

# TEXAS ENVIRONMENTAL UPDATE



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## TEXAS DEVELOPMENTS

### TCEQ Extends Enforcement Discretion for Chemical Manufacturing MSS Permits

TCEQ has issued a policy memorandum dated December 8, 2009 extending its enforcement discretion for chemical and allied product ("chemical") facilities that have submitted timely applications to permit planned maintenance, start-up and shutdown ("MSS") activities. (TCEQ issued a similar policy memorandum for refinery MSS permits on February 12, 2009.) As stated in the latest memorandum, the grace period for chemical facilities will expire on January 7, 2010; however, TCEQ will not issue all applied-for chemical facility MSS permits by that date. Under the policy outlined in the memorandum, enforcement discretion will continue to be used for unauthorized emissions under the following conditions:

- for a permit application assigned to a permit writer during 2008, the permit applicant provides written acceptance of its draft permit to the TCEQ by April 30, 2010; and for an application assigned to a permit writer during 2009, the permit applicant provides written acceptance of its draft permit by April 30, 2011;
- all unauthorized emissions from MSS activities are recorded and reported to the TCEQ for consideration of enforcement discretion; and
- owners/operators demonstrate sufficient progress for obtaining authorization by meeting the requirements of 30 TAC §106.263 or filing a permit amendment application after notice from a Regional office or after self-discovery of the need for authorization.

The policy memorandum is available at [http://www.tceq.state.tx.us/permitting/air/memos/nsr\\_memos.html](http://www.tceq.state.tx.us/permitting/air/memos/nsr_memos.html).

### TCEQ Posts New Web Page on Barnett Shale Activities and Steps Up Citizen Complaint Response Time

During December 2009, TCEQ dedicated a web page to provide ongoing information about the agency's monitoring of emissions from natural gas production in the Barnett Shale area. In addition, TCEQ's Deputy Director of the Office of Compliance and Enforcement, John Sadlier, issued a directive requiring that all complaints regarding activities in the Barnett Shale be followed by an on-site agency investigation within twelve hours of receipt ("Investigation Directive").

The Barnett Shale is a hydrocarbon-producing geological formation consisting of sedimentary rocks underlying the cities of Dallas and Fort Worth and covering about 5,000 miles. As reported in our November Texas Environmental Update ([www.bdlaw.com/client/beveridge/www/assets/attachments/November%202009%20Texas%20Update.pdf](http://www.bdlaw.com/client/beveridge/www/assets/attachments/November%202009%20Texas%20Update.pdf)), recent private and TCEQ studies of air quality in the area have suggested elevated levels of benzene and other constituents near those operations.

TCEQ has undertaken a number of initiatives to address emissions from oil and gas operations in the Barnett Shale. The agency's web page includes information on these initiatives including: (i) an explanation of emissions data collection and analysis; (ii) an

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overview of the impact of oil and gas exploration on ozone concentrations; (iii) a review and analysis of health effects; (iv) a discussion of air quality plans and strategies to prevent or reduce emissions; and (v) the agency's responses to technical questions pertaining to monitoring activities.

TCEQ's Barnett Shale web page is available at <http://www.tceq.state.tx.us/implementation/barnettshale/bshale-main>. A copy of the Investigation Directive is available at [www.bdlaw.com/assets/attachments/Barnett20Shale20Complaint20Investigation20Procedures1.pdf](http://www.bdlaw.com/assets/attachments/Barnett20Shale20Complaint20Investigation20Procedures1.pdf).

### **Governor Perry Responds to Greenhouse Gas Endangerment Finding**

On December 7, 2009, the EPA issued its Endangerment and Cause or Contribute Findings for Greenhouse Gases under the Clean Air Act (Endangerment Finding), its final finding that greenhouse gases threaten public health and welfare. As he has done in response to previous EPA action regarding the regulation of greenhouse gases, Governor Perry was quick to comment on this EPA action. In a strongly-worded letter to EPA Administrator Lisa Jackson, Governor Perry requested that EPA immediately withdraw the Endangerment Finding. He also sought the immediate withdrawal of the proposed Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards rule and the proposed Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring rule.

In support of his position, the Governor cited the "[r]ecent revelations that climate change scientists have altered, manipulated and destroyed data." The Governor noted that EPA relied on that data, particularly the reports of the Intergovernmental Panel on Climate Change and the U.S. Climate Change Science Program, instead of conducting an independent review of the scientific literature. In light of the recent allegations regarding the underlying data, the Governor asserts EPA has an obligation to conduct an independent review of the science before relying on it as the basis for the Endangerment Finding and the proposed rules. As he states in the letter to Administrator Jackson, "EPA sought to make its case on these now-discredited reports, rather than performing its own independent scientific analysis and literature review, in order to quickly force these regulations onto the American people. To regain the trust of the American people and send a strong message against falsifying scientific data, the EPA should now withdraw the proposed finding and rules."

Following the theme of his previous statements, Governor Perry emphasized the economic impact greenhouse gas regulation would have on the U.S. economy, and particularly the Texas economy. He noted that Texas' carbon dioxide emissions have fallen more than nearly every other state this decade, which he attributes to a Texas regulatory environment that promotes wind power and new, clean, low-emission power generation. In announcing the letter to Administrator Jackson at a speech in La Porte, the Governor emphasized that "Texas has already shown how to lower emission levels without killing jobs and jacking up prices."

### **The Aransas Project Files Notice of Intent to Sue over Management of Freshwater Flows**

On December 8, 2009, The Aransas Project (TAP) filed a 60-day notice of intent to sue the Texas Commission on Environmental Quality (TCEQ) over water flows in the San Antonio and Guadalupe river basins. TAP asserts that TCEQ's management of surface water rights from the two basins has resulted in inadequate freshwater inflows to the San Antonio-Aransas Bay complex, significantly impacting the marsh-estuary habitats used by the whooping crane. In the notice, provided pursuant to the Endangered Species Act's (ESA) citizen suit provisions, TAP alleges the TCEQ action violates Section 9 of the ESA, which prohibits the "taking" of endangered species. Specifically, TAP alleges that the permit program and its oversight by TCEQ constituted harm and harassment during the 2008-2009 wintering season, during which the whooping crane population allegedly suffered unprecedented mortality, and is reasonably likely to continue to cause harm and harassment in the future.

According to the notice, TAP will seek through the lawsuit an injunction barring the TCEQ from approving new San Antonio and Guadalupe basin water rights until there are assurances that such activities will not harm or harass whooping cranes; an injunction ordering the TCEQ to develop a Habitat Conservation plan for the San Antonio and Guadalupe river basins and San Antonio Bay; and an order requiring TCEQ to conduct an analysis of all permitted and exempt withdrawals and develop a binding plan for water development and water use in the San Antonio and Guadalupe river basins. The defendants identified in the notice include the three TCEQ commissioners, the TCEQ executive director, and the TCEQ's watermaster for the Guadalupe river, each in their official capacities.

TAP describes itself as "an alliance of citizens, organizations, and businesses who want responsible water management of the Guadalupe River Basin to ensure flows from the Hill Country all the way to the bays . . ." It is represented in this matter by Jim Blackburn of Blackburn & Carter.

### **TCEQ Approves Recommendation for PM<sub>2.5</sub> Annual NAAQS Designation for Harris County**

At their December 4, 2009 Work Session, the TCEQ Commissioners approved for transmittal to Governor Rick Perry a recommendation that Harris County be designated in attainment of the 1997 annual fine particulate matter ("PM<sub>2.5</sub>") national ambient air quality standard ("NAAQS"). Currently, the entire state of Texas is designated unclassifiable/attainment, a designation made by EPA in 2005. The Commissioners' recommendation includes a draft letter for Governor Perry to transmit to EPA urging an attainment designation for Harris County. Consideration of this recommendation is in response to the PM<sub>2.5</sub> redesignation request Governor Perry received from EPA on October 8, 2009. In that request, EPA pointed to 2006-2008 data suggesting that Harris County may be out of attainment with the PM<sub>2.5</sub> standard and gave TCEQ 120 days (until February 5, 2010) to respond with a recommendation. TCEQ's recommendation to the Governor is based upon the agency's finding that certified monitoring data from 2006-2008 and the most recent data from 2009, excluding exceptional events, show that Harris County is attaining the PM<sub>2.5</sub> annual NAAQS. Information and documents regarding the Commission's recommendation are available at <http://www.tceq.state.tx.us/implementation/air/sip/Hottop.html>.

### **TCEQ Releases Draft Texas Surface Water Quality Standards and Implementation Procedures Revisions**

TCEQ has released final drafts of the 2010 Texas Surface Water Quality Standards and Implementation Procedures Revisions ("Proposed Revisions"). The Proposed Revisions will be presented for Commission consideration on January 13, 2010 and it is anticipated that Texas Register publication will occur on January 29, 2010.

Among other things, the proposed revisions address: (i) new information and studies on the appropriate uses and criteria of individual water bodies; (ii) new scientific data on the effects of specific chemicals and pollutants; and (iii) new provisions in the Texas Water Code and EPA regulations and guidance. Additional information about the Proposed Revisions is available at <http://www.tceq.state.tx.us/rules/pendprop.html#07002>.

### **TERP Program: Application Period Closure & Opportunity to Comment on Guideline Revisions**

TCEQ has announced that it is no longer accepting applications for the Texas Emissions Reduction Plan ("TERP") Rebate Grants Program during this application period because it has received a sufficient number of applications to award the funds allocated for this fiscal year. TCEQ will announce new funding opportunities in early 2010, including a special federally-funded rebate grant. TCEQ will post new grant information on the agency's website at [www.terpgrants.org](http://www.terpgrants.org).

Additionally, the agency has released and requested written and oral public comment on proposed revisions to the Texas Emissions Reduction Plan – Guidelines for Emissions

Reduction Incentive Grants (RG-388). TCEQ indicates that it is proposing revisions to these guidelines to incorporate policy and statutory changes from House Bill 1796 enacted by the 81st Texas Legislature. The agency will host a public meeting to receive comment on the proposed changes in Austin on January 7, 2010. TCEQ has requested that comments be submitted by January 15, 2010. The proposed guideline revisions and information regarding how to submit comments is available at <http://www.tceq.state.tx.us/implementation/air/terp/guidelines.html>.

### TCEQ Releases Annual Enforcement Report

TCEQ has issued its Enforcement Report for Fiscal Year 2009. The report indicates that the agency issued more administrative orders during 2009 than during any other fiscal year. Specifically, TCEQ issued 1,756 administrative orders (up from 1,624 orders issued the previous year) providing for over \$14.5 million in payable penalties and over \$6.3 million in Supplemental Environmental Projects ("SEPs"). The agency estimates that enforcement orders resulted in the reduction or elimination of nearly 47 million pounds of pollutants, and approximately \$170 million in compliance costs to regulated entities to whom such orders were issued. The report is available at [http://www.tceq.state.tx.us/comm\\_exec/communication/media/12-09EnforcementReport09](http://www.tceq.state.tx.us/comm_exec/communication/media/12-09EnforcementReport09).

### Upcoming TCEQ Meetings and Events

- TCEQ will hold **Petroleum Storage Tank Compliance Workshops** on January 14 and 15, 2010 in the Dallas and Tyler areas. These free workshops are hosted by TCEQ's Small Business and Local Government Assistance Section. On-line registration is required. Additional information is available at [http://www.tceq.state.tx.us/assets/public/admin/calendar/jan\\_2010\\_calendar.html](http://www.tceq.state.tx.us/assets/public/admin/calendar/jan_2010_calendar.html).
- The **2010 Emissions Inventory Workshop** will be held on January 27, 2010 in Austin. This workshop will focus on a new Web-based reporting system. Additional information is available at [http://www.tceq.state.tx.us/assets/public/admin/calendar/jan\\_2010\\_calendar.html](http://www.tceq.state.tx.us/assets/public/admin/calendar/jan_2010_calendar.html).

### 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

### EPA Seeks Comments on New Approaches to Disclosure of Pesticide Inert Ingredients

On December 23, 2009, the U.S. Environmental Protection Agency ("EPA") made available for comment two alternative approaches to increase public availability of the identities of inert ingredients contained in pesticide products under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"). (To view the Federal Register notice describing EPA's advance notice of proposed rulemaking, go to <http://www.bdlaw.com/assets/attachments/EPA%20-%20Public%20Availability%20of%20Identities%20of%20Inert%20Ingredients.pdf>.) The public comment period is open until February 22, 2010.

EPA anticipates that its action will both assist consumers and users of pesticides in making informed decisions and reduce the presence of potentially hazardous ingredients in pesticides. At the same time, the Agency recognizes that mandatory inert ingredient disclosure could have "potential negative effects on innovation in the pesticide market," expressing a specific need to more closely examine the circumstances under which confidentiality of inert ingredients may be necessary to preserve manufacturers' research and development investments.



EPA's notice follows two petitions filed in 2006 by a group of states and several environmental interest groups seeking the disclosure on pesticide labels of 350 inert ingredients claimed by petitioners to be "hazardous." EPA partially granted the petitions on September 30, 2009, by committing to initiate a rulemaking to broaden the public availability of inert ingredient identities. (Please click here for EPA's September 30, 2009 response to the 2006 petitions; a summary of the Agency's response is also available here.)

EPA's new notice marks the initiation of the rulemaking process and outlines two alternative approaches for consideration and comment:

- Under the first option, EPA would require that pesticide labels identify "potentially hazardous inert ingredients." EPA is seeking comment on several specific questions raised by this approach, including how such a list of potentially hazardous ingredients should be identified, whether EPA should establish a "de minimis" concentration below which disclosure of a potentially hazardous inert ingredient would not be required, and whether the disclosure requirement should extend to potentially hazardous impurities.
- As a second option, EPA has proposed requiring that "all or most" inert ingredients be listed on pesticide labels. Acknowledging concerns about inert ingredient confidentiality, EPA is soliciting comment from pesticide registrants regarding the potential competitive impacts of a broader inert ingredient disclosure requirement.

EPA also raises a number of issues common to both approaches, including anticipated consumer responses, possible impacts on the development of new pesticide products, and whether any disclosure requirement should include the concentrations of inert ingredients. The Agency is also soliciting "ideas for alternative approaches, both regulatory and non-regulatory" in addition to the options described by its notice.

If you have any questions about EPA's notice or the regulation of inert ingredients under FIFRA, or if you would like more information concerning the Agency's rulemaking process and opportunities for public comment, please contact: Kathryn Szmuszkovicz at (202) 789-6037, [kes@bdlaw.com](mailto:kes@bdlaw.com); Alan Sachs at (410) 230-1345, [asachs@bdlaw.com](mailto:asachs@bdlaw.com); or David Barker at (202) 789-6050, [dbarker@bdlaw.com](mailto:dbarker@bdlaw.com).

### **Task Force Releases Framework for Coastal and Marine Spatial Planning**

On December 14, 2009, the Obama Administration's Interagency Ocean Policy Task Force released the nation's first draft framework for Coastal and Marine Spatial Planning ("CMSP"). The Interim Framework for Effective Coastal and Marine Spatial Planning ("Interim Framework") describes CMSP as an ecosystem-based management and planning tool that the Administration recommends using to identify appropriate locations for future ocean-based activities so as "to reduce conflicts among users, reduce environmental impacts, facilitate compatible uses, and preserve critical ecosystem services to meet economic, environmental, security, and social objectives." Implementation of CMSP, as proposed in the Interim Framework, will be national in scope to address national interests, but also scalable and specific to regional and local needs. It is anticipated that CMSP will be applied to traditional and new uses on the ocean and coasts, including oil and gas exploration and development; renewable energy projects (e.g., wind, wave); security, emergency response, and military readiness activities; commerce and transportation; and a myriad of other important uses.

The Interim Framework is open for a 60-day public comment period, ending February 12, 2010. After the comment period closes, the Task Force will finalize the recommendations made in both this report and its September 2009 national ocean policy report (see <http://www.bdlaw.com/news-694.html>) and provide a final report to the President in early 2010.

For more information about the Interim Framework, the Task Force, or the executive memorandum establishing the Task Force and authorizing the Interim Framework, visit: <http://www.whitehouse.gov/administration/eop/ceq/initiatives/oceans> or please contact Peter

## EPA Plans to Withdraw Emission Comparable Fuel Exclusion Under RCRA

On December 8, 2009, EPA issued a proposed rule to withdraw the Emission Comparable Fuel rule ("ECF Rule"), a regulation issued pursuant to the Resource Conservation and Recovery Act ("RCRA") during the Bush administration. 74 Fed. Reg. 64,643. Comments on the proposed withdrawal of the ECF Rule are due by January 22, 2010.

Comparable fuels are hazardous secondary materials that would otherwise be regulated as hazardous wastes but for their fuel value and hazardous constituent load, which is comparable to concentrations of hazardous constituents found in fossil fuels. See 40 C.F.R. 261.38. On December 19, 2008, EPA published a final rule expanding the conditional exclusion from the definition of solid waste—and, therefore, from regulation as hazardous wastes—for comparable fuels to include emission comparable fuels. 73 Fed. Reg. 77,954. The ECF Rule went into effect on January 20, 2009.

The exclusion for emission comparable fuels requires similar conditions for hazardous constituent concentrations as well as conditions meant to ensure that emissions are comparable to emissions from burning fuel oil. The ECF Rule also sets specific conditions under which emission comparable fuel can be stored so that the materials are not discarded.

The ECF Rule has drawn criticism both from environmental groups that see the rule as being too lenient and from industry that objects to the burdensome conditions on the exclusion. In May 2009, EPA announced its intention to withdraw the ECF Rule.

For more information about this proposed rule and other RCRA developments, please contact Don Patterson at [dpatterson@bdlaw.com](mailto:dpatterson@bdlaw.com), (202) 789-6032, Beth Richardson at [erichardson@bdlaw.com](mailto:erichardson@bdlaw.com), (202) 789-6066, or Erica Zilioli at [ezilioli@bdlaw.com](mailto:ezilioli@bdlaw.com), (202) 789-6078.

## EPA Finalizes Greenhouse Gas Endangerment Finding

On December 7, 2009, Environmental Protection Agency ("EPA") Administrator Lisa Jackson signed the Agency's final "endangerment" and "cause or contribute" findings for greenhouse gases ("GHGs"). First proposed by EPA on April 24, 2009, the findings respond to the U.S. Supreme Court's 2007 decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). See EPA Issues Proposed Endangerment Finding for GHGs, <http://www.bdlaw.com/news-550.html>. In that case, the Court held that GHGs are air pollutants under the Clean Air Act, and that EPA therefore must determine whether GHG emissions from new motor vehicles "cause or contribute to" air pollution that may reasonably be anticipated to "endanger" public health or welfare.

Collectively referred to as the "Endangerment Finding," the final action by EPA actually consists of two distinct findings regarding GHGs:

- **Endangerment Finding:** EPA has concluded that current and projected concentrations of six key GHGs in the atmosphere – carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF<sub>6</sub>) – "endanger both the public health and the public welfare of current and future generations." EPA defines the group of these six "well-mixed greenhouse gases" collectively as an "air pollutant" under the Clean Air Act.
- **Cause or Contribute Finding:** EPA also concluded that the combined emissions of the "well-mixed greenhouse gases" from new motor vehicles and new motor vehicle engines contribute to pollution that threatens the public health and welfare. Though these transportation sources emit only four of the key GHGs (CO<sub>2</sub>, CH<sub>4</sub>, N<sub>2</sub>O, and HFCs), EPA defined the contributing "air pollutant" as the aggregate of the "well-mixed greenhouse gases." EPA's contribute finding paves the way for regulating emissions from vehicles.

The Endangerment Finding alone does not directly impose any requirements on GHG sources. The issuance of the Finding, however, now authorizes – and obligates – EPA to regulate GHGs from motor vehicles and engines pursuant to section 202(a)(1) of the Clean Air Act. The Endangerment Finding provides the legal basis for EPA to finalize its proposed “Light Duty Vehicle Rule.” See 74 Fed. Reg. 49,454 (Sept. 28, 2009). This rule, proposed in conjunction with National Highway Traffic Safety Administration (“NHTSA”) Corporate Average Fuel Economy standards and applicable to various passenger vehicles and light-duty trucks, would establish regulations aimed at reducing GHG emissions from these vehicles, as well as improving their fuel economy. EPA proposed the Light Duty Vehicle Rule on September 28, 2009, and intends to finalize the Rule in March, 2010. According to EPA, once finalized, the Light Duty Vehicle Rule will make GHGs a “regulated pollutant” under the Clean Air Act, thereby triggering requirements of the statute’s construction and operating permit programs for stationary sources, in addition to the regulatory requirements that will apply to mobile sources.

In finalizing the Endangerment Finding, EPA reviewed and considered more than 380,000 comments. The Agency has prepared responses to these comments in eleven volumes, with each volume focusing on a different broad category of comments.

At this time, EPA has released a pre-publication copy of the Endangerment Finding as well as the accompanying technical support materials and responses to comments on its website at: <http://epa.gov/climatechange/endangerment.html>. The final Endangerment Finding will be published in the Federal Register in the coming days.

For more information about EPA’s Endangerment Finding and its relation to other EPA rules regarding GHGs, please contact David Friedland, at [dfriedland@bdlaw.com](mailto:dfriedland@bdlaw.com) or (202) 789-6047, or Tom Richichi, at [trichichi@bdlaw.com](mailto:trichichi@bdlaw.com) or (202) 789-6026. This alert was prepared with the assistance of Sean Roberts.

## **New Developments in Product Carbon Footprinting**

The World Resources Institute (“WRI”) and World Business Council for Sustainable Development (“WBCSD”) last month issued a draft Product Life Cycle Accounting and Reporting Standard to measure the greenhouse gas (“GHG”) emissions associated with consumer goods and services, commonly known as a product carbon footprint. A product carbon footprint aims to identify the total amount of GHGs emitted directly by a product, as well as indirectly “embedded” within a product, over its entire lifecycle, including emissions associated with the extraction of raw materials, manufacturing, transportation, use and end-of-life disposal. Although the draft standard is in the early stages of development, it proposes to establish the principles and framework for product GHG accounting. That framework, once completed, may likely form the basis of future sector-specific standards, labeling, and other regulatory requirements. WRI has solicited comments from stakeholders on the draft standard which it has requested be submitted by December 21, 2009.

This effort is the latest frontier in the movement to identify, report and minimize the lifecycle environmental impacts of consumer products, which includes green design, energy efficiency standards, and end-of-life materials management. (For additional information on product-related environmental restrictions, click here.) Attention to the challenges of measuring and meaningfully reporting product carbon footprints is growing quickly, and promises to be a significant focus of industry standard-setting as well as procurement-related and even regulatory activity in the future.

This Alert provides an overview of the new GHG Protocol draft standard, as well as survey of related product carbon-footprint developments. If you are interested in providing comments or learning more about the standard, contact information is included at the end of this alert.

To read the full alert, please go to <http://www.bdlaw.com/news-748.html>. For more information, please contact Russ LaMotte at [rlamotte@bdlaw.com](mailto:rlamotte@bdlaw.com), or Lauren Hopkins at [lhopkins@bdlaw.com](mailto:lhopkins@bdlaw.com).

## Senate Oversight Hearing on TSCA Highlights Familiar Concerns, New Science

After two subcommittee hearings on legislative reform of the Toxic Substances Control Act ("TSCA") in the U.S. House of Representatives this year,<sup>1</sup> the Senate has now gotten in on the action as well. On December 2, 2009, the Senate Environment and Public Works Committee and its Subcommittee on Superfund, Toxics and Environmental Health held a joint hearing entitled "Oversight Hearing on the Federal Toxic Substances Control Act."<sup>2</sup> While no legislation to modernize TSCA has been introduced in either the House or the Senate, the latest hearing gave federal legislators and policymakers, non-governmental organizations, and industry groups an opportunity to showcase their priorities.

The Subcommittee Chairman, Senator Lautenberg (D-NJ), declared his intention to introduce TSCA legislation "in coming weeks," and Committee Chairman Senator Boxer (D-CA) stated that chemicals management reform was now "at the top" of her legislative agenda. Those statements suggest that no bill is likely for the rest of 2009, but could come early in 2010.

The hearing appeared to be principally an effort to keep TSCA legislation in the public view while waiting for introduction of a revamped Kid-Safe Chemicals Act.

Chairman Lautenberg and other Democratic Senators offered many of the same justifications for TSCA reform heard at the two earlier House hearings. Most often repeated was that out of the more than 80,000 chemicals listed on the TSCA inventory, EPA has required testing of only about 200 and has banned only 5. Lautenberg also tied chemicals management to both health care reform and the economy, pointing to biomonitoring studies and saying that restricting exposures to hazardous chemicals would reduce health care costs.

Biomonitoring has emerged as a major theme of the TSCA debates of 2009, and this Senate hearing was no exception. Senator Lautenberg put into the record a study released that day by the Environmental Working Group finding 232 chemicals in the cord blood of ten newborns, indicating prenatal exposure. The report highlights bisphenol A, brominated flame retardants, and perfluorinated chemicals, among others.<sup>3</sup>

Senators from both parties asserted needs to better protect children and other sensitive populations; provide more information for the public and intermediate chemical users; protect the valuable innovations of the chemical industry which support the American economy and quality of life; and avoid piecemeal chemical-specific or state-by-state regulations. The advocates of chemicals management reform mentioned formaldehyde in pressed wood products, bisphenol A, and brominated flame retardants as examples of specific chemicals in need of regulation.<sup>4</sup>

The Republican Senators at the hearing displayed little interest in advancing the discussion on TSCA reform and instead focused almost exclusively on disputing the science behind EPA's climate change conclusions in light of e-mails hacked from British climate researchers. However, Ranking Member Inhofe (R-OK) reiterated his previously expressed position that any bill introduced be based on risk and cost-benefit analysis considerations and not the precautionary principle; use sound science; protect confidential business information and security-relevant information; include procedures for prioritization; and disallow citizen suits.<sup>5</sup>

The first witness was EPA Administrator Lisa Jackson. Her testimony followed closely on the testimony at the last House hearing from Stephen Owens, EPA Assistant Administrator for Prevention, Pesticides and Toxic Substances. She described limitations of TSCA, highlighted EPA's six legislative principles for TSCA reform,<sup>6</sup> and described EPA's actions in the meantime under current TSCA authority.<sup>7</sup> In response to a question from Senator Whitehouse (D-RI) regarding the tension between acting on sufficient science and avoiding delay, Jackson emphasized the need for legislation to include rigorous but flexible provisions for prioritization and efficiency. Administrator Jackson also noted in response to a question from Senator Klobuchar (D-MN) that EPA is pursuing regulation of formaldehyde in pressed wood products, but the risk assessment is not due for nearly a year.



The hearing's other witnesses, for whom the only Senator Lautenberg was in attendance, were John Stephenson, Director of Natural Resources and the Environment at the Government Accountability Office ("GAO"), and Dr. Linda Birnbaum, Director of the National Institute of Environmental Health Sciences ("NIEHS") and the National Toxicology Program ("NTP"). Mr. Stephenson largely recapitulated his testimony at the February House hearing on TSCA. GAO has issued more than a dozen reports describing flaws in TSCA, and in January 2009 added TSCA to its "High Risk Series" list of government programs "warranting attention by Congress." Stephenson expressed support for risk-based chemical prioritization, following a "vetting" of the TSCA Inventory to determine which chemicals are still in commerce.

Dr. Birnbaum testified regarding the advancement of science since the 1976 passage of TSCA. The new science of epigenetics (which refers to all modifications to genes other than changes in the DNA sequence itself), for example, has shown that during particularly susceptible stages of human development, relatively low doses of certain chemicals can disrupt normal development and also induce changes in gene expression that can affect several generations. In this vein, NIEHS is investigating potential impacts of environmental exposures to chemicals on new endpoints such as breast cancer and obesity.

Dr. Birnbaum also testified that a modernized TSCA needs to account for an ongoing shift toward new methods of toxicological testing such as high-throughput assays and alternatives to animal testing.<sup>8</sup> In response to a question from Senator Lautenberg regarding potential fast-track regulation of existing persistent, bioaccumulative, and toxic chemicals ("PBTs"), she also said that any chemicals that are highly persistent and bioaccumulative are likely to be toxic, and should be treated as such even where toxicity information is lacking.

While all three panelists represented government agencies, non-governmental organizations and industry sector voices did not go unheard. Democratic Senators referenced and added to the record a number reports and statements from stakeholders relating to TSCA modernization. Two such reports were released on the day of the Senate hearing. First, as noted above, the Environmental Working Group issued a report on chemicals found in cord blood. Second, officials from thirteen states released a set of TSCA reform principles.<sup>9</sup> Among other things, these principles called for preserving states' rights to address chemicals of concern themselves (a reference to preemption), and for funding state chemicals programs.

The NGO coalition Safer Chemicals, Healthy Families made a written statement available at the hearing.<sup>10</sup> A statement from Cal Dooley, President of the American Chemistry Council ("ACC"), describing ACC's TSCA modernization principles, was also entered into the hearing record.<sup>11</sup> ACC's actions on TSCA modernization were cited by several Senators and by Administrator Jackson as a reason for optimism regarding the prospects for new legislation.

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<sup>1</sup> See Beveridge & Diamond, P.C., *Congressional Hearing Builds Momentum For TSCA Amendments*, Nov. 20, 2009, <http://www.bdlaw.com/news-730.html>; Beveridge & Diamond, P.C., *First TSCA Reform Congressional Hearing of 2009 Held February 26*, Mar. 3, 2009, <http://www.bdlaw.com/news-506.html>.

<sup>2</sup> Senate Committee on Environment and Public Works and Subcommittee on Superfund, Toxics and Environmental Health, joint hearing, Oversight Hearing on the Federal Toxic Substances Control Act, Dec. 2, 2009, [http://www.epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_id=129f8be4-802a-23ad-4217-c8c5900bf3db](http://www.epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_id=129f8be4-802a-23ad-4217-c8c5900bf3db) (compiling all witnesses' written testimony and some Senators' opening statements).

<sup>3</sup> Environmental Working Group, *Pollution in People: Cord Blood Contaminants in Minority Newborns*, Dec. 2, 2009, <http://www.ewg.org/files/2009-Minority-Cord-Blood-Report.pdf>.

<sup>4</sup> For more information on formaldehyde in pressed wood, see Beveridge & Diamond, *Citizens' Petitions Under TSCA Seek to Change EPA's Agenda*, April 28, 2009, <http://www.bdlaw.com/news-557.html>. For more information on the bisphenol A controversy, see Beveridge & Diamond, P.C., *Bisphenol A Developments in 2008: The Year in Review*, <http://www.bdlaw.com/news-461.html>; *Bisphenol A Ban Proposals Proliferate*, April 17, 2009, <http://www.bdlaw.com/news-548.html>.

<sup>5</sup> See Senate Environment and Commerce Committee, Minority page, press release, *Senator Inhofe Statement on TSCA Reform* (Sept. 29, 2009), [http://epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord\\_id=0ccdc0e4-802a-23ad-4db0-7ff8d96ce095&Region\\_id=&Issue\\_id=](http://epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=0ccdc0e4-802a-23ad-4db0-7ff8d96ce095&Region_id=&Issue_id=).

<sup>6</sup> EPA, *Essential Principles for Reform of Chemicals Management Legislation*, <http://www.epa.gov/oppt/existingchemicals/pubs/principles.html>.

<sup>7</sup> See EPA, *Enhancing Existing Chemical Management Under TSCA*, <http://www.epa.gov/oppt/existingchemicals/pubs/enhanchems.html>.

<sup>8</sup> See Mark Duvall & Alexandra Wyatt, "Chemical Reaction: Revising Regulatory Science at EPA," *The Environmental Forum*, November 2009; Beveridge & Diamond, P.C., *Science at EPA Is Changing Quickly, With Big Potential Consequences*, June 19, 2009, <http://www.bdlaw.com/news-599.html>.

<sup>9</sup> States' Principles on Reform of the Toxic Substances Control Act, Dec. 2, 2009, available at <http://www.saferstates.com/attachments/StatePrinciples.pdf>. The states are California, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Oregon, Vermont, and Washington.

<sup>10</sup> See Andy Igrejas, *Safer Chemicals Healthy Families, An Auspicious Day for TSCA Reform*, Dec. 2, 2009, <http://blog.saferchemicals.org/2009/12/an-auspicious-day-for-tsca-reform.html> (overview of printed release).

<sup>11</sup> ACC Press Release, *ACC Reacts to Senate Hearings on TSCA Modernization*, Dec. 2, 2009, available at [http://www.americanchemistry.com/s\\_acc/sec\\_news\\_article.asp?CID=206&DID=10508](http://www.americanchemistry.com/s_acc/sec_news_article.asp?CID=206&DID=10508).

## EPA Finalizes Enforceable Numeric Limits on Stormwater Discharges from Construction Sites

On December 1, 2009, EPA finalized its Effluent Limitations Guidelines (ELG) for the Construction and Development Industry. This ELG is designed to control sediment pollution from construction sites and, for the first time, imposes nationally-applicable numeric effluent limitations on stormwater discharges from this industry. See 74 Fed. Reg. 62,996. Construction sites that disturb one or more acres must implement erosion and sediment control best management practices and, of paramount importance to the construction industry, the new regulations require construction sites that disturb ten or more acres of land at one time to meet a numeric effluent limitation (for turbidity, a measurement of sediment in water). EPA anticipates that the rule will affect over 81,000 entities, including residential and commercial construction companies and civil engineering firms involved in highway, street, and bridge construction.

Existing stormwater regulations require construction sites to implement control measures to manage stormwater discharges, but the new rule represents the first time EPA has established a national technology-based numeric effluent limitation for construction stormwater runoff. All entities that disturb one acre or more at a time must apply management practices to control stormwater discharges, such as: erosion and sediment controls, soil stabilization requirements, dewatering requirements, pollution prevention measures, prohibitions on certain discharges, and use of surface outlet structures. Under the final ELG, regulated entities that disturb 10 or more acres at one time must use a passive treatment system to treat stormwater runoff to a turbidity level of 280 nephelometric turbidity units (NTU). The 10 acre disturbance threshold includes non-contiguous land disturbances that occur at the same time and are part of a larger common plan of development or sale. Entities developing such sites will be required to take stormwater discharge samples throughout the day. The average of those samples must not exceed 280 NTU. The numeric limits do not apply if total daily precipitation exceeds the local 2-year, 24-hour storm. Despite this exception, EPA requires sampling on all days because whether such a storm threshold is met can only be determined at the end of the day.

The final rule will be effective on February 1, 2010 and, where applicable, the new numeric effluent limitation will require control in excess of that which has previously been required by the federal permitting program and by most state and local programs. Because EPA and state-issued general or individual construction stormwater permits traditionally mandate only non-numerical effluent limitations and best management practices, EPA is phasing in the numeric effluent limitation over four years. Construction sites that disturb 20 or more acres at once must monitor discharges from construction areas and comply with the numeric effluent limitation beginning 18 months after February 1, 2010, the effective date of the final rule. Construction sites that disturb between 10 and 20 acres at once must begin monitoring discharges from the site and comply with the numeric effluent limitation on February 1, 2014. EPA hopes that this phased-in approach will allow permitting authorities sufficient time to develop monitoring requirements and provide owners and operators sufficient time to comply. Permitting authorities must incorporate the new requirements into permits issued after February 1, 2010, even though the numeric limitation and monitoring requirements will not be applicable until 18 months or four years after February 1, 2010, depending on the

size of the construction site. For those states in which EPA is the permitting authority, EPA will include the new stormwater requirements when it updates the Construction General Permit, set to expire on June 30, 2011. In all other states, the rule implementation date will vary depending on when states reissue their general or individual permits.

The feasibility and legality of implementing enforceable numeric limits on stormwater discharges from construction sites was questioned by commentors on the proposed rule. Some commentors expressed concern about whether it is technically possible to meet the 280 NTU limit through passive treatment. Additionally, the National Association of Home Builders has asserted that regulation of turbidity is unlawful because turbidity is a measurement of a conventional pollutant, total suspended solids (TSS), and therefore it should be subject to less stringent conventional pollutant control requirements, rather than the more stringent non-conventional pollutant controls chosen by EPA. In the final rule, EPA states that turbidity is “analogous” to TSS but not “synonymous” because TSS and turbidity are measured differently. It remains to be seen whether the final rule, which, itself, was the result of litigation, may be challenged on these or other grounds. See *NRDC v. EPA*, 542 F.3d 1235 (9th Cir. 2008).

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## FIRM NEWS & EVENTS

### Beveridge & Diamond's Environmental Force Recognized by Law360

The December 7 Law360 includes two articles on Beveridge & Diamond's strength in the Environmental Law practice area. The first article, “Environmental Lawyers Dominate at Beveridge,” reports on the fact that Beveridge & Diamond has the heaviest concentration of environmental lawyers of any firm with 100 or more lawyers in the United States.

Law360 also recently published the results of a survey listing the 100 largest environmental practices in the United States, ranked by the number of lawyers at the firm. In the article, “Law360 Ranks Largest Environmental Practices,” Beveridge & Diamond came in first with the highest concentration of environmental lawyers, and second in terms of number of lawyers.

The survey, which looked at all law firms with 100 or more lawyers and select boutique firms, found that 91 percent of Beveridge & Diamond's lawyers were environmental lawyers, compared with the second-place and third-place law firms which had 29 and 24 percent environmental lawyers, respectively.

To read the article “Environmental Lawyers Dominate at Beveridge”, please go to <http://www.bdlaw.com/assets/attachments/Environmental%20Attorneys%20Dominate%20At%20Beveridge.pdf>.

To read the article “Law360 Ranks Largest Environmental Practices”, please go to <http://www.bdlaw.com/assets/attachments/Law360%20Ranks%20Largest%20Environmental%20Practices.pdf>.

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