McAfee & Taft
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REGULATED INDUSTRIES LEGAL INFORMATION NEWS & COMMENTARY

INSIDE THIS ISSUE

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President proposes new hardrock mining fees in economic growth plan

BY HEIDI SLINKARD BRASHER

In September 2011, President Obama issued his plan for economic growth and deficit reduction ("**Living Within our Means and Investing in the Future, The President's Plan for Economic Growth and Deficit Reduction**"). Within this plan, he advocated for savings through reduction of certain mandatory programs generally not appropriated on an annual basis. One area the president identified for reform was the Abandoned Mine Lands (AML) program, despite its inclusion in the president's failed budget request for FY2012.

Currently, the coal industry is assessed a fee which finances abandoned coal mine cleanup. While that fee has been used to fund state and tribal reclamation grants, additional funding was authorized by Congress in 2006 for states and tribes which had completed mine reclamation work; it was up to those entities to determine what to finance with these additional unrestricted federal funds.

The president seeks to reduce the unrestricted federal funding in the following manner:

- Terminate payments to states and tribes that have completed their reclamation work;
- Distribute unrestricted funds based on the priority level of the coal AML site; and
- Distribute unrestricted funds based on the priority level of the hardrock AML sites while also establishing a parallel AML program for abandoned hardrock sites financed by a new AML fee on hardrock mineral production similar to the one already in effect for the coal industry.

While the president's plan seems to shuffle allocation of the unrestricted funds according to priority levels, he purports this plan will save $1.3 billion over the next decade without explanation of the source of the savings and while creating the need for a new AML Advisory Council to review AMLs and rank them by priority level to determine the order of distribution of funding.

Hardrock mining industry opposition exists, not only for the assessment of a new production fee to fund the proposed hardrock AML program (designed to parallel the coal AML fee), but also because of the uncertainty associated with the lack of information about the amount of the fee and the source of the purported savings through reallocation of the currently unrestricted funds.

In addition to establishing an AML fee on hardrock mining and redistributing the unrestricted funding discussed above, the president also seeks to establish a leasing program for hardrock production on federal lands of at least 5% of gross proceeds – half would go to the states and half to the federal government – with an exemption provided for current mining claims which could elect to convert to the new leasing program. While the industry is not in favor of the new fees, particularly on gross, as opposed to net, proceeds, the president claims this hardrock leasing program will save an additional $36 million over the next decade.

The next step for these proposals is the Joint Selected Committee on Deficit Reduction.

Additional proposals affecting regulated industries

Additional White House proposals of interest to our regulatory clients include:

- **Reduction in subsidies to crop insurance companies** by lowering the rate of return on investment from 14% to 12%, reducing the cap on administrative expenses to the 2006 level, lowering the insurance company's reimbursement for the premium on catastrophic coverage policies, reduction of premium subsidies to farmers who are subsidized over 50% and a reduction in private land conservation funding to farmers, ranchers and forest owners.

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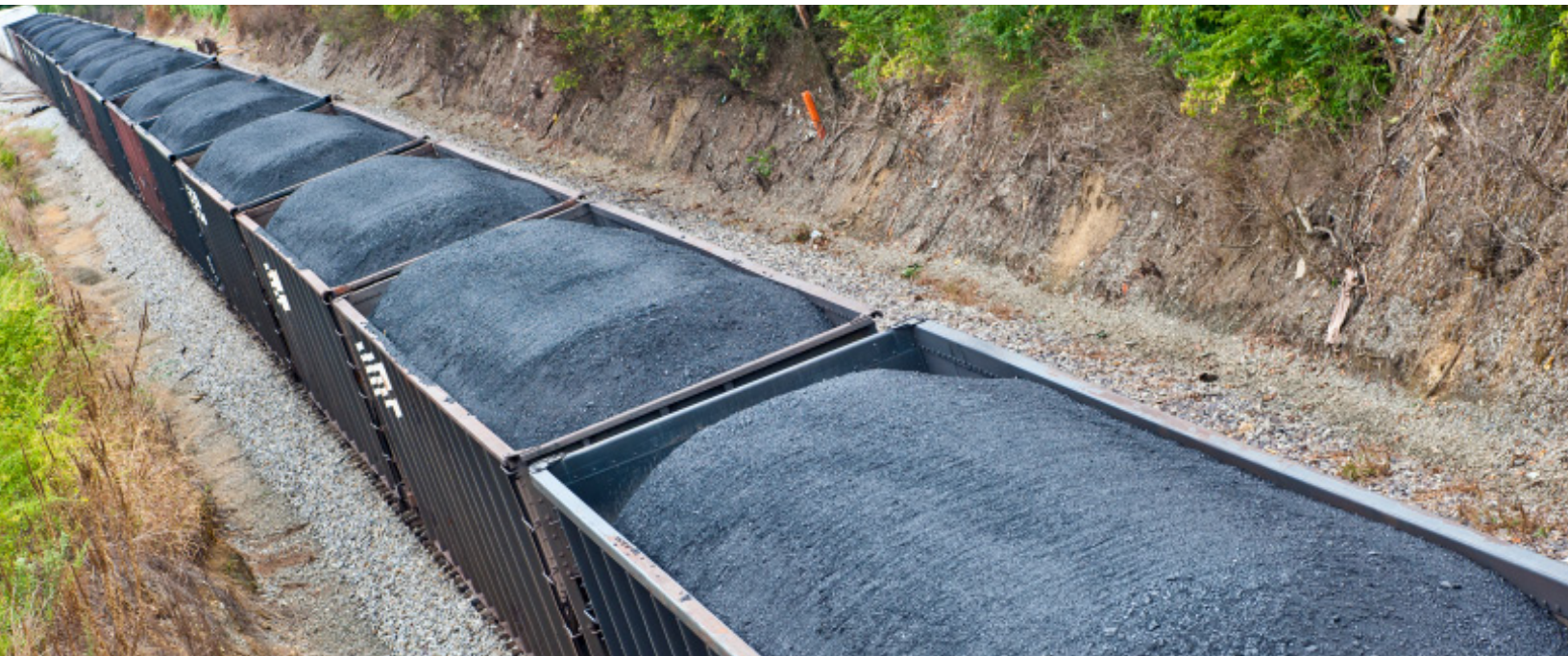
- **Increases in pesticide user fees** by increasing the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) user fees and starting to collect Federal Food, Drug and Cosmetic Act (FFDCA) fees to establish and reasses pesticide tolerances in 2012 (the collection of which has previously been blocked through 2012).
- Lift the Toxic Substances Control Act (TSCA) statutory cap on **chemical manufacturers' pre-manufacture user fees.**
- Collect fees from users beginning in 2014 to establish a Resource Conservation and Recovery Act **(RCRA) electronic manifest system.**
- Reauthorize a 15-year special assessment (similar to one which expired in 2007) from **domestic nuclear utilities** to cover the decontamination and decommissioning of the Department of Energy's gaseous diffusion plants.
- **Repeal the mandatory oil and gas research and development program** in 2012, two years before it was set to sunset in 2014, causing private companies to fund such research and development projects.
- Additional **Department of the Interior fees** for use of federal lands and water, including:
  - » Non-producing oil and gas fee of $4/acre
  - » The cost of administering leases will be shared with the states who also share in the proceeds
  - » Establish hardrock mining lease program (as discussed above)
  - » Increase the federal share on geothermal leases to 50/50 with the states
  - » Repeal oil and gas fee prohibition and mandatory permit funds for development on federal lands
  - » Reauthorize the recently expired Federal Land Transaction Facilitation Act (FLTFA) of 2000
- **Eliminate oil and gas tax preferences** by repealing as of 2013 those available to fossil fuels including:
  - » The use of percentage depletion with respect to oil and gas wells
  - » The ability to claim domestic manufacturing deduction against income derived from production of oil and gas
  - » The expensing of intangible drilling costs
  - » Deduction for costs paid and incurred for any tertiary injectant used as part of a tertiary recovery method
  - » The exception to passive loss limitations provided to working interests in oil and gas production
  - » Two-year amortization of independent producers' geological and geophysical expenditures, instead of allowing amortization over the same seven-year period as for integrated oil and gas producers
- **Repealing the following tax preferences for coal industry** to begin in 2013:
  - » Expensing exploration and development costs
  - » Percentage depletion for hard mineral fossil fuels
  - » Capital gains treatment for royalties
  - » The ability to claim domestic manufacturing deduction against income derived from the production of coal and other hard mineral fossil fuels
- **Reinstatement of Superfund taxes** to fund the cleanup of hazardous waste sites, beginning 2013 through 2021 including the following:
  - » A 9.7 cent-per-barrel excise tax on crude oil and imported petroleum products
  - » An excise tax on hazardous chemicals listed in 26 USC § 4661 of the Internal Revenue Code at rates between 22 cents and $4.87 per ton
  - » An excise tax on imported substances used with listed hazardous chemicals as feedstock
  - » Corporate environmental income tax imposed as 0.12% of amount by which the modified AMT income of the corporation exceeds $2 million

These proposals, and several more, are set to go to the Joint Selected Committee on Deficit Reduction as part of the American Jobs Act, Mandatory Savings, Health Savings, and Tax Reforms included in the President's Plan for Economic Growth and Deficit Reduction. Keep your eyes open for Congressional debate and action on these White House proposals.



European Union enforces carbon emissions cap-and-trade on U.S. airlines

BY MARY ELLEN TERNES

On October 6, 2011, in response to a challenge led by the Air Transport Association of America (ATA) (Case C-366/10), the advocate general of the European Court of Justice, Julian Kokott, issued a preliminary finding that the European Union's Emission Trading System (ETS), specifically Directive 2008/101/EC, imposing carbon dioxide emissions caps on international airlines "is compatible with all the provisions and principles of public international law referred to in the request for preliminary ruling," including the 1944 Convention on International Civil Aviation (Chicago Convention), the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol), and the 2007 Air Transport Agreement (Open Skies Agreement). While not a final ruling of the European Court of Justice, its 13-member judges are expected to give weight to AG Kokott's opinion.

On October 24, the U.S. House of Representatives passed a bill that would exclude U.S. airlines from the EU ETS. In response, on October 25, the EU announced its resolution to enforce the ETS emission limits on U.S. airlines flying to and from the EU. The ETS forces airlines to participate in the cap-and-trade program and reduce emissions, whether through reducing fuel use, utilizing cleaner fuel, or paying for their emissions. U.S. airlines flying to and from the EU would be subject to the program once it goes into effect on January 1, 2012.

McAfee & Taft attends 2011 International Pipeline Security Forum

BY VICKIE BUCHANAN

McAfee & Taft attorneys Chris Paul and Vickie Buchanan attended the 2011 International Pipeline Security Forum held in Ottawa, Canada, on October 25-26. This was the sixth consecutive year our counsel have participated in this invitation-only event.

The Forum, first held in 2005, is a conference coordinated by the United States and Canada under the Smart Border Declaration of December 2001 and the Security and Prosperity Partnership of March 2005. The purpose of the Forum is to bring key stakeholders from both sides of the border together to discuss critical energy infrastructure protection and emergency management issues specifically relating to interests and concerns with respect to pipeline security and vulnerabilities. The venue of the Forum alternates annually between the United States and Canada with the U.S. Department of Homeland Security, Transportation Security Administration, and Natural Resources Canada hosting the event. Attendees include senior representatives and officials from U.S. and Canadian pipeline-related associations, pipeline owners and operators, and contractors and representatives from government, security intelligence and law enforcement agencies.

» **Information about security-related issues available at www.mcafeetaft.com**

» **Security updates will be published in future editions of RegLINC**

EEOC sues trucking company for taking action to keep alcoholic driver off the road

BY CHRIS PAUL

The U.S. Equal Employment Opportunity Commission filed a lawsuit on August 16, 2011, claiming that Old Dominion Freight Line discriminated against self-admitted alcoholic Charles Grams by removing him from his position as a driver and offering him a non-driving position even if he completed a substance abuse counseling program. The EEOC claims the company is in violation of the Americans with Disabilities Act.

The EEOC says alcoholism is a recognized disability under the ADA and wants the company to reinstate Grams and another driver to their driving jobs and provide them with back pay, compensatory and punitive damages, and compensation for lost benefits. The EEOC is also seeking to block the company's alcohol-related policy which bans any driver who self-reports alcohol abuse from driving again.

According to the EEOC, Grams informed the company in June 2009 that he believed he had an alcohol problem. He had no driving incidents. In accordance with its policy, the company suspended him from driving, which paid him about $22 per hour, including benefits. As required by U.S. Transportation Department regulations, Grams met with a substance abuse professional who notified the company that Grams would participate in an outpatient treatment program and could return to work. Old Dominion, obviously concerned with public safety, offered Grams a part-time position as a dock worker when it became available. Grams decided he couldn't afford treatment because he believed he would have to pay for it upfront and be reimbursed by his insurance company only if it approved the treatment. Old Dominion ultimately fired him in July for job abandonment.

The EEOC contends that the company's actions deprived Grams and other affected drivers of "equal employment opportunities and otherwise adversely affects their status as employees, in violation of the ADA." According to the EEOC, "Grams is a qualified individual with a disability under ADA … who can perform the essential functions of a driving position." *Equal Employment Opportunity Commission v. Old Dominion Freight Line, Inc.*, Case No. 2:2011cv02153, Arkansas Western District Court.

» **Next up - Exxon forced to give Captain Hazelwood anoter tanker?**

DHS publishes ammonium nitrate security program notice of proposed rulemaking

BY VICKIE BUCHANAN

In 2008, Congress directed the Department of Homeland Security (DHS) to "regulate the sale and transfer of ammonium nitrate by an ammonium nitrate facility … to prevent the misappropriation or use of ammonium nitrate in an act of terrorism." Ammonium nitrate is a chemical manufactured in varying concentrations and is primarily used as a component part of agricultural fertilizer, in some first aid products (e.g., cold packs), and in explosives often used in the mining and construction industries. Ammonium nitrate was the primary explosive used by Timothy McVeigh in the bombing of the Murrah Federal Building in Oklahoma City on April 19, 1995.

In October 2008, DHS issued an Advance Notice of Proposed Rulemaking introducing the Ammonium Nitrate Security Program (ANSP). On August 3, 2011, DHS published the Notice of Proposed Rulemaking regarding the ANSP. The ANSP is proposed with the goal of reducing the likelihood of a terrorist attack through the misuse of ammonium nitrate by:

- Creating a registration program for purchasers and sellers of ammonium nitrate requiring purchasers and sellers to register with DHS and be evaluated against the Terrorist Screening Database (TSDB). After clearance through the TSDB, purchasers and sellers will be issued a registration number which will be required to authorize participation in the purchase, sale or transfer of ammonium nitrate
- Establishing procedures for reporting a theft or loss of ammonium nitrate
- Requiring businesses to keep records of all ammonium nitrate transactions for two years, and authorizing DHS to conduct inspections of records to ensure compliance with the ANSP

DHS is conducting several public meetings to receive comments on the ANSP. In addition, written comments may be submitted to DHS by December 1, 2011. Comments may be submitted online through the Federal eRulemaking Portal, or mailed to the Docket Management Facility. All comments should reference docket number 2008-0076.

» **More information on the Ammonium Nitrate Security Program**

SIDEBAR

Border 2020 draft open for comment

The EPA has provided notice of the draft "Border 2020 Program" – an eight-year, bi-national agreement between Mexico and the United States created through the efforts of both countries, the 26 U.S. border tribes, the indigenous Mexican communities, and the environmental agencies of each of the 10 U.S. border states. The program, developed under the La Paz Agreement, and following the 10-year Border 2012 agreement, is designed to "protect the environment and public health in the U.S.-Mexico border region, consistent with the principles of sustainable development."

The goals of the Border 2020 Program are:

1. Reduce conventional air pollutant and GHG emissions
2. Improve access to clean and safe water
3. Materials management and clean sites
4. Improve environmental and public health through chemical safety
5. Enhance joint preparedness for environmental response
6. Compliance assurance and environmental stewardship

Public comment will be accepted by the EPA until November 30, 2011.

» **Draft document**

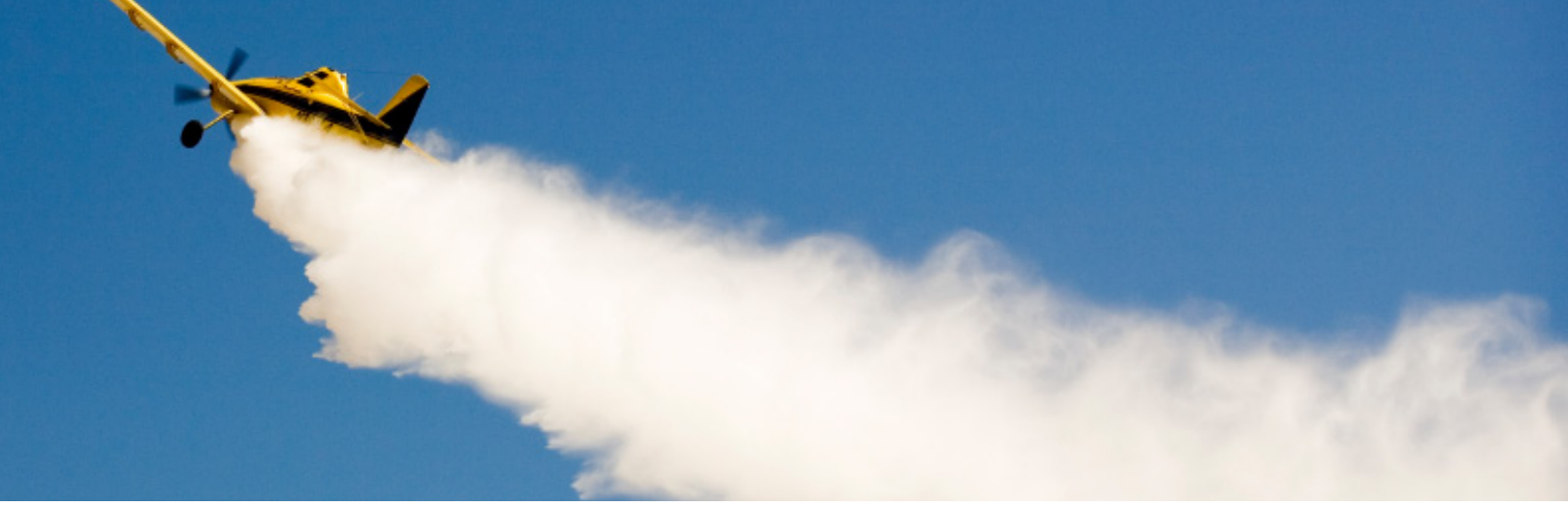
» **Additional information**

Fatal explosion at Bartlett Grain Company

On Saturday, October 29, 2011, an explosion at a grain elevator owned by Bartlett Grain Company in Atchison, Kansas, killed six people and sent two others to the University of Kansas Hospital with burn injuries. The explosion occurred while workers were loading a train with corn.

According to the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA), explosions at grain elevators are a leading hazard. When grain is handled at elevators, dust particles are created and float around inside the storage facility. The finer the grain dust particles, the greater its volatility, with dust particles from corn being the most dangerous. OSHA reports that more than 600 explosions have occurred at grain elevators over the past six decades resulting in more than 250 fatalities and more than 1,000 injuries. In 2010, there were grain explosions or fires in Louisiana, South Dakota, Illinois, Ohio and Nebraska.

OSHA is conducting an investigation to determine the cause of the explosion and whether Bartlett Grain Company violated any applicable laws or regulations.



Comment deadline extended for new oil and gas air emission regulation

BY JARED BURDEN

The Environmental Protection Agency has recently extended the deadline for comments to its proposed oil and gas air emission standards. The agency originally set a deadline for October 31, but have announced that they will now accept comment submissions until November 30. The new regulation's complexity and breadth has necessitated the extension as the rule has drawn scrutiny from both industry and environmental groups. A final rule is now expected to be issued on April 3, 2012.

The EPA is bound to promulgate the regulation under a consent decree that it entered with WildEarth Guardians. WildEarth brought suit against the EPA for its failure to review emissions standards for oil and gas facilities, activities that are mandated by the Clean Air Act. In response to the suit, the EPA agreed to a wholesale rethinking of emissions standards for volatile organic compounds, hazardous air pollutants, and other byproducts of oil and gas extraction, transmission and storage.

A copy of the proposed rule can be found in the *Federal Register*, Volume 76, 52738. The rule fills more than 100 pages in the *Register*. The entire oil and gas industry is implicated, including onshore and offshore operations, liquid natural gas operations, and distribution and transportation activities. The proposed regulation would revise NSPS and NESHAP standards for these operations, including providing standards for previously unregulated emissions sources such as glycol dehydrators and storage vessels without the possibility of flash emissions. These new rules are designed to be comprehensive, and each industry participant should review it carefully to determine how it will affect their operations.

To submit comments for the new rule, follow the directions at **www.regulations.gov.** Alternatively, comments can be mailed to the EPA. Be sure to include the docket number, EPA-HQ-OAR-2010-0505. Comments can be made anonymously.

EPA's long-delayed permits for pesticides sprayed near waters of the U.S. effective October 31, 2011

BY MARY ELLEN TERNES

Pesticide application is regulated pursuant to the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). However, the Sixth Circuit Court of Appeals required the EPA to develop a separate general pesticide NPDES permit with its 2009 decision, *National Cotton Council, et al., v. EPA*, 553 F.3d 927 (6th Cir. 2009). Pursuant to the Sixth Circuit's decision, the EPA developed its Pesticide General Permit (PGP) pursuant to the Clean Water Act's National Pollutant Discharge Elimination System (NPDES), regulating pesticide application near waters of the United States; however, its effective date has been continually delayed. After two and a half years of extensions, and continued attempts at legislative relief, this new general permit will become effective on October 31, 2011, in Oklahoma and New Mexico, as well as other states where the EPA has permitting authority. The PGP covers discharges to waters of the U.S. from the application of biological pesticides or chemical pesticides that leave a residue when the pesticide application is for: pest control of mosquitoes or other flying insects; control of aquatic weeds or algae; control of aquatic nuisance animals, e.g., fish, lampreys and mollusks; and control of forest canopy pests. The general permit is not available for use with respect to discharges into waters designated as impaired by that pesticide or its products of degradation, waters designated as Tier 3 for antidegradation purposes, or with respect to discharges covered by another NPDES permit.

» **Review the PGP and its history**

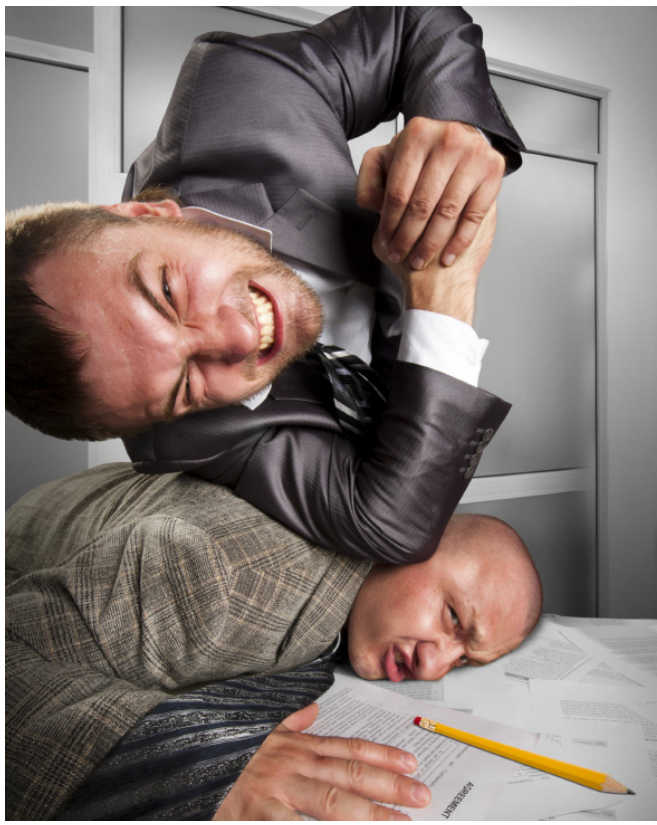
OSHA directive addresses workplace violence

BY VICKIE BUCHANAN

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) recently issued a directive on "Enforcement Procedures for Investigating or Inspecting Workplace Violence Incidents." Workplace violence is any act or threat of aggression, physical assault, harassment, intimidation, or other threatening behavior that occurs at a worksite. It ranges from threats and verbal abuse to physical assaults and even homicide. Broad definitions of workplace violence also includes acts of sabotage on worksite property.

Workplace violence is a recognized occupational hazard in some industries and environments, including in healthcare, social service settings and late-night retail establishments. OSHA reports that approximately 2 million American workers are victims of workplace violence every year, with many incidents going unreported. The Bureau of Labor Statistics Census of Fatal Occupational Injuries reports that of the 4,547 fatal workplace injuries that occurred in the U.S. in 2010, 506 were workplace homicides. Overall, homicide is currently the fourth-leading cause of fatal occupational injuries and is the leading cause of death for women in the workplace.

The directive is OSHA's first publication regarding its policies and procedures for investigations and inspections of workplace violence incidents. The directive applies "OSHA-wide" and became effective on September 8, 2011. The directive is intended to be guidance for OSHA inspectors; however, it also provides general recommendations to employers in all industries and administrative workplaces. Though **OSHA does not have a workplace violence standard, but employers may be found in violation of the "General Duty Clause" (Section 5(a)(1) of the Occupational Safety and Health Act) if they fail to furnish their employees with a place of employment free from "recognized hazards."** To that end, the directive encourages employers to "use any one or combination of the following abatement methods to materially reduce or eliminate the hazard of workplace violence:"



- Conduct a workplace violence hazard analysis:
  - » Provide employees with training on workplace violence
  - » Determine whether physical changes to the workplace setting or facility could eliminate or reduce security hazards
- Implement engineering controls:
  - » Install and maintain alarm systems and other security systems such as panic buttons, noise devices, cell phones or private channel radios and provide a reliable response system to these alarms
  - » Install closed-circuit recording on a 24-hour basis for high-risk areas and curved mirrors at hallway intersections or concealed areas
  - » Install bright lighting indoors and outdoors
  - » Limit access by keeping doors and windows locked
  - » Maintain all vehicles used in the field
- Implement administrative controls:
  - » Alter or implement work practices and policies to reduce exposure to security hazards
  - » Establish liaisons with local law enforcement and state prosecutors
  - » Report incidents of violence and train employees to report threats of violence, and maintain records of all such reports
  - » Advise employees of procedures for requesting police assistance or filing charges when assaulted; assist employees in doing so, if necessary
- Provide management support during emergencies and respond promptly to all complaints:
  - » Establish a trained response team to respond to emergencies
  - » Utilize properly trained security officers to handle aggressive behavior
  - » Follow written security procedures
- Develop a written, comprehensive workplace violence prevention program, which should include:
  - » A policy statement regarding potential violence in the workplace and assignment of oversight and prevention responsibilities
  - » A workplace violence hazard assessment and security analysis
  - » Development of workplace violence controls and abatement methods
  - » A recordkeeping system designed to report violent incidents and to be utilized by employers in recognizing incident trends
  - » Development of a workplace training program addressing workplace violence incidents
  - » Annual review of the workplace violence prevention program
  - » Development of procedures and responsibilities to be taken in the event of a violent incident in the workplace
  - » Development of a response team responsible for immediate care of victims, re-establishment of work areas and processes, and providing debriefing sessions with victims and co-workers.

» **Additional information here at OSHA's new web page devoted to preventing workplace violence**

Waste company and its executives criminally indicted for unlawful disposal of waste

BY HEIDI SLINKARD BRASHER

Englewood, Colorado-based Executive Recycling, Inc., a registered large quantity handler of universal waste, was indicted by a federal grand jury for environmental crimes and fraud on September 15, 2011. *U.S. v. Executive Recycling, Inc.*, 11-CR-0037-WJM, (D. Col. Sept. 15, 2011). The owner and CEO, Brandon Richter, and former VP of Operations Tor Olson were also indicted for numerous criminal acts, including wire and mail fraud, destruction of records, exportation contrary to law, and failure to file notification of intent to export hazardous waste.

Among the environmental wastes handled by the recycling company were cathode ray tubes (CRTs), which are found in glass displays of electronics such as televisions and computer monitors. Because of their lead content, particular laws and regulations are in place to address appropriate disposal of CRTs. However, according to the indictment, instead of paying the fees associated with disposal of the waste - and contrary to its advertisement to its customers – Executive Recycling sold the CRTs to overseas brokers, making more than $1.8 million. The waste was repeatedly exported to China and others in violation of federal law.

The 16-count indictment resulted from a 30-month, international investigation involving the United Sates, Canada and Hong Kong, and could lead to a $250,000 fine and two years in prison for each of the named executives and a $500,000 fine for a criminal conviction of the corporation.

This is just one recent example of the government's willingness to pursue a criminal action for violation of environmental laws – and demonstrates further its willingness to indict both the entity and the individuals involved.

EPA lifts EPCRA 313 administrative stay on hydrogen sulfide TRI reporting

BY MARY ELLEN TERNES

The EPA has lifted its 1994 administrative stay of the hydrogen sulfide (H2S) reporting requirements pursuant to the Emergency Planning and Community Right to Know (EPCRA) Section 313 Toxic Release Inventory (TRI) regulations. See 76 *Fed. Reg.* 64022 (Oct. 17, 2011). Hydrogen Sulfide was added to the agency's EPCRA Section 313 list of toxic chemicals on December 1, 1993. However, on August 22, 1994, the EPA issued an administrative stay in order to evaluate human health effects and exposure analysis issues. 59 *Fed. Reg.* 43048. The EPA has completed its evaluation, including comments received in response to EPA's February 26, 2010, notice of "Intent to Consider Lifting Administrative Stay." 75 Fed. Reg. 8889. Specifically, the EPA has determined that hydrogen sulfide causes chronic health effects in laboratory animals at concentrations as low as 20 parts per million, and due to its toxicity, significant adverse effects in aquatic organisms. With the lifting of this stay, facilities releasing hydrogen sulfide and otherwise subject to the EPCRA reporting requirements will need to include releases of hydrogen sulfide for the first time in their July 1, 2013, reports for the reporting year 2012.

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