Texas Environmental Update

BEVERIDGE & DIAMOND PC

July 2010

Texas Office
98 San Jacinto Boulevard
Suite 1420
Austin, TX 78701
(512) 391-8000

Peter Gregg
pgregg@bdlaw.com

Lydia G. Gromatzky
lgromatzky@bdlaw.com

Maddie Kadas
mkadas@bdlaw.com

Laura LaValle
llavalle@bdlaw.com

For more information about our firm, please visit www.bdlaw.com

If you do not wish to receive future issues of Texas Environmental Update, please send an e-mail to: jmilitano@bdlaw.com

Texas Developments

Texas SIP Gap Update -- EPA Denies Texas Flexible Permit Program and TCEQ Files Action for Judicial Review.

On July 23, 2010, days after EPA denied the Texas Flexible Permit Program for approval as part of the Texas State Implementation Plan ("SIP"), TCEQ requested judicial review of that decision in the Fifth Circuit Court of Appeals (*see* www.bdlaw.com/assets/attachments/State%20of%20Texas%20Petition%20for%20Review%20-%20flexible%20permit%20July%2023%202010.pdf). In a much anticipated decision, EPA denied the program on July 15, 2010, more than 15 years after TCEQ's original submission of the Flexible Permitting Rules for SIP approval. TCEQ's challenge follows a petition for judicial review of EPA's denial of the Texas Qualified Facilities Program for SIP approval. *See* http://www.bdlaw.com/news-904.html. EPA has denied both programs primarily alleging that they fail to ensure that federal New Source Review ("NSR") requirements are not circumvented. EPA's denial was long anticipated, even though Texas had earlier made efforts to address EPA's concerns through a proposed rulemaking to shore up the Flexible Permitting Rules in June. *See* http://www.tceq.state.tx.us/rules/pendprop.html.

Earlier in the month, on July 6, 2010, TCEQ also outlined a "two-step" deflexing program for converting existing Flexible NSR Permits to traditional NSR permits, a program offered in lieu of EPA's proposed audit process for deflexing, that has been widely criticized by industry. *See* www.bdlaw.com/assets/attachments/De-flex%20Options%20Ltr%20From%20TCEQ%20to%20EPA%207.6.10.pdf and http://www.bdlaw.com/news-904.html. It is unclear whether EPA will accept TCEQ's "two-step" process as a surrogate for its own, but in light of the apparent stand-off between the two agencies, approval seems unlikely to occur in the near term.

Texas Water Quality Standards Revisions Adopted

On June 30, 2010, the TCEQ Commissioners adopted revisions to the Texas Water Quality Standards ("TWQS") and associated Implementation Procedures. The Agency's TWQS evaluation and changes are intended to take into account the most recent scientific information. Among the changes are new rules that establish four tiers of recreational water standards (primary contact, secondary contact 1 and 2, and non-contact). The revisions also establish criteria for nutrients for reservoirs and update toxic criteria. Additionally, the Commissioners retained the existing standard for primary contact recreation of 126 E.coli per 100 milliliters. Information about these revisions is available at http://www.tceq.state.tx.us/comm_exec/communication/media/6-10WaterQuality6-30.

Barnett Shale: New Monitoring Results & Related Oil and Gas Facilities Rule Proposal

In its health effects evaluation of follow-up air emissions monitoring in the Barnett Shale Formation area (Fort Worth area) during April 2010, TCEQ found that benzene concentrations downwind of certain oil and gas production facilities "could potentially contribute to an elevated long-term (i.e., lifetime) cumulative exposure level if they are representative of typical ambient conditions." From this finding, TCEQ's Toxicology Division

has recommended continued monitoring to determine if the detected concentrations are representative. The Toxicology Division's health effects evaluation memorandum dated July 7, 2010, along with other Barnett Shale-related information, is available at http://www.tceq.state.tx.us/implementation/barnettshale/bshale-next.

In a related development, on July 28, 2010 TCEQ formally proposed new requirements for oil and gas facilities air emissions authorization. The proposal includes consideration of changes to the permit by rule and standard permit for such facilities. Regarding this proposal and TCEQ's assessment of such emissions in the Barnett Shale Formation area, TCEQ Chairman Bryan W. Shaw., Ph.D. stated: "The tremendous expansion of drilling in the Barnett Shale, in and around urban areas, required our agency to take a closer look at the potential impacts and protective measures that could be instituted to protect the public health around these operations." Information about this proposal is available at http://www.tceq.state.tx.us/comm_exec/communication/media/07-10oilandgasrules7-28 and http://www.tceq.state.tx.us/rules/pendprop.html.

Victoria County Ozone Attainment Area Contingency Plan Revision Adopted

On June 30, 2010, the TCEQ Commissioners adopted a Contingency Plan Revision to the 1997 Eight-Hour Ozone Maintenance Plan for the Victoria County Ozone Attainment Area State Implementation Plan ("SIP"). The revised contingency measure section includes a list of rules that TCEQ may implement if a violation of the 1997 eight-hour ozone standard occurs. The contingency measures include, but are not limited to, the following: Revision to 30 TAC Chapter 117, to control rich-burn, gas-fired, reciprocating internal combustion engines in Victoria County; inclusion of Victoria County in 30 TAC Chapter 115 volatile organic compounds rules for the control of crude and condensate storage tanks at upstream oil and gas exploration and production sites or midstream pipeline breakout stations; for more stringent controls for tank fittings on floating roof tanks; for limiting emissions from landings of floating roofs in floating roof tanks; and for control of VOC emissions from degassing operations for storage tanks. Additional information on this SIP revision is available at http://www.tceq.state.tx.us/implementation/air/sip/Hottop.html.

Upcoming TCEQ Meetings and Events

- The South Texas Chapter of the Health Physics Society will host the ***2010 Texas Radiation Regulatory Conference*** in Austin on September 2-3, 2010. The event will provide information about recent developments affecting the handling of radioactive materials in Texas, and will include presentations by TCEQ and other state and federal agencies. Information about this conference is available at http://www.tceq.state.tx.us/permitting/radmat/texas-radiation-conference.

- TCEQ will host a ***Water Quality Advisory Work Group Meeting*** and a ***Drinking Water Advisory Work Group Meeting*** in Austin on August 3, 2010. Both meetings will be available by webcast at http://www.texasadmin.com/cgi-bin/tnrcc.cgi. Information about these meetings is available at http://www.tceq.state.tx.us/permitting/water_quality/stakeholders/WQ_advisory_group.html and http://www.tceq.state.tx.us/permitting/water_supply/ud/awgroup.html.

- TCEQ will host its ***Annual Public Drinking Water Conference: Information and Tools for Public Water Systems and Utilities***, on August 10-11, 2010 in Austin. Information about this event is available at www.tceq.state.tx.us/permitting/water_supply/pdw/conference.html.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in July can be found on the TCEQ website at http://www.tceq.state.tx.us/comm_exec/communication/media/072810CommissionersAgenda.

BEVERIDGE & DIAMOND PC

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

Fourth Circuit Limits Nuisance Suits and Strengthens Preemption under Federal Environmental Laws

On July 26, the United States Court of Appeals for the Fourth Circuit barred a public nuisance action brought by North Carolina against the Tennessee Valley Authority ("TVA") based on interstate air emissions from TVA's power plants, finding that the state's action is preempted by the comprehensive air pollution scheme under the Clean Air Act. *See North Carolina v. TVA*, No. 09-1623, __F. 3d__, 2010 U.S. App. LEXIS 15286 (4th Cir. July 26, 2010). The three-judge panel dissolved the District Court's injunction that would have required TVA to spend $1 billion on pollution controls at its coal-fired power plants in Alabama and Tennessee. The Fourth Circuit's opinion is one of the broadest and strongest statements in years that tort suits and particularly nuisance actions can be barred where an industrial activity is regulated and permitted. This will likely reinvigorate efforts to preempt such suits through motions to dismiss and summary judgment. The opinion will discourage both government and private parties from using tort suits to second-guess regulatory decisions and its impact should extend beyond the Fourth Circuit and air pollution cases.

The large size of the lawsuit and the importance of the parties underscore the impact and precedental value of the opinion. The State of North Carolina sued TVA, one of the country's largest power generators, in 2006, arguing that eleven of TVA's coal-fired power plants located in Tennessee, Alabama, and Kentucky posed a public nuisance because air emissions from these plants crossed state lines and contributed to North Carolina's air pollution. *See North Carolina v. TVA*, Slip Op. at 9. The Western District of North Carolina sided with the state last year, granting a comprehensive injunction that ordered TVA to upgrade or install pollution controls for sulfur dioxide and nitrogen oxides at four of TVA's eleven power plants. *Id*. at 10.

Judge Wilkinson's opinion for the Fourth Circuit overturning the injunction criticizes common law tort remedies in a way not often seen in preemption decisions, which tend to be narrow and rooted in the preempting statute. The panel wrote that "[i]f allowed to stand, the injunction would encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air. The result would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." *Id*. at 6.

The Fourth Circuit relied on and reinvigorated a 1987 United States Supreme Court opinion, *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), that is often overlooked in preemption jurisprudence. *Ouellette* allowed a private nuisance suit to proceed despite the discharger's permit under the Clean Water Act but emphasized that allowing "a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states." *Id*. at 16 (citing *Ouellette*, 479 U.S. at 496-497). Agreeing with this principle, the Fourth Circuit found that a patchwork of nuisance injunctions based on interstate air emissions would frustrate Congress's judgment, supplant agencies' conclusions, and upset the reliance interests of both permit holders and source states. *Id*. at 24-25. The Fourth Circuit also found persuasive the fact that TVA's operations are expressly permitted by the states in which they are located, noting that it would be "odd" to find that an activity explicitly permitted by a state was a nuisance. *Id*. 29-30. The *TVA* opinion, in applying *Ouellette* aggressively to the Clean Air Act, has expanded preemption under the Clean Air beyond what other courts have done under the Act. Importantly, the Fourth Circuit found the policy needs for preemption more important

than the savings clause of the Clean Air Act (similar to other environmental statutes) that allows for state law to regulate emissions more strictly than federal standards. *Id*. at 18-21. The panel also emphasized that North Carolina could pursue administrative remedies under the Clean Air Act to challenge the permits for the TVA facilities. *Id.* at 32-34. (citing Clean Air Act sections 126 and 304, 42 U.S.C. §§ 7426, 7604).

The Fourth Circuit further held that the district court's decision compromised federalism principles by applying the law of North Carolina extraterritorially to TVA plants located in Alabama and Tennessee. *Id*. at 25. Specifically, the appeals court held that the district court, while acknowledging that a court must apply the law of the state in which the point source is located, erroneously applied North Carolina's Clean Smokestacks Act extraterritorially in Alabama and Tennessee. *Id.*

The Fourth Circuit did not hold that Congress has entirely preempted the field of emissions regulation, noting that it cannot anticipate every circumstance that may arise in every future nuisance action. *Id*. at 18.

For more information about the implications of the North Carolina v. TVA decision, please contact Jimmy Slaughter (jslaughter@bdlaw.com, 202-789-6040), David Friedland (dfriedland@bdlaw.com, 202-789-6047), or Richard Davis (rdavis@bdlaw.com, 202-798-6025).

9th Circuit Clarifies Who is a Current Owner or Operator for CERCLA Liability

The Ninth Circuit Court of Appeals recently issued a decision clarifying that a current owner or operator is determined at the time cleanup costs are incurred and not at the time a cost recovery suit is filed for purposes of determining liability under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 et seq. ("CERCLA"). In *State of California Department of Toxic Substances Control v. Hearhtside Residential Corp.*, No. 09-55389, the Court addressed an issue left open since its 2001 decision in *Carson Harbor Vill., Ltd. v. Unocal Corp*., 270 F.3d 863, 881 (9th Cir. 2001) (*en banc*), that the "owner and operator" liability category under CERCLA Section 107(a)(1) (42 U.S.C. § 9607(a)(1)) is limited to "current" owners or operators. In its decision, the Hearthside Court discussed the federal common law that touched on the issue as well as the policies underlying CERCLA, and held that the property owner at the time of the cleanup could not escape liability by selling the property before suit was filed.

The defendant here, Hearthside Residential Corporation ("Hearthside"), had purchased wetlands that it knew were contaminated with polychlorinated biphenyls ("PCBs"). In 2002, Hearthside entered into an administrative consent order with the California Department of Toxic Substances Control ("DTSC") to clean up the property. DTSC also claimed the PCB contamination had migrated to an adjacent residential property, but Hearthside refused to take action with respect to that property. DTSC then cleaned up the adjacent property in 2002 – 2003. Hearthside completed its cleanup of the wetlands property in 2005, and later sold the property. In 2006, DTSC filed suit against Hearthside, seeking to recover the cost of cleaning up the adjacent property.

Hearthside argued it was not liable because it was not the "owner and operator" of the wetlands property at the time DTSC filed suit. On motions for summary judgment, the trial court disagreed and granted DTSC partial summary judgment on the limited issue of whether Hearthside was an "owner and operator" of the property. Hearthside sought an interlocutory appeal to the Ninth Circuit, which agreed to hear the appeal as it presented an issue of first impression.

The Ninth Circuit held that a current owner/operator is determined at the time response costs are incurred and not at the time that cost recovery lawsuit is filed, for two reasons. First, such an interpretation best comports with CERCLA's overall structure. CERCLA's statute of limitations for a cost recovery action is triggered (1) at the completion of a removal action, or (2) at the initiation of a remedial action, CERCLA Section 113(g)(2) (42 U.S.C. § 9613(g)(2)), which the Court interpreted to imply that the potential defendant should be determined at the same stage in the process. Second, the court sought to effectuate CERCLA's remedial

purposes. It found that determining owner/operator status at the cleanup stage would deter responsible parties from delaying cleanup until they had found a buyer for the property. The court added that its ruling would encourage pre-litigation settlements, which it cited as an "important purpose" of CERCLA.

The Ninth Circuit's decision in *Hearthside* clarifies one aspect of CERCLA's perplexing scheme of strict liability. It also reinforces a long line of appellate decisions holding that CERCLA should be interpreted in a manner consistent with its remedial purpose, so as to encourage accelerated remediation of contaminated sites. This is an important consideration for CERCLA litigants, and provides some guidance when construing the statute's poorly worded liability provisions.

For more information, please contact Nico van Aelstyn at (415) 262-4008, nvanaelstyn@bdlaw.com, or Steve Jawetz at (202) 789-6045, sjawetz@bdlaw.com. This Client Alert was prepared with the assistance of Zachary Norris.

District Court Rejects Owner-Operator Liability Under CERCLA for Sewer System Owner Discharging to River

On July 7, 2010, the U.S. District Court for the Western District of Washington issued an opinion on cross motions for summary judgment in United States v. Washington State Department of Transportation (WSDOT), No. 08-8722RJB, rejecting CERCLA owner-operator liability for the owner of a sewer system discharging to a river. The U.S. had alleged that a storm sewer system owned and operated by WSDOT carried hazardous substances from various highways into waterways at the Commencement Bay-Nearshore Tideflats Superfund site in Tacoma, WA. The federal government was seeking response costs for cleaning up contaminated sediments in the waterways. Without citing any cases using similar reasoning, the Court settled on a narrow interpretation of current and former owner or operator liability under CERCLA Sections 107(a)(1) and 107(a)(2). In the Court's view, a potentially responsible party ("PRP") could be held liable as an owner or operator of a Superfund facility only if it is or was "the owner or operator of the facility in which the United States incurred a response cost." Because WSDOT does not own or operate the waterways where the federal government had incurred response costs, the Court denied the Plaintiff's motion for summary judgment on owner-operator liability.

Both the government's argument and the Court's reading of Section 107(a) focused on the definition of the word "facility." To the Court, the WSDOT roadways and storm sewers could not be considered a single CERCLA facility along with the waterway because they "are reasonably or naturally divided into multiple parts or functional units." The Court's decision, which reflected the government's arguments, focused on whether the roadways, sewer, and waterways could be one large facility instead of whether WSDOT could be held liable under Section 107(a)(1) for a release from a facility into a waterway.

The Plaintiff's argument and the Court's conclusion seems to overlook a more complete reading of Section 107(a), which imposes liability on an "owner and operator of a vessel or a facility, . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance." Other plaintiffs have relied on all of the language in Section 107(a) to impose liability on the owners or operators of facilities or vessels from which there was a release into the environment. For example, the courts in Westfarm Associates Ltd. v. Washington Suburban Sanitary Commission, 66 F.3d 669, 678–79 (4th Cir. 1995), and Bangor v. Citizens Communications Co., 2004 U.S. Dist. LEXIS 3845, *49–51 (D. Me. Mar. 11, 2004), both looked favorably on a broader reading of Section 107(a). Both courts found sewer owners liable under CERCLA section 107(a)(1) based on releases to the environment from their sewer pipes.

If the WSDOT opinion survives, this narrow application of owner-operator liability could reduce the universe of PRPs at contaminated sediment and groundwater Superfund sites. It is important to note, however, that the federal government here reserved "any other theories of liability" (i.e. arranger and transporter liability). Indeed, the Court concluded in a June 7, 2010 opinion in the same case that WSDOT could be held liable as an arranger under CERCLA Section 107(a)(3) for designing and maintaining the stormwater system that

discharges to the waterways that comprise the Superfund site.

For more information, please contact Steve Jawetz at (202) 789-6045, sjawetz@bdlaw.com. Graham Zorn assisted in the preparation of this alert.

D.C. Circuit Rules EPA Pesticide Registration Enforcement Approach Is Ripe for Challenge

On July 16, 2010 the U.S. Court of Appeals for the D.C. Circuit issued a ruling in *Reckitt Benckiser v. Jackson* reversing the District Court's dismissal of an action challenging EPA's efforts to implement effective cancellation of pesticide registrations without initiating formal registration cancellation proceedings. The case was remanded to the District Court for further proceedings regarding the lawfulness of EPA's practice. A copy of the opinion is available at http://www.bdlaw.com/assets/attachments/2010-07-16%20Reckitt%20Benckiser%20v%20EPA%20Opinion.pdf.

Reckitt Benckiser involves the scope of EPA's authority to seek effective cancellation of registrations for pesticide products issued under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y, without going through the formal registration cancellation process established by FIFRA § 6, 7 U.S.C. § 136d. In particular, the decision calls into question EPA's practice of pressing registrants to "voluntarily" cancel or modify existing registrations by declaring that the products will otherwise be considered "misbranded" and subject to misbranding enforcement actions by a date certain.

In May 2008, EPA issued its Risk Mitigation Decision for Ten Rodenticides ("RMD") which ended the FIFRA Section 4 reregistration process for a group of rodenticides. In the RMD, EPA concluded that certain product registrations did not meet statutory standards, and required substantial changes to these registrations, including a prohibition on sale of consumer-use products containing certain active ingredients. EPA asked registrants to voluntarily comply with these new requirements, and stated that any products not in compliance would be considered "misbranded" and would be subject to misbranding enforcement action by EPA as of June 4, 2011. Distribution or sale of "misbranded" pesticide products is illegal under FIFRA and is subject to civil and criminal enforcement and substantial penalties. FIFRA §§ 2(q), 12(a)(1)(F), 14, 7 U.S.C. §§ 136(q), 136j(a)(1)(F), 136l.

Reckitt Benckiser, which held registrations for consumer-use products that were effectively banned by the new restrictions, informed EPA that it would not voluntarily comply and asked EPA to initiate formal cancellation proceedings for its registrations under FIFRA § 6. The Section 6 process would, among other things, have given Reckitt Benckiser the right to a formal administrative hearing to challenge the substance and basis of EPA's RMD. After EPA failed to initiate cancellation and stood by its June 4, 2011 misbranding deadline, Reckitt Benckiser filed suit in March 2009 in District Court arguing that EPA had violated FIFRA by effectively canceling its existing registrations without providing the Section 6 process. In October 2009, the District Court dismissed the action for lack of jurisdiction, ruling on narrow grounds that the case was governed by FIFRA § 4(m), 7 U.S.C. § 136a-1(m), which places jurisdiction for EPA failure to take action required by the FIFRA Section 4 reregistration process in the Court of Appeals, not the District Court.

In the decision issued July 16th, the D.C. Circuit Court of Appeals reversed the District Court's dismissal, finding that jurisdiction was properly in the District Court under FIFRA § 16(a), as a challenge to an EPA final action under FIFRA not following a hearing. Although EPA argued that its actions were not final, and would not be unless and until EPA took enforcement action against Reckitt Benckiser for its failure to comply, the D.C. Circuit disagreed. The panel held that EPA -- through the RMD, subsequent letters to Reckitt Benckiser, and its statements to the Court in oral argument -- had taken a final position that the Agency has the ability to proceed with misbranding threats and enforcement instead of or before initiating cancellation proceedings. The opinion also noted the immediate hardships that Reckitt Benckiser faced as a result of EPA's misbranding threats, including lost sales and a choice "between costly compliance" and "the risk of serious civil and criminal penalties for unlawful distribution of 'misbranded' products." In a decision closely following its 1986 ruling in *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430 (D.C. Cir. 1986), the D.C. Circuit held that

the lawfulness of EPA's interpretation of its FIFRA obligations ("the pure legal question as to what procedures EPA [i]s obliged to follow") was therefore subject to judicial review under FIFRA § 16(a), and remanded the case to the District Court.

To implement its jurisdictional ruling, the D.C. Circuit remanded the action to the District Court for further proceedings and thus did not itself decide whether EPA's misbranding approach was lawful. However, language in the opinion describing EPA's actions as "in effect canceling the registrations without following the regulatory procedures provided in Section 6" and "bypassing cancellation proceedings for failure to comply with labeling changes" may suggest that the panel was skeptical of EPA's interpretation of its authority under the statute.

Unless EPA appeals or requests a rehearing, the action will return to the District Court to resolve the lawfulness of EPA's approach. In the meantime, EPA's approach of implementing effective pesticide registration cancellation through misbranding enforcement threats is on uncertain legal ground. In addition, the *Reckitt Benckiser* decision reinforces the holding in *Ciba-Geigy* that an agency refusal to provide procedural rights can be "final" and thus that in the right circumstances parties may be able to seek judicial review when an agency denies statutory and regulatory procedural rights before the agency has taken final action on the underlying substantive issue.

For more information please contact Kathy Szmuszkovicz at (202) 789-6037, kes@bdlaw.com, or David Barker at (202) 789-6050, dbarker@bdlaw.com.

President Signs Into Law Conflict Minerals Legislation

The President signed into law today H.R. 4173, the Wall Street Reform and Consumer Protection Act. Apart from the financial market regulatory reforms that constitute the overwhelming focus of the new law, the law imposes on many manufacturers new requirements relating to "conflict minerals." Specifically, section 1502 will impose on many companies new SEC reporting requirements if their products contain metals derived from certain minerals defined as "conflict minerals."

These measures arise from heightened concerns in recent years regarding the role that revenues from the mining of certain rare minerals play in financing the ongoing conflict in the Democratic Republic of Congo ("DRC"). The conflict has been marked by the extreme use of sexual- and gender-based violence, which has contributed to an emergency humanitarian situation in eastern DRC and neighboring regions. The new law aims to use the market power of downstream manufacturers to begin to help address some of these longstanding issues.

Scope

The new requirements apply only to SEC-filing companies and only if "conflict minerals" are necessary for the functionality or production of their products. "Conflict minerals" are defined to include columbite-tantalite (coltan), cassiterite, gold, wolframite, and other metals designated by the Secretary of State.

Many products, including a number of electronic products, contain gold and metals derived from cassiterite (tin), coltan (tantalum) and wolframite (tungsten), and therefore many electronic manufacturers will be subject to the law's requirements. However, applicability is not limited to electronic manufacturers; any SEC-filing company using conflict minerals in its products is subject to the law's requirements.

Key Elements

Companies that fall within scope are required to disclose annually whether their products were produced with conflict minerals that originated in the DRC or an adjoining country. If they were, then companies are required to submit a report to the SEC containing:

- a description of the measures the company took to exercise due diligence on the

source and chain of custody of such minerals;

- a description of any products that are not "DRC conflict free" (i.e., products that contain minerals that finance or benefit armed groups in the DRC or adjoining countries);
- the identity of the facilities used to process the conflict minerals;
- the country of origin of the conflict minerals; and
- information on "efforts to determine" the mine or location of origin "with the greatest possible specificity."

The report must also be audited by an independent private auditor. Companies must certify that audit and also post a copy of the entire report on their website. In addition, companies may label a product "DRC conflict free" if the product does not contain conflict minerals that directly or indirectly finance or benefit armed groups in the DRC or adjoining countries.

In addition to the SEC's implementing regulations, other U.S. government guidance will be developed that will affect companies' implementation of these obligations:

- The Secretary of State is required to develop a plan (within 6 months) that provides guidance to companies seeking to exercise due diligence on the origin and chain of custody of conflict minerals used in their products and by their suppliers.
- The Secretary of State will also produce a map of mineral rich areas in the DRC and adjoining countries that will define "conflict zone mines" that are under the control of armed groups.
- The Comptroller General will develop standards for the third party audits, and will also report to Congress on the use of conflict minerals by companies whose products contain conflict minerals but are not required to file with the SEC.

Next Steps

The SEC is required to promulgate regulations to implement the law no later than 270 days after enactment. Disclosure, due diligence and reporting requirements will apply for the first full fiscal year for a company that begins after the promulgation of the regulations.

The SEC rulemaking process will address a number of important issues regarding further elaboration of these obligations, including: (a) the due diligence standards that will apply; (b) reporting procedures; (c) the criteria to claim that a product is "DRC conflict free"; and (d) penalty provisions. The rulemaking process will provide an opportunity for public comment. Companies will also want to track the final publication of the regulations in order to determine when their disclosure and reporting requirements begin.

Implications

Unlike other materials restriction regulations, the supply chain due-diligence and reporting approach that the new law will trigger focuses on the origin of certain common materials, rather than their content level or the presence of harmful materials. Many companies have already begun to review their due diligence procedures in anticipation of the new disclosure requirements, which will present novel supply chain management requirements on top of those required by other recent measures such as the Lacey Act amendments. B&D has extensive experience advising companies on compliance and implementation strategies for such measures. Please contact us if you would like further information.

For more information, please contact Russ LaMotte at (202) 789-6080 (rlamotte@bdlaw.com), Paul Hagen at (202) 789-6022 (phagen@bdlaw.com), or Jackson Morrill at (202) 789-6030 (jmorrill@bdlaw.com).

BEVERIDGE & DIAMOND PC

D.C. Circuit Upholds Constitutionality of CERCLA Unilateral Orders

On June 29, 2010, the U.S. Court of Appeals for the D.C. Circuit issued its opinion in *GE v. Jackson*, a case involving a challenge to the constitutionality of unilateral administrative orders ("UAOs") issued by the U.S. Environmental Protection Agency ("EPA") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). A copy of the decision can be found at http://pacer.cadc.uscourts.gov/common/opinions/201006/09-5092-1252407.pdf. Under CERCLA, EPA may issue a UAO to potentially responsible parties ("PRPs"), requiring them to clean up contamination at a site upon a determination "that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." 42 U.S.C. § 9606(a). PRPs are subject to daily penalties and potentially treble damages for noncompliance with a UAO if they lack "sufficient cause" for the noncompliance. 42 U.S.C. § 9606(b)(1). If PRPs comply with a UAO, they can seek reimbursement from the Fund for the reasonable costs of the action once it is completed, if they are able to show that they are not liable under CERCLA or that the ordered action was arbitrary and capricious or otherwise not in accordance with law.

In the present appeal, GE argued that the UAO provisions of CERCLA facially violate the Due Process Clause of the U.S. Constitution by depriving UAO recipients of property without providing for a pre-deprivation hearing before a neutral decision-maker. GE also argued that EPA's pattern and practice in administering the UAO provisions denies PRPs due process. GE argued that two different types of deprivations rise to the level of due process violations: "(1) the money PRPs must spend to comply with a UAO or the daily fines and treble damages they face should they refuse to comply; and (2) the PRPs' stock prices, brand value, and cost of financing, all of which . . . are adversely affected by the issuance of a UAO." *Slip op*. at 10.

In deciding the facial challenge to the UAO provisions, the Court followed all prior cases on this topic and held that the UAO regime satisfies due process requirements. The Court concluded that the UAO provisions are facially constitutional because EPA must sue noncompliant PRPs in court before EPA can obtain any penalties or damages, and UAO recipients are not subject to penalties or damages if they can show they had "sufficient cause" not to comply. *Slip op*. at 12. The Court also found unpersuasive GE's argument that a UAO inflicts significant, immediate harm prior to judicial review because the very issuance of a UAO will depress the recipients' stock price or otherwise harm their reputation, stating that the type of deprivation described by GE was not the type protected under the 5th Amendment. *Slip op*. at 13-22.

While the Court found that the district court had jurisdiction to consider GE's pattern and practice claim, *slip op*. at 24, and that GE had standing to bring the claim, *id* at 28, it ruled in favor of EPA on the merits. The Court held that "even if GE is correct that EPA's implementation of CERCLA results in more frequent and less accurate UAOs, the company has failed to identify any constitutionally protected property interests that could be adversely affected by such errors." *Slip op*. at 29-30.

The Court, while not unsympathetic to GE, was unequivocal: "We fully understand, as GE argues, that the financial consequences of UAOs can be substantial. We also understand that other administrative enforcement schemes that address matters of public health and safety may provide greater process than does CERCLA. Such concerns, however, do not implicate the constitutionality of CERCLA or of the policies and practices by which EPA implements it." *Slip op*. at 31 (citations omitted).

The speed with which the court issued its decision (the case was argued on May 18) is surprising, especially in a case that GE has been pursuing for ten years.

The case began in 2000, when GE filed suit in the United States District Court for the District of Columbia, alleging that CERCLA's UAO regime created an unconstitutional deprivation of property by failing to provide adequate procedural safeguards. The complaint was dismissed in 2003 (*GE I*) for lack of jurisdiction, on the grounds that CERCLA Section 113(h) prohibits pre-enforcement due process challenges to CERCLA on any particular UAO. The appeals court reversed in 2004 (*GE II*), stating that while an as-applied challenge to a specific UAO might run afoul of Section 113(h), a challenge to the facial constitutionality

of the UAO provisions was not based on any particular action or order by EPA, so Section 113(h) did not apply.

On remand, the district court in 2005 (*GE III*) dismissed GE's facial challenge on a motion for summary judgment. The court declined, though, to dismiss GE's so-called "pattern and practice" challenge to the UAO regime, "i.e., GE's argument that EPA's policies and procedures for issuing UAOs exacerbate CERCLA's constitutional deficiencies." *Slip op*. at 8. However, following discovery, the district court granted summary judgment for EPA in 2009 (*GE IV*) on the pattern and practice challenge, because it concluded that the consequential injuries suffered by GE were not the sort of property interests entitled to due process protection. GE appealed both *GE III* and *GE IV*, which were decided together in *GE v. Jackson* on June 29, 2010.

GE v. Jackson is the latest in a long line of cases upholding the constitutionality of UAOs. Shortly after enactment of the 1986 Superfund Amendments and Reauthorization Act ("SARA"), several entities challenged the law's UAO provisions as facially unconstitutional because they created a material deprivation without a hearing before a neutral decision-maker. *See Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 391–92 (8th Cir. 1987); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 316 (2d Cir. 1986); *Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 664 (7th Cir. 1995). In these and other cases, the courts universally have found that UAOs are constitutional.

Opponents of the UAO regime hoped that the Court in *GE v. Jackson* would find the UAO statute unconstitutional, thereby creating a circuit split that might entice the Supreme Court to consider the issue. Because the D.C. Circuit's decision dovetailed with those of its sister circuits, however, the Supreme Court is unlikely to grant certiorari should GE seek it. Thus, for the time being, the constitutionality of the UAO provisions should be considered settled law. Going forward, while individual parties may still prevail against EPA in disputes over particular UAOs, there appears to be little or no hope of a silver bullet with which to counter EPA's increasing reliance upon this powerful enforcement tool.

For more information, please contact Nico van Aelstyn at (415) 262-4008, nvanaelstyn@bdlaw.com, Steve Jawetz at (202) 789-6045, sjawetz@bdlaw.com, or Daniel Brian at (415) 262-4016, dbrian@bdlaw.com.

EPA Applies GHG Reporting Requirements to Four Additional Industry Sectors

On June 28, 2010, the EPA released a Final Rule expanding the Greenhouse Gas Reporting Program ("GHGRP") (codified at 40 C.F.R. part 98) to require annual greenhouse gas ("GHG") emissions reporting from four additional source categories: industrial waste landfills; industrial wastewater treatment facilities; magnesium production facilities; and underground coal mines. First promulgated on October 30, 2009, the GHGRP is the national system for reporting emissions of carbon dioxide ("CO_2") and other GHGs produced by major emission sources in the United States. Click here for our complete overview of the GHGRP. The four newly added sectors were among the forty-two source categories EPA originally proposed for inclusion, but were deferred in the 2009 rulemaking.

As a result of the June 28 Rule, facilities in the following source categories must now submit annual reports of their GHG emissions:

1. **Industrial Waste Landfills**: An industrial waste landfill must now report its annual methane generation and destruction if it: (1) accepted organic waste on or after January 1, 1980; (2) has a total design capacity of at least 300,000 metric tons; and (3) is located at a facility whose aggregate emissions from all source categories covered by the GHGRP are at least 25,000 tons per year ("tpy") of carbon dioxide equivalent ("CO_2e"). Affected industries include organic chemical manufacturers, plastics and resins manufacturers, pulp and paper facilities, food processors, water treatment facilities, petroleum refineries, rubber and miscellaneous products manufacturers, allied product manufacturers, textile manufacturers, and leather product facilities. Many of these industries are already required to report their emissions under the GHGRP. The new Rule means they must now include emissions

from their onsite industrial waste landfills in their annual reports.

2. **Industrial Wastewater Treatment**: Facilities required to report under this source category are those that meet the 25,000 tpy CO_2e aggregate emissions threshold, use anaerobic processes to treat industrial wastewater and wastewater treatment sludge, and operate in any of the following sectors: pulp and paper manufacturing, food processing (fruits, vegetables, meat and poultry processing only), ethanol production, or petroleum refining. As with the industrial landfill category, many facilities with industrial wastewater treatment processes are already subject to the GHGRP; the latest rule will expand their reporting requirements.

3. **Magnesium Production**: This new source category covers facilities where magnesium is produced and that emit 25,000 tpy or more of CO_2e.

4. **Underground Coal Mines**: All active coal mines and those under development are encompassed by this new source category. Unlike the three other new categories, there is no minimum CO_2e emissions threshold for underground coal mines.

GHG monitoring requirements for the four new source categories begin January 1, 2011, and the first annual reports for these categories are due March 31, 2012.

Beyond adding four new source categories, EPA also used the June 28 rulemaking to finalize its decision not to include ethanol production and food processing as distinct source categories in the GHGRP. Even though such facilities are not specifically identified as a source category in the Rule, they must still report their GHG emissions to the extent individual processes at their facilities are listed, and their aggregate emissions from those sources meet the reporting threshold. For example, a food processing facility with an industrial wastewater treatment process would be required to report its wastewater treatment emissions, along with any other emissions from covered source categories (such as fuel combustion units and industrial waste landfills), if the aggregate emissions from all covered source categories meets the 25,000 tpy CO_2e emissions threshold.

EPA also finalized its decision not include coal suppliers as a source category. The Agency determined that reporting from suppliers is not necessary because the total CO2 emissions from coal combustion will be obtained through downstream sources covered by the Reporting Rule. Moreover, EPA concluded that existing data sources already provide substantial information regarding the location and magnitude of emissions from coal consumption.

The impacts and implementation of this rule and the underlying GHGRP will vary considerably depending on the industry sector and the characteristics of a particular facility. For more information or if you have any questions, please contact David Friedland at dfriedland@bdlaw.com, (202) 789-6047, or Graham St. Michel at gstmichel@bdlaw.com, (202) 789-6039, in Washington, DC; Amy Lincoln at alincoln@bdlaw.com, (415) 262-4029, in San Francisco; or Steve Richmond at srichmond@bdlaw.com, (781) 416-5710, in Wellesley, Massachusetts.

Firm News & Events

Eleven B&D Attorneys Named in Who's Who Legal Environment 2010

Beveridge & Diamond, P.C. is pleased to announce that 11 of our attorneys are ranked among the top U.S. lawyers in environmental law in the 2010 edition of The International Who's Who of Environment Lawyers.

From our Washington, DC office, Karl Bourdeau, Holly Cannon, Richard Davis, Henry Diamond, David Friedland, Paul Hagen, Russ LaMotte and Kathryn Szmuszkovicz are named.

From our Baltimore, MD office, Robert Brager is named

From New York, NY office, Stephen Gordon and Christopher McKenzie are named.

The *International Who's Who of Environmental Lawyers* is a publication of the celebrated *Who's Who Legal* directory. It is the product of surveys conducted with clients of law firms from all over the world.

Office Locations:

Washington, DC

Maryland

New York

Massachusetts

New Jersey

Texas

California