

TEXAS ENVIRONMENTAL UPDATE



August 2011

TEXAS DEVELOPMENTS

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TCEQ Seeks Public Comment on Penalty Policy Revisions

TCEQ has proposed revisions to the agency's Penalty Policy that would increase statutorily authorized penalties, cap the penalty enhancement attributable to compliance history to implement the provisions of TCEQ's Sunset Bill and other legislative enactments and provide that all avoided cost returns earned by respondents (with the exception of political subdivisions and non-profit organizations) will be included in the total assessed penalty. The proposed revisions include changes to the Environmental/Property and Human Health Matrix, the Programmatic Penalty Matrix and provisions following the Economic Benefit Matrix. TCEQ will accept public comment until September 9, 2011. The revised Penalty Policy is available at <http://www.tceq.texas.gov/about/comments.html>. The TCEQ Commissioners will consider public comment received and the proposed revisions at a work session scheduled for September 28, 2011. The Commissioners considered the proposed Penalty Policy revisions at prior work sessions held on July 5 and August 25, 2011. Additional information related to the proposed changes to the Penalty Policy may be obtained by viewing the recorded webcasts of these work sessions at <http://www.texasadmin.com/tceqw.shtml>.

TCEQ Sunset Bill Implementation Underway

TCEQ has published a schedule for implementing changes to rules, guidance documents and operational changes that are necessary to implement House Bill 2694, TCEQ's Sunset Bill. Eleven separate rule proposals are planned to implement the statutory changes adopted under the Sunset Bill. The subjects of rule changes include, among others, compliance history, enforcement policy and water curtailment issues. The agency has also identified non-rulemaking activities that are necessary to implement Sunset Bill issues and Sunset Advisory Commission management directives. Specific information regarding the agency's implementation activities is available at <http://www.tceq.texas.gov/agency/sunset/index.html>.

TCEQ to Adopt Rules to Suspend Water Rights During Drought or Emergency Shortage

Pursuant to the TCEQ Sunset Bill, the agency will develop rules to implement new Texas Water Code §11.053, which provides that the Executive Director may suspend or adjust water rights during a time of drought or emergency shortage of water after consideration of specified factors. The agency held a stakeholder meeting on August 11, 2011, and accepted informal written comments until August 26, 2011. Agency staff specifically requested input related to the following: (i) definitions for the terms "drought" and "emergency shortage of water;" (ii) consideration of the development and implementation of conservation plans; (iii) conditions required for issuance of an Order suspending or adjusting water rights; (iv) duration of a temporary Order; and (v) procedural requirements related to notice, opportunity for hearing and appeal. The agency plans to consider a water curtailment rule proposal on October 18, 2011, and consider adoption on April 11, 2012.

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Additional information regarding the development of these rules is available at <http://www.tceq.texas.gov/legal/events/stakeholdermeetingnotice.html>.

Surface Casing Program To Be Transferred to Texas Railroad Commission

TCEQ's Sunset Bill provides that surface casing program responsibilities will be transferred from TCEQ to the Railroad Commission of Texas (RRC) effective September 1, 2011. After the transfer, the RRC will be responsible for providing surface casing and groundwater protection recommendations for oil and gas activities. The transfer of responsibility affects, among other things, disposal wells used for injecting oil and gas waste and permits for geologic storage of anthropogenic carbon dioxide. According to a joint announcement made by TCEQ and the RRC, applications for groundwater protection advisory letters may be submitted to TCEQ until August 31, 2011. Thereafter, applications or correspondence relating to groundwater protection recommendations must be sent to the RRC. Additional details relating to the transfer of responsibilities, applications processing, and fee payments are available at http://www.tceq.texas.gov/permitting/waste_permits/surface_casing/transfer.

Texas SIP News

TCEQ has adopted a state implementation plan (SIP) revision for the 2008 lead National Ambient Air Quality Standard (NAAQS). This SIP revision, adopted on August 17, 2011, is intended to meet the requirements of Federal Clean Air Act §110(a)(2)(D)(i) relating to the interstate transport of lead under the 2008 NAAQS. The SIP revision references existing control strategies to reduce the concentration of lead in Collin County as well as dispersion modeling of major lead sources in Texas. For more information, see http://www.tceq.texas.gov/assets/public/implementation/air/sip/lead/transport/11005SIP_ado.pdf.

TCEQ has also approved the proposal of a revision to the El Paso PM10 state implementation plan to incorporate changes to 30 TAC §111.147, which include alternative control measures and a revised Memorandum of Agreement with the City of El Paso. The public comment period for the proposed SIP revision will begin on September 2, 2011 and close on October 3, 2011. A public hearing on the proposal will be held in El Paso, Texas on September 27, 2011. A copy of the proposed SIP revision and additional details relating to public comment and the public hearing are available at <http://www.tceq.texas.gov/airquality/sip/elp/elp-latest-pm>.

Texas Railroad Commission Announces Formation of Eagle Ford Shale Task Force

Texas Railroad Commissioner David Porter has announced the appointment of the members of the Eagle Ford Shale Task Force, created to establish best practices for developing the Eagle Ford Shale, promote economic benefits and improve communication among all affected parties. The Eagle Ford Shale is roughly 50 miles wide and 400 miles long. A press release issued by Commissioner Porter indicates that the area "has the potential to be the single most significant economic development in our state's history." Members of the task force include local community leaders, elected officials, environmental groups, water representatives, oil and gas producers, pipeline companies, oil services companies, land owners, mineral owners and royalty owners. The task force held its first meeting in San Antonio in July and is expected to meet on a monthly basis in the future. Additional details are available at <http://www.rrc.state.tx.us/commissioners/porter/press/072711.php>.

TCEQ Proposes Boundary Reevaluation for Galena Park Air Pollutant Watch List

TCEQ has announced that it is seeking public input on its proposal to expand the Galena Park Air Pollutant Watch List (APWL) area. In its announcement, TCEQ indicates

that annual average benzene concentrations exceeded the long-term, health-based Air Monitoring Comparison Value of 1.4 parts per billion by volume at the Galena Park monitoring site from 1998 to 2007 and that benzene sources outside of the Galena Park APWL area have the potential to affect annual average benzene concentrations at both the Galena Park and Pasadena North monitoring sites. Agency staff will accept public comment on the proposed boundary change through September 29, 2011. A public meeting will also be held in Galena Park on September 27, 2011. Additional information on the boundary proposal, submitting public comments, and the public meeting is available at http://www.tceq.texas.gov/toxicology/AirPollutantMain/APWL_index.html#consideration.

Upcoming TCEQ Meetings and Events

- TCEQ will hold a meeting of the stakeholder group for **Texas Low Emission Diesel (TxLED) Program** in Austin on September 1, 2011. Information is available at http://www.tceq.texas.gov/airquality/mobilesource/TxLED_Adv_Grp.html#topic3#topic3.
- TCEQ will hold a **Water Quality/Storm Water Seminar** in Austin on September 8-9, 2011. Information about the seminar is available at <http://www.tceq.texas.gov/p2/events/stormwater.html>.
- TCEQ will host its annual **Advanced Air Permitting Seminar** and an **Oil and Gas Facilities Workshop** in Austin on October 26 and 27, 2011. Information regarding these events is available at <http://www.tceq.texas.gov/p2/events/AdvancedAirPermitting>.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in August can be found on the TCEQ website at <http://www.tceq.texas.gov/news/releases/8-11Agenda8-17>.

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

TSCA Developments in Congress and at EPA

Legislation to amend the Toxic Substances Control Act is still in play, despite the Congressional preoccupation with other issues. EPA is making considerable progress in implementing its Enhanced Chemical Management Program under TSCA, despite roadblocks set up by the Office of Management and Budget. This report provides an update on both the legislative and administrative developments under TSCA.

To read the full report, please click see <http://www.bdlaw.com/assets/attachments/BD%20Client%20Alert%20-%20TSCA%20Developments%20in%20Congress%20and%20at%20EPA%20August%202011%202011.pdf>.

Congress Fixes Problems in Consumer Product Safety Improvement Act

On August 12, 2011, President Obama signed into law amendments to the Consumer Product Safety Improvement Act of 2008 (CPSIA) designed to address longstanding complaints about some aspects of the CPSIA.¹ This action came two days before the CPSIA would have made all existing children's products containing more than 100 ppm of lead illegal to sell or resell, even if they were in compliance with all applicable consumer product safety standards at the time of manufacture. This client alert reviews the key provisions of these just-in-time amendments.

After Three Years, Swift Passage

When enacted on August 14, 2008,² the CPSIA received overwhelming support in both houses of Congress.³ It lowered lead levels in children's products in stages, required third-party testing of certain children's products for conformity with CPSC standards, and banned the use of phthalates above 0.1% in children's toys and child care articles, among other provisions. It also revitalized the Consumer Product Safety Commission (CPSC), providing the CPSC with increased funding and enforcement tools.⁴

Yet problems with the CPSIA were quickly identified. For example, the CPSC concluded that the lead ban applied retroactively to products in inventory and used products, so that toys, books, and other products containing lead above the CPSIA limits that were legal when manufactured could no longer be sold, even in resale shops.⁵ Twelve bills to address this issue, impacts on small business, or other concerns were introduced in the 111th Congress, but did not pass. The Committee Report for the fiscal year 2010 CPSC appropriations bill directed the CPSC to report on potential amendments to the CPSIA,⁶ which the CPSC did in 2010.⁷

The Subcommittee on Commerce, Manufacturing, and Trade of the House Energy and Commerce Committee held hearings on February 17 and April 7, 2011, on a draft CPSIA amendments bill being circulated for comment.⁸ On May 23, 2011, Representative Mary Bono Mack (R-CA) introduced the "Enhancing CPSC Authority and Discretion Act of 2011," H.R. 1939, which would have made numerous changes to the CPSIA. Democrats objected that the bill went too far. On August 1, 2011, Rep. Bono Mack introduced a more limited unnamed bill, H.R. 2715, which garnered bipartisan support. On the day it was introduced, the bill was passed by the House by a vote of 421-2 and sent to the Senate. The Senate had its own more limited bill introduced by Senator Mark Pryor (D-AR) on July 28, 2011, the "Consumer Product Safety Flexibility Act," S. 1448. The Senate passed H.R. 2715 without amendment by unanimous consent, rather than its own bill, also on August 1. H.R. 2715 became law with President Obama's signature on August 12.

Applicability of Lead Limits to Existing Products

Section 1 of H.R. 2715 amends CPSIA § 101(a) by adding a provision that each lead limit "shall apply only to a children's product. . . that is manufactured after the effective date of such respective limit." This overturns the CPSC General Counsel's opinion that found the CPSIA lead limit to apply retroactively to existing inventory and used children's products.

The timing of this change is critical. On August 14, 2011, the allowable lead limit dropped from 300 ppm to 100 ppm.⁹ On that date, previously manufactured children's products with lead content below 300 ppm but above 100 ppm would have become illegal to sell, but for enactment of this law. Now the new, lower limit applies only to children's products manufactured on or after August 14, 2011.

Exceptions to the Lead Limits

Section 1 of H.R. 2715 also has the effect of restoring the ability to resell used children's products containing lead above 600 ppm produced prior to February 10, 2009, and those containing lead above 300 ppm produced prior to August 14, 2009. A separate provision makes explicit that the lead limits do not apply to used children's products. This exclusion does not apply to children's metal jewelry or to children's products which the donor or seller knows has lead above the otherwise applicable lead limits.

CPSIA § 101(b) allowed the CPSC narrow authority to exempt products or components from the applicable lead limits. Section 1 of H.R. 2715 broadens that authority considerably. Now, the CPSC may find that a product, class of products, or component part requires the inclusion of lead above the applicable limit because it is not technologically feasible to remove the excessive lead or make the lead inaccessible, and an exception would have no measurable adverse effect on public health or safety, such as by increasing blood lead levels.

Section 1 completely exempts off-road vehicles, such as all-terrain vehicles, snowmobiles, and dirt bikes, from the lead limits. House Representatives speaking in support of the bill

pointed out that safety requires certain components and parts of these vehicles to include levels of lead that may exceed CPSIA's allowable limits, but not to the extent that would threaten public health or safety. For example, Rep. Henry Waxman (D-CA) stated that "there are some products that require a small amount of lead to maintain their strength and durability and don't pose a serious threat to public health or safety. ATVs and bicycles are examples of these."¹⁰

In 2009, the CPSC announced a stay of enforcement of the lead limits for bicycles, jogger strollers, and bicycle trailers intended for children 12 and younger. It substituted other limits instead.¹¹ Section 1 makes that stay permanent, except that it drops the maximum lead limits to 300 ppm beginning January 1, 2012.

Third Party Testing

CPSIA § 102 imposes burdensome requirements for third party testing of children's products for conformity with CPSC product safety rules for such products.

Section 2 of H.R. 2715 directs the CPSC to seek public comment on ways to reduce the cost of third party testing requirements consistent with assuring compliance with applicable product safety rules. It identifies several opportunities for reducing burdens on which the CPSC is to solicit comments. Within a year after the end of the comment period, the CPSC must prescribe new or revised third party testing regulations if it determines they would reduce testing costs while assuring compliance. If the CPSC determines that it lacks authority to implement opportunities for reducing the burdens, it must so report to Congress.

In addition, section 2 specifically tries to help reduce the burdens of third party testing on small batch manufacturers (defined to include manufacturers of no more than 7,500 units of the same product and with no more than \$1 million in gross revenues from consumer products). It directs the CPSC to take into account "any economic, administrative, or other limits on the ability of small batch manufacturers to comply with such requirements" and provide alternative testing requirements for them. If no alternatives are available or economically practicable, the CPSC must exempt small batch manufacturers from the requirements altogether. Alternatives and exemptions are not available for lead paint; cribs; small parts; children's metal jewelry; baby bouncers, walkers, or jumpers; or durable infant or toddler products. Any small batch manufacturer operating under alternative requirements or an exemption must register with the CPSC.

Further increasing flexibility under this provision, section 2 authorizes certification of compliance with an applicable product standard by documentation that a product meets another national or international governmental standard that the CPSC determines is the same as or more stringent than the applicable product standard.

Ordinary books and ordinary paper-based printed materials are exempted altogether from the third party testing requirements. Metal or plastic parts are not included in the exemption. Also, bicycle parts are excluded with respect to certification of compliance with the lead limits.

Durable Nursery Products

CPSIA § 104, known as the "Danny Keysar Child Product Safety Notification Act," directs the CPSC to adopt consumer product safety standards for durable nursery products, such as cribs, based on voluntary standards. Section 3 of H.R. 2715 facilitates the process for updating those CPSC standards as the underlying voluntary standards change.

ASTM Toy Standard

CPSIA § 106(a) adopts ASTM International Standard F963, Consumer Safety Specifications for Toy Safety, as a consumer product safety standard. That standard directs compliance with certain Food and Drug Administration (FDA) food requirements in connection with food products supplied with toys and cosmetics in toys, setting up a concern about overlapping jurisdiction.¹² Section 4 of H.R. 2715 exempts from the CPSC's consumer product safety standard any provisions of F963 that restate or incorporate FDA requirements.

Phthalates Bans

The ban on three phthalates (DEHP, DBP, and BBP) and interim ban on three others (DINP, DIDP, and DnOP) in CPSIA § 108 apply to children's toys and child care articles. Section 5 of H.R. 2715 clarifies that those bans apply only to any plasticized component part of a children's toy or child care article or any component made of other materials that may contain phthalates.

Section 5 also excludes from the bans any inaccessible parts of a children's toy or child care article. The lead limits under CPSIA § 101 have an inaccessible parts exclusion, but the phthalate bans under CPSIA § 108 have lacked one until now. The CPSC is directed to provide guidance on the scope of this exemption within one year, similar to its guidance on the inaccessible parts exclusion for lead,¹³ but the exemption became effective upon enactment.

Tracking Labels

CPSIA § 103 requires manufacturers of children's products to mark their products with information to enable the manufacturer and ultimate purchasers to trace back the products to their original batch or run, or similar information. Section 6 of H.R. 2715 authorizes the CPSC to adopt rules excluding specific products or classes of products from this requirement if it is not practicable for them to bear such marks. Instead, the CPSC may establish alternative requirements for those products.

Consumer Product Safety Information Database

CPSIA § 212 directs the CPSC to establish a publicly available, searchable database on the safety of consumer products. The database is to include reports of harm relating to the use of consumer products. The database, SaferProducts.gov, began accepting reports about products subject to the CPSC's jurisdiction in March 2011. It has attracted opposition from industry due to concerns about inaccurate information showing up in the database.

Section 7 of H.R. 2715 delays by five days the posting of information on the database for which the CPSC receives notice that the information is materially inaccurate. During that time the CPSC can consider whether to determine that the information is materially inaccurate and thus should be excluded.

Section 7 also directs the CPSC to respond to a report of harm by seeking the model or serial number, or a photograph, of the consumer product involved, if such information is not included in the report. Inclusion of a report in the database does not depend on the CPSC's receipt of such information, however.

Subpoena Authority

Section 27(b) of the Consumer Product Safety Act (not amended by the CPSIA) authorizes the CPSC to issue subpoenas for documentary evidence. Section 8 of H.R. 2715 also authorizes subpoenas for physical evidence. The CPSC may now subpoena federal, state, and local government agencies for documentary and physical evidence.

All Terrain Vehicles Standard

In 2006, the CPSC published a proposed rule on banning three-wheeled all terrain vehicles.¹⁴ Section 9 of H.R. 2715 directs the CPSC to adopt a final standard within one year of enactment.

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¹ Office of the Press Secretary, the White House, Statement of the Press Secretary H.R. 2715 (Aug. 12, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/08/12/statement-press-secretary-hr-2715>.

² Pub. L. 110-314 (2008).

³ The House approved the conference report 424-1, and the Senate approved it 89-3.

⁴ See Beveridge & Diamond, P.C., CPSC Implements New Consumer Product Requirements (2008), *available at* <http://www.bdlaw.com/news-417.html>; Beveridge & Diamond, P.C., Consumer Product Safety Improvement Act: One-Year Update (2009), *available at* <http://www.bdlaw.com/assets/attachments/09-15-09%20CPSIA%20Update.pdf>.

⁵ CPSC General Counsel Cheryl A. Falvey, Retroactive Application of the CPSIA to Inventory (Sept. 12, 2008), *available at* <http://www.cpsc.gov/library/foia/advisory/317.pdf>.

⁶ Departments of Transportation and Housing and Urban Development, and Related Agencies Appropriations Act, 2010, Conference Report, H.R. Rep. No. 111-366, 912-13 (2009), *available at* <http://www.gpo.gov/fdsys/pkg/CRPT-111hrpt366/pdf/CRPT-111hrpt366.pdf>. A court ruled that the phthalate bans in CPSIA § 108 also apply retroactively. *National Resources Defense Council, Inc. v. CPSC*, 597 F. Supp. 2d 370 (S.D.N.Y. 2009).

⁷ CPSC, U.S. Consumer Product Safety Commission Report to Congress Pursuant to the Statement of the Managers Accompanying P.L. 111-117 (Jan. 15, 2010), *available at* <http://www.cpsc.gov/about/cpsia/cpsiareport01152010.pdf>.

⁸ Subcommittee on Commerce, Manufacturing, and Trade, House Energy and Commerce Committee, Hearing: A review of CPSIA and CPSC Resources (Feb. 17, 2011), *available at* <http://energycommerce.house.gov/hearings/hearingdetail.aspx?NewsID=8220>; id., Hearing: Discussion Draft of H.R. _____, a bill that would revise the Consumer Product Safety Improvement Act (Apr. 7, 2011), *available at* <http://energycommerce.house.gov/hearings/hearingdetail.aspx?NewsID=8422>.

⁹ CPSIA § 101(a)(2)(C) provided that, as of August 14, 2011, children's products may not contain more than 100 ppm of lead "unless the Commission determines that a limit of 100 parts per million is not technologically feasible for a product or product category." On July 26, 2011, the CPSC announced its decision that the 100 ppm limit was technologically feasible and would go into effect on August 14 for children's products not otherwise excluded under CPSC regulations. 76 Fed. Reg. 44463 (July 26, 2011).

¹⁰ 157 Cong. Rec. H5827 (daily ed. Aug. 1, 2011) (statement of Rep. Henry Waxman). Co-sponsor Rep. G.K. Butterfield (D-N.C.) also pointed out that vehicles such as all-terrain vehicles, snowmobiles, and dirt bikes should be exempted because "constructing strong, rigid parts for these vehicles often requires more lead than CPSIA would otherwise allow" and "[t]he safety of our young people is paramount." 157 Cong. Rec. H5826 (daily ed. Aug. 1, 2011) (statement of Rep. G.K. Butterfield).

¹¹ 74 Fed. Reg. 31254 (June 30, 2009).

¹² See memorandum from J. Bidgett, Office of Hazard Identification and Reduction, to R. Howell, Office of Hazard Identification and Reduction, CPSC, Evaluation of the Toy Standard for Section 106 of the CPSIA (May 10, 2010), *available at* http://www.cpsc.gov/volstd/toys/f963_05102010.pdf.

¹³ See 16 C.F.R. § 1500.87 for the CPSC's interpretive rule on this exclusion.

¹⁴ 71 Fed. Reg. 45904 (Aug. 10, 2006).

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