Texas Environmental Update

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Texas Developments

EPA Issues Greenhouse Gas Permitting Rules that Provide for EPA to Act as Permitting Authority in Texas

On December 23, 2010, EPA Administrator Lisa Jackson signed a series of rules regarding prevention of significant deterioration ("PSD") permitting for greenhouse gas ("GHG") emissions. Among other implementation provisions, these include rules providing for EPA to act as the permitting authority in Texas and seven other states (Arizona, Arkansas, Florida, Idaho, Kansas, Oregon and Wyoming) until the affected states and local agencies revise their programs to allow for permitting GHG emissions pursuant to EPA's Tailoring Rule. The above-referenced states are among the 13 states to which EPA issued a state implementation plan ("SIP") call on December 13, 2010 requiring selection of a date (from December 22, 2010 to December 1, 2011) by which the state would submit a SIP revision to ensure their PSD program covers GHG emissions. EPA indicates that because Texas did not select a SIP submittal date, the Clean Air Act provides for default to the latest possible date, which is December 1, 2011. The other states listed above opted for the earliest SIP submittal deadline (December 22, 2010), but did not submit revised SIPs by that date.

Two of the rules are specific to Texas, addressing the fact that Texas has informed EPA that the State has neither the intention or authority to modify its PSD program to include permitting of GHG emissions. One of the rules is an immediately-effective interim final rule pursuant to which EPA proposes to correct its previous full approval of Texas' PSD program into a partial approval and partial disapproval. The correction is based upon EPA's determination that Texas' PSD program is flawed because the state did not address how the program would apply to pollutants that become newly subject to CAA regulation, including non-National Ambient Air Quality Standard ("NAAQS") pollutants such as GHGs. In that immediately-effective interim final rule EPA also proposes to promulgate a federal implementation plan ("FIP") "in order to assure that GHG-emitting sources in Texas are able to proceed with plans to construct or expand." The other Texas-related rule is a companion proposed rule pursuant to which EPA requests comment on the substance of the interim final rule. A public hearing on the proposal will be held in Dallas on January 14, 2011. Comments must be received on or before February 12, 2011.

The pre-publication versions of the series of proposed rules as well as additional information about GHG permitting are available at http://www.epa.gov/nsr/actions.html#dec10.

Environmental Groups File Notice of Intent to Sue EPA Over Title V Permits

A consortia of six environmental groups led by the Environmental Integrity Project (EIP) has filed notice of intent to bring a citizen suit under the Clean Air Act (CAA) for EPA's failure to act on Texas Title V permits to which the Agency has objected. The petition alleges that EPA has violated a non-discretionary duty to issue or deny pending Title V permit applications, as required under the CAA, and has unreasonably delayed doing so. The petition lists the forty-three permits to which EPA has lodged a range of objections, from objections that are administrative in nature (for example, conflicting recordkeeping provisions) to those that more fundamental and challenge underlying NSR authorizations (for example, authorizations issued pursuant to the Flexible Permits and Qualified Facilities programs, two NSR programs for which EPA denied SIP approval earlier this year). The environmental groups' notice

to sue comes at a time when Region 6 and TCEQ are deeply and publicly divided over a number key air quality program issues; the alleged infirmities of Texas Title V permits has been central to that debate. The petition is available at www.bdlaw.com/assets/attachments/Notice_of_Intent_to_Sue_EPA_TexasTitleV.122010.pdf.

EPA Region 6 Issues Opportunity to Confer and Sets Deadline for De-Flex Plans

Continuing its aggressive press to have all Texas flexible new source review ("NSR") permit holders commit to transition those permits to standard NSR permits (pursuant to 30 Tex. Admin. Code 116 Subchapter B or so-called "Subchapter B Permits"), on December 2, 2010, EPA sent a follow-up letter to all flexible permit holders who received September 20, 2010 "Opportunity to Confer" letters. The new letter outlines, again, EPA's views regarding the limited ways for major sources to legally "de-flex" their permits -- (1) through EPA's voluntary audit program and (2) through a "Four-Step" process that would involve commitments through Title V permits. Both options involve a detailed look-back regarding a facility's operations under the flexible permit to determine whether circumvention of federal NSR may have occurred. EPA reiterates its threat to pursue enforcement against those entities that fail to submit to EPA a letter identifying the company's transition process by the Agency's December 22, 2010 deadline. A copy of the letter is available at www.bdlaw.com/assets/attachments/Second_notice_to_confer_21.2.2010.pdf.

EPA and TCEQ At Odds Over TPDES Permitting Issues

On December 2, 2010, by means of a press release as well as written correspondence, EPA Region 6 Administrator, Al Armendariz, called into question the status of approximately 80 Texas Pollutant Discharge Elimination System ("TPDES") permits, many of which are permits in the renewal phase that have been administratively continued pending resolution of long-standing disagreements between EPA and TCEQ about appropriate permit conditions. Although the disagreements relate to a number of issues, the subject highlighted by the EPA Regional Administrator relates to whole effluent toxicity ("WET") requirements. EPA has requested that TCEQ provide revised draft permits addressing EPA's concerns within six months. Copies of EPA's press release and letter as well as the list of facilities affected are available at EPA's website at http://www.epa.gov/region6/index.htm.

TCEQ's response to EPA is indicative of growing frustration between the two agencies and states that EPA's approach on these issues "does not advance our common goal of clean water." *See* Letter from C. Maguire (TCEQ) to A. Armendariz (EPA) dated December 8, 2010, available at www.bdlaw.com/assets/attachments/TCEQ%20Response%20Letter.pdf. It is unlikely that these federal/state disagreements relating to Texas water quality will be put to rest in the near term.

Texas Railroad Commission Adopts Carbon Storage Rules

The Texas Railroad Commission has adopted new rules governing the underground storage of man-made carbon dioxide ("CO_2"). The purpose of the rules is to protect the underground sources of drinking water while promoting the capture and storage of anthropogenic CO_2. The rules include requirements for applications, fees, geologic site characterization, permit issuance, construction, operation, testing, monitoring and closure. A copy of the new rules, which became effective on December 20, 2010, may be found at http://www.rrc.state.tx.us/rules/proposed.php.

Sunset Advisory Commission Holds Public Hearings on TCEQ

On December 15, 2010, the Sunset Advisory Commission conducted hearings on the Sunset staff reports and recommendations for TCEQ. Sunset staff recommendations include, among others, the following: (i) TCEQ's public assistance efforts lack coordination

and focus, (ii) TCEQ's approach to compliance history fails to accurately measure entities' performance, negating its use as an effective regulatory tool, and (iii) the statutory cap on the Air Emissions Fee limits TCEQ's ability to adequately fund the Title V air permit program. The Sunset Advisory Commission considered hours of testimony from regulated entities, environmental groups and interested persons. The Sunset staff report and hearing materials are available at TCEQ's website at http://www.tceq.state.tx.us/agency/sunset/. The Sunset Advisory Commission is scheduled to meet on January 12, 2011 to issue its decision on the recommendations.

TCEQ Accepting Public Comment on Pesticides Permit and Rule Proposals

On December 7, 2010, TCEQ issued public notice of a proposed new general permit under Texas Water Code Chapter 26 that would authorize the application of biological pesticides or chemical pesticides that leave a residue in water when such applications are made into or over, including near, waters of the United States. The proposed general permit would apply to the entire state. TCEQ has scheduled a public meeting on the general permit on January 12, 2011 in Austin, Texas. The public comment period on the pesticides permit ends on January 17, 2011.

TCEQ is also moving forward with proposed amendments to TCEQ rules found at 30 TAC Chapters 213 and 311. The proposed rule changes will allow authorized pesticide application to continue into, over and near the Highland Lakes and in areas over the Edwards Aquifer. TCEQ will hold a public hearing to take public comment on the proposed rules on January 6, 2011 at TCEQ headquarters. Additional information about the proposed rulemaking as well as the general permit is available at http://www.tceq.state.tx.us/permitting/water_quality/stakeholders/pesticidegp_stakeholder_group.html.

TCEQ Air News Regarding Oil & Gas Production Facilities & the $PM_{2.5}$ NAAQS

On January 26, 2011, TCEQ commissioners will consider for adoption a proposed new oil and gas permit by rule and a new non-rule standard permit for oil and gas facilities. These proposed authorization mechanisms and additional information about them are available at http://www.tceq.state.tx.us/permitting/air/announcements/nsr_announce_3_25_10.html. In connection with developing these permitting mechanisms, TCEQ has prepared and issued for comment a proposed Oil & Gas Spreadsheet emissions calculation tool, Screen Modeling Protocol, ISC Modeling Protocol and Representative Analysis Protocol for use in estimating emissions and impacts from such oil and gas production sites. TCEQ requests that comments on the tools be submitted by the extended deadline of January 31, 2011. These tools and additional information about them are available at http://www.tceq.state.tx.us/permitting/air/announcements/nsr-announce-10-29-10.html.

TCEQ has issued interim implementation guidance regarding the fine particulate matter ("$PM_{2.5}$") national ambient air quality standards ("NAAQS") final rule published on October 20, 2010 (75 FR 64864). The guidance relates to the EPA-added maximum allowable increases in ambient pollutant concentrations ("increments") and two screening tools -- known as the Significant Impact Levels ("SILs") and a Significant Monitoring Concentration ("SMC") for $PM_{2.5}$. The rule was effective on December 20, 2010 for the SILs and SMC, and the increment demonstration will be applicable as of October 20, 2011. TCEQ's guidance document is available at http://www.tceq.state.tx.us/permitting/air/memos/interim_guidance_naaqs.html.

Upcoming TCEQ Meetings and Events

- TCEQ's ***Municipal Solid Waste Management and Resource Recovery Advisory Council*** will hold its next quarterly meeting in Austin on January 13, 2011. Information about this event is available at http://www.tceq.state.tx.us/permitting/waste_permits/advgroups/msw_advcouncil.html#meetings.

- TCEQ will host a quarterly ***Drinking Water Advisory Work Group Meeting*** in Austin

on January 25, 2011. Information about this event is available at http://www.tceq.state.tx.us/permitting/water_supply/ud/awgroup.html.

- TCEQ will host a quarterly ***Water Quality Advisory Work Group Meeting*** in Austin on January 25, 2011. Presentation/discussion topics on the agenda include: Status of Storm Water Multi-Sector General Permit Renewal; Results and Effectiveness of Watershed Protection Plans; Implementation of EPA's Construction Effluent Guidelines; TCEQ Sanitary Sewer Overflow Initiative; and Update on Pesticide General Permit Draft. Information about this event, including the full agenda, is available at http://www.tceq.state.tx.us/permitting/water_quality/stakeholders/WQ_advisory_group.html.

- The ***2011 TCEQ Emissions Inventory Workshop*** will be held in Austin on February 9, 2011. The Workshop will provide guidance on how to submit an emissions inventory update on TCEQ's internet-based reporting system, and demonstrations on emissions inventory submissions via the interactive update and the single text file update. Information about this event, including the full agenda, is available at http://www.tceq.state.tx.us/p2/events/emissions_inventory.html/.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in December can be found on the TCEQ website at http://www.tceq.state.tx.us/news/releases/12-10Agenda12-14.

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

SEC Issues Proposed Regulations Requiring Disclosure of Conflict Minerals

On December 15, 2010, the Securities and Exchange Commission ("SEC") issued proposed regulations implementing section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "Act"), which requires certain companies to make disclosures about the source of conflict minerals in their manufactured products. The proposed regulations (available at http://www.bdlaw.com/assets/attachments/2010-12-15%20SEC%20Proposed%20Reg%20re%20Conflict%20Minerals.pdf) address some—but by no means all—of the numerous open questions regarding the scope and applicability of the Act's requirements.

These requirements are likely to affect a wide spectrum of manufacturing companies and their suppliers, and will result in new supply chain management challenges.

Stakeholders have until January 31, 2011 to submit comments on the proposed rules to the SEC.

Background

"Conflict minerals" are defined under the Act to include columbite-tantalite, also known as coltan (used to produce tantalum), cassiterite (used to produce tin), wolframite (used to produce tungsten), gold, and other minerals designated by the Secretary of State. As discussed in a previous client alert (available at http://www.bdlaw.com/news-910.html), the Dodd-Frank disclosure requirements are part of a U.S. effort to reduce the market for minerals that may directly or indirectly finance armed conflict in the Democratic Republic of Congo ("DRC') and adjoining countries. These minerals are widely used in the electronics, jewelry, industrial machinery, automotive, and aeronautics industries, among many others.

Proposed Rules

Under the proposed rules, any issuer for which conflict minerals are "necessary to the functionality or production of a product manufactured, or contracted to be manufactured, by that issuer" would be required to disclose in the body of its annual report1 whether those conflict minerals originated in the [DRC] or an adjoining country."

The proposed rules would essentially require a three-step process.

First, companies must assess whether they are subject to the statutory due diligence and disclosure requirements. They do so by determining:

a. if they are issuers that file reports with the SEC pursuant to sections 13(a) or 15(d) of the Securities Exchange Act of 1934; and

b. if any conflict minerals (or their derivatives) are necessary for the production or functionality of products they manufacture.

Addressing one significant question regarding the applicability of the requirements – what does it mean to "manufacture" a product? -- the proposal clarifies that the rules apply to any entity that has "any influence" over a product's manufacturing. This clarification presumably encompasses any company that sets product specifications for a product or component that is produced by a contract manufacturer.

The proposed rules also clarify that the obligation applies to any entity that offers a generic product under its own brand name, even if it had no influence over the specifications, as long as it contracted to have the product manufactured for itself.

Second, if a company meets the criteria in the first step, the company must determine whether the conflict minerals originated in the DRC or an adjoining country. This assessment requires a "reasonable country of origin inquiry." If the company determines that the conflict minerals did not originate from the DRC or adjoining countries, the company must disclose that information along with a description of the enquiry it used to reach this conclusion: (1) on its website; and (2) in its annual report to the SEC.

The SEC chose not to specify what constitutes a "reasonable country of origin inquiry" in its proposed rules. But the preamble to the proposed rule suggests that the "reasonable inquiry" would likely require less than the full due diligence process required under Step 3, that the reasonableness standard does not require absolute accuracy, that the inquiry might (at least for the time being) be based on reasonably reliable representations from the supply chain that the conflict minerals did not originate in DRC countries (including if the source smelter had been identified as a "DRC conflict free" smelter pursuant to recognized and audited standards).

Third, if, after completing a reasonable country of origin inquiry, a company determines that conflict minerals in its products originated from the DRC or adjoining countries or cannot determine that its conflict minerals did not originate in the region, then the company must "furnish" to the SEC a "Conflict Minerals Report." This report must include:

- a description of any of its products containing conflict minerals that directly or indirectly finance or benefit armed groups in the DRC or adjoining countries;
- the facilities used to process those conflict minerals;
- the country of origin of those conflict minerals; and
- a description of the company's efforts to identify the source and chain of custody of its conflict minerals, including the due diligence standard that they used in making the above determinations.

The report must be accompanied by an independent private sector audit of the report and a certification by the company that it obtained such an audit.

As with the country of origin inquiry at Step 2, the SEC declined to "dictate the standard for, or otherwise provide guidance concerning, due diligence that issuers must use in making

their supply chain determinations." Instead, the proposed rules would require issuers to disclose the due diligence used, including whether they followed recognized standards or guidance of supply chain due diligence. The rules specifically suggest that issuers that follow internationally recognized standards -- such as those under development under OECD auspices (as described below) -- "would provide evidence that the issuer used due diligence in making its supply chain determinations."

The disclosure, due diligence, and reporting requirements are effective with respect to the company's activities in the first full fiscal year following the SEC's promulgation of final regulations (likely in April 2011).

Several issues raised by industry in comments to the SEC remain unresolved. For example, the SEC expressly declined to read a materiality threshold into the requirement that conflict minerals be necessary to the functionality or production of a product. Instead, the SEC requested additional comments on whether the final rule should adopt a de minimis threshold "based on the amount of conflict minerals used by issuers in a particular product or in their overall enterprise."

The proposed rule provides special treatment for recycled metals, recognizing the inherent impossibility in tracing the country and mine of origin for such inputs, but it does not exempt such minerals from the burdensome supply chain due diligence and reporting requirements that apply to virgin minerals. If a company's conflict minerals originated from recycled or scrapped sources rather than from mined sources, the company would be required to disclose that in its annual report. In addition, the company would have to furnish a Conflict Minerals Report that describes the measures taken to exercise due diligence in determining that their conflict minerals were recycled or scrap. Under the proposed rule, such products would be considered DRC conflict free. The result of the proposed rule is that the presence of recycled or scrap metals in a manufacturer's supply chain would trigger the more burdensome "Step 3" due diligence measures than the use of virgin minerals that couuld, based on a "reasonable inquiry," be considered to come from non-DRC sources. The SEC specifically requested comments on this proposed approach.

Context and Implications

The U.S. conflict minerals disclosure requirements will necessarily entail a sweeping review of and revision to many companies' supply chain management policies, in order to implement the source-of-origin and due diligence requirements that the presence or use of these common materials will trigger. The rules have already generated significant activity along the entire supply chain of many products manufacturers.

The new rules provide little concrete guidance regarding the degree and type of source-of-origin tracking and other conflict minerals policies that will constitute due diligence. Instead, companies are likely to look to external standards for benchmarking and guidance. Significant work in this area has already been accomplished through OECD-sponsored efforts to develop responsible supply chain management standards for conflict minerals. The OECD guidance, which was recently endorsed by a UN expert group on the DRC conflict and which the SEC preamble specifically pointed to as a reference standard, is available at http://www.oecd.org/document/36/0,3343,en_2649_34889_44307940_1_1_1_1,00.html.

Because it is not currently possible to trace the source of origin of metals back up the supply chain prior to the smelter, the source of origin and due diligence measures for downstream users will turn in large measure on their ability to rely on smelters that have adopted responsible and auditable policies regarding the source of minerals. Ongoing work by industry groups such as the Electronic Industry Citizenship Coalition ("EICC") and Global e-Sustainability Initiative ("GeSI") to develop a Conflict Free Smelter program, and related standards, will likely play a central role in the implementation of these new requirements. We will report on those developments in the future as they are further developed and released.

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Developments in the Regulation of Carbon Nanotubes Under TSCA

Carbon nanotubes (CNTs) promise a myriad of advantages over traditional materials due to their strength, electrical conductivity, and other remarkable properties. Yet preliminary studies have already identified CNTs as potentially posing health risks. The following article reviews the multiple activities that the Environmental Protection Agency has taken and plans to take to regulate CNTs under the Toxic Substances Control Act (TSCA) in light of those potential risks.

EPA's primary tool in regulating CNTs has been premanufacture review of individual CNTs and subsequent imposition of testing and work practice controls through consent orders, in some cases followed by adoption of a significant new use rule (SNUR) applying those controls to all who may manufacture or process the CNT. The article examines the nomenclature issues underlying the premanufacture notification (PMN) requirement for CNTs and identifies PMNs known to have been submitted for CNTs and their resulting consent orders and SNURs.

In addition, EPA has required the submission of toxicological information on CNTs through consent orders and through section 8(e) of TSCA. The article identifies the CNT submissions under section 8(e) to date. It also reviews the test rule, categorical SNUR, and reporting rule for various nanomaterials, including CNTs, that EPA plans to propose in 2011.

To read the full article, see http://www.bdlaw.com/assets/attachments/2010-12-14%20Client%20Alert%20re%20CNT%20SNUR%20and%20Docket.pdf.

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Globally Harmonized System Update: OSHA Hosts Public Meeting to Discuss Preparations for December UN Meetings

On November 30, 2010, the Occupational Safety and Health Administration ("OSHA") held an informal public meeting to solicit input for the upcoming session of the United Nations Subcommittee of Experts on the Globally Harmonized System of Classification and Labeling of Chemicals ("UNSCEGHS"), to be held from December 7-9, 2010, in Geneva, Switzerland.[1] During the meeting, OSHA officials offered little insight into the position that the United States delegation would be taking with respect to various proposals to update the Globally Harmonized System ("GHS"). Instead, they listened to input from the stakeholders in attendance. OSHA officials indicated that they would consider the stakeholders' comments while finalizing their positions on the proposals before the UNSCEGHS, but they emphasized that the comments would have no bearing on the rulemaking process for OSHA's hazard communication standard ("HCS").

1. Background

Many countries have regulatory systems in place for hazardous chemical classification and labeling, but differences in the various country systems require multiple classifications, labels and safety data sheets ("SDSs") for the same product when marketed in different countries or regulated by different authorities. This leads to inconsistent information provided to those potentially exposed to chemicals, as well as regulatory burdens on companies selling chemicals in multiple countries.

In 1992, the United Nations Conference on Environment and Development issued a mandate to develop a globally harmonized chemical classification and labeling system. Pursuant to this mandate, a coordinating group of countries, stakeholder representatives, and international organizations developed the GHS. The GHS contains classification criteria for physical hazards, classification criteria for health and environmental hazards, and hazard communication elements, including requirements for labels and SDSs. The UN formally

adopted the GHS in 2003 and encouraged countries to implement it as soon as possible. The GHS has subsequently been revised, with the Third Revised Edition of the GHS released in 2009.[2]

In the United States, OSHA has the principal responsibility for regulating classification, labeling, and SDSs required for chemicals in the workplace. OSHA began regulating the classification and labeling of chemicals in 1983, when it issued the HCS.[3] The HCS was subsequently amended in 1987 and 1994 to expand its coverage and make technical changes. On September 30, 2009, after the issuance of the Third Revised Edition of the GHS, OSHA issued a proposed rule that would substantially modify the HCS to conform with the GHS. OSHA's proposed modification to the existing HCS included minor changes in terminology and definitions, revised criteria for classification of chemical hazards, revised labeling provisions, a specified format for SDSs, and requirements for employee training on labels and safety data sheets.[4] OSHA accepted public comments on its proposed rule until December 29, 2009. It is in the process of finalizing the HCS rule with the expectation of publication in 2011.

2. UN Session on Harmonized Labelling

Between December 7 and 9, 2010, the UNSCEGHS will meet to discuss several proposals for updating the Third Revised Edition of the GHS. These proposals address: (1) classification of chemically unstable gases and gas mixtures; (2) determination of the chemical instability of gases; (3) the inclusion of simple asphyxiants; (4) revision of precautionary statements in annexes 1, 2, and 3 of the GHS; (5) draft amendments to the GHS that were adopted in principle by the UNSCEGHS at its nineteenth session; (6) hazard communication for the supply and use of aerosols; (7) revision of the precautionary statements for gases in transportable gas cylinders under pressure; (8) hazard communication for gases under pressure; (9) addressing potential issues associated with the adoption of "corrosive to metals" for supply/use situations; and (10) editorial changes.[5]

In addition, the UNSCEGHS will discuss: (1) the development of a global list of GHS classified chemicals; (2) information relating to nanomaterials that has been developed by Australia; (3) ongoing work on dust explosion hazards; and (4) ongoing work on corrosivity criteria.[6] A U.S. delegation will be in attendance, headed by OSHA, that includes the Consumer Product Safety Commission, the Department of Transportation, and the Environmental Protection Agency. The U.S. delegation and will offer its position on these proposals.

3. OSHA's Public Meeting

On November 12, 2010, OSHA announced that it would hold an informal public meeting to discuss the proposals that will be before the UNSCEGHS in Switzerland.[7] This meeting took place at OSHA's Headquarters on November 30, 2010. It was led by Maureen Ruskin, the Director of the Office of Chemical Hazards - Metals, for OSHA's Directorate of Standards and guidance. Over 40 different stakeholders participated in the meeting, including representatives from industry groups, labor groups, consumer groups, and various companies.

During preliminary comments, Ms. Ruskin explained that the purpose of the meeting was to gather information and comments from the public that the U.S. delegation could consider when developing its positions for the UNSCEGHS meeting. She also explained that the comment period has ended with respect to the proposed HCS standard, and that OSHA would not consider any comments made during the meeting when finalizing the HCS proposal. Finally, in response to questions about how any further updates to the GHS would affect the HCS rulemaking, she explained that there would have to be additional rulemakings to incorporate any new changes to the GHS into the HCS standard.

Ms. Ruskin then proceeded to introduce each of the proposals that will be before the UNSCEGHS, and ask if the participants had any comments on those proposals. The proposals regarding the inclusion of simple asphyxiants, supply and use of aerosols, the supply and use of substances and mixtures that are "corrosive to metals," and the development of a global list of GHS classified chemicals generated the most discussion

among the meeting participants.

A. Proposal to Address Simple Asphyxiants in the GHS

Representatives of labor groups voiced strong support for the proposal to address simple asphyxiants in the GHS. Representatives from industry were generally supportive of the proposal, but voiced concerns that the proposal was not confined to asphyxiants in confined or enclosed spaces, and did not reference any test methods.

B. Hazard Communication for Supply and Use of Aerosols

Representatives from consumer groups voiced strong support for the proposal relating to the supply and use of aerosols. It would create a category, hazard standard, and precautionary statements for non-flammable aerosols. In response to a question from a meeting participant, OSHA officials indicated that the United States has been supportive of a category for non-flammable aerosols in the past.

C. Proposal to Address Potential Issues Associated with the Adoption of "Corrosive to Metals" for Supply/Use Situations

The proposal regarding "corrosive to metals" was met with opposition by several meeting participants because it was seen as a way to avoid labeling, as it would allow labeling elements to be omitted where a substance or mixture is corrosive to metals but not to skin and/or eyes. In particular, some commenters pointed out that metal corrosion can lead to fires and other hazards, thus warranting hazard warnings. Other commenters, however, supported the proposal because they believed that it was not necessary to warn consumers if the substance or mixture only led to minimal corrosion at the consumer level.

Another commenter pointed out that hazards associated with substances and mixtures that are corrosive to metals but not to skin and/or eyes may not be a big problem, since they have never been regulated by OSHA. OSHA officials conceded to the meeting participants that they had not yet developed a position on this proposal.

D. Global List of GHS-Classified Chemicals

The meeting participants supported ongoing discussion about the development of a global list of chemicals classified according to GHS criteria, but noted several concerns. In particular, they were concerned about who would develop the list, the methods that would be used to develop the list, mechanisms for updating the list, dispute resolution, harmonization by sector, and whether the list would be binding. OSHA officials agreed that they wanted to continue discussions about a global list and would actively participate in those discussion.

4. Conclusion

OSHA's public meeting in preparation for the UN Meetings on the GHS generated productive discussion among various stakeholders about how the GHS should be updated to better classify chemicals and communicate hazards. OSHA has shown a commitment to conforming with the GHS. Although it is yet to be seen what position the U.S. will take on the proposals to be considered in Geneva, there is a possibility that there could be future OSHA rulemakings to adopt further changes to the GHS.

This client alert was prepared by Mark Duvall, mduvall@bdlaw.com, and by Jayni Lanham, jlanham@bdlaw.com.

[1] Preparation for December UN Meetings on the Globally Harmonized System of Classification of Labelling of Chemicals (GHS), 75 Fed. Reg. 69472 (Nov. 12, 2010).

[2] See Beveridge & Diamond, P.C., GHS Update: Release of the Third Revised Edition and OSHA's Proposed Rule Implementing the Globally Harmonized System of Classification and Labeling of Chemicals (Oct. 1, 2009), http://www.bdlaw.com/news-666.html.

[3] 29 C.F.R. §§ 1910.1200, 1915,1200, 1917.28, 1918.90, 1926.59.

[4] Hazard Communication, 72 Fed. Reg. 50280 (Sept. 30, 2009). See Beveridge & Diamond, P.C., Harmonizing

Hazard Communication: OSHA Proposes to Implement the Globally Harmonized System (Oct. 16, 2009), http://www.bdlaw.com/news-706.html.

[5] AC.10/C.4 - Working Documents 2010 - Sub-Committee of Experts on GHS, available at http://www.unece.org/trans/main/dgdb/dgsubc4/c42010.html.

[6] *Id.*

[7] Preparation for December UN Meetings on the Globally Harmonized System of Classification of Labelling of Chemicals (GHS), 75 Fed. Reg. 69472 (Nov. 12, 2010).

TRI Update: Additional Chemicals, and More on the Way

The scope of the Toxics Release Inventory ("TRI") under the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA") just increased, and the U.S. Environmental Protection Agency ("EPA") has plans to make it even bigger.

1. Background on TRI

Under section 313 of EPCRA,[1] certain facilities that manufacture, process, or otherwise use specified toxic chemicals in amounts above reporting threshold levels must submit annually to EPA and to designated state officials toxic chemical release reporting forms containing required information. In addition, under section 6607 of the Pollution Prevention Act of 1990,[2] facilities reporting under section 313 must also report pollution prevention and waste management data, including recycling information, for those chemicals.

According to EPA, TRI data help the public, government officials, and industry in the following ways:

- to identify potential concerns and gain a better understanding of potential risks;
- to identify priorities and opportunities to work with industry and government to reduce toxic chemical disposal or other releases and potential risks associated with them; and
- to establish reduction targets and measure progress toward those targets.[3]

TRI reporting is required annually. Each owner or operator of a covered facility must report on or before July 1 on activities during the previous calendar year involving a listed chemical above applicable thresholds that occurred at the covered facility.[4] Listed chemicals, known as "toxic chemicals," appear in 40 C.F.R. § 375.65. EPA originally adopted the TRI list in 1988.[5] Since, then, EPA has added and removed chemicals from the list. Before the most recent final rule, described below, there were 581 individually listed chemicals and 30 chemical categories (including 3 delimited categories containing 58 chemicals). Three chemicals on the list are currently under administrative stays.[6]

There have been multiple amendments to the TRI program since it was first issued in 1988. These amendments have expanded the scope of the program and the facilities covered by the rule, as well as the activities subject to regulation. The most recent prior amendment was the April 2009 change to the TRI reporting requirements, discussed in a previous client alert.[7]

2. Addition of 16 Carcinogens

On November 26, 2010, EPA published a final rule adding 16 chemicals to the TRI list in 40 C.F.R. § 372.65, the first additions since 1999.[8] This change, effective on November 30, 2010, will apply to the reporting year beginning on January 1, 2011, for reports due by July 1, 2012. The final version of the rule contained no changes from the proposed rule.[9]

The 16 chemicals were listed on the basis of carcinogenicity. EPCRA provides EPA with the authority to add chemicals to the TRI list when there is enough evidence to verify any of the listing criteria. EPCRA § 313(d)(2) includes as a criterion chemicals "known to cause or [that] can reasonably be anticipated to cause in humans- (i) cancer ...."

All 16 are listed in the National Toxicology Program ("NTP") Report on Carcinogens ("RoC"), 11th edition. NTP describes the RoC as "an informational scientific and public

health document ... that identifies and discusses agents, substances, mixtures, or exposure circumstances that may pose a hazard to human health by virtue of their carcinogenicity." The 11th RoC contains 246 chemicals, with 58 classified as known human carcinogens and the remaining 188 identified as reasonably anticipated to be human carcinogens. The 16 chemicals identified in the final rule for listing in the TRI program were identified in the 11th RoC as "reasonably anticipated to be a human carcinogen." The 16 include the following 12 individual chemicals:

1-Amino-2,4-dibromoanthraquinone, CAS No. 81-49-2
2,2-bis(Bromomethyl)-1,3-propanediol, CAS No. 3296-90-0
Furan, CAS No. 110-00-9
Glycidol, CAS No. 556-52-5
Isoprene, CAS No. 78-79-5
Methyleugenol, CAS No. 93-15-2
o-Nitroanisole, CAS No. 91-23-6
Nitromethane, CAS No. 75-52-5
Phenophthalein, CAS No. 77-09-8
Tetrafluoroethylene, CAS No. 116-14-3
Tetranitromethane, CAS No. 509-14-8
Vinyl fluoride, CAS No. 75-02-5

They also include the following members of the polycyclic aromatic compounds category, which has a lower threshold per 40 C.F.R. § 372.28(a)(2):

1,6-Dinitropyrene, CAS No. 42397-64-8
1,8-Dinitropyrene, CAS No. 42397-65-9
6-Nitrochrysene, CAS No. 7496-02-8
4-Nitropyrene, CAS No. 57835-92-4

EPA estimates that 175 facilities will be affected by the rule. The affected facilities will be required to file a total of 186 reports containing release and waste management data for the 16 chemicals that EPA has added.

3. Lifting the Stay on Reporting Requirements for Hydrogen Sulfide?

Still pending is EPA's proposal to lift its long-standing stay in the TRI reporting requirements for hydrogen sulfide, a gas commonly found at refineries, industrial facilities, and some animal feeding operations.

Hydrogen sulfide was initially added to the TRI in 1993, on the basis of chronic toxicity, over industry objections. EPA concluded that certain neurotoxic effects of hydrogen sulfide were sufficient evidence for listing hydrogen sulfide on the basis of chronic effects.[10] However, EPA stayed the mandate in 1994 due to industry objections that (1) it had shifted the basis of its finding from chronic respiratory effects in the proposed rule to chronic neurotoxic effects in the final rule, and (2) it had not included evidence of exposure in its listing decision, in contrast to how it had used exposure analysis in other TRI listings. EPA indicated that it would issue a "forthcoming" Federal Register notice to solicit comments on those issues, but did not actually do so for nearly 16 years.[11]

In 2003 EPA updated its review of hydrogen sulfide under its Integrated Risk Information System ("IRIS") program. The IRIS assessment concluded that the inhalation reference concentration "is based on an effect that could be considered neurological (e.g., olfactory neuronal loss)."[12]

On February 26, 2010 EPA published a notice indicating its intention to lift the stay for hydrogen sulfide and soliciting comments. Citing the IRIS reevaluation, EPA concluded that hydrogen sulfide can "reasonably be anticipated to cause serious or irreversible chronic human health effects at relatively low doses and thus is considered to have moderately high to high chronic toxicity."[13] Adverse and supportive comments were filed by the May 12, 2010 closure of the comment period. EPA has not indicated when it expects to take further action.

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4. More Chemicals Under Consideration for Listing

EPA has announced its intention to consider adding several more chemicals to the TRI list, although it has not yet issued any notices of proposed rulemaking to begin the listing process formally.

As part of its "enhanced" chemicals management program under the Toxic Substances Control Act, EPA has issued chemical action plans for eight chemicals or groups of chemicals: benzidine dyes; bisphenol A; hexabromocyclododecane; nonylphenol and nonylphenol ethoxylates; perfluorinated chemicals; penta, octa, and decabromodiphenyl ethers in products; phthalates; and short-chain chlorinated paraffins. EPA has announced two additional categories of chemicals for which it is in the process of developing an action plan: diisocyanates and siloxanes.[14] The action plans identify EPA concerns and indicate activities, both regulatory and non-regulatory, that EPA will consider to address those concerns.

For three of the action plans released so far, the planned activities include TRI listings for currently unlisted chemicals. These are the plans for hexabromocyclododecane,[15] nonylphenol and certain nonylphenol ethoxylates,[16] and certain phthalates.[17] Although the earliest of these threeaction plans, that for phthalates, was released nearly a year ago, EPA has not yet issued a rulemaking proposal to add any of these chemicals to the TRI list.

5. Releases From Articles in Storage

Also pending is EPA action on a proposed interpretation about the scope of the TRI exemption for articles.

The TRI rules exempt from the threshold quantity calculations the amount of any listed chemical present in an article at a covered facility. The exemption does not apply to the manufacture or processing of the article. Moreover, the exemption provides that "[i]f a release of a toxic chemical occurs as a result of the processing or use of an item at the facility, that item does not meet the definition of article."[18] "Article" is defined in part as a manufactured item with a specific shape and end use based on that shape "which does not release a toxic chemical under normal conditions of processing or use of that item at the facility or establishments."[19]

In a 2007 letter to members of the wood treating industry, EPA presented its view that they had misinterpreted previous EPA guidance on the scope of the articles exemption. The letter stated that the exemption does not apply to treated wood that, after processing and during storage, emits listed chemicals into the air or from which listed chemicals drip as a result of processing (treatment with chemicals). The wood treaters obtained a preliminary injunction on the basis that EPA had previously given the articles exemption "a definitive interpretation" that releases during storage were not subject to TRI reporting. The court ordered that EPA was "enjoined until further order of this Court from requiring, under [TRI], that plaintiffs and/or their members calculate and report emissions from finished goods in storage."[20] The problem was that EPA had not gone through notice and comment on the changed interpretation.

In 2009, EPA responded to the court decision by issuing a proposed clarification of the articles exemption to provide that "[i]f a release of a toxic chemical occurs as a result of the processing or use of an item at the facility, that item does not meet the definition of article and the releases from the item are not exempt." It also made a rebuttable presumption that any releases (e.g., offgassing or drippage) of listed chemicals from treated items at a wood treatment facility are the result of processing or use.[21]

Several commenters objected to the proposed clarification. Nevertheless, EPA sent its final clarification to the Office of Management and Budget ("OMB") for review on November 15, 2010.[22] Press reports indicate that some industry commenters on the proposed clarification may ask OMB to disapprove the final clarification.[23]

For more information, please contact Mark Duvall at mduvall@bdlaw.com. This alert was prepared with the assistance of Annise Maguire.

[1] 42 U.S.C. § 11023.

[2] 42 U.S.C. § 13106.

[3] See http://tri.supportportal.com/ics/support/KBAnswer.asp?questionID=21182.

[4] 40 C.F.R. § 372.30(d).

[5] 53 Fed. Reg. 4500 (Feb. 16, 1988).

[6] See http://www.epa.gov/tri/trichemicals/index.htm.

[7] Beveridge & Diamond, P.C., "TRI Developments" (Apr. 3, 2009), http://www.bdlaw.com/news-533.html.

[8] 75 Fed. Reg. 72727 (Nov. 26, 2010). The most recent previous additions involved PBTs, 64 Fed. Reg. 58666 (Oct. 29, 1999). Changes to the TRI list are available at http://www.epa.gov/tri/trichemicals/list%20changes/ChemListChanges05.pdf.

[9] 75 Fed. Reg. 17333 (Apr. 6, 2010).

[10] 58 Fed. Reg. 63500, 63509 (Dec. 1, 1993).

[11] 59 Fed. Reg. 43048 (Aug. 22, 1994).

[12] EPA, IRIS Summary of Hydrogen Sulfide (2003), http://www.epa.gov/ncea/iris/subst/0061.htm.

[13] 75 Fed. Reg. 8889 (Feb. 26, 2010).

[14] EPA, Enhancing EPA's Chemical Management Program, http://www.epa.gov/oppt/existingchemicals/pubs/enhanchems.html.

[15] EPA, Hexabromocyclododecane (HBCD) Action Plan (Aug. 18, 2010), http://www.epa.gov/oppt/existingchemicals/pubs/actionplans/RIN2070-AZ10_HBCD%20action%20plan_Final_2010-08-09.pdf.

[16] EPA, Nonylphenol (NP) and Nonylphenol Ethoxylates (NPEs) Action Plan (Aug. 18, 2010), http://www.epa.gov/oppt/existingchemicals/pubs/actionplans/RIN2070-ZA09_NP-NPEs%20Action%20Plan_Final_2010-08-09.pdf.

[17] EPA, Phthalates Action Plan (Dec. 30, 2009), http://www.epa.gov/oppt/existingchemicals/pubs/actionplans/phthalates_ap_2009_1230_final.pdf.

[18] 40 C.F.R. § 372.38(b).

[19] 40 C.F.R.. § 372.3.

[20] *Creosote Council v. Johnson*, 555 F. Supp. 2d 36 (D.D.C. 2008).

[21] 74 Fed. Reg. 42625, 42628 (Aug. 24, 2009).

[22] OMB, Regulations under EO 12866 Review, http://www.reginfo.gov/public/.

[23] Inside EPA, Industry May Urge OMB to Expand EPA's Planned TRI Waiver for 'Products' (Nov. 23, 2010), http://insideepa.com/201011232346107/EPA-Daily-News/Daily-News/industry-may-urge-omb-to-expand-epas-planned-tri-waiver-for-products/menu-id-95.html. Industry representatives had previously met with OMB on this issue on July 26, 2010, www.whitehouse.gov/omb/oira_meetings/.

International Developments

European Parliament Approves Recast of RoHS Directive

On November 24, 2010, the European Parliament voted to approve substantial amendments to the Restriction of Hazardous Substances ("RoHS") Directive (2002/95/EC), which restricts the use of certain hazardous substances in electrical and electronic equipment ("EEE"). The amendments are the result of a compromise negotiated between the European Parliament and the Council in mid-November, and signal the close of a two-year co-decision process initiated by the Commission's proposal in December 2008 to amend, or "recast" the Directive. The Council's formal adoption of the changes, the final step in the process, is expected in late December 2010 or early 2011. Member States will then be required to transpose the new Directive into national law for its provisions to become effective.

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I. Summary of Key Changes in RoHS Recast

Scope of Products Covered. The scope of the current RoHS Directive is defined to include the categories of equipment set out in Annex I of its companion legislation, the Waste Electrical and Electronic Equipment ("WEEE") Directive (2002/96/EC), excluding categories 8 and 9 — medical devices and monitoring and control equipment. The recast RoHS Directive would incorporate all ten categories of equipment set out in the WEEE Directive in a new Annex I, including medical devices and monitoring and control equipment, and an additional eleventh "catch-all" category for any EEE not covered by the other ten categories. The resulting "open scope" would therefore extend to all EEE unless specifically exempted. The Directive would also provide a definition for "dependent on electricity" that would expand the scope of products covered to those that use electricity for any intended function. Cables and certain two-wheeled vehicles will also be explicitly included in the scope of RoHS.

Although the scope has been significantly expanded, the recast Directive would also expressly include a number of current exemptions. For example, the exemptions for large-scale stationary industrial tools, fixed installations, and means of transport will remain outside the scope of RoHS and will be expressly listed as exemptions from RoHS. Other exemptions include active implantable medical devices, certain photovoltaic panels, and equipment designed solely for research or development purposes and made available on a business-to-business basis. Definitions of several key exemptions are also included in the recast Directive to further clarify its scope.

The new scope will likely face significant interpretive issues that may be worked out in the near future by the Commission and the Technical Adaptation Committee, as took place with the original Directive.

Substance Restrictions. Notably, the recast Directive would not expand the list of substances subject to the Directive's restrictions, despite support from some stakeholders (including members of the European Parliament) for restrictions on additional substances such as polyvinyl chloride ("PVC") and halogenated flame retardants. The Parliament's late addition of requirements for nanomaterials has also been removed in the interest of compromise. The maximum concentration values for the substances currently restricted under the Directive will remain unchanged.

The recast Directive does not list particular substances for possible future addition, as the Commission had initially proposed. However, a non-binding recital directs the Commission to study the four substances listed in the Commission's proposal (hexabromocyclododecane (HBCDD), bis (2-ethylhexyl) phthalate (DEHP), butyl benzyl phthalate (BBP) and dibutylphthalate (DBP)). The Commission will be required to review the existing list of six restricted substances within three years of publication, leaving open the possibility of future additions to the list. After this initial review, the Commission, on its own initiative or upon request by a Member State, may amend the list of restricted substances on the basis of scientific evidence and taking into account the specific criteria set out in the Directive. Any changes to the list must also be consistent with the Regulation concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals ("REACH"). The recast Directive expands the Commission's power by authorizing the Commission to adopt such changes to the restricted substances list through the streamlined "delegated acts" process, which would not require formal adoption by Parliament and Council.

Technical Exemptions. The RoHS Directive currently allows the Commission to approve technical exemptions for applications of the six substances if substitution is "technically or scientifically impracticable, or where the negative environmental, health and/or consumer safety impacts caused by substitution are likely to outweigh the environmental, health and/or consumer safety benefits thereof." The recast Directive includes an additional limitation — technical exemptions must not weaken the environmental and health protection of REACH. The Commission must also take into account the availability of substitutes and the socio-economic impact of substitution when determining whether to include a technical exemption or the length of an exemption. Exemptions would be subject to a maximum validity period — up to seven years for medical devices and monitoring and control instruments, and up to 5 years for all other EEE. However, manufacturers may apply to the Commission for renewal

of any technical exemption.

Spare Parts. The Directive currently exempts spare parts used for the repair or reuse of EEE placed on the market before July 2006. Under the recast Directive, non-RoHS-compliant parts and components manufactured before 2006 may also be reused in new equipment placed on the market before July 2016, provided the reuse takes place within "auditable closed-loop business-to-business return systems" and consumers are notified that the equipment contains reused parts.

Compliance. The recast Directive will also include specific requirements for manufacturers and importers to demonstrate compliance with the Directive. Under the existing Directive, the act of putting covered equipment on the market constitutes a declaration by the manufacturer or importer that the equipment is RoHS compliant. However, in line with the Commission's initial proposal, the recast Directive would require a compliance declaration, CE marking, and a host of conformity procedures to be performed before products can be sold on the EU market. Manufacturers must also maintain a register of non-conforming EEE and product recalls. In the event a non-compliant product is put on the market, the recast Directive will require disclosure to the competent national authorities of affected Member States and appropriate corrective actions. Additionally, the Directive will require Member States to conduct market surveillance as part of their enforcement program.

II. Timing and Next Steps

The Council is expected to formally adopt the recast Directive in late December 2010 or early 2011. The Directive will enter into force 20 days after its publication in the Official Journal, and member states will then have 18 months to transpose it into national law.

Newly-covered EEE will not be immediately subject to the requirements in the recast Directive. Instead, these products will be phased-in according to the following schedule:

- Medical devices and monitoring and control equipment – within 3 years after entry into force (2014).
- In vitro medical devices – within 5 years after entry into force (2016).
- Industrial monitoring and control equipment (including equipment developed exclusively for industrial or professional use) – within 6 years after entry into force (2017).
- EEE outside the scope of the existing Directive but that would be covered under the recast Directive – within 8 years after entry into force (2019).

III. Update on Status of WEEE Directive Recast

Despite initial attempts to proceed with revisions to the WEEE Directive in parallel with the RoHS revisions, the WEEE recast is progressing at a much slower pace. A number of issues remain outstanding, including relating to the scope of the Directive, collection and recovery targets, and monitoring requirements. While the scope of the recast WEEE Directive is expected to be largely aligned with the recast RoHS Directive, some differences are foreseen. For example, a majority of delegations support the inclusion of photovoltaic panels within the scope of the WEEE Directive, although certain photovoltaic panels will be exempt under the recast RoHS Directive. A first reading vote by Parliament is expected by February 2011, after which the Council will issue its position. A second reading agreement on the WEEE recast is not expected until late 2011.

For more information, please contact Elizabeth Richardson (erichardson@bdlaw.com), Paul Hagen (phagen@bdlaw.com), or Lauren Hopkins (lhopkins@bdlaw.com).

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Firm News & Events

Brian Levey and Marc Goldstein Receive NAIOP Massachusetts Public Affairs Award

Beveridge & Diamond, P.C. is pleased to announce that Brian C. Levey and Marc J. Goldstein, both Principals in Beveridge & Diamond's Massachusetts office, received the Public Affairs Award from NAIOP (the Commercial Real Estate Development Association) in recognition of their work on the Permit Extension Act, which was signed into law in August of this year. The Permit Extension Act has allowed countless development projects throughout Massachusetts to move forward.

David Begelfer, NAIOP's CEO said "The Permit Extension Act could not have been possible without a team of dedicated legislators and NAIOP members, particularly Brian and Marc. NAIOP is grateful for their leadership and hard work on this issue."

To read NAIOP's press release, please click here.

NAIOP Massachusetts formally recognized Brian and Marc for their contributions to the Chapter at NAIOP's Annual Meeting on December 15, 2010.

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