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Clean Air and Clean Water Acts: What to Watch For

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Environmental regulations remain an ever dynamic area with new requirements always on the horizon. These changes present constant challenges and new legal implications for businesses, their environmental managers and even their executives. The Clean Air Act and the Clean Water Act are two areas of environmental regulation where these changes, and the legal implications, are noteworthy.

Clean Air Act

Permits: One size does not fit all.

As permitting progresses under Title V of the Clean Air Act, implications of the emission control and certification requirements are becoming more apparent. Facilities applying for air permits need to be sure that the emission controls stipulated by their proposed air permit are appropriate for the particular equipment and that the emission limitations required will be actually achievable. Standardized control requirements frequently stipulated in air permits may not be the most appropriate technology for your given equipment or processes. If not addressed while the permit is still in draft form, facilities will find that required controls cannot be feasibly implemented or that emission limitation cannot be achieved. Attempting to modify a final permit is difficult and costly proposition. If attention is not given to negotiating a properly tailored air permit, a facility will almost immediately be subject to enforcement actions with costly penalties.

With extensive portions of facilities' air emissions reporting data being available to the public pursuant to law, citizen suits will assuredly be a growing liability risk. Environmental action groups need only compare a company's reported data with its permit emission limits to find instances of noncompliance which can support a private cause of action, regardless of whether regulator enforcement is undertaken. Citizen suits can carry potentially detrimental financial and public relation implications which companies will surely want to avoid.

Air permits also require company executives to certify the validity of reporting data and compliance with permit requirements. Historically, regulatory agencies had the burden of trying to determine if and when permit violations had occurred. With this certification requirement, however, the burden is now shifted to companies to prove their compliance with permit requirements. Not only will a marked increase in enforcement actions likely result as certified reporting data reveals permit violations, but (as news stories have already illustrated) criminal charges may also be brought against company executives for certifying fraudulent reporting data.

To minimize these liability risks, it is critical that companies pay close attention to air permits as they are being drafted, negotiate feasible and appropriate emission controls, understand and implement all permit requirements, meticulously perform record keeping requirements, and be sure that reporting data to be certified by a company officer is accurately detailed and timely submitted.

Clean Water Act

New requirements will soon trickle down

With the first round of Clean Water Act regulations fairly well implemented, the second phase is now in the works. Among its effects, the new regulations, currently in draft form, increase the drainage runoff control requirements imposed on construction activity. Contractors are currently required to develop and implement storm water runoff controls for construction projects impacting five (5) acres or more. Under Phase II, these plans will need to be developed and implemented for construction projects affecting as little as one (1) acre. Additionally, the proposed regulations impose stringent requirements on certain municipalities and public institutions, including counties, cities, towns, universities, colleges, military bases, hospitals and correctional facilities. Over the coming years, these entities will be required to detect and remedy any "illicit" sources discharging into their storm water systems. This promises to be a time-consuming and costly effort to identify any drain lines coming from industrial, commercial or residential buildings which are improperly releasing into drainage ditches, rather than into the sanitary sewer system. To meet this requirement, we expect municipalities will likely shift these detection and remedy obligations at least onto their commercial and industrial sewer customers. While the state's rules concerning these increased requirements are still in draft form, they are to be finalized by March of 2003.

If you have any questions about compliance with the Clean Air Act or Clean Water Act, or any other environmental law issue, the attorneys at Kahn, Dees, Donovan & Kahn, LLP can help. Call us if you have any questions.