

MEMORANDUM

IMPACT OF BULMER/NALCO DECISION ON THE OBLIGATION TO REMOVE THE PACK FROM COOLING TOWERS

The issue of the removal of the pack from cooling towers for cleaning purposes has recently become a matter of concern for many in the industry. Our view is that the requirements relating to the cleaning of the pack remains as set out in the HSC Approved Code of Practice (“ACOP”) and Guidance L8 ‘Legionnaires’ disease – The control of legionella bacteria in water systems’ and recent additional guidance specifically concerning this matter issued by the Health and Safety Executive (“HSE”).

ACOP para 54(e) requires the maintenance of the cleanliness of the cooling system and the water in it so as to ensure the prevention and control of the risk from exposure to legionella.

Guidance para 138, indicates ways in which the above requirement can be complied with and states that, where practicable, the packs should be removed at least once a year and preferably every 6 months and where this is not practicable, that it may be necessary to apply supplementary strategies. This is Guidance and does not make the removal of the pack mandatory. Moreover this is confirmed by the supplementary guidance note issued by the HSE specifically to address this issue which goes on to say that other equally effective means can be employed to maintain a clean system.

HP Bulmer and Nalco were prosecuted recently in the Hereford Crown Court for breaches of the Health and Safety at Work etc. Act which led to a fatal outbreak of Legionnaires' Disease in 2003. Both companies pleaded guilty, and on 1 July 2008 each company was fined £300,000 plus costs. During the sentencing, His Honour Judge Alistair McCreath made some comments which have been interpreted by some in the industry as an indication of a change in the applicable law which would make the removal of the pack mandatory, notwithstanding the clear guidance to the contrary issued by the HSE.

This is not a correct interpretation of the Judge’s remarks. The Court’s sentence was not a decision on a point of law in the Bulmer/Nalco case, since both companies had already pleaded guilty to the offences with which they were charged. Questions of interpretation of the Health and Safety at Work etc. Act, and the Guidance did not arise. Therefore the Judge’s comments cannot be construed as *ratio decidendi* (the reason for the decision) which would be required if the comments are to be considered as precedent and binding on Courts in prosecutions in other cases.

Accordingly, any reference to an obligation to remove the pack from the cooling tower cannot be interpreted as making such removal mandatory. Since the Judge’s comments were not the basis of the verdict, because the companies had pleaded guilty, they are therefore only *obiter dictum* and can be used in other prosecutions as persuasive but not binding.

Following the Judges’ comments, the HSE has made its position clear; namely that the current guidance published by the HSE sets the requirements for all members of the industry. Commenting on the Judge’s remarks, Paul McDermott of Biological Agents Unit at the HSE wrote:

“I believe that the key issue is the cleanliness of the pack (and the rest of the system), rather than its physical removal from the towers. The new HSE guidance makes it clear that it is the cleanliness (or lack of it) that predisposes a cooling tower to Legionella colonisation where bacterial numbers can reach dangerous levels. Assessment of cleanliness of the pack and appropriate, effective cleaning as a result of the findings of that assessment is a fundamental element of the control regime of any cooling tower and HSE’s position on this remains unchanged”

In our opinion, the legal position remains as it was before the prosecution in the Bulmers/Nalco case.