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COUNSEL'S REPORT

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LEGISLATIVE

A. Obama Administration Blocks Implementation of U.S. EPA Ozone Rules, Delays Greenhouse Gas Rules for Utilities

In early September, President Obama blocked the implementation of tough new U.S. EPA ozone rules that businesses argued were an unnecessary regulatory burden that would have cost the economy billions of dollars and hampered job growth. Proposed in January 2010, the standards would have limited ground-level ozone to between 60 and 70 parts per billion measured over eight hours. The Bush Administration set the current standard at 75 parts per billion in 2008. In choosing to adopt a stricter standard, however, U.S. EPA Director Lisa Jackson chose not to implement the Bush standard, and most states follow a level set in 1997 at 84 parts per billion. According to news reports, the Obama Administration's retreat has caused uncertainty among state regulators, who are left to wonder which standard will now apply. In announcing its decision, the White House left open the possibility that the ozone standard could be tightened in 2013, when the rule will be revisited as part of a required, five-year Clean Air Act review.

On October 11, 2011, five health and environmental groups sued the Obama Administration for blocking the implementation of the new ozone standard. The same groups had sued the Bush Administration over its ozone policy but agreed to suspend the suit when the Obama Administration came to office and agreed to reconsider the 75 ppb standard.

The Administration followed its about-face on the ozone standard with an announcement two weeks later that it was delaying its issuance of rules that would regulate greenhouse gas emissions from utilities. U.S. EPA was supposed to issue the rules by Sept. 30, 2011, a date set as part of a court settlement with several states and environmental groups. The agency indicated in news reports that while it will miss the Sept. 30 deadline it plans to issue the rules soon.

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B. Proposed Expansion of OCAPP Program and Protections

Director Nally recently met with OMA and other business trade groups to unveil a proposed expansion of Ohio EPA's Office of Compliance Assistance and Pollution Prevention (OCAPP). Currently, OCAPP assists only "small businesses" (defined as privately-held with less than 100 employees) with compliance with environmental regulations and its primary focus is air pollution control regulations. By statute, information provided by small businesses to OCAPP regarding air issues cannot be shared with Ohio EPA Division of Air Pollution Control for use in enforcement. Director Nally wants to expand OCAPP's programs and protections to all businesses and to all environmental media. Ohio EPA has drafted legislation to accomplish this goal. Under the proposed legislation, information provided to OCAPP cannot be used by other Ohio EPA divisions for enforcement. Information, however, would still be subject to the public records law, except for air information, which is currently excluded from public records by statute.

C. Ohio EPA Omnibus Bill

The OCAPP legislation will be part of an omnibus Ohio EPA bill that will address various areas, including allowing Ohio EPA to renew wastewater discharge permits even if applicant is in noncompliance, exempting coal combustion waste from solid waste generation fees and allowing BUSTR sites to be eligible under Ohio's Voluntary Action Program (VAP) (see summary of areas attached). Ohio EPA does not yet have a sponsor for the bill but LSC is working on draft language. Ohio EPA hopes to have hearings in November and move the bill quickly.

D. North Carolina Restricts Environmental Rulemaking

In July North Carolina passed legislation that environmental rules issued by the state may not be more restrictive than federal requirements unless there is a "serious and unforeseen threat" to public health, safety or welfare or more stringent rules are required by state or federal law or a court order. The law became effective after the legislature overrode a veto by the Governor of North Carolina.

ADMINISTRATIVE

A. U.S. EPA Activities of Note

1. U.S. EPA Delays Implementation of Boiler MACT Rules

In May 2011, U.S. EPA announced that it was postponing implementation of new regulations aimed at cutting pollution from commercial, institutional and industrial boilers. The boiler maximum achievable control technology ("Boiler MACT") standards

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affect thousands of boilers nationwide that burn coal, natural gas and other fuel to produce steam that is then used to generate electricity or heat. The Boiler MACT rules have been heavily criticized by industry and some members of Congress who have warned that the rules would lead to substantially increased costs and job cuts.

U.S. EPA released the rules under court order in February. But in a written statement in the Federal Register on May 18, 2011, the agency said it decided to postpone the rules' effective date because the general public "did not have sufficient opportunity to comment on certain revisions EPA made to the proposed rules." As currently written, the rules would have required affected companies to comply by 2014. On October 24, 2011, U.S. EPA announced that it will not propose a revised Boiler MACT by October 31st as planned. The proposed revision is being reviewed by OMB, and U.S. EPA intends to propose the revision by November 30th.

C. Ohio EPA Activities of Note

1. Water Quality Rule Packages

On May 2 and 3, 2011, Ohio EPA hosted a two-day information session regarding the four inter-related rule packages: a.) Water Quality Standards; b.) Antidegradation; c.) Section 401 Water Quality Certifications; d.) Stream Mitigation

Most of these rules have been under evaluation by Ohio EPA for several years and have already been released for interested party review. The public comment period closed on June 6, 2011, and OMA and other business trade groups submitted comments in opposition to many of the proposed rule changes.

2. Draft Industrial Storm Water Permit

As noted in previous Counsel's Report, Ohio EPA published for public comment a draft renewal National Pollutant Discharge Elimination System (NPDES) general permit relating to storm water discharges associated with industrial activities. This permit is a renewal of the Industrial Storm Water general permit issued in 2006, but closely mirrors U.S. EPA's Multi-Sector General Permit (MSGP). The proposed new permit is much more extensive (171 pages) and requires monitoring and establishes benchmarks for certain pollutants. The draft has not been well received by industry. Among other changes, the draft permit adds effluent benchmarks for six industrial sectors, adds quarterly benchmark monitoring requirements for nineteen industrial sectors during the first year of the general permit, and requires continued monitoring and control-measure modifications for facilities not meeting the industry-specific pollutant level until the benchmark is met. OMA submitted comments to Ohio EPA on the draft permit on February 28, 2011 and met with the Director of Ohio EPA on May 4, 2011 and on July 13, 2011 to express concerns with the draft permit. As a result of the May meeting, Ohio

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EPA decided to extend the existing general permit indefinitely to allow time for Ohio EPA, OMA and other business trade groups to reach a compromise on the new draft permit. The existing general permit was set to expire on May 31, 2011.

OMA and other business trade groups met with the Director again on October 24, 2011 in a final attempt to resolve outstanding issues. As noted in Ohio EPA's Responsiveness Summary to comments on the draft permit, the prior administration entered into a Stipulation and Settlement Agreement in an ERAC appeal of the former general stormwater permit. As part of the settlement, Ohio EPA agreed that when the general permit was renewed in May 2011, Ohio EPA would adopt the federal multi-sector permit. This was not mentioned by Ohio EPA in previous meetings as a reason for moving away from the old general permit to a new multi-sector permit.

Because of concerns with benchmarks becoming *de facto* effluent limitations and challenges in conducting mandated quarterly visual sampling, OMA and the other business trade groups have not yet supported the new multi-sector general stormwater permit.

3. Submission of SIP for Lead to U.S. EPA

On October 13, 2011, Ohio EPA submitted to U.S. EPA a request for approval of the SIP for the 2008 Lead (Pb) National Ambient Air Quality Standard (NAAQS). This document confirms that Ohio EPA continues to retain the resources necessary to evaluate ambient air quality, develop plans to attain new and existing ambient air quality standards, run a complete new source review program, and effectively enforce all applicable requirements.

4. Ohio EPA 2011 Annual Report

In July 2011 Ohio EPA issued its annual report summarizing activities conducted by Ohio EPA (see attached). Notably absent from this annual report, as compared to previous annual reports, is any listed "goals" for enforcement activities by media or Ohio EPA districts or any comparison of civil penalty dollars with past years.

JUDICIAL

A. Federal Cases

1. Puget Soundkeeper Alliance v. BNSF Railway Co.
(U.S. District Court-Washington, August 10, 2011)

A federal court recently granted summary judgment against a rail yard operator in a Clean Water Act citizens suit. In 2009 Washington adopted the federal multi-sector

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general stormwater permit which requires, among other things, that permittees compare stormwater sample results against benchmarks and conduct quarterly visual monitoring. The court found that the permittee violated several conditions in the general permit, including the failure to conduct adequate visual monitoring during specified quarters and failure to evaluate best management practices (BMPs) to reduce contamination levels below benchmarks. Trial is set for January 3, 2012 to address remaining issues in the case, including civil penalties for the violations.

2. Barrous v. BP P.L.C. (U.S. District Court - California October 3, 2011)

A federal court recently held that a property owner may seek prospective damages, and possible punitive damages, against an oil company for damages stemming from a leaking UST at a neighboring gas station. In this case the oil company had obtained a “no further action” (NFA) letter from the appropriate state agency. The court held that the NFA does not necessarily mean that the harm is abatable as a matter of law.

B. State Cases

1. State ex rel. Merrill v. ODNR (Ohio Supreme Court)

On September 14, 2011, the Ohio Supreme Court rendered a unanimous decision holding that the territory of Lake Erie held in public trust by the state extends only to the natural shoreline, not the high water mark. Justice O’Donnell authored the decision and noted that the “boundary of the public trust does not, as the court of appeals concluded in affirming the trial court, change from moment to moment as the water rises and falls; rather, it is the location where the water usually stands when free from disturbing causes.” Property rights advocates applauded the decision. The court based its decision, in part, on a 1878 decision interpreting the “natural shore line” of Lake Erie.

2. Kids v. Global Warming (Ohio EPA Petition)

On May 4, 2011, a group called "Lynne Nickol and Kids vs. Global Warming" submitted a petition to Ohio EPA to request rulemaking to reduce carbon dioxide emissions. The petition was submitted under the public trust doctrine to protect and preserve public trust assets for continued use and benefit of Ohio's youth and future generations. This group also has filed lawsuits across the country against several states making the same allegations. Ohio EPA has yet to respond to the petition.

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3. State ex rel. DeWine v. Miller (Ohio Court of Appeals - April 21, 2011)

In this case the court of appeals held that a trial court could impose penalties less than the amount of stipulated penalties set forth in a consent decree as a sanction for contempt for violation of the consent order. The court held that this is not an abuse of discretion.