

Legal Update on Environmental Issues

DAYTON BAR ASSOCIATION

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Presented by:

Daniel A. Brown, Esq.

Sebaly, Shillito + Dyer

A Legal Professional Association

1900 Kettering Tower

Dayton, Ohio 45423

(937) 222-2057 direct

(937) 222-6554 fax

dbrown@ssdlaw.com

www.ssdlaw.com

Overview of Federal Environmental Laws

- Clean Air Act (“CAA”)
- Clean Water Act (“CWA”)
- Resource Conservation and Recovery Act (“RCRA”)
- Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”)
- Emergency Planning and Community Right to Know Act (“EPCRA”)
- Safe Drinking Water Act (“SDWA”)
- Toxic Substances Control Act (“TSCA”)
- Occupational Safety and Health Act (“OSHA”)

Clean Air Act (“CCA”)

- Enacted in 1970, amended in 1977 and 1990
- Ambient Air Quality Standards (“NAAQS”)
 - Sulfur Dioxide (SO₂)
 - Carbon Monoxide (CO)
 - Nitrogen Oxides (NO_x)
 - Volatile Organic Compounds (VOCs)
 - Ozone (O₃)
 - Lead (Pb)
 - Particulate Matter < 10 microns in size (PM10)

CCA

- State Implementation Plans (“SIP”)
- New Source Performance Standards (“NSPS”)
- Stationary Source Permits
- National Emission Standards for Hazardous Air Pollutants (“NESHAPS”)
 - 1990 Amendments to the CAA listed 189 chemicals
 - Industry specific
 - Maximum Achievable Control Technology (“MACT”)

Clean Water Act (“CWA”)

- Enacted in 1972, amended in 1977 and 1987
- Original goal was achieve “fishable and swimmable waters by 1985
- Water Quality Standards
- Effluent Discharge Limitations
 - By specific pollutants
 - By industry category

CWA

- National Pollutant Discharge Elimination System (“NPDES”) permits
- Responses to spills of oil and hazardous substances
- Storm Water
- Wetlands protection

Resource Conservation and Recovery Act (“RCRA”)

- Enacted in 1976, amended in 1984
- Regulates the generation, treatment and disposal of “solid waste” and “hazardous waste”
- Identification of hazardous wastes
 - Listed hazardous wastes
 - Characteristic hazardous wastes
 - Material Safety Data Sheets (“MSDS”)
- Hazardous Waste Manifests

RCRA

- Treatment Storage and Disposal (“TSD”) facility requirements
- Used Oil Recycling - limited exception
- Solid Waste Landfill construction requirements
- Ground water monitoring
- Hazardous Waste Injection Wells
- Underground Storage Tanks (“USTs”)
 - Enforced in Ohio by Bureau of Underground Storage Tank Regulations (“BUSTR”)

Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”)

- Adopted in 1980, amended in 1986
- Goal is to clean up abandoned hazardous waste sites
- National Priorities List (“NPL”)
 - Lists the contaminated sites scheduled for cleanup in order of priority
 - By Nov. 2001, construction was completed on 804 of the 1,485 sites on the NPL
 - 6 million people live within 1 mile of an NPL Site

CERCLA

- National Contingency Plan (“NCP”)
 - EPA’s blueprint for responding to spills of hazardous substances and oil
- Average NPL site cleanup = \$30 million
- Potentially Responsible Parties (“PRPs”)
 - Owners and operators of the site
 - Persons who arranged for the disposal of hazardous substances at the site
 - Transporters who chose the site for disposal

CERCLA

- NPL Sites in the Dayton area
 - Arcanum Iron & Metal Site – Arcanum
 - Cardington Road Landfill – Dayton
 - Miami County Incinerator Site - Troy
 - Mound Research Labs - Miamisburg
 - North Sanitary Landfill - Dayton
 - Powell Road Landfill – Dayton
 - Tremont City Landfill - Springfield
 - United Scrap Lead Site - Troy
 - Wright Patterson Air Force Base - Dayton

Emergency Planning and Community Right to Know Act (“EPCRA”)

- Part of the 1986 amendments to CERCLA
- Goal is to inform the public about the risks related to business use of chemicals in the area
- Material Safety Data Sheets (“MSDS”)
- Emergency Planning
- Emergency Reporting of Releases
- Toxic Chemical Release Reporting - (Form R)
- More than 600 toxic chemicals that must be reported under TRI.

Safe Drinking Water Act (“SDWA”)

- Enacted in 1974, amended in 1986 and 1996
- Primary Drinking Water Standards
 - 16 inorganic chemicals (metals)
 - 54 organic chemicals (VOCs)
 - 3 radionuclides
 - 6 microorganisms

SDWA

- Maximum Contaminant Level (“MCL”)
- Secondary Drinking Water Standards
 - to protect the “public welfare” from aesthetic problems
 - including: color, corrosivity, iron, odor, pH, total dissolved solids
- Sole Source Aquifers - special protections

Toxic Substances Control Act (“TSCA”)

- Enacted in 1976
- Regulates the production, use and distribution of toxic chemicals
- Premanufacture Notice (“PMN”) required within 90 days of producing new chemical
- Testing requirements
- Research and Development (“R&D”) exemption
- PCB phase-out of all production by 1979
- Asbestos removal from school buildings

Occupational Safety and Health Act (“OSHA”)

- Enacted in 1970
- Designed to protect employees from exposure to occupational risks
- Some occupational risks involve exposure to hazardous chemicals

OSHA

- OSHA Hazard Communication Program
 - Chemical manufacturers and importers must:
 - evaluate chemicals produced
 - ensure that the products are properly labeled
 - develop MSDS for each hazardous chemical
 - supply each customer with an MSDS for each product

OSHA

- OSHA Hazard Communication Program
 - Employers must:
 - implement a written hazard communication program
 - explain risks of chemical exposure to their employees
 - train employees on how to properly handle chemicals in the workplace

OSHA

- Permissible Exposure Limit (“PEL”)
- Asbestos Handling Standards
 - adopted in 1994 to protect maintenance workers from exposure to friable asbestos fibers
 - initial exposure assessment
 - employee training
 - warning signs
 - notification to contractors working on site

Recent Developments- Air Pollution

- Ozone Transport
 - New EPA regulations require a 75% cut in nitrogen oxide (NO_x) emissions from power plants in the midwestern and southern states to protect air in the northeastern states.
 - The ruling will require installation of expensive pollution control equipment such as scrubbers, starting in 2003, in order to meet the new 0.08 part per million air quality standard for ozone.

Recent Developments- Air Pollution

- Ozone Transport
 - The ruling will most directly affect power production costs in coal burning states like Ohio, Indiana, Illinois, Michigan, Pennsylvania, Kentucky, and Tennessee.
 - Ohio required to submit a revised State Implementation Plan (“SIP”) to ensure the NO_x reductions.
 - Estimated cost of compliance is \$950 million.

Recent Developments- Air Pollution

- PM 2.5 Standards
 - Beginning in the year 2002, EPA will begin enforcing new regulations that established air quality standards for emissions of PM 2.5 (particulate matter with a diameter of 2.5 microns or more) to replace the current PM10 standards.
 - Recent studies show that the health effects from breathing industrial dust and soot are more severe than previously thought, including an increased risk of heart attacks.
 - 2.5 microns = $1/30^{\text{th}}$ of the width of a human hair

Recent Developments- Air Pollution

- PM 2.5 Standards
 - Currently, all of Ohio's 88 counties are in compliance with the NAAQS for PM10. Under the new regulations for PM 2.5, Ohio estimates that only 4 counties will be in compliance.
 - The consequences could include restrictions on new development and expansion of industry in those counties that are not in compliance
 - The regulations are currently being challenged in several court cases by industry groups.

Recent Developments - Water Pollution

- Storm Water Discharge Permits.
 - Under new rules issued in December 1999, industrial facilities are exempted from permitting if they certify that no industrial materials are exposed to storm water.
 - Industrial materials include material handling equipment or activities, industrial machinery, raw materials, intermediate products, by-products, final products, or waste products.
 - No exposure may be achieved by sheltering industrial materials from rain, snow, and runoff.
 - Construction activities are not subject to the exclusion.

Recent Developments - Water Pollution

- Nationwide Permits (“NWP”)
 - In December 1999, the U.S. Army Corps. of Engineers established new regulations controlling discharges into wetlands, floodplains, ditches and other waters of the United States.
 - Pre-construction notification (“PCN”) is now required for losses of 1/10 acre of wetlands in residential, institutional, and commercial construction projects and for losses of 1/4 acre of wetlands in other projects.
 - Some NWPs prohibit the loss of more than one acre of wetlands. Most NWPs require compensatory mitigation for the loss of wetlands.

Recent Developments - Water Pollution

- New Nationwide Permits.
 - NWP 39 - Residential, Commercial and Industrial Developments.
 - NWP 41 - Reshaping Existing Drainage Ditches.
 - NWP 42 - Recreational Activities.
 - NWP 43 - Storm Water Management Facilities.
 - NWP 44 - Mining Activities.

Recent Developments - Water Pollution

- Modified Nationwide Permits.
 - NWP 3 - Maintenance.
 - NWP 7 - Outfall Structures and Maintenance.
 - NWP 12 - Utility Line Activities.
 - NWP 14 - Linear Transportation Crossings.
 - NWP 27 - Stream and Wetland Restoration Activities.
 - NWP 40 - Agricultural Activities.

Recent Developments – Water Pollution

- SWANCC v. U.S. Army Corps. (Feb. 2000)
 - U.S. Supreme Court decided that the CWA protection of “navigable waters” does not extend to isolated wetlands.
 - In response, many states passed their own wetlands protection acts.
 - State of Ohio passed a law protecting isolated wetlands in July 2001.
 - Filling of isolated wetlands in Ohio now requires an Ohio EPA permit.

Recent Developments – CERCLA

- Valleycrest Landfill - Dayton
 - 27,000 drums removed from Area 5.
 - Landfill gas extraction system installed.
 - Drum removal in Area 1 scheduled to begin in December 2001.
 - More than \$31 million already spent on drum removal and investigation costs.

Recent Developments – CERCLA

- Tremont City Landfill - Springfield
 - 8 acre barrel fill area contains 52,500 drums of liquid industrial waste.
 - 22 acre former oil recycling area
 - 50 acre landfill contains residential and industrial waste.
 - USEPA is urging “barrel fill” PRPs to perform a Remedial Investigation/Feasibility Study (“RI/FS”) on the entire site.
 - Landfill PRPs to be notified soon.

Recent Developments - Hazardous Waste

- Superfund Recycling Equity Act of 1999
 - Intended to correct one of the unintended consequences of CERCLA that discourages legitimate recycling.
 - Under new CERCLA Section 127, persons “arranging for the recycling of recyclable materials” are not liable as generators or transporters under CERCLA Section 107.
 - “Recyclable material” is defined to include scrap paper, scrap plastic, scrap glass, scrap textiles, scrap rubber (other than whole tires), scrap metal, spent lead-acid, nickel cadmium and other spent batteries, and minor amounts of materials incident to and adhering to the scrap metal as a result of normal and customary use.

Recent Developments - Hazardous Waste

- Superfund Recycling Equity Act of 1999
 - *For recycling transactions that occurred before the Act was passed (November 1999)*, a person is not liable for participating in a recycling transaction unless the person “knew or should have known” that the recycling facility was actually disposing of the materials as opposed to recycling them.
 - *For recycling transactions that occurred after passage of the Act*, a person claiming the benefits must have taken reasonable care to determine the environmental compliance status of the recycling facility prior to sending recyclable materials there.

Recent Developments - Hazardous Waste

- Disposal of Fluorescent Lamps.
 - Effective, January 6, 2000, spent hazardous waste lamps will no longer be regulated as hazardous waste, but instead will be regulated under EPA's universal waste rule, which imposes less stringent storage and disposal requirements.
 - The regulations include a distinction between small quantity and large quantity handlers of universal waste.
 - Destination facilities remain subject to all applicable hazardous waste permitting and management requirements of RCRA.

Recent Developments - Brownfields

- “Brownfields” are defined to be abandoned, idled or underused industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.
- In 1994, Ohio enacted a Voluntary Action Program (“VAP”) to encourage redevelopment of Brownfields.
- In 2001, Ohio EPA and USEPA reached a Memorandum of Agreement (“MOA”) regarding Ohio’s VAP program to ensure that USEPA would not require additional work at VAP sites.

Recent Developments - Brownfields

- The MOA establishes a “two track” system for dealing with Brownfields sites.
- *Classic VAP Track* - will allow volunteers to undergo a streamlined No Further Action (“NFA”) review, and will rely more on audits after the project is completed to ensure that the work was conducted in accordance with the applicable requirements.
- *MOA Track* - allows more extensive agency involvement and additional public participation, preapproval of certain documents and work plans, and a public meeting. The MOA track would be required in order to receive a federal covenant not to sue.

Recent Developments - Brownfields

- Clean Ohio Fund.
 - November 2000 ballot initiative, authorizes bonds for:
 - \$200 million to support Brownfield redevelopment and public health projects. (Grants and loans)
 - \$200 million to support preservation of streams, watersheds, green space, recreational land, and farm land. (Grants with matching funds requirements)

Recent Developments - OSHA's Proposed Ergonomic Standard

- OSHA has proposed a comprehensive amendment to its General Industry Standards designed in an effort to reduce the incidence of Musculoskeletal Disorders (“MSDs”) through the implementation of Ergonomics Programs.
- The Bureau of Labor Statistics has identified MSDs as the largest job related injury and illness problem in the U.S. today. These disorders account for 1/3 of all occupational injuries and illnesses, costing employers between \$15 and \$20 billion in workers’ compensation expenses each year.

Recent Developments - OSHA's Proposed Ergonomic Standard

- Under the proposed rule, a complete ergonomics program will include the following elements:
 - management leadership and employee participation
 - hazard information and reporting
 - job hazard analysis and control
 - training
 - MSD management
 - program evaluations
- After receiving substantial negative comments, OSHA withdrew the proposal for more study.

Recent Developments - Risk Management Program

- The 1990 Amendments to the CAA required EPA to issue regulations requiring the development of Risk Management Plans (RMPs) by facilities which have more than a threshold quantity of any of 140 regulated substances in a process.
- Common regulated chemicals include propane, ammonia, sulfur dioxide, hydrochloric acid, nitric acid, acetylene, and methane.

Recent Developments - Risk Management Program

- An RMP must be submitted for any facility with more than 10,000 pounds of propane in a process that does *not use the propane as a fuel, or is not a retail facility holding the propane for sale as a fuel.*

Recent Developments - Risk Management Program

- Affected facilities must prepare RMP Evaluations which include:
 - a hazard assessment of the off-site consequences of releases under worst-case and alternative scenarios
 - a release prevention program
 - an emergency response program.
- The requirement to post the “hazard assessment” on the internet is being reconsidered in light of the terrorist attacks of September 11, 2001.

Recent Developments - Risk Management Program

- The final RMP must contain:
 - a five year accident history for the regulated chemical
 - process safety information
 - process hazard analysis
 - information concerning standard operating procedures, training, maintenance, management of process changes, RMP compliance audits, accident investigations, employee participation, and contractor safety procedures.
- Deadline for RMP submittal was January 3, 2000.

Recent Developments - Enforcement

- Record number of USEPA enforcement actions and penalties assessed in fiscal year 2000.
 - 2.6 billion in injunctive relief for environmental cleanup, pollution control equipment and monitoring.
 - \$224 million for civil penalties (compared to \$166 million in 1999).
 - 6,027 civil and judicial actions (compared to 3,935 such actions in 1999).
 - Criminal environmental defendants sentenced to 146 years in prison and \$122 million in criminal fines (compared to \$61 million in 1999).

Recent Developments - Enforcement

- Guidance on responding to an Ohio EPA enforcement action.
 - *Respond Promptly.* Follow the instructions in the notice and contact the agency to let them know that you received the notice.
 - *Gather Information.* Gather and analyze the information related to the allegations. Be willing to provide the agency with information to refute the allegations. Review private and public files in search of relevant information.
 - *Work within the agency's established framework.* Respond to any proposed penalty based on the penalty policy at issue.

Recent Developments - Enforcement

- Supplemental Environmental Projects (“SEPs”).
 - SEPs are projects that a defendant in an enforcement action agree to undertake as a condition of settlement in exchange for a reduction in the civil penalty assessed.
 - SEPs are above and beyond the requirements for mere compliance with environmental laws, and represent a direct investment to fund improvements to the environment.
 - Typical ratio is 50% of SEP costs as a reduction in the civil penalty assessed.

Recent Developments - Enforcement

- EPA Environmental Audit Policy
 - Goal is to protect human health and the environment by encouraging companies and other regulated entities to voluntarily disclose and correct violations.
 - Businesses that meet policy conditions are eligible for penalty reductions and waivers and other benefits.
 - Disclosure of the violation must occur within 21 days after it is discovered.
 - Not applicable to repeat offenders, criminal actions or violations that may result in serious risk or harm.

Civil Penalty Cases

- Alco Industries, Fremont, Ohio - *\$53,000 civil penalty for hazardous waste violations, including: storage without a permit, failure to evaluate waste to see if it was hazardous, failure to properly mark or date the hazardous waste storage containers, failure to inspect communication and emergency response equipment, failure to conduct personnel training for employees in hazardous waste management, failure to have immediate access to the emergency communications device, and failure to have a contingency plan.*

Civil Penalty Cases

- Metatec Corporation, Dublin, Ohio - *\$34,000 civil penalty for illegal treatment and disposal of hazardous waste wipers, failure to provide land disposal restriction information with shipments of hazardous waste, failure to manifest hazardous wastes, treating hazardous waste without a permit, failure to maintain weekly logs of emergency equipment tests and inspections.*

Civil Penalty Cases

- East Manufacturing Corporation, Randolph, Ohio - *\$54,000 civil penalty for installing air sources without the required permits, exceeding VOC emission limits, failure to maintain a daily record of emission violations and records of the average daily VOC content of the coating.*

Civil Penalty Cases

- Hermitage Builders, Lake County, Ohio - *Builder settled by agreeing to pay \$35,000 civil penalty for violations of the state water pollution control laws in the construction of a country club, including failure to: initiate adequate vegetative practices in disturbed areas; apply soil stabilization practices; install a settling pond for storm water runoff collection; minimize off-site vehicle mud tracking; and failure to maintain an inspection log.*

Civil Penalty Cases

- International Matrix Tank Terminal, St. Rose, Louisiana - *\$800,000 fine for falsifying a waste water discharge sample report on chemical oxygen demand (“COD”) levels*
- Commonwealth Oil Refining Company, Atlanta, Georgia - *\$61,500 fine for failure to maintain annual records of PCB equipment inspections under the TSCA standards for transformers and large capacitors.*

Civil Penalty Cases

- Sorenson Engineering, Yucaipa, California - *\$32,500 fine and installation of \$230,000 in pollution control equipment for failing to file annual Toxic Release Inventory (“TRI”) reports for releases of phosphoric acid and nitric acid under EPCRA § 313. The action was originally brought by an environmental group.*

Civil Penalty Cases

- Atlantic Coast Demolition and Recycling, Philadelphia - *\$400,000 fine for violations including failure to update its emergency management plan, storage of waste in excess of the permit limits, and failure to notify EPA about violations. Company was also required to hire an environmental manager to oversee daily operations.*

Civil Penalty Cases

- Material Service Corp., Chicago, Illinois - *\$7,500,000 settlement against quarry operator who allegedly destroyed 37 acres of high quality wetlands. The settlement included a \$500,000 civil penalty and \$7 million payable to a local environmental group for restoration of the ecosystems along the river.*

Criminal Penalty Cases

- State of Ohio v. Schechner, *131 Ohio App.3d 808 (1999)*.
 - *Defendant was the landlord of a property. His tenant left owing back rent and leaving numerous barrels of unknown waste on the property.*
 - *After Ohio EPA discovered the barrels and confirmed that they contained hazardous wastes, Defendant refused to comply with Ohio EPA's order to dispose of the barrels.*
 - *Later, the barrels were found in an abandoned U-Haul truck.*

Criminal Penalty Cases

- State of Ohio v. Schechner.
 - *Defendant was convicted of intentional failure to perform sampling as required by Ohio EPA; knowingly attempting to dispose of hazardous waste in violation of law; knowingly attempting to dispose of solid waste in a manner and location other than a sanitary landfill; unlawfully transporting hazardous waste; and recklessly storing hazardous waste.*
 - *Defendant was fined \$25,000 and sentenced to 2 years in prison.*

Criminal Penalty Cases

- Gary Blake, owner of Bay Drum and Steel, Tampa, Florida - *Convicted and sentenced to 13 years in prison for environmental crimes committed over an 8 year period. Defendant ordered employees to discharge 4 million gallons of wastewater contaminated by hazardous waste, including pesticides, heavy metals and toxic solvents into the storm sewer that empties into McKay Bay near Tampa.*

Criminal Penalty Cases

- Gilbert Darnley, owner of Petroleum Recovery Service, Elk Grove, California - *\$1,900,000 fine and up to 80 months in jail for dumping more than 160,000 gallons of waste oil on the ground at his company's headquarters. Over 1,000 drums, many leaking and rusted, were found on the property.*