

Piling It On For The Dockbuilders

By David A. Webb and Lawrence S. Ebner

In July 2007, both New York and New Jersey enacted legislation prohibiting future installation of creosote-treated marine or foundation piling. Those bills were the product of politics, not science. Even though the Creosote Council (CCIII) mounted an enormous effort to defeat the legislation over a period of many years, it was ultimately unsuccessful in preventing a larger, better funded, and more politically active opponent from achieving its goal. It is important for members of the wood preserving industry to understand what happened in New York and New Jersey—and why—so that the industry can prepare itself for the next legislative threats to wood preservatives.

Political Theater

On July 17, New Jersey Gov. Jon Corzine, appearing before cheering union leadership and rank and file at the Building and Construction Trades Council Convention in Atlantic City, ceremonially signed a pair of union-sponsored bills “protecting New Jersey workers.” One of those bills, A-2804/S-1965, which he officially signed on July 13, was the creosote bill. Corzine declared that “Construction workers should not have to put their health in jeopardy to earn a living.”

Two weeks earlier New York Gov. Eliot Spitzer, with little fanfare, catered to the same union interests by signing into law a similar creosote bill that his predecessor, Gov. George Pataki (R), had vetoed three years in a row. But following Corzine’s public splash, Gov. Spitzer staged his own bill signing ceremony on July 26. Surrounding himself with labor and environmental leaders, Spitzer offered some prepared remarks about the supposed dangers of creosote. He praised the legislative efforts of his “good friends,” the District Council of Carpenters (DCC), and ceremo-

nially re-signed the bill, handing out souvenir pens to his admirers. According to Spitzer, “[t]his is a law that will...help ensure that workers will be protected from the harsh effects of this dangerous chemical...we were able to achieve a sensible, workable bill that provides long-needed protections while not hampering business needs.” One of the DCC officials then thanked Spitzer “for once again standing up in the face of environmental injustice and federal inaction.”

Despite the rhetoric, the New York and New Jersey bills are limited in scope and do not affect the production, sale or use of creosote-treated railway ties or utility poles, which account for well over 95 percent of the creosote-treated wood market. Nevertheless, in their zeal to please organized labor, Spitzer and Corzine failed to recognize the substantial long-term costs to the public of prohibiting the use of creosote-treating marine and foundation piling—products that are important components of their states’ and the nation’s infrastructures.

These totally unwarranted bills and CCIII’s exhaustive efforts to defeat them highlight the need for the entire wood preserving industry to consider that the New York and New Jersey bills are a wake-up call for preventing this sort of politically motivated legislation from spreading to other wood preservatives or to other states.

Wood Preserving Coalition

Formed in the mid-1980s CCIII functioned primarily as a joint data development group for conducting the product chemistry, health and safety, worker exposure, and other studies needed by the U.S. Environmental Protection Agency (EPA) to re-register creosote. In recent years, CCIII has taken on a broader, proactive, product stewardship role on behalf of creosote

wood treaters as well as creosote producers. These activities include monitoring—and actively opposing—unnecessary and scientifically unjustifiable, creosote-related legislative and regulatory measures.

CCIII took the lead in assembling an extraordinarily experienced team to marshal opposition to the New York and New Jersey bills. In New York, CCIII retained a lobbyist, Rich Leckerling, from the government relations practice group of Albany’s Whiteman, Osterman and Hanna LLP, and New Jersey lobbyist, Ed McGlynn, former Gov. Thomas Kean’s chief of staff. Other members of the team included Dave Webb, CCIII administrative director; Mike Juba, manager of global product safety and health at Koppers Inc. and CCIII chair; John Butala, toxicologist and technical advisor to CCIII; Larry Ebner of McKenna Long and Aldridge LLP in Washington, D.C., and attorney for CCIII, and his colleagues in Washington, D.C., New York City and Albany.

Other groups including the Railway Tie Association (RTA), Southern Pressure Treaters’ Association (SPTA), Treated Wood Council (TWC), and Western Wood Preservers Institute (WWPI) provided additional support. In addition, Bill Crossman and Randy Kelly of Atlantic Wood Industries, which operates a creosote wood treatment plant in Hainsesport, N.J., joined the team.

Creosote & Creosote-Treated Wood

Creosote is comprehensively regulated at the federal level by the U.S. EPA under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). As a restricted-use pesticide, creosote can be applied only in pressure-treatment plants by or under the direct supervision of trained, state-certified applicators. Like all pesticidal active ingredients first registered prior to 1988, creosote

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has been subject to an extensive EPA re-registration review. The purpose of the re-registration review is to ensure that creosote's continued registration is supported by up-to-date scientific studies and that creosote does not pose significant risks to human health or the environment when used in accordance with its nationally uniform, EPA-approved labeling.

EPA has the resources, expertise and experience to determine in an impartial, scientific manner how pesticides should be regulated. As an additional layer of protection, FIFRA allows the states to further restrict the sale or use of federally registered pesticides in order to take regional or local factors into account. State regulation of pesticides is supposed to be accomplished by expert state agencies such as the New York Department of Environmental Conservation (NYDEC) and the New Jersey Department of Environmental Protection (NJDEP). Creosote has been registered for use by both NYDEC and NJDEP for many years.

When state legislators find it politically expedient to supersede both the U.S. EPA and their own state agencies, the results not only can be scientifically indefensible but also detrimental to the public. That is exactly what happened with the New York and New Jersey creosote bills.

Creosote-treated piling has many important uses, including in foundations for buildings, highway bridges and sewer lines, and construction and maintenance of governmental, industrial, and commercial piers, docks, fender systems, and other port and shipping facilities. Without question, creosote-treated piling, like creosote-treated railway ties and utility poles, are an integral part of the nation's critical infrastructure. (See <http://www.creosotecouncil.org/pdf/creosote.pdf>.) Now that New York and New Jersey legislators have passed a creosote-treated piling ban, contractors in those states will be forced to use more costly, less effective materials which, unlike creosote-treated wood, have not been scientifically demonstrated to have minimal environmental impact in aquatic and other sensitive environments.

In addition, the bills may force the Atlantic Wood Industries plant in Hainesport to close due to loss of the New York and New Jersey markets for creosote-treated piling.

Summary Of New York and New Jersey Bills

The New York and New Jersey creosote bills are similar but not identical. Each bill prohibits the sale and use (and in New York, the manufacture) of creosote and creosote-treated wood *except* that railroads and utility companies are expressly exempt—thus the bills *do not apply* to products such as creosote-treated railway crossties, switch ties and bridge timbers or to creosote-treated utility poles.

Neither bill affects creosote-treated wood that already is in place. They only prohibit the future installation of creosote-treated piling or other non-exempt products such as old railway ties used for landscaping. The New York bill explicitly states that creosote-treated wood that is “in use...may be continued to be used in such use.” Although the New Jersey bill does not contain this statement, one of the bill's principal sponsors specifically confirmed at a March 2007

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committee hearing that it is not intended to require removal of existing structures.

The New Jersey bill also contains a blanket prohibition against burning of creosote and creosote-treated wood. The New York bill only prohibits burning except in certain permitted facilities. Both bills otherwise require creosote and creosote-treated wood to be disposed of in permitted landfills that are properly lined to prevent groundwater contamination.

Each bill authorizes the state's environmental protection agency to issue regulations implementing the legislation. The bills also give those agencies authority to waive the sale and use prohibition “on a case by case basis” if creosote-treated wood is needed for construction or reconstruction “as a result of a declared state of emergency.”

The New Jersey bill became effective on

July 17. In New York, the bill goes into effect on Jan. 1, 2008, except that the effective date for the prohibition against installation of creosote-treated piling is Jan. 10, 2010, for pleasure vessel marinas and service facilities.

Finally, the New Jersey bill contains a highly misleading preamble purporting to identify the human health and environmental risks of creosote and creosote-treated wood, followed by the legislature's mistaken determination “that it is in the public interest to prohibit the sale, use and burning of creosote and creosote-treated wood products.” The New York bill is accompanied by a similarly inflammatory introduction, which broadly, vaguely and erroneously asserts that “the phase-out of creosote would protect public health and the environment.”

Union Clout

Both the New York and New Jersey bills were conceived and initiated by Dockbuilders Union (DU) #1456 of Greater New York and New Jersey. The DU is affiliated with the NYC District Council of Carpenters (DCC) and Joiners of America, and coordinates with the New Jersey Regional Council of Carpenters. These labor organizations, which routinely contribute to the political campaigns of candidates in both parties, made the creosote bills high priority items in their legislative agendas.

The DU began its crusade against creosote sometime in the late 1990s. By the spring of 2000, the union was supporting a so-called “Creosote Research Project,” which centered on a “Creosote Exposure/Medical Questionnaire” distributed to current and retired members. The union organized a “Creosote Informational Meeting,” which, according to an April 14, 2000, letter to members, “marks the beginning of the most comprehensive, focused effort ever undertaken to find medical answers determining whether extensive creosote exposure has medically caused disease in our members.” Rather than waiting for the results of the research project, the same letter boasted that “legislative bills are being prepared...to outlaw any future use of the creosote product. This legislative initiative has been spurred solely by Local Union 1456.”

To the best of the authors' knowledge, no scientific analysis of the questionnaire ►

results ever has been published or otherwise made public. Nor is there any credible scientific evidence linking creosote-treated piling with alleged health problems affecting some DU members, the majority of whom work outdoors all day and, according to the questionnaire responses, are heavy smokers. Yet, the DU obstinately blames creosote for a variety of members' ailments, including skin cancer and respiratory problems.

This same unwavering attitude was evident when CCIII representatives took the initiative to meet with union leadership in June 2006. Union leadership indicated that they were not interested in hearing about the scientific studies on creosote, about the need to follow standard precautionary measures (such as wearing gloves and long sleeve shirts) when working with creosote-treated piling, or about worker education and training. Instead, they literally pounded the table in unison, adamantly insisting that they would continue their fight for a creosote ban until their last breaths, and that unless the CCIII supported a creosote ban, there was nothing to discuss.

The DU also had no interest in participating in a proposed Mt. Sinai Hospital study to assess whether dermal absorption of creosote can be decreased through proper work practices—standard precautionary measures, which DU members admitted that they routinely ignore—such as the use of protective clothing and gloves. Although the union leadership denied any knowledge of the study, the U.S. Dept. of Health and Human Services research grant for the study indicated that the study was supposed to focus on 30 of the union's members. Further, the principal investigator for the study was supposed to be Dr. Jacqueline Moline, whom the DU identified as one of the directors of the union-sponsored Creosote Research Project.

Industry Opposition Efforts In New York and New Jersey

In May 2003, New York Sen. Carl Marcellino and Assemblyman Richard Brodsky introduced a bill that would have banned virtually all uses of creosote and creosote-treated wood. CCIII promptly launched a vigorous opposition effort, meeting with the bill's sponsors and staff and disseminating a memorandum discussing why the bill was unnecessary and unwarranted. Equally important, CCIII Lobbyist Rich Leckerling mobilized a

broad coalition of industry groups affected by the bill, including the railroad, telecommunications and utility industries. Although the senate version of the bill subsequently was amended to exempt the railroads, the legislation failed to pass either house during the 2003 legislative session.

Brodsky reintroduced the creosote bill in March 2004. This time, in an attempt to neutralize industry's most potent opposition, the bill exempted both the railroads and utilities. As a result, the broad-based industry coalition that had opposed the original bill began to crumble. The fact that the coalition, which had been so effective to date, had been divided and thus conquered was a major contributing factor that led to the bill passing the senate in June 2004.

CCIII's focus then turned toward urging a veto. This included mobilizing a letter writ-

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ing campaign from remaining coalition partners and meetings with Pataki's staff. Pataki vetoed the bill in August 2004. His veto message stated that the bill was premature in view of EPA's ongoing FIFRA re-registration review of creosote. In addition, the governor's veto message pointed out that the bill failed to exempt the Port Authority of New York and New Jersey, which is a major user of creosote-treated wood, and included an unnecessary prohibition against properly controlled incineration of creosote-treated wood.

In May 2005 Marcellino declined to reintroduce the bill. Nevertheless, the DCC prepared a further amended version of the bill, which was introduced by former Sen. Nicholas Spano. In the assembly, the bill again was sponsored by Brodsky. CCIII continued the fight against the bill, but it passed both houses in June 2005. And in December 2005, following additional CCIII lobbying efforts, Pataki again found the bill

flawed and vetoed it for the second time.

The bill made its way through the legislature again in June 2006 and in December 2006 Pataki vetoed the bill for the third time.

In 2007, the bill passed the New York Legislature for the fourth year in a row, despite CCIII's exhaustive efforts.

This time CCIII again sought a veto, but the political climate in New York had changed. Spitzer was elected governor. Further, his top environmental policy advisor, Judith Enck, is a well-known environmental activist. CCIII met with Enck to no avail. Spitzer signed the bill that his predecessor saw fit to veto three times.

New Jersey

Pataki's 2004 and 2005 vetoes were a major source of frustration for the DCC and DU, so they tried an end run by pushing a similar bill in New Jersey. They enlisted the aid of the New Jersey Council of Carpenters (NJCC). At NJCC's behest, State Assemblyman Patrick Diegnan introduced A-2804 in March 2006. Diegnan was somewhat familiar with creosote-treated wood because he had introduced A-2828 in May 2004. That 2004 bill was not promoted by any labor groups, but instead by a Union County citizens' group called Coalition to Stop the Freight Train, whose goal was to halt the reactivation of an abandoned short-line freight railroad through their communities. The group's original strategy was to alarm the public about installation of new creosote-treated railroad ties, although A-2828 itself would have been limited to purchase of creosote-treated wood by New Jersey state agencies. Over the course of the next year and a half, CCIII Lobbyist Ed McGlynn met with Diegnan and the bill's co-sponsors to discuss the vital role that creosote-treated ties play in railroad operations and the lack of significant human or environmental risk. McGlynn also met with state officials, including from the New Jersey DOT and New Jersey Transit and with members of the Stop the Train coalition.

CCIII was thus instrumental in ensuring that A-2828 was not approved by the New Jersey Assembly.

But this was just a prelude to Diegnan's introduction of A-2804 in March 2006. A-2804 was the NJCC/DU's bill banning sale and use of new creosote-treated piling and prohibiting burning of creosote and ►

creosote-treated wood. In the senate, the bill was introduced by Sen. Stephen Sweeney, who serves as chair of the Labor Committee and vice chair of the Environment Committee, and whose day job is as a “union business agent.”

Unfortunately, the Democrats had won majorities in both houses of the legislature in November 2005. And Corzine, who had a 100 percent approval rating from the AFL-CIO while a U.S. Senator for New Jersey, had just taken office as governor.

McGlynn arranged for CCIII representatives to meet with Diegnan in June 2006 to discuss his bill. Diegnan indicated that he was motivated to introduce the bill because of his personal distaste for unsightly railroad rights of way. Since the bill expressly exempted the railroads’ use of creosote-treated wood, this made no sense. Diegnan promised that he would not move the bill through the assembly’s Environment Committee without first affording CCIII another opportunity to discuss it. That also turned out to be inaccurate.

McGlynn then arranged a meeting between CCIII and New Jersey Sen. Bob Smith, who chairs the Environment Committee. Smith seemed persuaded that the creosote bill was unwarranted. But when the bill came before that committee for hearing in March 2007, he turned the session over to Vice-Chair Sweeney, the bill’s primary sponsor in the senate, and left the room to attend a different committee hearing.

McGlynn met individually with more than 40 New Jersey state legislators to advocate against the bill on behalf of CCIII.

In addition to meeting individually with key legislators, CCIII presented live testimony at the Assembly Environment Committee’s hearing on the bill in December 2006 and before the Senate Environment Committee in March 2007. DU representatives also testified at those sessions. The Senate Environment Committee hearing was particularly frustrating, since it was evident that Sweeney’s mind already was made up on the subject.

Even before both houses of the state legislature passed the bill, CCIII undertook an effort to urge Corzine to conditionally veto it. A conditional veto would have meant that the bill would not have become law unless the legislature amended the bill in the manner specified by the governor. CCIII recommended a conditional veto that would

have eliminated the ban on sale and use of creosote-treated piling, and instead, would have required dockbuilders and other workers to comply with simple precautionary measures to avoid or reduce skin exposure. In urging a conditional veto, McGlynn and CCIII representatives met with members of the governor’s staff and also with the port authority. On two occasions CCIII representatives also spoke directly with Corzine about the bill.

Unfortunately, as discussed above, political expediency and union muscle prevailed over science and reason both in Trenton and Albany. DCC, which spent well in excess of \$1 million in lobbying expenses and campaign contributions over the course of five years to get the bills enacted, had won.

Future Challenges

What else could CCIII and its industry allies have done in New York or New Jersey to try to defeat the creosote-treated piling bills? Probably nothing. CCIII fielded the best possible team. It succeeded in holding off legislation for more than four years. But in the end, the wood preserving industry was no match for the organized labor lobby, which contributes hundreds of thousands of dollars to New York and New Jersey political candidates’ campaigns.

Not surprisingly, environmental and anti-pesticide groups, which are long-time allies of organized labor, are quite pleased with these developments. For example, according to Beyond Pesticides, the creosote-treated piling legislation is “a great first step...What we are looking at is for railroad workers’ unions and telecom unions to push for the same things for their workers.”

To help prevent other states from adopting similar, or broader, legislation, there are some things that the wood preserving industry should do right away.

First, producers, treaters, users and industry allies should work together to change the *false* perception among some state legislators and regulators, and the media, that creosote-treated wood—railway ties, utility poles, and marine and foundation piling—are outdated, hazardous products that are harmful to health and the environment and are, or should be, on the way out. The industry needs to be proactive in emphasizing the important role that creosote-treated wood continues to play in the nation’s critical infrastructure, its cost-effectiveness compared to alternative materials, and the

substantial health and safety testing on creosote that has been conducted in recent years to comply with EPA re-registration requirements.

Second, wood preserving industry groups and allied organizations should continue communicating with each other and join forces to identify and fight legislative and regulatory threats against creosote and creosote-treated wood products in a unified manner. For example, in both New York and New Jersey, TWC, which had access to its own lobbyists, actively supported the CCIII’s opposition efforts.

Third, creosote producers and treaters—and industry allies—should become more politically active. This not only means making sufficient funds available to engage the best possible lobbyists where and when needed, but also making, to the extent permitted by law, financial contributions to selected political candidates’ campaigns.

Fourth, members of the wood preserving industry should recognize that the above points also apply to other wood preservatives. If anti-pesticide forces have their way, the New York and New Jersey creosote-treated piling bills are merely the first step in eliminating all types of wood preservatives and pressure-treated wood. Thus, the entire wood preserving industry must remain vigilant and be better prepared to respond quickly where and when necessary.

These suggestions do not guarantee success. But, unless the wood preserving industry—as a whole—becomes more politically active, there is little way it can start leveling the playing field. Without leveling the playing field, what happened in New York and New Jersey will likely be just remembered as the tip of the iceberg as it relates to further legislative actions directed at wood preservers. §

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