Environmental Law Practice Newsletter June 2010

A Message from the Environmental Practice Group... *We are pleased to bring you this issue of our EnviroBrief newsletter. Today's legal and political climate provides a host of environmental issues. We hope that you will find our chosen topics of value. We encourage you to contact us with any comments you may have on the articles below or with respect to any of your environmental legal concerns.*

REACH Registration Process Remains Challenging For Those Doing Business In or With the EU

On April 16, the European Chemicals Agency (ECHA) published a list of almost 4,500 substances that it expects to be registered by the November 30, 2010 deadline as required by the European Union's REACH (Registration, Evaluation, and Authorization of Chemicals) legislation. ECHA plans to update the list periodically.

November 30 is the first major deadline for substance registrations under REACH legislation. The deadline applies to substances manufactured in or imported into the EU in annual volumes of 1,000 metric tons or more, and to some toxic substances at lower volumes. After the November 30 deadline, it will be illegal to manufacture or sell applicable chemicals within the EU that have not been registered.

This initial ECHA list targets chemical substances used in manufacturing. The publication of this list is intended, at least in part, to enable manufacturers to verify that their essential raw materials are going to be registered (by their suppliers or by someone) before the November 30 deadline. If a company doing business in the EU sees that a substance it utilizes is not yet on the list of substances to be registered, that company may want to determine whether its suppliers intend to register the substance (or whether the substance does not need to be registered).

Notwithstanding the impending deadlines, some aspects of the REACH registration process are moving at a slow pace. REACH requires companies to share substance data and make joint registrations through Substance Information Exchange Forums ("SIEFs"). But, as of mid-April, SEIFs had been formed for only about 2,500 substances.

For a REACH Primer, see
http://www.thompsoncoburn.com/Libraries/Articles/REACHPrimer_Cohen.pdf

In This Issue

USEPA Region 7 General Counsel Shares Agency Priorities

Thompson Coburn hosted the second meeting of the St. Louis EHS Leaders Network on June 9th where David Cozad, USEPA Region VII General Counsel, spoke on Agency priorities as outlined by Administrator Lisa Jackson. He shared with the group USEPA's seven key areas of focus:

1. Taking Action on Climate Change
2. Improving Air Quality
3. Assuring the Safety of Chemicals
4. Cleaning Up Our Communities
5. Protecting America's Waters
6. Expanding the Conversation on Environmentalism and Working for Environmental Justice
7. Building Strong State and Tribal Partnerships

From an enforcement perspective, USEPA is committed to aggressively addressing pollution problems that make a difference in communities. It will pursue violators and polluters with vigorous civil and criminal enforcement that targets the most serious water, air and chemical hazards. USEPA is also working hard to reset the Agency's relationship with states and improve transparency.

For FY2011-2013, USEPA will use the National Enforcement Initiatives to address the following six environmental and public health problems:

1. Keeping raw sewage and contaminated runoff out of our waters
2. Cutting animal waste to protect surface and ground waters
3. Reducing widespread air pollution from the largest sources, especially the coal-fired utility, cement, glass and acid sectors
4. Cutting toxic air pollution that affects communities' health
5. Reducing pollution from mineral processing operations
6. Assuring energy extraction sector compliance with environmental laws

Mr. Cozad's remarks were candid and direct, and they reinforced the importance of companies having disciplined and comprehensive compliance assurance processes.

Ninth Circuit Affirms Conviction of Corporate Officer

In a recent case, prosecutors charged both a company and a corporate officer of that company with illegally storing hazardous waste in violation of the Resource Conservation and Recovery Act. United States v. Reis, No. 09-30177, 2010 WL 601403 (9th Cir., Feb. 22, 2010). The corporate officer argued that the "responsible corporate officer doctrine" did not apply. That doctrine focuses generally on the criminal liability of senior management in situations in which the officer may not have possessed direct knowledge of the alleged criminal conduct. This doctrine has been used by courts in certain situations since the 1940's. In the Reis case, however, direct evidence was submitted to the jury of the corporate officer's personal knowledge of the illegally stored hazardous waste. In upholding the conviction, the Ninth Circuit explained that the government, by convicting based upon direct evidence, did not proceed under the "responsible corporate officer doctrine." Given the circumstances, the court concluded that both a company and its corporate officer(s) can be convicted of a RCRA crime without resorting to the "responsible corporate officer doctrine."

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NEW BUSINESS INTEGRATION
What to think about after a deal has closed
An EHS Checklist

Capture all **deficiencies** identified during due diligence and disclosed by the seller.

Ask yourself…. How can I efficiently…

a. Assess the gravity of each deficiency?
b. Evaluate required disclosures to regulators?
c. Determine who is responsible to cure…which are the seller's responsibility?
d. Prioritize deficiencies…what should be fixed first?
e. Evaluate and select proposed corrective actions?
f. Determine who should address…the location, corporate, technical consultants?

Get the **documents** in order!

Ask yourself…. How can I efficiently…

a. Identify all documents that must be modified, updated or renewed?
   - permits
   - orders
   - plans and programs (SPCC, etc.)
   - emergency planning and contact information
   - PRP groups
b. Ensure required deadlines are identified, responsibilities understood and deadlines are met?
c. Prevent inappropriate assumption of liability due to modification or updates?

Ensure that the necessary **EHS work** continues!

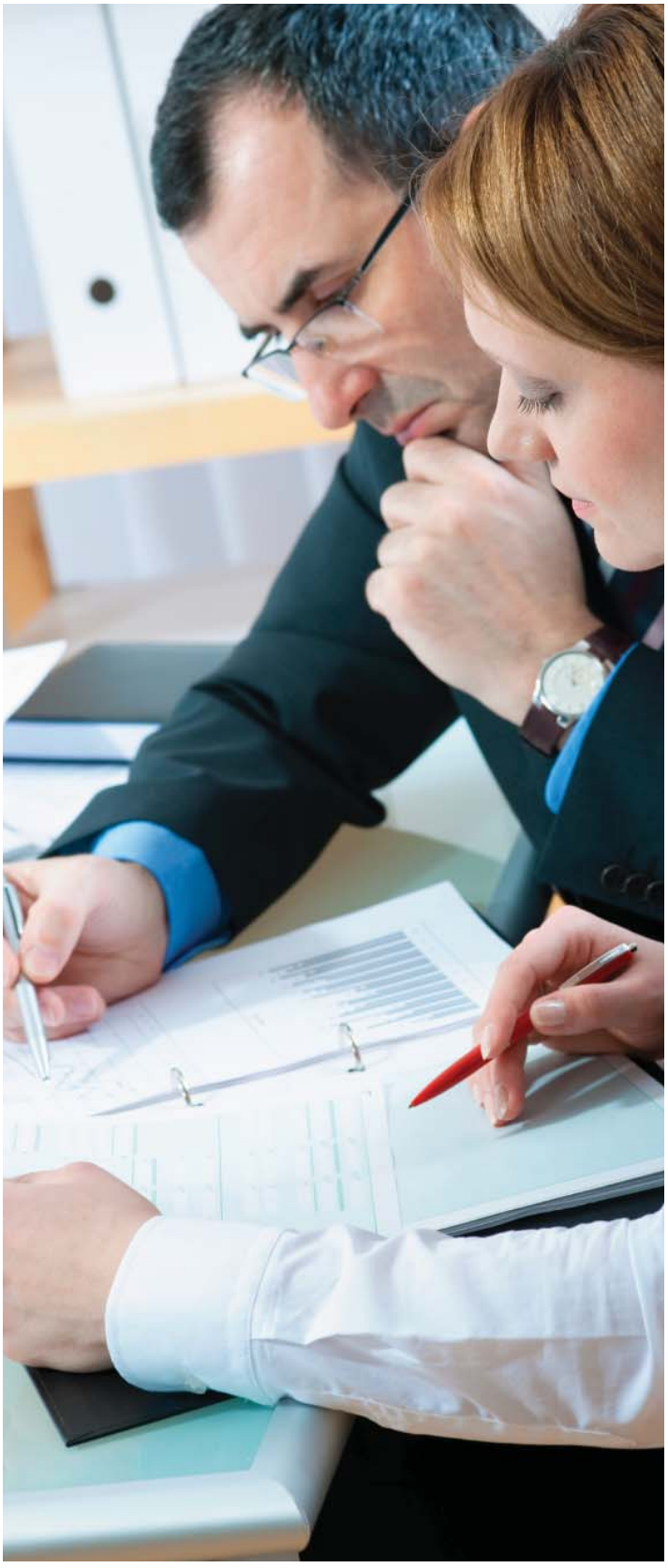
Ask yourself…. How can I efficiently…

a. Identify the work underway (permits and projects in progress, remediation, PRP group interface, etc.) and how to best staff going forward?
b. Determine if access to key people exists?
c. Determine unique situations or issues requiring special attention?
d. Ensure timely and accurate reporting against deadlines?

Begin integration of corporate **policies** and **procedures**?

Ask yourself…. How can I efficiently…

a. Assess the need for a "soft" versus "hard" integration?
b. Decide the appropriate timing…does "one size fit all"?
c. Determine which programs of the acquired business are actually superior?
d. Assess if a full compliance audit is necessary versus an initial compliance assessment? What's the schedule?



Supreme Court Clarifies Test to Use When Determining "Principal Place of Business" for Diversity Jurisdiction

On February 23, 2010, the United States Supreme Court, in *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010), answered the question of what factors courts should look to when determining the "citizenship" of a multistate corporation when analyzing diversity jurisdiction. The 9-0 decision is likely to resolve confusion among lower courts that had adopted many differing standards for establishing a company's principal place of business in diversity cases. The key language in Justice Breyer's opinion expanded upon the Seventh Circuit's approach:

> We conclude that "principal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's "nerve center." And in practice it should normally be the place where the corporation maintains its headquarters--provided that the headquarters is the actual center of direction, control, and coordination, i.e., the "nerve center," and not simply an office where the corporation has its board meetings (for example, attended by directors and officers who have traveled there for the occasion).

Id. at 1192. Justice Breyer went on to explain that "[a] corporation's 'nerve center,' usually its main headquarters, is a single place":

> A "nerve center" approach, which ordinarily equates that "center" with a corporation's headquarters, is simple to apply comparatively speaking. The metaphor of a corporate "brain," while not precise, suggests a single location. By contrast, a corporation's general business activities more often lack a single principal place where they take place. That is to say, the corporation may have several plants, many sales locations, and employees located in many different places. If so, it will not be as easy to determine which of these different business locales is the "principal" or most important "place."

Id. at 1193-94. Justice Breyer recognized that there will still be hard cases even after this ruling. However, while there is no magic answer on what exact set of factors will constitute a company's corporate headquarters (notwithstanding this attempt by the Supreme Court to add clarity to this confusing area), the Court's unanimous adoption of the "nerve center" approach should prove helpful in resolving many diversity jurisdiction issues.