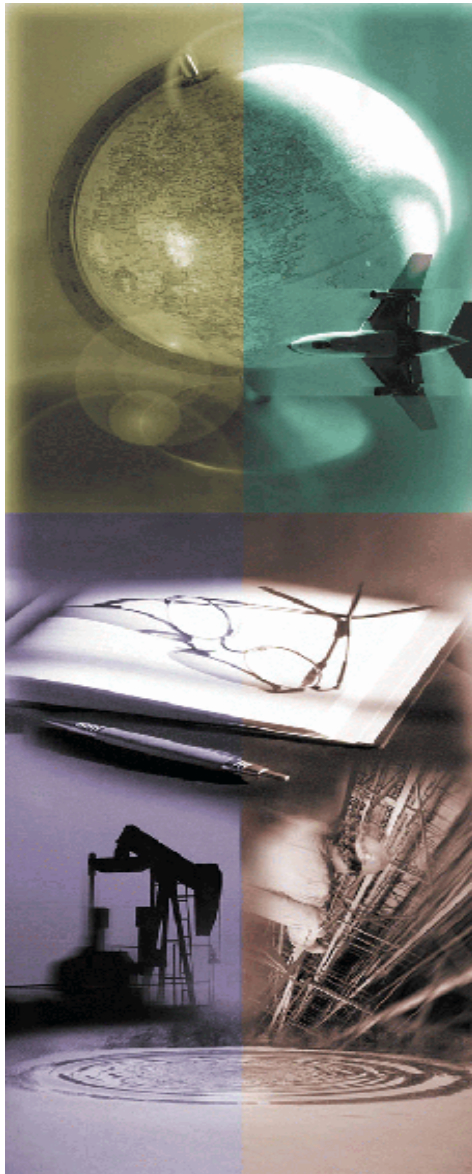
*James Dale Davidson*

### PCB Violations Net \$1.2 Million Plus 3-Year Removal Program

Alleged violations of the Toxic Substances Control Act for polychlorinated biphenyls (PCBs), including improper PCB disposal, storage, marking, recordkeeping, and marketing at several of Memphis Light, Gas & Water Division (MLGW) facilities resulted in \$1.2 million in civil penalties and a requirement to conduct a Supplemental Environmental Project (SEP). This is the highest penalty in this type of enforcement action that includes a SEP. Under the SEP, MLGW will voluntarily accelerate a PCB removal program that within three years will significantly reduce the quantity of electrical and other equipment that contain quantities of PCBs.

### Ethanol's Use Outstrips Plans to Deal with its Risks

Increased American production of ethanol-blended gasoline in order to move the nation toward energy independence and away from imported fuels has increased risks for some as the flammable liquid is transported through residential neighborhoods. This increased risk has forced officials to begin piecing together new emergency plans designed to respond to potential fires. Some accidents have already occurred, such as the derailment of 23 Norfolk Southern Corp. tank cars in New Brighton, Pennsylvania, in 2006 that sparked a fire that burned for 48 hours and forced



evacuation of seven blocks. Local firefighters must be properly trained and equipped to fight ethanol fires, since they cannot be extinguished with traditional foams. The slow response of officials, coupled with the aggressive tactics of railroad companies, have complicated safety efforts around the country.

### EU Agency Reports GHG Emissions Down 9.3%

As reported in *Environmental Protection News*, according to the European Union's (EU) greenhouse gas (GHG) emissions inventory report, EU-27 overall domestic emissions are down 9.3 percent below 1990 levels. Generally, a falling trend in emissions has existed since 2005, which has largely been due to lower use of fossil fuels in sectors responsible for some of the largest sources of GHG emissions in the EU, namely households and services. Further, the year 2006-2007 brought warmer weather and higher fuel prices, which in turn contributed to a decrease in emissions, particularly in the household sector. Officials are anxious to continue this falling trend in emissions.

*The GHG emissions inventory report is produced by the European Environment Agency (EEA) and it contains key information about Member State emission allowances under the Kyoto Protocol and emissions trends for the main sectors.*

### U.K. Expert: U.S. Not Losing Nuclear "Race"

As reported in *Environmental Protection News*, professor and U.K. energy expert Stephen Thomas claims that lobbyists and utility company officials in the United States have their facts wrong about the status of European nuclear power. Thomas stated that nuclear power in France, Finland, and Great Britain is so plagued with problems that it can hardly be referred to as a "nuclear renaissance" as some U.S. officials contend. According to Thomas, the reality in Europe is that nuclear power is afflicted with the same kind of regulatory and financial uncertainty as it is in the United States.

### Supreme Court Pits Business Against the Environment

The recently-completed term of the Supreme Court of the United States has raised some interesting questions as to whether the Roberts Court will bring a new era of pro-business interests decisions against environmental interests. *The National Law Journal* reports environmental interests were 0-for-5 in the most recent term:

- In *Entergy Corp. v. Riverkeeper*, the Court ruled 6-3 for electric utilities, agreeing with a utility argument that the Clean Water Act authorized the use of cost-benefit analysis in regulating structures for water cooling intake.
- In *Coeur Alaska v. Southeast Alaska Conservation*, the Court ruled 6-3 in favor of an argument that the Army Corps of Engineers had the authority to issue permits for dumping dredge or fill dirt into a lake in Alaska without meeting stringent EPA permits.
- In *Burlington Northern Railway/Shell Oil Co. v. U.S.*, the Court ruled 8-1 that joint and several liability is not mandated in every cost recovery case under the federal Superfund law, narrowing liability for companies who sold the product that may have polluted a given site.

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- In *Winter v. NRDC*, the Court ruled 6-3 to lift an injunction that required the Navy to conduct an environmental impact statement and limited the use of sonar near marine mammal life.
- In *Summers v. Earth Island Institute*, the Court ruled 5-4 that certain environmental groups lacked standing to challenge U.S. Forest Service regulations exempting the service from notice, comment, and appeal processes for fire rehabilitation and salvage timber sales.

Critics allege that the Court, which normally has a more even-handed result with cases dealing with business and environmental interest conflicts over the course of a given term, chose these five cases because they were all victories for environmental interests at the lower appellate levels; others point out that five cases is hardly a representative test sample. Four of the five cases reversed decisions of the 9<sup>th</sup> Circuit Court of Appeals, which traditionally has a more solicitous approach to environmental groups.

Interestingly, these cases came to fruition during the Bush administration, and thus many dealt with conflicts of executive power versus legislative mandates; if anything, this might signal a more expansive view of executive power, rather than a particular statement about the Court's views on environmental issues. While these cases certainly are not a trend, they send a signal – but what kind of signal will remain something of interest.

### Trucking Industry Concerned with Cap and Trade

The recent global warming legislation passed by the U.S. House of Representatives that created a “cap and trade” provision for green house gas emissions, has created concerns within the trucking industry. The American Trucking Association (ATA) recently sent a letter to House Energy and Commerce Committee Chairman Henry Waxman expressing “strong reservations” about the legislation. In particular, the ATA believes that mobile sources of emissions, like trucks, should be regulated differently than traditionally stationary sources of emissions. The ATA's letter can be read at: <http://www.oktrucking.org/index.php?page=blog>.

### Mexico Gets Gas Masks

According to *Environmental Protection News*, personal protective suits, multi-gas meters, and other related hazardous materials response equipment were transferred to Mexico's Civil Protection Agency for use in Ciudad Juárez through a collaborative agreement between the Environmental Protection Agency and U.S. Northern Command under the U.S.-Mexico Border 2012 Program. The goal of the program is to strengthen border hazardous material response capabilities by building capacity for response to environmental pollution incidents on the Mexico side of the border region.

The program allows governments on both sides of the border to have a response to environmental contingencies should any develop. The program also includes training for Mexican personnel for chemical accidents, spills, and natural disasters. The U.S. Northern Command was created in 2002 to provide command and control of Department of Defense efforts and to coordinate support of civil authorities in defending, protecting, and securing the U.S. and its interests; the Border 2012 program works to protect environmental and health interests on both sides of the U.S.-Mexico border.

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## Privacy Laws May Prevent Electronic Health Records

Congress recently allocated \$19 billion to the American Reinvestment and Recovery Act of 2009 with the intention of accelerating the use of “certified electronic health record (EHR) technology.” EHR would be used by hospitals and physicians that provide Medicare and Medicaid services and would replace the paper and computer files used by most hospitals and physicians. The system would include all of a patient’s medical history as well as laboratory test results, medications prescribed, and much more. EHR technology also promises to reduce waste, fraud, duplication, and medical and medication errors. However, this type of system may not be possible because of federal and state laws protecting a patient’s privacy.

For example, federal law protects the identity, diagnosis, and treatment of an individual undergoing treatment in an alcohol or drug abuse program that is regulated or directly or indirectly assisted by a federal program. There are also a number of state laws protecting the confidentiality of sensitive health data. For instance, states have statutes in place to protect the unauthorized disclosure of an individual’s HIV test results to a third party in a manner that identifies the individual.

In addition, there is the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. 1320d-1320d-8 (HIPAA), which requires health care providers and other entities to make a reasonable effort to limit the amount of protected health information to only the amount necessary to accomplish the intended task. More recently, the Health Information Technology for Economic and Clinical Health Act, H.R. 1, §§ 13101-13424 (HITECH Act), was passed and when it becomes effective in 2010, will expand the privacy protections allowed under HIPAA.

Currently there are several proposed solutions for this problem, such as obtaining patient authorization for every release of confidential information or putting firewalls in place to limit unintended disclosures. These solutions, however, are not likely to be feasible, and a better solution is still needed if EHR is to become a reality.

## Mail and Wire Fraud Law – “Honest Services” Provision

The “honest services” provision, 18 U.S.C. § 1346 of the federal anti-fraud statute, makes it a crime to deprive citizens or corporate shareholders of honest government services and has been used to convict numerous state and local government officials. Under the honest services provision, which is part of federal mail and wire fraud law, it is assumed that public officials owe the general public a duty to provide honest services. If an official fails to provide these services and does so by using the mail, a telephone, or even e-mail, it becomes a crime. Conviction under this statute carries with it a penalty of up to 20 years in prison.

In the 1970s and 80s, federal prosecutors were allowed to extend mail and wire fraud law to include schemes to defraud individuals of intangible rights of honest services and impartial government. Then, in 1987, the Supreme Court rejected the “honest services” theory in *McNally v. U.S.*, stating that the interpretation of the mail fraud statute only applied to the protection of property rights. Congress, in response to the ruling, modified mail and wire fraud law to include the honest services provision, and effectively overruled the *McNally* case, ensuring that mail and wire fraud law would again include a citizen’s rights to honest services by a public official.

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Despite the seemingly straightforward wording of the statute, courts have struggled with it since its enactment. There are differing opinions on how to interpret the statute among the Circuit Courts, and judges have become increasingly critical of the statute, stating that it is vague and does not provide the defendant with sufficient notice. In May of 2009, the Supreme Court decided to grant *certiorari* in a case involving the honest services provision. While it is unclear how the Supreme Court will rule, many attorney experts expect the Court to rule narrowly on the application of the law.

In 2007, the honest services provision was used to convict Conrad Black, a newspaper magnate, for fraud. Black was accused of pocketing money from bogus non-compete agreements. However, the U.S. Supreme Court has recently ruled that it will review Black's 2007 conviction, which will result in the honest services provision being used much more carefully in the meantime.

There is controversy surrounding the provision, and it is believed that the Supreme Court will focus on whether or not a private individual must have intended to deprive a victim of property or money in order to be convicted. Black's counsel argues that Section 1346 is vague, which is proven by the differing appellate courts' interpretation of the law. Solicitor General Elena Kagan, however, argues that the law is clear and that the appellate courts' decisions differ only slightly.

In February, Justice Scalia dissented when the Supreme Court declined to hear another honest services case. In his dissent, Scalia stated that the circuits are clearly divided on how to interpret the provision, and there is a need for the Supreme Court to provide clarification. While it is unclear how the Supreme Court will rule in the Black case, it is clear that the provision will be used sparingly or avoided altogether until the Supreme Court reaches a decision.

### Environmental Law – Fluorescent Recycling Enforced

Fluorescent lamps have become increasingly popular with the rising costs of energy. They use less energy than a traditional incandescent bulb, last 13 times longer, and because they require less energy, significantly reduce the amount of greenhouse gas from power plants. However, fluorescent lamps contain mercury, a naturally-occurring toxin that affects the nervous system. When a fluorescent lamp is in use or is intact, the mercury contained inside cannot escape, but when disposed of improperly, the lamps can be broken or crushed, releasing mercury into the atmosphere. The U.S. Environmental Protection Agency, along with other agencies, recommends that all fluorescent lamps be recycled. The bans on the disposal of fluorescent lamps vary from state to state, with some states requiring lamps used in large quantities to be recycled and others requiring that all fluorescent lamps be recycled. In the past year, the EPA has penalized numerous groups, including Macy's Inc. in New York City, for improper disposal of fluorescent lamps.

### Employment Law – Department of Labor Turns Up the Heat

In April, a federal judge ordered a California-based cleaning company to pay \$227,791 in post-judgment interest plus \$2,400 in daily fines for failing to follow a 2007 order to pay nearly \$3.5 million in back wages to employees. In response, U.S. Secretary of Labor Hilda Solis stated that,

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“The Department of Labor will not hesitate to take action to ensure workers receive the compensation they have worked hard for and earned.” Accordingly, employers should prepare for more aggressive wage and hour enforcement.

### Employment Law – The End of Veterans’ Preference?

In August, the U.S. Court of Appeals for the Federal Circuit will hear a challenge to the “reconstruction” process frequently used by the Merit Systems Protection Board as a remedy under the 1998 Veteran Employment Opportunities Act (VEOA). The reconstruction process is used by the Board when an agency is in violation of the veterans’ preference, which allows all veterans the legal right to a federal job. Typically, when an agency is in violation of veteran’s preference, a judge can order retroactive reinstatement and compensation for lost wages and benefits. However, when the Board orders an agency to reconstruct the hiring for the particular job in question, it allows the agency to decide not to hire anyone for the position, effectively undoing any orders from a judge allowing for reinstatement and compensation. Many believe that the reconstruction process is a violation of veteran’s rights under VEOA, which was designed to give veterans a mechanism for enforcing their preference rights.

Under VEOA, a veteran must file a complaint with the Department of Labor within a certain amount of time. If the department finds that the complaint has merit, the veteran must then try to settle the situation with the offending agency. Typically, the agency is not interested in settling, and the veteran then has to take the complaint to the Merit Systems Protection Board. Many complaints never reach the Board level because veterans are either intimidated by the Board’s rules and regulations or cannot afford the time and money to pursue the complaint. In addition, the complaints that do reach the Board are rarely granted relief. In 2006, 92 VEOA appeals were received and only five of the cases were granted relief.

The appeal to be heard in August will be the first time the Federal Circuit has considered whether the Board’s reconstruction process is a proper interpretation of the VEOA’s remedy provision. The provision provides that the Board shall order an agency to comply and award compensation if it finds that an agency has violated a right. Many feel that the reconstruction process is contrary to the plain words of the statute.

### False Claims Act – Amendments Expand the Range of Conduct Subject to Liability

On May 20, President Obama signed into law the Fraud Enforcement and Recovery Act of 2009 (FERA). The bill includes several provisions that expand the range of conduct subject to liability under the federal False Claims Act and its *qui tam* provisions. FERA’s amendments address several recent court decisions that many have felt undermine the effect of the False Claims Act. Congress was particularly concerned with *Allison Engine Co. v. U.S. ex rel. Sanders*, 128 S. Ct. 2123 (2008), *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), and *U.S. ex rel. DRC Inc. v. Custer Battles LLC*, 376 F. Supp.2d 617 (E.D. Va. 2006).

Under the old version of the False Claims Act, liability under 18 U.S.C. § 3729(a)(2) extended to those who knowingly made or used or caused to be made or used a false or fraudulent claim in an effort to get the false or fraudulent claim approved or paid for by the government. In *Allison*

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*Engine*, the court found that this requirement absolved a defendant that made a false claim to a private entity and did not intend the government to rely on the statement as a condition of payment. Congress overturned the *Allison Engine* decision by modifying the intent requirement which now only requires that a statement be “material” to a false claim, regardless of a specific intent to be paid by the government.

Also, the old version of the False Claims Act, strengthened by *Totten*, required that the claim be presented to an employee or officer of the U.S. Government for payment (§ 3729(a)(1)(A)). FERA modifies the definition of a claim by including liability for false claims presented to contractors, grantees and other non-governmental recipients. Congress also addressed their concern with the *Custer Battles* decision by expanding the definition of a claim. Under *Custer Battles*, the court ruled there was no liability for presenting a false claim for Iraqi funds administered by the U.S. because the government did not have title to the money. FERA now extends liability to include situations, such as this, in which the money being sought by the false claim is to be spent or used on the government’s behalf and the government either provided the money or will reimburse a portion of it.

Finally, FERA broadened the liability for reverse false claims. When a person uses a false claim to avoid paying money to the government, it is considered a reverse false claim. FERA, unlike the old version of the False Claims Act, provides liability for the knowing avoidance of an obligation to pay money to the government, even if no false claim exists.

Aside from changing the liability provisions of the False Claims Act, Congress also amended who is allowed to authorize a civil investigative demand. Under the old False Claims Act, only the attorney general could approve a civil investigative demand, which resulted in very few demands being issued. FERA now allows the attorney general to delegate the authority to approve civil investigative demands to a designee. The attorney general or designee can also share information under a civil investigative demand with realtors.

## Global Warming

Click link to read a very interesting article on global warming.

<http://cei.org/rcandtestimony/2009/06/25/proposed-ncee-comments-draft-technical-support-document-endangerment-analy>

## Environmental Update

Information presented by regulators at the June Environmental Federation of Oklahoma meeting made several trends and issues very clear:

- EPA is scrutinizing state enforcement activities. This means that not only will EPA be demanding that states take enforcement action, but that fines and penalties will also be subject to review, criticism, and potentially override.
- EPA is scrutinizing permits issued by states with delegated program authority. This means that some permits may be reopened by the state or even “federalized.”
- New regulations are coming and the federal oversight role may overwhelm the reasonable and practical approaches which at least some states have interposed.

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- More permits will be subject to public comment.
- New “excess emission” rule is in place. Major changes in reporting, applicability in maintenance activities (will now need to be included as emissions in permits), and in defenses in enforcement are included. This last element is of particular concern, as excess emissions will be deemed a Clean Air Act violation and the defense will really apply to penalty rather than determining if a violation has occurred. There are still provisions for malfunctions, shutdown, and startup processes where an excess emission is not necessarily a violation as long as the requisite reporting is completed.

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