

TEXAS ENVIRONMENTAL UPDATE



April 2010

TEXAS DEVELOPMENTS

EPA Disapproves Qualified Facilities Programs; TCEQ Adopts New Rules to Address Concerns

In an anticipated but controversial decision, EPA disapproved the Texas qualified facilities New Source Review ("NSR") permitting program. Among other concerns, EPA determined that the program allows major NSR permit modifications without a federal NSR permit amendment, and fails to meet state implementation plan amendment criteria. EPA has also criticized the program for failing to include adequate public participation. EPA published its decision on March 31, 2010, a deadline established by consent decree resulting from an industry lawsuit against EPA. Additional information is available at <http://epa.gov/region6/index.htm>. In a related action, on March 30, 2010 TCEQ proposed amended rules intended to address EPA's concerns about the Texas qualified facilities program. TCEQ's proposal is available at <http://www.tceq.state.tx.us/rules/prop.html#10006>.

EPA is expected to disapprove two other parts of the Texas air program -- the Flexible Permit Program and the NSR Reform regulations -- by the end of this year, and likely by the end of the summer. Information about EPA's consideration of these Texas air program elements is available at <http://epa.gov/Region06/index.htm>. EPA has met with industry groups to outline a proposed procedure for conducting what it is calling "Flex Permit Rehabilitation" -- a process that would require a voluntary third-party audit program and public participation in connection with transitioning from flexible permits to permits with unit-specific emission limits.

EPA Finds TCEQ's Proposed WET Implementation Procedures "Inadequate"

By letter dated March 30, 2010, EPA Region 6 reported its finding that the whole effluent toxicity ("WET") implementation procedures ("IP") that TCEQ approved for proposal in January 2010 are inadequate. EPA states that "[w]hile the proposed IP revisions may address facilities demonstrating the most egregious levels of toxicity, we believe they do not constitute an appropriate approach to determining reasonable potential (RP) for all discharges that have demonstrated toxicity." This letter reflects an ongoing disagreement between TCEQ and EPA regarding the WET biomonitoring program, including the use of WET limits for sub-lethal effects, pursuant to which EPA has raised objections to several Texas Pollutant Discharge Elimination System ("TPDES") permits. In the letter, Regional Administrator Al Armendariz expresses concern that "objections to TPDES permits will continue as a result of the proposed revisions to TCEQ's implementation procedures, which calls into question TCEQ's ability to administer the TPDES program consistent with the CWA requirements and the Memorandum of Agreement between our agencies." EPA's letter is available at www.bdlaw.com/assets/attachments/Armendariz%20letter%20to%20Vickery%20re%20WET.pdf, and TCEQ's IP proposal is available at http://www.tceq.state.tx.us/permitting/water_quality/stakeholders/2010standards.html#contacts.

The public comment period for TCEQ's proposed 2010 Water Quality Standards and WET implementation procedures began January 18 and ended March 17, 2010. The agency's target agenda date for adoption of the Water Quality Standards and approval of the IP is June 30, 2010.

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Layla Mansuri Appointed Region 6 Associate Regional Administrator

Regional Administrator Armendariz recently announced Administrator Lisa Jackson's appointment of Layla Mansuri to be Associate Regional Administrator for the Region 6 office. In his announcement, Regional Administrator Armendariz noted Ms. Mansuri's experience in environmental law, environmental justice, air quality, and climate change. Prior to her appointment, Ms. Mansuri was an attorney with the Environmental Integrity Project, a nonprofit group focused on enforcement of environmental protection laws. She has also worked for Public Citizen, Environmental Defense Fund, and in EPA's Office of Environmental Justice.

TCEQ Proposes to Replace Thermoset Resin Facility PBR with Standard Permit

TCEQ is proposing to replace the existing thermoset resin facility permit by rule ("PBR") in 30 TAC §106.392 with a new air quality standard permit. TCEQ indicates that transitioning to the standard permit would be appropriate given that the existing PBR, which was last amended in 1994, is based upon emissions factors that have subsequently been found to underestimate styrene emissions from thermoset resin operations, and a short-term effects screening level ("ESL") for styrene that TCEQ has since replaced with a lower ESL. The PBR currently authorizes thermoset resin facilities with a maximum resin and gelcoat usage of 75 tons per year ("tpy") for spraying operations and 150 tpy for non-spraying operations. The proposed standard permit emission limits would vary depending on building height, stack height, and emission stream flow rate. Advance written approval from TCEQ's Executive Director to operate under the standard permit would be required prior to commencing construction or operation of a facility. Pursuant to TCEQ's proposal, owners or operators currently authorized under the PBR could continue to operate pursuant to the PBR until the facilities are modified.

TCEQ will hold a public meeting on the proposed standard permit in Austin on May 6, 2010 at 10:00 a.m., at TCEQ, Building E, Room 201S, 12100 Park 35 Circle, Austin. Written comments must be submitted to TCEQ by May 10, 2010. The agency's published notice of the proposal in the April 2, 2010 issue of the Texas Register (35 Tex. Reg. 2762) is accessible at <http://texinfo.library.unt.edu/texasregister/html/2010/apr-02/in-addition/in-addition.html#149>. Additional information regarding the proposed standard permit, including the terms and conditions of the proposed standard permit, is available on TCEQ's website at http://www.tceq.state.tx.us/permitting/air/announcements/nsr_announce_04_02_10.html.

Dallas-Fort Worth SIP Revisions

On April 14, 2010, TCEQ's Commissioners approved the publication of proposed revisions to the Dallas-Fort Worth nonattainment area State Implementation Plan (SIP) for the 1997 eight-hour ozone standard. The revisions would convert the SIP's environmental speed limit (ESL) requirements into a transportation control measure (TCM). The conversion would allow local air quality planners the flexibility to change environmental speed limits in the Dallas-Fort Worth area without the TCEQ having to undertake a SIP revision for each change. Instead, the change could be made through the TCM substitution process. The change was proposed by the North Texas Tollway Authority to provide flexibility in the North Central Texas Council of Governments transportation planning process. The public comment period on the proposed revisions extends from April 30, 2010 to June 1, 2010. A hearing will be held at TCEQ's Region 4 offices on May 24, 2010.

Upcoming TCEQ and RRC Meetings and Events

- TCEQ will host its annual **Environmental Trade Fair & Conference** on May 4-5, 2010 at the Austin Convention Center. A banquet will be held on the evening of May 5th, during which the 2009 Texas Excellence Awards will be given. Additional information is available at <http://www.tceq.state.tx.us/assistance/events/etfc/etf.html>.

- A **TCEQ Commissioners' Work Session** is scheduled to be held on May 14, 2010 at the TCEQ Headquarters in Austin. Additional information is available at http://www.tceq.state.tx.us/comm_exec/agendas/wk_sess/w_session.html#schedule.
- TCEQ will conduct a **Highly Reactive Volatile Organic Compounds ("HRVOC") Stakeholder Group Meeting** on May 14, 2010 in Houston at the Houston-Galveston Area Council at 3555 Timmons Lane, Suite 120, Room A, to provide training on completing the HRVOC Emissions Cap and Trade ("HECT") Program Baseline Emissions Certification Form. For more information, please contact Luke Baine of the Stationary Source Programs Team at (512) 239-5856, or by email at lbaine@tceq.state.tx.us.
- The Texas Public Department of Public Safety will host the **2010 Texas Hurricane Conference** on May 18-20, 2010 at the McAllen Convention Center. Additional information is available at <http://www.tceq.state.tx.us/response/hurricaneconference>.
- The Texas Gas Association ("TGA") will be hosting the **US Department of Transportation Pipeline and Hazardous Materials Safety (PHMSA)/Railroad Commission Pipeline Safety Seminar for Texas** in Corpus Christi on June 16-18, 2010 at the Omni Hotel Bayfront. Natural Gas will be covered on June 16-17, 2010 and Hazardous Liquids will be covered June 17-18, 2010. For more information, please contact Carrie Smith at carrie.smith@rrc.state.tx.us.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in April can be found on the TCEQ website at http://www.tceq.state.tx.us/comm_exec/communication/media/10-04Agenda4-14, and http://www.tceq.state.tx.us/comm_exec/communication/media/4-10Agenda4-28.

Recent Texas Rules Updates

For information on recent TCEQ rule developments, please see the TCEQ website at <http://www.tceq.state.tx.us/rules/whatsnew.html>.

NATIONAL DEVELOPMENTS

Proposed Legislation Would Overhaul TSCA

The "Safe Chemicals Act of 2010" ("SCA"), S. 3209, introduced April 15 by Senator Lautenberg (D-NJ), proposes to fundamentally overhaul the Toxic Substances Control Act ("TSCA"). A companion proposal in the House of Representatives, the discussion draft for the "Toxic Chemicals Safety Act of 2010" ("TCSA"), was released the same day by Representatives Waxman (D-CA) and Rush (D-IL). This long-awaited legislation offers concrete targets for discussion and analysis in a political environment that features broad consensus regarding the need for modernization of TSCA, but far less consensus regarding the specific shape that modernization should take. Stakeholder dialogue on the bills is ongoing, but major points of disagreement remain—even between the two bills themselves—and prospects for passage of the legislation during this term of Congress are low.

This complex legislation would make extensive changes to the industrial chemicals management framework in the United States. For the first time, chemical manufacturers, importers, and processors would be responsible for submitting a minimum data set for all chemicals in commerce and for establishing that their chemicals met a safety standard of "reasonable certainty of no harm." The Environmental Protection Agency ("EPA") would be required to prioritize, evaluate, and manage new and existing chemicals in tight timeframes. EPA's authority to impose restrictions and conditions on existing chemicals would be greatly enhanced, particularly by its ability to impose such conditions in its safety determinations. Confidentiality provisions would be narrowed, while EPA's authority to order data production

and testing would be expanded. These and numerous other proposed changes to the legal framework would modernize various dimensions of TSCA, but would also impose substantial new burdens on both industry and EPA. This alert reviews the major changes proposed by the SCA and the TSCA.

For the entire article, please go to <http://www.bdlaw.com/assets/attachments/2010-04-19%20Alert%20on%20Proposed%20Legislation%20to%20Overhaul%20TSCA.pdf>.

For more information, please contact Mark Duvall at mduvall@bdlaw.com or Alexandra Wyatt at awyatt@bdlaw.com.

Debate over Chemical Plant Security Moves to the Senate

Following the House's passage of a chemical plant security bill last November, the Senate has begun to turn its attention to the issue, with subcommittee hearings held in March and multiple bills either proposed or in the works. As in the House, the focus of contention thus far in the Senate has been the possible addition of inherently safer technology ("IST") requirements into a reauthorization of the existing Chemical Facility Anti-Terrorism Standards ("CFATS") program.

Background

The security of chemical facilities has been a subject of increased concern since the September 11, 2001 attacks, when it became apparent that stores of hazardous chemicals are a logical target for terrorists. Members of Congress have agreed on the need for a federal chemical facility security program, but have disagreed sharply on the issue of making IST mandatory. IST refers to technological and procedural steps intended to reduce the potential for a hazardous chemical release, in contrast to security measures intended to deter sabotage of existing processes. IST measures typically involve modifying processes to reduce the quantity of hazardous chemicals used or stored, reducing temperatures or pressures, or replacing a hazardous chemical with a less hazardous one. While facilities are always free to reduce hazards in these ways, a mandatory IST approach would require facilities to examine their industrial processes to evaluate safer alternatives and would enable a government agency to compel facilities to adopt the changes that it concludes are justified.

In 2006, unable to resolve their dispute over IST, legislators compromised on a temporary solution, CFATS, a program that requires facilities that use certain hazardous chemicals above threshold quantities to conduct security vulnerability assessments and respond with site security plans. The provision, Section 550 of the 2007 Department of Homeland Security ("DHS") appropriation, included a three-year sunset clause under which the authority was set to expire in October 2009.¹ However, the authority has since been extended to October 2010.² Thus, as was the case with the House during 2009, the Senate debates chemical plant security during 2010 in the shadow of an October deadline, although the ease of extending the authority has already been demonstrated, and presumably could be repeated.

The House Proposal, H.R. 2868

During much of 2009, the House of Representatives debated proposals to reauthorize CFATS.³ Ultimately, in November, the House passed H.R. 2868, the "Chemical and Water Security Act of 2009," which would make DHS's CFATS authority permanent and create a similar security program under the Environmental Protection Agency ("EPA") and state environmental agencies for water treatment facilities. H.R. 2868 retains the existing CFATS program essentially intact, but includes two controversial features: IST and citizen enforcement.

First, H.R. 2868 would require all facilities to assess IST alternatives, although it uses the substitute label, "methods to reduce the consequences of a terrorist attack." After several revisions, the IST provisions that eventually passed incorporate several important compromises to soften their impact on industry. A facility's IST assessment would include considerations of cost, risk allocation, and impairment of its ability to remain in business.⁴

While DHS would be authorized to require facilities in the highest risk categories to implement IST measures, the authority would be discretionary and subject to an appeal within DHS in which DHS would be required to consult with industrial specialists before deciding to require implementation.⁵

Second, H.R. 2868 adds another source of political tension: authorizing “any person” to sue to enforce the law.⁶ As with its IST provisions, the bill’s original citizen suit language was revised to reduce its impact, limiting the scope of potential defendants to the government only. However, a late amendment added a second avenue of citizen enforcement by requiring DHS to establish a procedure to accept the filing of “citizen petitions.”⁷ The procedure would allow any citizen to compel DHS to investigate any potential violation of the CFATS program and report its findings to the petitioner. These findings would be deemed “final agency action,” enabling petitioners to sue the agency.

H.R. 2868 would establish security programs for drinking water and wastewater treatment utilities, both currently exempt from CFATS. Although administered by EPA and the states instead of DHS, the water utility security programs would be based on the CFATS model. Both of these proposed programs also include IST provisions similar in effect to the final version for chemical facilities: IST implementation would be mandatory for high risk utilities, but subject to agency discretion. Unlike the chemical facility program, the water utility security programs would not be subject to either citizen suits or citizen petitions.

Senator Collins’ Bill, S. 2996

On February 4, 2010, Senator Susan Collins (R-ME), an outspoken critic of mandatory IST, introduced S. 2996, the “Continuing Chemical Facility Antiterrorism Security Act of 2010.” S. 2996 would extend the CFATS authority intact until October 4, 2015, five years beyond its current term. Collins’ bill would add two voluntary DHS programs: a chemical security training program and a chemical security exercise program. In her floor statement, Collins argued that “Forcing chemical facilities to implement IST could wreak economic havoc on some facilities and affect the availability of products that all Americans take for granted. . . . [M]andatory IST would negatively restrict the production of pharmaceuticals and microelectronics, unnecessarily crippling those industries.”⁸ S. 2996 has co-sponsors from both parties (currently two Democrats and two Republicans), an indication that the debate in the Senate may lack the party-line character that prevailed throughout much of 2009 in the House.

Senate Homeland Security Committee Hearing

On March 3, 2010, the Senate Committee on Homeland Security and Governmental Affairs held a hearing to initiate the Senate’s long-anticipated debate on chemical plant security legislation.⁹ The principal topics before the Committee were the two bills, H.R. 2868 and S. 2996; the merits of granting governmental authority to mandate IST; and the current exclusion of water utilities from the CFATS program. Most of the contention was focused on IST. Senator Collins and representatives of the chemical industry argued against mandating IST, whereas officials of DHS and EPA voiced the Obama Administration’s support for a phased introduction of IST requirements. In addition to concerns over the continued viability of certain products and facilities under a mandatory IST requirement, witnesses argued that IST is not a security methodology, and further that it is a poorly defined concept not suitable for enforcement.

The Obama Administration Announces Its Position

Representing DHS at the hearing, Rand Beers, Under Secretary for the National Protection and Programs Directorate, presented the Obama Administration’s current position on chemical plant security legislation.¹⁰ According to Beers, the Administration supports the following:

- passage of permanent legislation;
- CFATS remaining in effect, with gradual implementation of any changes;
- using IST where possible, in balance with other considerations;

- protection of sensitive information under the current program; and
- creating a CFATS-like program for water utilities under EPA, with support from DHS to ensure consistency.

The Administration also advocates modifying the existing CFATS exemptions for facilities regulated under the Maritime Transportation Security Act (“MTSA”) and the Nuclear Regulatory Commission (“NRC”), giving CFATS a review role for MTSA facilities, and clarifying the scope of the NRC exemption. Beers expanded on the Administration’s view of how IST should be incorporated into CFATS, approximating H.R. 2868 as passed by the House. In the Administration’s view, IST requirements should be consistent among industries, with assessment of IST mandatory for all high-risk facilities. For the highest risk facilities (Tiers 1 and 2 under CFATS), the Administration supports giving the agencies the authority to require implementation of IST “if such methods demonstrably enhance overall security, are determined to be feasible, and, in the case of water sector facilities, consider public health and environmental requirements.”¹¹

Senator Lautenberg Bill Expected

Senator Frank Lautenberg (D-NJ), Chairman of the Senate Environment and Public Works Committee’s Subcommittee on Superfund, Toxics and Environmental Health, has a well established record of proposing legislation to regulate the chemical industry, including chemical facility security bills in the 106th and 109th Congresses,¹² and proposals to reform the Toxic Substances Control Act -- most recently the Safe Chemicals Act of 2010, introduced on April 15.¹³ Soon after the House passed H.R. 2868, Lautenberg announced his intention to introduce a chemical facility security bill that “would create a permanent comprehensive plan to deal with chemical security nationwide.”¹⁴ In the past, Lautenberg has been a staunch advocate of mandatory IST, which therefore appears certain to remain at the center of contention as the Senate confronts chemical security in 2010.

For more information, please contact Mark Duvall at mduvall@bdlaw.com or Russell Fraker at rfraker@bdlaw.com.

¹ Department of Homeland Security Appropriations Act, 2007, § 550, Pub. L. No. 109-295, 120 Stat. 1355, 6 U.S.C. 121 note (2006).

² Department of Homeland Security Appropriations Act, 2010, § 550, Pub. L. No. 111-83, 123 Stat. 2142, 6 U.S.C. 121 note (2009).

³ See Beveridge & Diamond, P.C., “Chemical Plant Security Legislation: Where We’ve Been, Where We Are, Where We’re Going,” April 29, 2009, [available at http://www.bdlaw.com/news-559.html](http://www.bdlaw.com/news-559.html); Beveridge & Diamond, P.C., “Chemical Plant Security Legislation: On the Move,” July 2, 2009, [available at http://www.bdlaw.com/news-611.html](http://www.bdlaw.com/news-611.html); Beveridge & Diamond, P.C., “Congress Poised to Defer Permanent Chemical Plant Security Legislation Until 2010,” July 9, 2009, [available at http://www.bdlaw.com/news-625.html](http://www.bdlaw.com/news-625.html); Beveridge & Diamond, P.C., “Chemical Plant Security Legislation Advances with Companion Bill on Drinking Water Utilities,” October 26, 2009, [available at http://www.bdlaw.com/news-712.html](http://www.bdlaw.com/news-712.html); Beveridge & Diamond, P.C., “House of Representatives Passes Chemical Plant and Water Utility Security Legislation,” November 17, 2009, [available at http://www.bdlaw.com/news-727.html](http://www.bdlaw.com/news-727.html).

⁴ H.R. 2868 § 2111.

⁵ *Id.* § 2111(b).

⁶ *Id.* § 2116.

⁷ *Id.* § 2117.

⁸ 156 Cong. Rec. S492 (daily ed. Feb. 4, 2010).

⁹ *Chemical Security: Assessing Progress and Charting a Path Forward Before the S. Comm. on Homeland Security and Governmental Affairs*, 111th Cong. (2010). Statements and archived webcast are available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=c5606ab3-bfba-414a-b735-ef35a4adc677.

¹⁰ *Chemical Security: Assessing Progress and Charting a Path Forward Before the S. Comm. on Homeland Security and Governmental Affairs*, 111th Cong. (2010) (statement of Rand Beers, Under Secretary, National Protection and Programs Directorate, Dept. of Homeland Security), [available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=c6d95188-01c3-4f64-bfb9-c8b27d8dbcb8](http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=c6d95188-01c3-4f64-bfb9-c8b27d8dbcb8).

¹¹ *Id.*

¹² S. 1470, “Chemical Security Act of 1999,” 106th Cong. (1999); S. 2486, “Chemical Security and Safety Act

of 2006," 109th Cong. (2006).

¹³ S. 3209, 111th Cong. (2010).

¹⁴ Press Release, Sen. Frank Lautenberg, On 25th Anniversary of Bhopal Disaster, Lautenberg Highlights Need for Greater Chemical Security (Dec. 3, 2009), available at <http://lautenberg.senate.gov/newsroom/record.cfm?id=320411>.

Federal Court Rejects Challenge to CWA Permit Regulating Upland Ditches

The U.S. District Court for the District of Columbia recently determined that upland manmade ditches may be subject to federal jurisdiction under the Clean Water Act ("CWA"). In *National Association of Home Builders v. U.S. Army Corp of Engineers*, No. 07-972 (D.D.C. Mar. 30, 2010), the court rejected a challenge by the National Association of Homebuilders ("NAHB") to the U.S. Army Corps of Engineers' authority to issue nationwide permit 46 ("NWP 46"), which extends CWA jurisdiction to discharges of dredged or fill material into upland ditches. The ruling marks a significant setback to development interests and could lead to changes in the Corps' Section 404 permitting practices.

The Corps issued NWP 46 in 2007 as a general permit to cover certain manmade, upland ditches that convey water to or divert it from CWA-jurisdictional waters. The permit allows the Corps to determine on a case-by-case basis whether these ditches are subject to CWA jurisdiction and, therefore, whether a landowner must obtain a Section 404 permit before discharging dredged or fill material into them. NAHB, which has long argued that the CWA does not reach any manmade ditches constructed in uplands, challenged the permit shortly after it took effect.

NAHB argued that the Corps violated the Administrative Procedure Act by issuing NWP 46 as a means to regulate upland ditches as "waters of the United States" and requiring permits for discharges to features over which it has no authority. NAHB asserted that ditches are expressly included in the CWA's definition of "point source," but not in its definition of "waters of the United States." This nuance, NAHB reasoned, indicated that Congress intended ditches to be viewed as point sources that convey discharges to jurisdictional waters, but not as jurisdictional waters themselves. The group further argued that ditches are not "relatively permanent, standing or continuously flowing" hydrologic features and, therefore, do not satisfy the test for CWA jurisdiction articulated in the U.S. Supreme Court's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). See <http://www.bdlaw.com/news-59.html>.

The court rejected these arguments. It said that NAHB did not meet the requirements for sustaining a facial challenge to NWP 46 – i.e., showing that "no set of circumstances exists under which the permit would be valid." On the contrary, the district court explained, the Supreme Court in *Rapanos* contemplated that ditches, such as those covered under the general permit, could be jurisdictional waters under the CWA even if the statute includes them in its definition of "point source." Thus, the district court held, while certain upland ditches may not qualify as waters of the United States under the CWA, it could not be said that these features are categorically beyond the Corps' regulatory authority under the statute. Accordingly, the court granted summary judgment to the Corps.

The most recent National Association of Home Builders decision adds another layer of uncertainty to the scope of CWA jurisdiction over non-navigable waters and wetlands. In the wake of *Rapanos*, the Corps and the Environmental Protection Agency issued joint guidance, see <http://www.bdlaw.com/news-438.html>, stating that "ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water generally are not waters of the United States" In light of the court's ruling, this policy – and landowners' associated permitting requirements under the Clean Water Act – now may be subject to further refinement. As is all too often the case with the Section 404 program, confusion and uncertainty reign.

For more information about the impact of this decision, please contact Fred Wagner (fwagner@bdlaw.com, 202-789-6041) or Parker Moore (pmoore@bdlaw.com, 202-789-6028).

EPA's Lead-Based Paint Requirements For Renovation of Residential Properties Go Into Effect In April 2010

Pursuant to the Toxic Substances Control Act, on April 22, 2008, EPA promulgated regulations governing the renovation of residential properties (the "regulations"). The purpose of the regulations is twofold: (1) to ensure that owners and occupants of target housing and child-occupied facilities receive information on lead-based paint hazards before renovations begin and (2) to ensure persons performing renovations are properly trained and certified and that the work practices outlined in the regulations are followed.

Owners of target housing (housing constructed prior to 1978, with some exceptions) and child-occupied facilities are already required to comply with the Pre-Renovation Education Rule, which went into effect in June of 1999, by distributing a specified pamphlet to occupants and owners.

Once the regulations become fully effective, on April 22, 2010, owners of target housing and child-occupied facilities will be required to ensure that renovation work performed in or on target housing or child-occupied facilities is performed by certified renovators and in compliance with the work practices established by the regulations.

Importantly, the regulations have broad application, both with respect to the activities covered and the buildings implicated. For example, "renovations" is broadly defined and includes just about any activity that could result in the disturbance of painted surfaces, including surface preparation and restoration, window repair, weatherization projects, and removal of building components such as walls, ceilings and plumbing. Additionally, the regulations cover all target housing, thereby going beyond the scope of certain local requirements. New York City's lead paint law, for example, does not cover coops or condominiums, whereas they are covered under the EPA regulations.

Under the regulations, violators may be subject to civil and criminal sanctions. As such, owners of rental housing, coop boards, and condominium homeowners associations should take steps to ensure any work performed on housing constructed prior to 1978 is handled by certified renovators and completed in compliance with the regulations. Owners of child care facilities should take similar precautions.

A copy of EPA's regulations can be found at <http://www.epa.gov/fedrgstr/EPA-TOX/2008/April/Day-22/t8141.pdf>.

For more information or assistance ensuring your renovations comply with these new regulations, please contact Christopher McKenzie (cmckenzie@bdlaw.com, 212-702-5434), Harold Segall (hsegall@bdlaw.com, (202) 789-6038) or Edward West (ewest@bdlaw.com, (202) 789-6070).

Update on EPA's Recent and Forthcoming Chemical Action Plans Under TSCA

On March 29, 2010, EPA released its chemical action plan ("CAP") for bisphenol A ("BPA"), describing steps EPA will take to manage environmental concerns.¹ Shortly beforehand, on March 17, 2010, EPA announced that it was adding four chemicals or groups of chemicals to its CAP development schedule: nonylphenol/nonylphenol ethoxylates, hexabromocyclododecane ("HBCD"), siloxanes, and diisocyanates.² A CAP for benzidine dyes and pigments is anticipated shortly, as they, like BPA, were on EPA's original list of target chemicals.

These CAPs, which follow four others released on December 30, 2009,³ are core components of EPA's efforts, announced on September 29, 2009, to enhance its chemicals management program under the Toxic Substances Control Act (TSCA).⁴ While the plans will have direct and important impacts on a number of supply chains, they also reflect a broader policy shift complemented by EPA's concurrent efforts to promote reform of TSCA.⁵ This alert reviews the BPA CAP, previews the next five forthcoming CAPs, and provides context for chemical manufacturers, importers, processors and users who may be impacted to some degree.

Background and Selection of Chemicals

EPA's comprehensive approach to "Enhancing EPA's Chemicals Management Program" follows repeated statements from EPA Administrator Lisa Jackson and others that chemical safety would be a top priority for the Agency, in light of their view that TSCA has proven "inadequate" over time. "The most important component" of these efforts, according to EPA, is "identifying chemicals that pose a concern to the public, moving quickly to evaluate them and determine what actions need to be taken to address the risks they may pose, [and] initiating appropriate action," including through the CAPs.⁶

Administrator Jackson has also initiated actions increasing transparency at the Agency, such as by posting the non-confidential TSCA Inventory for free online on March 15, 2009.⁷ However, EPA's selection of chemicals for CAP development has been somewhat controversial for its level of transparency and the absence of stakeholder dialogue. EPA's website for its approach to enhance its current chemicals management program under TSCA originally contained (as of September 30, 2009) an assertion that the Agency would "initiate a stakeholder dialogue to address the prioritization of chemicals for future risk management action" and would "formally engage stakeholders and the public in this discussion," but this language has since been dropped from the website without explanation.⁸

BPA Action Plan

BPA is a key component of polycarbonate and epoxy resins widely used in consumer and industrial applications. It is a suspected endocrine disruptor, based mainly on animal tests.⁹ A recently released biomonitoring study, the Centers for Disease Control's Fourth National Report on Human Exposure to Environmental Chemicals, found BPA to be present at detectable levels in a large portion of the U.S. population.¹⁰

Despite Administrator Jackson's earlier speech remarking on risks from BPA "in baby bottles,"¹¹ the BPA CAP recognizes that most human exposure to BPA is from food contact substances, which fall under the jurisdiction of the Food and Drug Administration ("FDA") rather than EPA. FDA announced its new concerns and efforts regarding BPA on January 15, 2010,¹² and on April 5, 2010, FDA released for comment a set of scientific study reviews and exposure estimates relating to food contact materials made with BPA.¹³ EPA's CAP, therefore, largely focuses on potential environmental effects instead of human health. This shift potentially expands the scope of industries that may be affected, because BPA enters the environment from non-food-contact uses as well as from food-contact uses.

The CAP reviews EPA's current knowledge of the uses, hazards, exposure profiles, and risk management history for BPA, citing federal, state, academic, and international reviews.¹⁴ The CAP concludes by proposing the following information-gathering and control actions:

- Issuing a proposed rule in late 2010 to add BPA to the "Concern List" under TSCA section 5(b)(4) on the basis of its potential for chronic effects on aquatic species. The Concern List provisions have never before been used, although EPA also proposed adding other chemicals to the list in its December 2009 CAPs for phthalates and polybrominated diphenyl ethers ("PBDEs"). Under section 5(b)(4), EPA may compile a list of chemical substances for which it finds that the manufacture, processing, distribution, use, or disposal may present an unreasonable risk of injury to health or the environment. Once a chemical is on the Concern List, data requirements for premanufacture or significant new use notices are increased; export notification provisions of TSCA section 12 apply; and EPA can, by rule, require small businesses to submit reports from which they are otherwise exempt. However, it is widely expected that the main impact will be on the markets for the listed chemicals and products that contain them.
- Issuing a proposed rule in late 2010 to require environmental effects testing and exposure/concentration monitoring under TSCA section 4(a).
- Using EPA's Design for the Environment ("DfE") program under the Pollution Prevention Act to analyze readily available alternatives that would reduce BPA uses and exposures in applications such as thermal and carbonless paper coatings, foundry castings, and pipe linings.

While the BPA CAP is focused on environmental effects, EPA continues to work closely with FDA on analyzing human health impacts. EPA also states that it will continue to conduct its own evaluations of health impacts from non-food-packaging exposures to BPA.

Other Chemical Action Plans On the Horizon

Benzidine Dyes and Pigments

The CAP for benzidine dyes and pigments is anticipated prior to those announced on March 17, 2010. Benzidine dyes and pigments were originally announced in the September 29, 2009 rollout of EPA's enhancements to its chemicals management program.

Because they are considered carcinogenic, benzidine dyes and pigments have largely been phased out of U.S. commerce. EPA issued a significant new use rule ("SNUR") for a number of benzidine-based chemicals in the mid-1990s, recognizing that there was at that point "no ongoing manufacture, import, or processing, of the listed benzidine-based chemical substances, except for ... a few, limited purposes."¹⁵ The forthcoming CAP for benzidine dyes and pigments therefore likely represents EPA's efforts to "pick the low-hanging fruit" by taking advantage of control efforts already taken for certain chemicals.

Nonylphenol/nonylphenol ethoxylates ("NP/NPEs")

Long-chain NPEs are common surfactants for which there is concern that they may degrade in the environment to short-chain NPEs or to NP, which in turn are suspected to pose both acute hazards to aquatic organisms and to disrupt their endocrine systems. In 2007, a group of environmental non-governmental organizations including the Sierra Club petitioned EPA to initiate data gathering and chemical control rulemaking proceedings under TSCA sections 4 and 6, respectively. EPA granted only certain aspects of the petitioners' section 4 test rule request, and the groups sued EPA.¹⁶ After the parties settled, EPA issued an advance notice of proposed rulemaking on June 17, 2009, requesting comment on a test rule that would require aquatic and sediment toxicity testing and potentially other data gathering.¹⁷ The Fall 2009 Semiannual Regulatory Agenda indicated that a test rule may be proposed by the end of 2011.¹⁸ The forthcoming CAP is likely to refer to this rulemaking.

Hexabromocyclododecane ("HBCD")

HBCD is a brominated flame retardant used in some construction materials, electrical parts, and textiles. It is anticipated to persist and bioaccumulate if released into the environment, and is suspected to have thyroid effects and possibly aquatic toxicity.¹⁹ It is also the subject of a forthcoming Integrated Risk Information System ("IRIS") toxicological review.²⁰ HBCD was assigned an initial risk-based "high priority" by EPA's now-defunct Chemicals Assessment and Management Program ("ChAMP").²¹

Siloxanes

Siloxanes are a broad class of chemicals used in a wide variety of industrial and consumer products. Six siloxanes deemed representative of the class were the subject of a 1996 Memorandum of Understanding between EPA and Dow Corning Corporation. Dow Corning agreed to a Product Stewardship Program, from which a set of data was released in 2009.²² Following the theme of selecting chemicals for which chemical management actions have already been taken, these six "representative" siloxanes are likely to be singled out in the upcoming CAP for siloxanes.

Diisocyanates

Diisocyanates, most prominently methylene diphenyl diisocyanate ("MDI"), toluene diisocyanate ("TDI"), and hexamethylene diisocyanate ("HDI"), are used in the production of polyurethanes and in other applications. Diisocyanates have been the subject of EPA toxicology profiles and protection recommendations,²³ and HDI was tested under a consent order entered into in 1997.²⁴

Next Steps

At a recent chemical industry conference, GlobalChem 2010, Wendy Cleland-Hamnett,

Director of the Office of Pollution Prevention and Toxics, announced that EPA intends to release twelve CAPs during 2010. Both the identity of the chemicals that will be added to the CAP release schedule next, and exactly how those chemicals will be chosen by EPA, are currently unknown.

For more information, please contact Mark Duvall, 202-789-6090, mduvall@bdlaw.com. This alert was prepared with the assistance of Alexandra Wyatt.

¹ EPA, Bisphenol A Action Plan (March 29, 2010), http://www.epa.gov/oppt/existingchemicals/pubs/actionplans/bpa_action_plan.pdf.

² EPA, Existing Chemical Action Plans, <http://www.epa.gov/oppt/existingchemicals/pubs/ecactionplan.html>.

³ Beveridge & Diamond, P.C., "EPA Issues Four Chemical Action Plans Under TSCA" (Jan. 5, 2010), <http://www.bdlaw.com/news-764.html>.

⁴ EPA, "EPA Administrator Jackson Unveils New Administration Framework for Chemical Management Reform in the United States" (Sep. 29, 2009), <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/d07993f9dcf801c2285257640005d27a6!OpenDocument>.

⁵ See EPA, Essential Principles for Reform of Chemicals Management Legislation, <http://www.epa.gov/oppt/existingchemicals/pubs/principles.html>.

⁶ EPA, *supra* note 2.

⁷ EPA, "EPA Makes Chemical Information More Accessible to Public" (Mar. 15, 2010), <http://yosemite.epa.gov/opa/admpress.nsf/e77fdd4f5afd88a3852576b3005a604f/c7860ed6d012f9df852576e7006365b0!OpenDocument>.

⁸ While the language has been dropped from the main website, it is still available in a PDF at <http://www.epa.gov/oppt/existingchemicals/pubs/Existing.Chem.Fact.sheet.pdf>.

⁹ Beveridge & Diamond, P.C., Bisphenol A: A Hot Topic at FDA, EPA, States, and the Courts (Feb. 19, 2010), <http://www.bdlaw.com/news-810.html>.

¹⁰ See generally Beveridge & Diamond, P.C., TSCA Reform Efforts Turn to Biomonitoring Studies for Support (Feb. 12, 2010), <http://www.bdlaw.com/news-809.html>.

¹¹ See, e.g., EPA Administrator Lisa Jackson, Remarks to the Commonwealth Club of San Francisco (Sep. 29, 2009), <http://yosemite.epa.gov/opa/admpress.nsf/a883dc3da7094f97852572a00065d7d8/fc4e2a8c05343b3285257640007081c5!OpenDocument>.

¹² FDA, Update on Bisphenol A (BPA) for Use in Food, <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm064437.htm>.

¹³ 75 Fed. Reg. 17145 (April 5, 2010), <http://edocket.access.gpo.gov/2010/pdf/2010-7511.pdf>.

¹⁴ The international reviews include: Environment Canada, Health Canada. *Screening Assessment for the Challenge Phenol, 4,4' (1-methylethylidene)bis- (Bisphenol A) CAS 80-05-7* (Oct. 2008), http://www.ec.gc.ca/substances/ese/eng/challenge/batch2/batch2_80-05-7_en.pdf; European Union, Updated Risk Assessment Report: Bisphenol A, http://ecb.jrc.ec.europa.eu/documents/Existing-Chemicals/RISK_ASSESSMENT/REPORT/bisphenolreport325.pdf; Japan National Institute of Advanced Industrial Science and Technology, Risk Assessment Document Series 4: Bisphenol A (2007), summary at http://unit.aist.go.jp/riss/crm/mainmenu/BPA_Summary_English.pdf.

¹⁵ 61 Fed. Reg. 52287, 52288 (Oct. 7, 1996), <http://www.epa.gov/EPA-TOX/1996/October/Day-07/pr-24192DIR/pr-24192.html>; 40 C.F.R. § 721.1660.

¹⁶ See Beveridge & Diamond, P.C., Citizens' Petitions Under TSCA Seek to Change EPA's Agenda (Apr. 28, 2009), <http://www.bdlaw.com/news-557.html>.

¹⁷ 74 Fed. Reg. 28654 (June 17, 2009), <http://edocket.access.gpo.gov/2009/E9-14250.htm>.

¹⁸ EPA, Semiannual Regulatory Agenda - Fall 2009, at 300-301, available at <http://www.regulations.gov/public/component/main?main=UnifiedAgenda>.

¹⁹ See, e.g., EPA, Initial Risk-Based Prioritization of High Production Volume Chemicals: HBCD (2008), <http://www.epa.gov/hpvis/rbp/HBCD.3194556.Web.RBP.31308.pdf>.

²⁰ IRISTrack Report for Hexabromocyclododecane Assessment, http://cfpub.epa.gov/ncea/irisrtrack/index.cfm?fuseaction=viewChemical.showChemical&sw_id=1102.

²¹ *Supra* note 19.

²² 74 Fed. Reg. 38013 (July 30, 2009), <http://www.epa.gov/fedrgstr/EPA-TOX/2009/July/Day-30/t18195.pdf>.

²³ See EPA Design for the Environment Program, Isocyanates Profile, <http://www.epa.gov/dfe/pubs/auto/profile/>.

²⁴ See 1,6-Hexamethylene Diisocyanate (HDI) Test Results, <http://www.epa.gov/opptintr/chemtest/pubs/hexametdc.html>.

Update on Developments in EPA Regulation of Nanotechnology

Nanotechnology is a hot topic for the U.S. Environmental Protection Agency ("EPA"), having captured the attention of high-level administrative officials as well as of the enforcement

branch of the agency. At a recent chemical industry conference, GlobalChem 2010, Steve Owens, Assistant EPA Administrator for Prevention, Pesticides and Toxic Substances¹, and other EPA officials spoke at length about both the great promise of nanotechnology and EPA's view that the risks of nanotechnology are unknown and potentially serious. In light of these concerns, EPA is taking a new path forward on regulation of manufactured nanomaterials under the Toxic Substances Control Act ("TSCA"). Nanomaterial researchers, manufacturers, and users should be prepared for an increasingly stringent regulatory environment.

Categorical Significant New Use Rule for Existing Nanomaterials

One key issue is the distinction between "new" and "existing" chemicals under TSCA, as applied to nanomaterials. Pre-market notifications ("PMNs") are required for new chemicals that are not on the TSCA Inventory that are not covered by an exemption, allowing EPA to conduct a risk assessment and possibly impose controls. If a chemical is on the Inventory, however, no notification is required for a company to manufacture the chemical unless there is a significant new use rule ("SNUR") applicable to the chemical.

EPA's January 2008 "TSCA Inventory Status of Nanoscale Substances – General Approach" indicated that EPA would deem the nanoscale version of a macroscale substance listed on the TSCA Inventory, i.e., having the same molecular identity, to be an "existing" chemical substance, and therefore not subject to new chemical notification requirements.² In a September 2009 speech, Steve Owens announced that the new administration at EPA was reviewing that approach.³ At issue is whether EPA can effectively regulate nanomaterials which happen to have the identical molecular identity—but perhaps very different properties and hazards—other than under the PMN program.

EPA has apparently resolved that debate by planning to utilize an alternative to the PMN program for addressing "existing" nanomaterials, use of a categorical SNUR. On February 19, 2010, EPA announced on its website that:

The Agency is developing a SNUR under section 5(a)(2) of TSCA to ensure that nanoscale materials receive appropriate regulatory review. The SNUR would require persons who intend to manufacture, import, or process certain nanoscale materials for an activity that is designated as a significant new use to submit a Significant New Use Notice (SNUN) to EPA at least 90 days before commencing that activity. The SNUR would identify existing uses of nanoscale materials based on information submitted under the Agency's voluntary Nanoscale Materials Stewardship Program (NMSP) and other information.

The SNUNs would provide the Agency with a basic set of information on nanoscale materials, such as chemical identification, material characterization, physical/chemical properties, commercial uses, production volume, exposure and fate data, and toxicity data. This information would help the Agency evaluate the intended uses of these nanoscale materials and to take action to prohibit or limit activities that may present an unreasonable risk to human health or the environment.⁴

At the GlobalChem chemical industry conference on March 30, 2010, Steve Owens, Wendy Cleland-Hamnett (Director of the Office of Pollution Prevention and Toxics ("OPPT") within OPPTS), and Jim Willis (Director of the Chemical Control Division of OPPT) provided further details:

- The SNUR will be based on the category of "existing" nanomaterials (those with the same molecular identity as a macroscale substance listed on the Inventory) that are "new". Potentially, thousands of nanomaterials could be covered. (Under section 26(c) of TSCA, EPA may take any action allowable for a single chemical with respect to a category, "category" meaning a group of chemicals whose members are similar in some sense or "are in some other way suitable for classification as such.")
- By "new", EPA apparently plans to exclude current uses of nanomaterials. EPA cannot regulate "ongoing" uses under its SNUR authority.
- The SNUR would apply to any chemical for which more than 10% of its particle

range is in the range of 1-100 nanometers, unless already reported as a new use.

- The SNUR would apply to manufacturers (a term which also applies to importers) and processors.
- EPA will propose the SNUR by the end of 2010.

This SNUR would have the effect of requiring essentially the same information submissions for “new” and “existing” nanoscale materials, and would give EPA equal opportunities to impose controls under section 5(e) of TSCA (rather than the much more burdensome section 6). Ultimately, according to Willis, EPA’s goal is to have a notification on every nanomaterial in commerce.

Under section 12(b) of TSCA, export notifications are required for exports of any chemical for subject to a proposed or final SNUR, which would cover nanomaterials subject to the categorical SNUR. Willis indicated that EPA does not plan to require export notifications based on the SNUR.

Nanomaterial PMNs

At the conference, both Cleland-Hamnett and Willis mentioned that EPA has received over a hundred notices on “new” nanomaterials. Willis commented that all notifications have been subjected to restrictions (e.g., through TSCA section 5(e) consent orders). EPA continues to strongly recommend pre-notice consultations for companies submitting PMNs, to determine the information and tests that EPA may require through consent orders. Manufacturers of nanomaterials may also apply for TSCA section 5(h)(4) exemptions from notification requirements, but the only exemption that EPA has been granting for any nanomaterials so far is the exemption under 40 C.F.R. § 723.50 for low release, low exposure (“LoREX”) chemicals, and not the low volume exemption (volumes less than 10,000 kg/year), also under 40 C.F.R. § 723.50.

In November 2008, EPA clarified that carbon nanotubes (“CNTs”) would generally be considered “new” chemicals, since they belong to a different allotrope of carbon than amorphous carbon, diamond, and graphite.⁵ That clarification indicated that “Some time after March 1, 2009, EPA anticipates focusing its compliance monitoring efforts to determine if companies are complying with TSCA section 5 requirements for carbon nanotubes.” At the March 30 conference, Willis reported that about 20 companies have reported CNTs.

He added that since March 2009, OPPT has worked with the EPA Office of Enforcement and Compliance Assurance (“OECA”) to identify CNT manufacturers who have not submitted notifications. Another speaker at the conference, Mike Bellot of the Office of Civil Enforcement within OECA, stated that since March 2009 two-thirds of TSCA inspections were for CNTs, including those ostensibly operating under the “research & development” exemption from PMN requirements.⁶ He emphasized that companies operating under that exemption must meet all its requirements in order for the exemption to apply. He also mentioned that EPA is paying special attention to spray-on nanotechnology products.

Other Data Gathering Rules and Initiatives

In the December 7, 2009 Unified Agenda, EPA announced that it was planning to issue by November 2010 a TSCA section 4 test rule for certain multi-walled CNTs and nanosized clays and alumina.⁷ At the March 30 conference, Willis provided additional information:

- The test rule proposal will apply to both single-walled and multi-walled CNTs.
- The CNTs to be tested will be those with comparatively high production and high exposure, those most commercially relevant.
- The tests will use Organization for Economic Co-operation and Development (“OECD”) procedures.
- The tests will include a two-year bioassay, chronic exposure, and environmental fate testing.
- The environmental fate testing will include leaching from landfills, weathering, incineration, and photolysis, since EPA is concerned about the potential for CNTs that are agglomerated or entrained in the polymer matrix to be freed at the end-of-

life and be released into the environment.

EPA is also developing a proposed rule under TSCA section 8(a) to require the submission of additional information.⁸ Willis indicated that it will apply to all nanomaterials already on the market.

The section 4 proposal and the section 8(a) proposal largely spring from the limited scope of the data set returned by EPA's voluntary Nanoscale Materials Stewardship Program ("NMSP"), which concluded at the end of 2009.⁹ At the conference, Owens characterized the results as "disappointing." A final report on the NMSP is forthcoming. Willis said that it will come out around May 1 and will note that 31 companies submitted information covering 132 unique nanomaterials.

Domestic and International Collaboration

EPA has stressed its high level of interaction with other entities working on nanotechnology health and safety issues. It has been collaborating with other federal agencies such as the National Institute for Occupational Safety and Health and the Food and Drug Administration, with universities and research consortia, and with agencies of other countries such as the United Kingdom's Department for Environment, Food and Rural Affairs and the U.K. Environment Agency, on nanotechnology research and regulation strategies.

EPA has also been working with the OECD Working Party on Manufactured Nanomaterials (“WPMN”) as a co-sponsor for testing of fourteen “representative” nanomaterials for dozens of endpoints.¹⁰ EPA’s efforts as a member of the WPMN intersect with its development of a test rule under TSCA section 4: “When deciding which nanoscale materials and tests to require EPA will consider ongoing testing programs including the OECD sponsorship program.”¹¹

For more information, please contact Mark Duvall at 202-789-6090, mduvall@bdlaw.com. This alert was prepared with the assistance of Alexandra Wyatt.

¹ On April 22, 2010 (Earth Day) the EPA Office of Prevention, Pesticides and Toxic Substances will change its name to “Office of Chemical Safety and Pollution Prevention.” See http://www.epa.gov/oppts/pubs/basic_info.html.

² EPA, <http://www.epa.gov/oppt/nano/nmsp-inventorypaper2008.pdf>.

³ Steve Owens, Remarks to the International Conference on Transatlantic Regulatory Co-operation: Securing the Promise of Nanotechnology (Sept. 10, 2009), http://www.epa.gov/oppts/pdfs/nanotechnology_speech.pdf.

⁴ Available at <http://www.epa.gov/oppt/nano/#existingmaterials>.

⁵ Beveridge & Diamond, P.C., Update on EPA's Regulation of Carbon Nanotubes under the Toxic Substances Control Act (July 10, 2009), <http://www.bdlaw.com/news-627.html>.

⁶ 40 C.F.R. § 720.36.

⁷ Available at <http://www.regulations.gov/public/component/main?main=UnifiedAgenda>.

⁸ EPA OPPT, Control of Nanoscale Materials under the Toxic Substances Control Act, <http://www.epa.gov/oppt/nano/>.

⁹ EPA, Nanoscale Materials Stewardship Program, <http://www.epa.gov/oppt/nano/stewardship.html>.

¹⁰ See EPA, *supra* note 8; OECD WPMN, Safety of Manufactured Nanomaterials, http://www.oecd.org/department/0,2688,en_2649_37015404_1_1_1_1_00.html.

¹¹ See OECD WPMN, Series of Safety of Manufactured Nanomaterials No. 20, Current Developments / Activities on the Safety of Manufactured Nanomaterials – Tour de Table, at 65 (Feb. 24, 2010), [http://www.oalis.oecd.org/oalis/2010doc.nsf/LinkTo/NT00000CCE/\\$FILE/JT03279090.PDF](http://www.oalis.oecd.org/oalis/2010doc.nsf/LinkTo/NT00000CCE/$FILE/JT03279090.PDF).

President Obama Expands Offshore Oil and Gas Leasing

Standing in front of the “Green Hornet” -- a Navy fighter jet expected to be the first plane to break the sound barrier on a fuel mix that is half biomass -- on March 31, 2010, President

Obama proposed allowing oil and gas leasing off large portions of the Atlantic and Alaska coastlines as well as in the eastern Gulf of Mexico. The announcement came as “part of a broader strategy that will move [the Nation] from an economy that runs on fossil fuels and foreign oil to one that relies more on homegrown fuels and clean energy.” While the President’s proposal has already drawn criticism from environmentalists on the left and Republicans who favor even broader leasing on the right, the bottom line is that any new drilling is a long way off.

As a result of both congressional and presidential moratoria, new offshore leasing has been prohibited on the West Coast, all of the East Coast, and portions of Alaska and the Gulf of Mexico since the early 1980s. All that changed in 2008 when President Bush lifted the presidential ban on drilling and Congress allowed its corresponding restriction to lapse. But despite those significant steps, there have been hurdles to offshore drilling, including a 2009 DC Circuit decision striking down the environmental analysis of the 2007 - 2012 leasing program. In light of the foregoing, observers have anxiously watched and waited since President Obama took office to see which way the energy policy winds might be blowing.

The President’s plan calls for offshore oil and gas development on the East Coast from Delaware to central Florida as well as in portions of the eastern Gulf of Mexico more than 125 miles from Florida’s coast. The plan also calls for four more lease sales by 2012 in the Gulf of Mexico, and sales off the Virginia coast and in the Cook Inlet in Alaska, but only if the Virginia and Alaska sales can be done in an environmentally-responsible manner and do not interfere with military activities. Notably, the plan will not include offshore drilling from New Jersey northward in the Atlantic; off California, Oregon, and Washington; and in Alaska’s Bristol Bay, an area that environmentalists consider especially sensitive. President Obama has also delayed planned lease sales in the Chukchi and Beaufort Seas off Alaska to allow for further environmental study.

While the President’s proposal continues the trend toward new offshore development, industry has a long road ahead before it can begin drilling. Under federal law, a 5-year program must first be in place before lease sales can occur. Once the 5-year program and necessary environmental reviews are complete, the Minerals Management Service, the federal agency tasked with administering offshore oil and gas leases, will hold a competitive lease sale. Successful bidders must then comply with complex exploration and development plan approval processes, which include the opportunity for state review and participation, before beginning to drill. From the date of lease issuance, it can take up to ten years before production begins, and not all leases yield oil or gas production.

Reactions to the plan have been mixed. Conservationist groups label it “a wholesale assault on the oceans,” while industry proponents offer warm, though not necessarily overwhelming, praise. But the divide may not be as clear as it seems. Environmentalists have praised the bar on leasing in Bristol Bay, while at least one Republican Congressman, Mike Pence, has called the move “a smokescreen,” adding that “only in Washington, D.C., can you ban more areas to oil and gas exploration than you open up, delay the date of your new leases and claim you’re going to increase production.”

But the shades of gray seen across the political and ideological spectrums should not come as a surprise, as the President himself acknowledged trying to steer a course between staunch opposition to new offshore drilling and advocacy for opening all US waters to energy exploration. Steering such a course and balancing this country’s energy needs and its environmental concerns has never been easy. Only time will tell if this new approach takes flight -- just like the “Green Hornet.”

A link to a comprehensive overview of the President’s plan can be found at <http://www.doi.gov/whatwedo/energy/ocs/index.cfm>.

If you would like further information or to discuss the implications of this recent activity in more detail, please contact Peter Schaumberg at 202-789-6043 or pschaumberg@bdlaw.com, Fred Wagner at 202-789-6041 or fwagner@bdlaw.com, or Bill Sinclair at 410-230-1354 or wsinclair@bdlaw.com.

FIRM NEWS & EVENTS

Beveridge & Diamond Makes PAR's "The Best" List for Advancing Women Lawyers in New Partner Classes

We are pleased to announce that Beveridge & Diamond, P.C. has made "The Best" list in the Project for Attorney Retention's (PAR) New Partner Report.

The survey released by PAR found that in 2010 many law firms made significant advances in retaining and promoting their women lawyers. Beveridge & Diamond made "The Best" list with 60% of our 2010 Partner class being female.

To view the PAR results, please go to <http://www.bdlaw.com/assets/attachments/PAR%20New%20Partners%20Release.pdf>, or visit www.pardc.org. To review Beveridge & Diamond's Diversity & Inclusion information, please visit <http://www.bdlaw.com/firm-diversity.html>.

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