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JUDGE STRIKES DOWN PROPOSED "PUBLIC NOTICE OF POLLUTION" RULE

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On December 30, 2016, an Administrative Law Judge with Florida's Division of Administrative Hearing, Judge Bram D. E. Canter, issued a Final Order striking down a proposed rule of the Florida Department of Environmental Protection entitled "Public Notice of Pollution" As explained in my July 29, 2016, blog, the proposed rule was intended to replace a FDEP-issued emergency rule that by Florida law was effective for only 90 days. As with the emergency rule, the proposed rule would have significantly increased pollution notification requirements.

The proposed rule applied to any person who is an owner or operator of an "installation," a term broadly defined in existing FDEP rules to include any facility or activity in Florida that may be a source of pollution. The proposed rule would have imposed the increased reporting requirements on the owner or operator upon discovery at the installation of a "reportable release," a term defined broadly to include any substance at the installation whose release is "not authorized by law" and either (i) must be disclosed under specified existing FDEP pollution reporting requirements or (ii) is defined under state or federal law as a "hazardous substance" or "extremely hazardous substance."

If such owner or operator has or discovers a "reportable release" covered by the proposed rule, that person must provide notice of it to (i) the FDEP, specified local governmental officials, and property owners in the "affected areas" in writing within either 24 and 48 hours (depending on nature of the release); and (ii) the general public by providing notice to local broadcast television affiliates and a newspaper of general circulation in the area of the contamination.

Florida law now has no generalized pollution reporting obligation, only obligations for specified types of pollution. As a result, current FDEP implementing rules contain a patchwork quilt of reporting requirements, which for the most part only require the reporting of certain types of pollution releases, and then only to the FDEP. When a property owner discovers existing pollution, these rules often do not require any reporting, not even to the FDEP. Moreover, most current reporting requirements limit a property owner's duty to notify other property owners to those on adjacent property, and only when the pollution has spread onto the adjacent land. The current reporting requirements, in other words, can be very complex. The proposed rule required notification not only upon occurrence of a reportable release, but also upon the discovery of any release occurring at any time in the past—provided the pollution found in the release meets the "reportable release" definition. This proviso was a significant amendment to the language of the proposed rule as originally noticed, which followed the language of the emergency rule. The original version would have required notice of any "incident at a facility causing pollution," as well as the "discovery of pollution." The "pollution" definition is statutory, whereas "reportable release" would have been a newly-created definition. The "pollution" definition includes any substance that is "or may be potentially harmful or injurious to human health or welfare, animal or plant life, or property or which unreasonably interfere with the enjoyment of life or property, including outdoor recreation unless authorized by applicable law."

The “pollution” definition in the originally noticed proposal was much broader and more generic than the “reportable release” rule definition, and would thus have established for the first time by rule a general reporting obligation for the discovery of “pollution” on an owner or operator’s property no matter what the nature of the “pollution” or when it was released. Thus, for example, if a consultant doing a Phase II Environmental Site Assessment had discovered existing contamination on property and reported it to the owner or operator, the owner or operator would have been required to report that to the FDEP, no matter whether the owner or operator was at all responsible in the first place for causing or contributing to the contamination that the consultant had discovered.

At workshops that the FDEP held to hear public comment on the proposed rule, industry groups complained that the FDEP should be the exclusive recipient of the notification and responsible entity for deciding whether and how to transmit that information to the public. These groups also complained that the reporting requirement would apply to any size or type of “release,” no matter how insignificant, thereby having the potential to cause undue public alarm. The objectors persuaded the FDEP to lessen the subject of the reporting obligations from “pollution” to “reportable release,” but not to whom and how the notices should be distributed. Several groups then filed a rule challenge at the Division of Administrative Hearings, which is the forum responsible for determining whether a proposed rule should be struck down as an “invalid exercise of delegated legislative authority.”

In his Final Order Judge Canter agreed that the proposed rule exceeded the FDEP’s statutory authority. The Florida Administrative Procedures Act establishes that in developing rules a state agency cannot rely upon a general grant of rulemaking authority, and that the agency’s authority can “extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.” Reciting those grounds, Judge Canter rejected the FDEP’s assertion that the proposed reporting requirements were “integral” to the FDEP’s general statutory authority to control pollution. Because there was no statutory language specifically imposing that reporting requirement, Judge Canter found that the FDEP’s current statutory authorities were not specific enough to impose a public notification obligation upon the person responsible for the release. Judge Canter also found the proposed rule invalid because it imposed additional regulatory costs on the responsible party for providing public notification that was not specifically authorized by law.

As explained in my prior blog, when Governor Scott issued his executive order directing the FDEP to issue its emergency rule and then proceed with rulemaking to require public notice of pollution, he also stated his intention to seek statutory authority in the upcoming legislative session for these notice requirements. Bills have very recently been introduced in the Florida House and Senate to authorize the proposed rule’s reporting requirements. As shown by the industry opposition to the FDEP proposed rule, however, the scope of any additional notice requirements will likely continue to be hotly debated, both as to what should be publicly noticed and how. While few if any industry groups are likely to express open opposition to legislation requiring disclosure of pollution spill incidents that might adversely affect human health, safety or the environment, the following are likely to be ongoing topics of debate:

- Whether disclosure requirements should apply to new spills only or also to the discovery of existing pollution in soils, groundwater or surface water from any source, for any reason, at any time past or present;
- Should the disclosure be provided only to the FDEP or comparable local agency, or should it be also made to the public; and
- If there is public disclosure, who should do it (responsible party or FDEP), what should be disclosed (e.g., degree of potential for harm), how widespread should notice be, what form of media should be used, and should there be thresholds for when the contamination is extensive enough to warrant disclosure.

When it comes to statutory requirements for reporting the occurrence of pollution or the discovery of existing pollution, there has long been a debate over what is the full extent of the FDEP’s current legal authority to require disclosure, whether it has exercised all of that authority, and whether it has the authority to require any further disclosure. Governor Scott’s order, the recent proposed rulemaking, Judge’s Canter’s ruling on it, and the current proposed legislation are bringing many of these issues to a head. It will be interesting to see to what extent the Florida Legislature this year can bring any resolution to this debate. Given the complexity of

the reporting requirements and the fact that the reporting requirements are in flux, it is strongly recommended that affected property owners obtain knowledgeable legal counsel as soon as possible when confronted with this issue.

For more information on this topic, please contact Dan Thompson on the firm's Government and Regulatory Team.

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