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Environmental Practice BRIEFING

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Following are recent environmental developments that may be of interest to our colleagues, clients and other friends:

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United States: Development Moratoriums As Takings (The Supreme Court's Tahoe-Sierra Decision)

In Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 (April 23, 2002), the United States Supreme Court ruled that temporary moratoriums on construction are not categorical takings that automatically require "just compensation" under the Fifth Amendment to the United States Constitution. In affirming the decision of the Ninth Circuit Court of Appeals, the Court departed from its recent trend of siding with property owners and developers over government regulators in property rights cases. And in so doing, the Court provided an analysis of takings jurisprudence that will aid future courts in determining when government regulation amounts to a compensable taking of property.

The Tahoe Regional Planning Agency ("TRPA"), a governmental agency established in 1969 under an interstate compact between Nevada and California, was charged with developing a comprehensive landuse plan and regional water quality plan for the Lake Tahoe region. In 1981, based on its concern that the rapid development of the area was leading to a buildup of algae in the lake (resulting in water-quality degradation and a loss of clarity in the famously crystal-clear waters), TRPA imposed a temporary moratorium on construction activities. The purpose of the moratorium, which lasted 32-months, was to allow TRPA to better study the water quality issues and to propose additional landuse regulations, if appropriate.

Approximately 400 landowners in the region (under the name Tahoe-Sierra Preservation Council) sued TRPA and the relevant state governments in 1984 for $27 million in damages, claiming that the moratorium deprived them of the benefits of their private property without providing required just compensation. Specifically, the landowners argued that the moratorium, which prohibited all new construction during the 32-month period, rendered their private property valueless during that period. According to the landowners, any government action that renders private property valueless, even temporarily and regardless of the purpose of the action, constitutes a compensable taking under the Fifth Amendment.

The Supreme Court disagreed. According to the Court, a distinction must be made between the government's physical invasion of an owner's property and other government actions that, while falling short of a physical invasion, might still decrease the value of an owner's property. An actual physical invasion of private property is automatically a taking requiring compensation. However, other government actions that decrease the value of private property, according to the so-called "regulatory taking" jurisprudence, are compensable takings only when, after appropriate factual inquiry, a court determines that the government action "goes too far" in usurping private property rights. In the regulatory takings context, one circumstance in which a government action "goes too far", and consequently requires compensation, is when such government action deprives the property owner of the entirety of the economic value of its private property.

Considering the facts of the case at hand, the Supreme Court easily found that there was no actual physical invasion of the owner's property that automatically required compensation. The Court then determined that, in part because the affected property continued to have economic value after the moratorium ended, TRPA had not "gone too far" with the moratorium and was not required to provide any compensation to the owners. The Court's decision, in denying compensation to property owners whose property rights were adversely impacted by a government moratorium, put the Court squarely on the side of government entities such as TRPA and their power to regulate private property.

In reaching its decision, the Court determined that TRPA's process of developing the landuse regulations relating to the Lake Tahoe region did not impose an unreasonable burden on the property owners. In fact, the parties and the Court all agreed that TRPA's task was a complex and difficult one, and that the 32-month process did not reflect mismanagement, stalling or other unnecessary delay. Furthermore, it was demonstrated that after the moratorium had ended, the landowners' property continued to have economic value, and sometimes significant economic value. Finally, the Court emphasized that imposing a nonlegislated deadline on a government's landuse decision could be an unacceptable burden on government decision making and could result in hasty and ill-considered landuse decisions.

While the Supreme Court found that landowners are not automatically entitled to compensation when government regulation temporarily blocks their right to develop their property, the Court did indicate that a construction moratorium could constitute a taking, depending on the relevant facts and circumstances. The decision suggests that regulators should be conscientious and prudent when imposing a moratorium, because a moratorium can constitute a taking requiring compensation when it is unreasonably implemented or extended (i.e., if the moratorium lasts longer than is necessary to complete the government authority's action requiring the moratorium). Regulators should not be punished, however, for taking the time necessary to diligently prepare regulations and policies.

France: France Adopts Public Disclosure Environmental Requirements

On February 20, 2002, the French State Council adopted a decree that substantially increases the obligation of companies listed on the country's stock exchange to make specified public disclosures. These disclosure guidelines were implemented pursuant to a May 15, 2001 French law which requires the public disclosure of information regarding the social and environmental consequences of business activities undertaken by French companies. The new disclosure requirements come into effect with annual reports for the 2002 fiscal year.

Depending on the nature of the reporting company's activities, the information that must be disclosed includes: (a) data on water, raw material and energy consumption, and air and water emissions levels; (b) measures taken by the company to protect the environment; (c) amounts spent by the company to minimize the company's impact on the environment; (d) efforts to comply with regulatory requirements; and (e) financial reserves established for environmental liabilities. Some of this information previously was required, by the Commission des Opérations de Bourses (a French governmental entity that serves a role similar to that of the United States Securities and Exchange Commission), to be disclosed by French public companies in respect of fiscal year 2001.

California: First United States' Law to Combat Global Warming

On July 22, 2002, California Governor Gray Davis signed the first law in the United States enacted with the express purpose of reducing global warming. The new California law requires that: (a) the California Air Resources Board ("CARB") draft regulations that result in the "maximum feasible reduction" in carbon dioxide, hydrofluorocarbons and other greenhouse gas emissions from motor vehicles; (b) manufacturers be given "flexibility to the maximum extent feasible" in achieving these reductions; and (c) the regulations be cost-effective. The law does not require CARB to rely on any one set of mechanisms to achieve these objectives. The CARB regulations are to be promulgated by January 1, 2005, but are not to go into effect until January 1, 2006, and cannot apply to model years prior to 2009.

California is the United States' largest automobile market, accounting for approximately 13% of the United States' automobile sales. Perhaps owing to its disproportionate potential to impact air quality and its aggressive attempts to control air pollution, California is permitted under federal law (unlike the 49 other states) to set more stringent air pollution control standards than those promulgated by the federal government. Once such standards are imposed by California, however, other states may adopt California's standards. Litigation against the new measure is expected from the automobile industry which had waged a multi-million dollar campaign to stop the bill's passage. It also is expected that pressure from environmental and other groups will mount on other states to adopt California's standards.

United States: EPA's Audit Policy (Waiver of Penalties After Voluntary Disclosure)

More than five years after becoming effective and more than one year after being revised, the United States Environmental Protection Agency's ("EPA's") voluntary disclosure policy--the so-called "Self-Audit Policy"--appears to be achieving its intended results. According to a recent report of the Self-Audit Policy's 2002 year-to-date statistics, as of the end of April 2002 EPA had waived penalties valued at $539,653 for six firms, located in EPA's Mid-Atlantic Region, that voluntarily disclosed and corrected violations of federal environmental law. EPA had waived approximately $350,000 in penalties against 18 companies in that same Region during all of 2001 under the Self-Audit Policy.

The Self-Audit Policy, as set forth in an EPA document entitled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," became effective in January 1996. The purpose of the Self-Audit Policy is to enhance protection of human health and the environment by providing regulated entities with "major incentives" to voluntarily discover, disclose, correct and prevent violations of federal environmental law.

The major incentives offered by EPA primarily involve EPA's waiver of financial penalties. Financial penalties imposed by EPA generally are comprised of two components: (i) the value of the economic benefit gained as a result of the noncompliance; and (ii) a "gravity-based" component that comprises the punitive portion of the penalty. The specific incentives that accrue as a result of complying with the Self-Audit Policy include: (A) waiver of the entirety of the gravity-based component of the penalty; (B) reduction of the gravity-based component by 75% when all of the

conditions other than the "systematic discovery" condition (as described below) are met; (C) regardless of meeting the "systematic discovery" condition, EPA generally will not recommend criminal penalties for a complying entity; and/or (D) EPA generally will not request audit reports from the complying entity.

A regulated entity generally must meet the nine conditions of the Self-Audit Policy to benefit from the Policy's incentives. The nine conditions are: (1) "Systematic Discovery" of the violation through compliance management or an audit program; (2) "Voluntary Discovery" through a procedure that is not legally required; (3) "Prompt Disclosure" in writing to EPA within 21 days of discovery (or a shorter period required by law); (4) "Independent Discovery and Disclosure" before EPA found out about the violation through a third-party source; (5) "Correction and Remediation" of the violation, usually within 60 days of discovery; (6) "Prevent Recurrence" of the violation; (7) "Repeat Violation Ineligible" within the same facility within 3 years or, as a pattern of violation, at another facility owned or operated by the same party within 5 years; (8) "Excluded Types of Violations" include those that may result in serious actual harm, those that may result in significant harm to public health or the environment, those that may present an imminent and substantial endangerment, those that constitute criminal acts, and those that violate the terms of a judicial or administrative order or a consent agreement; and (9) "Cooperation" of the discloser with EPA.

International: Kyoto Protocol Likely to Come Into Effect Based on Poland's Ratification

On July 2, 2002, the Polish Parliament--one chamber of the Polish legislature--approved the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change. The Protocol requires industrialized countries to reduce their greenhouse gas ("GHG") output to specified levels below 1990 output levels. It is expected that the Protocol will gain the approval of the full Polish legislature and be ready for execution by Polish President Alexander Kwasniewski in September 2002. President Kwasniewski's signature will complete Poland's ratification of the Protocol.

The Protocol takes effect when it has been ratified by at least 55 counties accounting for at least 55% of the GHGs emitted in 1990. Currently, more than 70 countries have ratified or are about to ratify the Protocol, but those countries account for only 53% of 1990 GHG emissions. Poland's GHG contribution in 1990 was 3%, and therefore its ratification will result in the Protocol taking legal effect as international law.

More recently, both Russia and Canada announced that they would soon ratify the Protocol, ensuring that the Protocol will become effective even if Poland's ratification effort fails. The Protocol has not been ratified by the United States and the Bush Administration has indicated its unwillingness to support this global initiative.

Members of Shearman & Sterling's Environmental Practice Group provide legal advice regarding a wide variety of international, foreign national, federal and state environmental matters relating to business transactions and other matters of interest to Shearman & Sterling clients. This publication is intended only as a general discussion of the issues presented. Nothing in this document should be regarded as legal advice. Shearman & Sterling would be pleased to provide additional details about any matter discussed in this Briefing or advice about specific circumstances that might implicate environmental concerns. For more information on the topics covered in this publication, please contact Jason Y. Pratt ((212) 848-5449), Jeffrey L. Salinger ((212) 848-7574) or Bernard A. Weintraub ((212) 848-7442), or any other member of the Environmental Practice Group.