

Message from Our Partner in Charge

In this inaugural edition of *Washington, D.C. Update*, we offer a cornucopia of items of interest to our clients and friends:

We recently welcomed to the Washington office partner Jane Luxton. She writes about how the Endangered Species Act is becoming increasingly enmeshed with the green movement, keeping alive the prospect of various litigation.

Jeremy Frey and Frank Razanno write that under the federal health care anti-fraud statute, prosecutors are looking at bonuses and incentive compensation as possible emblems of fraud, and they advise that companies may want to alter their incentive packages to avoid possible scrutiny by federal regulators.

Pepper recently started practice groups devoted to issues of importance to Canada and India, and in this issue we feature details about Pepper's upcoming Canadian Webinar Series and a webinar devoted to India.

In upcoming events, Pepper attorneys are part of several valuable events, workshops and seminars focusing on a wide variety of issues.

David A. Wormser
202.220.1447 / wormserd@pepperlaw.com

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Climate Change and the ESA: Regulatory Decisions Keep Litigation Prospects Strong

This article was originally published on The Horinko Group Web site (www.thehorinkogroup.org). It is reprinted here with permission.

In two contradictory decisions announced within the space of ten days - both relating to the polar bear, climate change, and the Endangered Species Act - the Obama administration has managed to anger parties across the political spectrum and create uncertainties about the implications of its actions and the resulting state of the law. On April 28, Interior and Commerce Secretaries Salazar and Locke announced their rescission of a December 2008 Bush administration final rule modifying requirements for the consultation process under section 7 of the Endangered Species Act (ESA). But in contrast to this decision, the Obama administration decided to uphold a companion December 2008 "special polar bear rule," which specifically limited consideration in ESA consultations of adverse effects from actions outside the bear's normal habitat, including CO2 climate impacts from facilities thousands of miles away.

The Endangered Species Act and the Consultation Quagmire

The ESA, enacted in 1973, is often cited as a prime example of federal environmental statutes that were intended for other purposes but have become enmeshed in the U.S. climate change debate. Under the original consultation rule, agencies that grant permits or take other federal action affecting listed species must consult with the relevant "service agency" - either the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS), depending on the species - under ESA section 7 to ensure that the action does not jeopardize the species or result in the destruction or adverse modification of its critical habitat.

If a species is listed because of climate-change related factors, as in the case of certain corals and polar bears, any federal “action” that adds more CO₂ to the atmosphere arguably makes it harder for that species to survive and recover. Such circumstances raise an important question: Can an action agency conclude that the CO₂ emissions from a new power plant, manufacturing facility, road-building project - or even a new hospital, a school, or additions to the federal vehicle fleet - would have “no effect” on a threatened or endangered species, as the courts have interpreted that term?

Avoiding a Regulatory Nightmare

Although the 2006 listing of elkhorn and staghorn corals for, among other reasons, climate change related factors, had already set the issue in motion, that listing was little noticed. The May 2008 polar bear listing, however, shone a spotlight on the matter. At the time, the Washington Post noted the problem, arguing that if the ESA were to be “used as a backdoor way to regulate greenhouse gas emissions,” the outcome would be “a potential regulatory nightmare.”

To address this concern, the Bush administration’s ESA rule modification authorized action agencies to make consultation determinations without involving FWS or NMFS in circumstances where no take was anticipated and the effects of the action were “manifested through global processes” and “cannot be reliably predicted or measured” at the individual species scale, “would result at most in an extremely small, insignificant impact,” or would pose a “remote” potential risk of harm. Reacting sharply, environmental groups characterized the rule as “lethal,” saying that allowing action agencies to make such a determination on their own - notwithstanding the threat of judicial review - would “eviscerate the Endangered Species Act process.”

Perhaps as a belt-and-suspenders move, in the contemporaneous special polar bear rule, the Bush administration explicitly addressed attempts to link climate change to ESA consultations for that species, effectively ending consultations for impacts potentially caused by global carbon emissions. Critics felt it “falsely asserted that there was no direct link between specific greenhouse gas emissions and the decline in the polar bear’s habitat,” while others not only disagreed with excluding CO₂ emissions, but also feared the “blanket exemption” in the rule would additionally exempt more conventional sources of

contaminants that could negatively affect polar bears, such as oil and gas drilling.

The April-May Decisions and Their Aftermath

The Obama administration’s decision to rescind the 2008 consultation rule modification was hailed by environmental groups like the Center for Biological Diversity as a “huge victory in favor of sound science and common sense,” while homebuilders and other industry groups denounced the move as adding to confusion about the role of climate change factors in ESA determinations. At the same time, the Center’s spokesman cautioned, “it’s only half the pie,” citing the special polar bear rule, which restricted consideration of greenhouse gas and other factors outside the bears’ current range.

But on May 8, despite receiving letters signed by 41 House members, 130 environmental groups, 1,000 scientists, and 53 law professors urging rejection of the special polar bear rule, Secretary Salazar declared he would keep it in place. At a minimum, these opposite-leaning actions have left ambiguity in their wake, and a closer analysis suggests the results are not what the administration hoped to achieve.

With such intense objection to both rules, the administration’s decision to revoke the consultation rule came as no surprise, but Secretary Salazar’s retention of the special polar bear rule sent shock waves: “Salazar’s decision today is a gift to Big Oil and an affirmation of the pro-industry/anti-environmental policies of the Bush Administration,” said [Center for Biological Diversity’s Noah] Greenwald. Even more tellingly, the environmental groups’ reactions pointed out the inconsistency: “It makes little sense for Salazar to rescind Bush’s national policy barring consideration of global warming impacts to endangered species in general, but keep that exact policy in place for the one species most endangered by global warming - the polar bear,” said Greenwald.”

Secretary Salazar’s press release explained his reasoning for retaining the special polar bear rule: “[T]he Endangered Species Act is not the proper mechanism for controlling our nation’s carbon emissions. Instead, we need a comprehensive energy and climate strategy that curbs climate change and its impacts – including the loss of sea ice.” Ironically, Secretary Kempthorne said virtually the same thing one year earlier: “Listing the polar bear as threatened can reduce avoidable losses of polar bears. But it should not open the door to use the ESA to regulate

greenhouse gas emissions from automobiles, power plants, and other sources. That would be a wholly inappropriate use of the Endangered Species Act.”

Conclusion

Regardless of this concurrence on intentions, the April-May determinations limits consideration of greenhouse gases in consultations relating to polar bears, but not regarding other species listed because of climate change factors, such as elkhorn and staghorn corals and the black abalone. The ESA has long been a notorious litigation magnet, and this recent split decision does not appear to have hindered the ability of those who see it as a useful tool for advancing larger climate change policy objectives, targeting unwelcome CO2 emitting facilities and projects wherever they are.

This column was adapted from Ms. Luxton’s paper in the Washington Legal Foundation’s Critical Legal Issues Series (Number 166, July 2009). Visit http://www.pepperlaw.com/pdfs/072409JaneLuxton_WLFArticle.pdf for the original paper.

Author:

Jane C. Luxton
202.220.1437 / luxtonj@pepperlaw.com

Canadian Webinar Series

U.S. Climate Change Legislation

October 15, 2009 | 12:00 – 1:00 P.M. EASTERN

The clock is ticking, and the Obama administration and Democratic congressional leadership are committed to enacting U.S. climate change legislation in time for the December 7-18 climate change treaty negotiations in Copenhagen. Ms. Luxton and Mr. Walsh are following developments closely as Senate leaders work to get the 60 votes needed for passage, then work out differences with the House bill adopted June 26. Join us for an update and analysis of the prospects for climate change legislation this year and potential effects for Canadian and cross-border businesses.

Moderator

Susan J. Krembs, Partner, Pepper Hamilton LLP

Speakers

Jane C. Luxton, Partner, Pepper Hamilton LLP

William J. Walsh, Of Counsel, Pepper Hamilton LLP

Register for this complimentary online webinar at https://www.regonline.com/US_Climate_Change.



Peppercast: Voluntary Disclosure Program Encourages Compliance with Foreign Account Reporting

Last year, there were increased efforts by federal prosecutors and IRS agents to investigate taxpayers for failing to file Foreign Bank Account Reports (FBARs) and foreign earned income.

In this podcast with Leonard Schneidman, of counsel in Pepper Hamilton’s Tax practice and resident of Pepper’s Boston office, and Michael A. Schwartz, a partner in Pepper’s White Collar and Corporate Investigations practice and resident of the Philadelphia office, they discuss one of the tactics of the IRS to recover these outstanding taxes, the Voluntary Disclosure Program.

Listen today by visiting the Tax and White Collar and Corporate Investigations sections of Pepper’s podcenter at www.pepperpodcasts.com.

Bonuses and Incentive Compensation as Emblems of Fraud: DOJ's Latest 'Teaching Moment?'

In some ongoing criminal investigations under the federal health care anti-fraud statute (18 U.S.C. §1347), prosecutors are beginning to question whether ordinary corporate compensation policies of providers are emblems of fraud. Consistent with the U.S. Department of Justice (DOJ)'s new-found penchant for "regulation by prosecution," employee compensation and bonus arrangements tied directly to revenue generation by rank-and-file employees and their supervisors are currently being scrutinized by prosecutors in some Medicare and Medicaid fraud investigations.

Investigators into Medicare and Medicaid overpayments, billing and coding irregularities, and imperfect compliance with a wide variety of state and federal regulatory requirements are examining providers' compensation policies as a possible cause of fraud and abuse. Instead of companies providing disincentives for fraud, so the theory goes, those that directly reward employees based on their attributable billings and collections are actually supplying incentives for fraud. For companies otherwise coming under investigation, prosecutors seem to be suggesting that while such compensation arrangements motivate employees to perform their jobs efficiently, for too many they also are encouraging non-compliance. The argument seems to be that sales-driven corporate cultures deemphasize both legal compliance and quality of care in pursuit of revenue. When something so basic as a compensation policy encourages fraud, even rigorous corporate compliance programs will be ineffective in suppressing fraud and abuse.

With the Centers for Medicare & Medicaid Services starting their Recovery Audit Contractor (RAC) program and Medicaid Integrity Program (MIP) to identify Medicare and Medicaid claim reimbursement outliers, senior management and compliance officers should consider ways to appropriately provide employees with incentives for performance while avoiding compensation based on individual revenue generation.

This means that providers, on a company-wide basis, should consider reducing bonuses for employees, supervisors and management based on billings and collections in favor of a more salary-based compensation approach, as well as more generally tying bonuses to business-unit or

Providers, on a company-wide basis, should consider reducing bonuses for employees, supervisors and management based on billings and collections in favor of a more salary-based compensation approach, as well as more generally tying bonuses to business-unit or enterprise performance rather than to individual achievements.

enterprise performance rather than to individual achievements.

With prosecutors apparently beginning to consider bonus and incentive compensation policies as a possible "red-flag," changes in your company's incentive compensation policies may help you avoid becoming the subject of criminal prosecution for fraud and abuse in what may be the DOJ's latest "teaching moment."

Authors:

Jeremy D. Frey
215.981.4445 / 609.452.0808
frej@pepperlaw.com

Frank C. Razanno
202.220.1286
razzanof@pepperlaw.com

Upcoming Events

The Computer Forensics Show

October 5-6, 2009

Santa Clara Convention Center | Santa Clara, CA

M. Peter Adler will be speaking.

www.computerforensicsshow.com

National Society of Compliance Professionals National Membership Meeting

October 5-7, 2009

Marriott Downtown | Philadelphia, PA

Ivan B. Knauer will co-present on the topic “Who Is a Senior and What Are the Regulatory Challenges?” on October 6.

www.nscpmeetings.com

Pepper Partners Presenting at Philadelphia Chapter of Tax Executive Institute

October 07, 2009

Ellen McElroy and Todd B. Reinstein will be presenting on “Federal/International/Financial Reporting.”

www.tei.org

Delaware Valley and New Jersey HIMSS Chapter Meeting

October 22-23, 2009

Atlantic City, New Jersey

M. Peter Adler’s presentation will focus on the integration of the HITECH Act into health care compliance programs. The HITECH Act provisions of the American Recovery and Reinvestment Act (ARRA) include a number of new security and privacy provisions that covered entities and business associates must integrate into their compliance programs. The session will discuss these new requirements and what they will mean to affected organizations.

<http://www.dvhimss.org/programs/programs.html>

CSI 2009 Annual Conference

October 24-30, 2009

Gaylord National Resort | National Harbor, MD
(near Washington, D.C.)

M. Peter Adler will be speaking on two panel sessions: “Cloud Security Summit Part I: Intro to the Cloud and the Cloud Services Landscape” and “Cloud Security Summit Part III: Compliance Challenges in the Cloud.” The Cloud Security Summit begins with Part I, an introduction of what we mean by “cloud computing,” an overview of the cloud services landscape and a first look at the risks, from a technological viewpoint. Cloud users may not have access to logs and may not know the geographical location of the servers on which their data resides. The Cloud Security Summit Part III continues with a hard look at how these characteristics spark new challenges to maintaining and proving compliance with data security, data privacy and e-discovery regulations.

www.csiannual.com

AHF Live: The Affordable Housing Developer’s Summit

October 26-28, 2009

Sheldon L. Schreiber will be speaking on a panel titled, “HUD in a New Administration.” With new HUD leadership now in place, hear about the latest changes in the multifamily programs, including Section 236, Section 202, and Section 8. Also, panelists will give their thoughts on how well the new leadership is doing so far.

www.ahflive.com/index.html

Don't Miss Future Issues

Be sure to receive future issues of *Washington, D.C. Update*. Please subscribe online at www.pepperlaw.com, or you may fill out the form below and mail it to Pepper Hamilton LLP, Attn: Kathy Rebecchi, 3000 Two Logan Square, Eighteenth and Arch Streets, Philadelphia, PA 19103-2799, or fax it to Kathy Rebecchi at 215.981.4750.

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WEBINAR: FCPA Effect on Business in India

On October 20, Pepper partner Gregory A. Paw and Omar McNeill, general counsel from Freeh Group International will discuss enforcement efforts under the U.S. Foreign Corrupt Practices Act, with a focus on how these efforts affect companies doing business in India. They will look at enforcement trends significant to companies looking to invest or raise capital in India, and due diligence investigation in India. They also will provide guidance on avoiding liability and best preparing for smooth international transactions and operations.

Moderator:

Valérie Demont, Partner, Pepper Hamilton LLP

Speakers:

Gregory A. Paw, Partner, Pepper Hamilton LLP
Omar McNeill, General Counsel, Freeh Group International

Register for this complimentary online webinar at https://www.regonline.com/FCPA_India.

Pepper Hamilton LLP
Attorneys at Law

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Please send address corrections to phinfo@pepperlaw.com.

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