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# REID AND RIEGE, P.C.

ENVIRONMENTAL & LAND USE ADVISORY - WINTER 2011

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## The New Department of Energy and Environmental Protection

Governor Malloy announced his intention to combine the Department of Environmental Protection and Department of Public Utility Control into the Department of Energy and Environmental Protection, “DEEP.” Statements of key Senators and Representatives indicate the Legislature will support the Governor’s proposed merger. Although this merger may have come as a surprise, the concept of an energy department has been proposed by both political parties. The Governor has set a high, but appropriate energy goal, namely, to reduce the cost of energy in Connecticut to the cost of energy in the other New England States, New York and New Jersey. *Presently, Connecticut’s energy costs are about 20% higher than the New England States.* The question is whether a pro-renewable energy policy will be able to significantly reduce energy costs without governmental subsidies to encourage use of more costly clean energy?



Daniel Esty, the Governor’s choice for DEEP Commissioner, is very knowledgeable on energy and environmental policies. He has formed several organizations that work with businesses to formulate and strategize their energy and environmental goals. He has the right credentials to lead DEEP. Unfortunately, a 93 page bill has been introduced to facilitate the merger of DEP and DPUC which, once passed, may take until this Fall before the new Department operates smoothly. But, I do not expect this delay to adversely affect DEP’s environmental functions, as most of the changes will occur to the DPUC functions. The Governor believes the existing structure of DPUC is antiquated and wants the new DEEP to drive an energy policy that calls for a clean environment, while reducing energy costs. In the end the merger will better coordinate the State’s energy policy.

### Daniel C. Esty to Head New DEEP

- What to expect from the new DEEP Commission
- The government inspector’s here...don’t panic!
- DEEP: is one department stronger than two?

It is difficult...no, impossible to object to the qualification of Daniel C. Esty, Governor Malloy’s choice for Commissioner of the new Department of Energy and Environmental Protection. I spent the weekend reviewing his 15 page resume, which included 11 pages of articles and books he has authored or co-authored on environmental policy. *Mr. Esty is likely the most credentialed appointment in the history of Department of Environmental Protection* and an eloquent speaker to boot. What does this mean for the regulated community?

First and foremost, he is strongly oriented toward environmental and energy *policies*. While Mr. Esty spent four years with the U.S. EPA in the early 1990’s, he is not a career politician. He is a “think tank” academic. Accordingly, it would not surprise me to see greater emphasis toward high priority significant energy and environmental issues confronting Connecticut. For energy, it is likely to be energy cost; for environment, climate change/CO<sup>2</sup> emissions.

Second, he will likely choose Directors reporting to him with strong administrative skills. These appointments will be important. His choice of Directors and their staff will have considerable influence over the day-to-day operations.

Third, Mr. Esty will encourage the business community to voluntarily support stronger pollution controls and natural resource management as part of his environmental sustainability policy to reduce costs, lower risks and expand green jobs. Green industries will be well received by the new Commissioner. His latest book is Green to Gold: How Smart Companies Use Environmental Strategies to

Innovate, Create Value, and Build Competitive Advantage. Yes, I am reading it.

Fourth, Mr. Esty is well liked by environmental organizations. He is on the Board of the Connecticut Fund for the Environment and Board of Advisors of Planet Green.

What does this all mean? Expect to see another departmental reorganization with heightened emphasis on air quality and energy. His Directors will continue to control permitting and enforcement, but with stronger incentives to achieve and exceed environmental and energy standards. Finally, I expect a willingness to reevaluate existing programs, e.g., Transfer Act, RSRs, Brownfields and Renewable Energy and prioritize these and other programs to promote his environmental policy goals and to reduce energy costs. Will this academic succeed? I feel Mr. Esty will bring a fresh look to the Department's issues and the merger of energy and environmental responsibilities is well suited to his skills and a friendlier business climate.

**What to Do When the Government Inspector Arrives**

Federal Government inspections are on the rise as the economy improves. This Alert provides statistics on certain EPA/DEP and OSHA programs, but similar upward inspection trends are present in other federal agency programs, for example, Equal Opportunity (EEOC).

Government inspections frequently occur as a result of a site event (e.g., fire, explosion, injury), disgruntled employee or government inspection priority. Thus, *there is often a predetermined focus in a government investigation and elevated risk to the employer of enforcement.*

The following suggestions represent good business practices...not your legal obligations, which can vary considerably depending on the nature of the inspection and the identity of the state or federal agency. These practices may be considered for *civil* investigations but, if you ascertain the investigation is criminal, there is only one recommendation...consult with your

legal counsel, immediately! A wrong step could have serious implications.

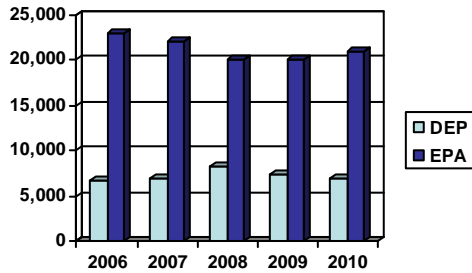
Consider the following 10 practice tips:

1. Request a pre-meeting with the inspector to ascertain the reason, nature and areas of investigation.
2. Ask an employee to accompany you throughout the entire investigation for the purpose of taking notes of the inspector's comments and areas inspected.
3. Consider in advance of the inspection how you may respond to requests for copies of documents, employee interviews, samples, and photographs. Generally, the inspector has broad investigation rights, but is subject to rules applicable to business trade secrets and governmental security requirements. If you are inclined to deny the request for inspection, first consult your legal counsel.
4. Require the inspector (and your team) to wear all required safety gear.
5. Narrow the inspection to the areas identified in the pre-meeting. Expanding the inspection, for example, to a plant wide tour, rarely operates to the employer's advantage.
6. Take duplicates of all documents, photographs and samples allowed to be taken by the inspector. If a duplicate sample cannot be provided by the inspector, discuss with legal counsel whether to allow the sampling.
7. If you have permitted the inspector to interview employees, ask to be present. If your request is denied, ask the inspector to confirm the denial is a lawful response or simply the inspector's preference for a private meeting.
8. *Immediately* correct a deficiency identified by the inspector before leaving the area...if not possible, inform your note taker to undertake action after the inspection. You will score points!

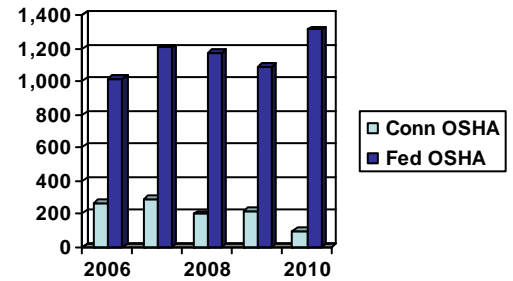
9. Conduct a post-inspection interview asking the inspector to identify all areas of concern and non-compliance and to provide a copy of the inspector's report when completed. Promptly discuss with legal counsel how to respond to the deficiencies noted in the post-inspection interview.

10. Finally, do not discipline or take adverse action against any employee for reporting alleged deficiencies to the government resulting in the investigation. Employees are often protected by “Whistle Blower” statutes, which sanction employers for retaliatory action.

**Comparison of EPA (national data) & DEP Inspections**



**Comparison of FED OSHA (in CT) & Conn OSHA Enforcement<sup>1</sup>**



<sup>1</sup>In Connecticut, Federal OSHA regulates private employers. Conn OSHA regulates public employers.

*The Reid and Riege Environmental & Land Use Advisory is a publication of Reid and Riege, P.C. It is designed to provide clients and others with a summary of legal developments which may be of interest or helpful to them.*

*This issue of the Environmental & Land Use Advisory was written by Thomas M. Armstrong, a member of the Environmental Practice Group at Reid and Riege, P.C., which represents companies, financial institutions, commercial developers, municipalities, property owners and individuals on a variety of environmental, land use and worker safety matters. Lawyers in this Practice Group assist clients in administrative and litigation proceedings, due diligence investigations, permitting, remediation projects, local and state land use matters and employer/employee safety issues.*

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