Texas Environmental Update

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

Karen Hansen
khansen@bdlaw.com

Maddie Kadas
mkadas@bdlaw.com

Laura LaValle
llavalle@bdlaw.com

Bryan Moore
bmoore@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

March 2012

Texas Developments

TCEQ Commissioner and Executive Level Staffing Changes

In a series of fast-paced but anticipated changes, TCEQ ushers in a new executive team and a new Commissioner this month. Key changes, with more to be announced in days to come, include:

- Governor Perry has appointed Toby Baker to take the place of out-going Commissioner Buddy Garcia whose term is expiring. Baker currently advises the Governor on energy, natural resources and agriculture issues. His term will begin April 16, 2012 and expire on August 31, 2017.
- TCEQ Commissioners have named Zak Covar as Executive Director, following the retirement of Mark Vickery. Covar, who has served as Deputy Executive Director since 2009, begins his term on May 1, 2012.
- Stephanie Bergeron-Perdue, currently Deputy Director, Office of Legal Services, has been appointed to serve as Special Counsel to Covar.
- In a joint communication, Vickery and Covar announced several key leadership moves, including:
    - Ramiro Garcia, currently the Area Director for Central Texas, Field Operations Division, as the Deputy Director of the Office of Compliance and Enforcement;
    - Susan Jablonski, current Director of the Radioactive Materials Division, as the new Area Director for Central Texas, Field Operations Division;
    - Kelly Keel, current Executive Assistance to Vickery, as the Area Director for Coastal and East Texas, Field Operations Division; and
    - Ashley Wadick, current Special Counsel to the Executive Director, as Director of the Houston Regional Office.

Fifth Circuit Vacates and Remands EPA SIP Disapproval of Pollution Control Project Standard Permit

In the first of a series of state and industry challenges to EPA's rejection of marquee Texas New Source Review ("NSR") programs for SIP approval, the Fifth Circuit has vacated and remanded EPA's disapproval of the Texas Pollution Control Project ("PCP") Standard Permit NSR minor source rules. *Luminant Generation Company, L.L.C. v. U.S. Environmental Protection Agency*, Slip. Op. No. 10-60891 (March 26, 2012). Repeatedly noting that EPA missed its own statutory deadlines to act on Texas' NSR program by three years, the Court struck down EPA disapproval of the PCP rules on any other criteria than those set forth in the Clean Air Act ("CAA") for minor sources.

In its ruling (available at www.bdlaw.com/assets/attachments/PCP%20opinion.pdf), the Court followed long-standing U.S. Supreme Court precedent initiated by *Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975) and focused on the federalist principles deeply embedded in the structure of the Act. The Court emphasized the limited role of EPA

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in approving a SIP, noting that the "Act confines the EPA to the ministerial function of reviewing SIPs for consistency with the Act's requirements" and that the statute demands that EPA has no choice but to approve a SIP when it meets all applicable statutory criteria. The Court vigorously concurred with all three challenges to EPA's rulemaking, vacated EPA's original disapproval of the PCP Standard Permit rules, and ordered that EPA "must limit its review of Texas' regulations to ensuring that they meet the minimal CAA requirements that govern SIP revisions to minor NSR." Slip Op at 2-3.

The Opinion precedes highly-anticipated rulings on the state and industry challenges to EPA's disapproval of the Texas Flexible Permit Program and Qualified Facilities Program. Industry practitioners quickly filed briefs pointing to the PCP Standard Permit opinion as supporting their positions in those cases. Certainly, the court's opinion does not bode well for EPA Texas SIP disapprovals.

TCEQ Issues Test Compliance History Scores

Following proposed changes to compliance history rules to conform to legislative mandates in 2011, TCEQ has now posted sortable "test compliance history scores" intended to reflect how compliance history scores might be calculated under the proposed new formula. The rule changes are intended to improve overall accuracy and place more weight on significant violations and repeat offenders.

Although the compliance scores are qualified as approximations, a recent Austin American-Statesman analysis reported that the new formula produced fewer "unsatisfactory" (currently "poor") scores relative to the earlier formula, reducing the number of "unsatisfactory" scores from about 1600 to 890 sites. Generally speaking, it is anticipated that most regulated entities will continue to remain in the "satisfactory" (average) performance category under the new formula, if adopted as proposed. The public comment period on the draft rules closed on March 23, 2012. The "test" scores are available at http://www.tceq.texas.gov/enforcement/history/compliance-history-test-data.html, and the Austin American-Statesman article is available at http://www.statesman.com/news/local/proposed-environmental-rule-to-give-hundreds-more-texas-2253164.html.

EPA Authorizes Changes to Texas Hazardous Waste Program

On March 6, 2012, the U.S. Environmental Protection Agency ("EPA") published in the Federal Register an immediate final rule authorizing changes to Texas' hazardous waste program under the Resource Conservation and Recovery Act ("RCRA"). Pursuant to the authorization, hazardous waste facilities in Texas "will now have to comply with the authorized State requirements instead of the equivalent Federal requirements in order to comply with RCRA." This will not impose additional requirements on facilities, as the authorized regulations are currently effective under Texas law and will not be changed by the EPA's actions. The final authorization will become effective on May 7, 2012 unless the EPA receives adverse written comments by April 5, 2012. The EPA does not expect such comments, as it views the authorization as a "routine program change." The rule is available at http://www.gpo.gov/fdsys/pkg/FR-2012-03-06/pdf/2012-5376.pdf.

Environmentalist Groups Sue EPA in U.S. District Court for the Eastern District of Louisiana

On March 13, 2012, a coalition of non-governmental organizations filed a complaint (available at www.bdlaw.com/assets/attachments/LA%20Complaint.pdf) (the "Complaint") in the U.S. District Court for the Eastern District of Louisiana asserting violations of the Administrative Procedure Act ("APA") by the U.S. Environmental Protection Agency ("EPA") and its administrator, Lisa Jackson, on account of the EPA's denial ("Denial") of plaintiffs' July 30, 2008 petition requesting the establishment of revised state water quality standards to address nutrient pollution in the waters of the Mississippi River Basin and Northern Gulf of Mexico pursuant to the Clean Water Act ("CWA").

The Complaint alleges that the Denial violates the APA because it fails to comply with Section 303(c)(4)(B) of the CWA, which provides that "the Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard…in any case where [she] determines that a revised or new standard is necessary to meet the requirements of this Act." Specifically, plaintiffs allege that the Denial either (a) "does not provide a reasoned explanation as to why revised or new water quality standards to address excessive nutrient pollution…are 'not necessary to meet the requirements of the CWA' within the meaning of Section 303(c)(4)(B)" or (b) "is contrary to the undisputed evidence in the Petition that numeric nutrient water quality standards are necessary pursuant to Section 303(c)(4)(B) of the CWA."

As relief, in addition to litigation costs and "such other relief as the Court may deem just and proper," plaintiffs seek (a) a declaration by the court that the Denial is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, in violation of the APA… and the CWA," and (b) an order that the EPA provide a response to the Petition within 90 days "that is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."

Upcoming TCEQ Meetings and Events

- TCEQ will host a S***takeholder Meeting About TMDL Projects for the Houston Ship Channel and Upper Galveston Bay*** on April 4, 2012 in Houston. The meeting will include discussion of progress on these TMDL projects. Participation will be possible in person or by webcast. Information regarding this event is available at http://www.tceq.texas.gov/waterquality/tmdl/stakeholder-meeting-about-tmdl-projects-for-the-houston-ship-channel-and-upper-galveston-bay.
- TCEQ will host a ***Stakeholder Meeting About a TMDL Project for Beaches in Corpus Christi*** on April 12, 2012 in Corpus Christi. At this first meeting about the project, TCEQ personnel will introduce the project, which will aim to reduce concentrations of bacteria that affect recreational uses at Cole and Ropes parks. Information regarding this event is available at http://www.tceq.texas.gov/waterquality/tmdl/corpusbeaches.
- TCEQ will host its annual ***Environmental Trade Fair & Conference*** at the Austin Convention Center on May 1-2, 2012. A banquet will be held on the evening of May 2 during which the 2012 Texas Excellence Awards will be accepted. Information regarding this event is available at http://www.tceq.texas.gov/p2/events/etfc/etf.html.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in March can be found on the TCEQ website at http://www.tceq.texas.gov/news/releases/commissionersagenda032812 and http://www.tceq.texas.gov/news/releases/commissionersagenda030712.

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

OSHA Revises Its Hazard Communication Standard to Implement GHS

Warnings about chemical hazards will never be the same. The Occupational Safety and Health Administration just drastically changed its hazard communication standard, which has been in effect for nearly 30 years. It did so to embrace a standardized approach developed

through the United Nations known as the Globally Harmonized System. This amended standard, published March 26, 2012, means that virtually all the labels and material safety data sheets prepared over those three decades need to be revised by June 1, 2015. The biggest challenge will be to reevaluate the hazards of every hazardous chemical using a rigorous classification scheme. This client alert analyzes the key changes in the OSHA rule.

To read the full alert, please see http://www.bdlaw.com/assets/attachments/OSHA%20Revises%20HCS%20to%20Implement%20GHS.pdf

Supreme Court Rules Property Owners May Challenge EPA Compliance Orders

In a closely-watched case, the U.S. Supreme Court on March 21 told the Environmental Protection Agency ("EPA") to stop "strong-arming . . . regulated parties" who wish to go directly to court to contest compliance orders that assert jurisdiction over wetlands as well as other waters under the Clean Water Act ("CWA"). EPA had long maintained that property owners could not challenge in court the assertion of jurisdiction over wetlands and waters when EPA issues compliance orders against owners for filling those features without a permit. Accordingly, property owners had to wait for EPA to bring a civil suit against them for alleged CWA violations before they could argue in front of a judge that the wetlands or waters were not subject to federal jurisdiction. Meanwhile, EPA could and would assess heavy financial penalties against owners for each day they failed to abide by a compliance order, even if an owner believed the U.S. had no jurisdiction over its land.

In *Sackett v. EPA*, the high court unanimously reversed lower federal courts as well as decades of EPA practice, holding that citizens may initiate a civil action under the Administrative Procedure Act ("APA") to challenge EPA's issuance of an administrative compliance order under the CWA. Mike and Chantell Sackett, preparing to build a house in Bonner County, Idaho, filled part of their lot with dirt and rock without first obtaining a CWA Section 404 "dredge or fill" permit from the Army Corps of Engineers. The Sacketts had believed their property contained no federal wetlands, being separated from a nearby lake by several lots containing permanent structures. The Corps and EPA believed otherwise.

When the couple received the compliance order to restore their property, they requested a hearing from EPA but were denied. They then sued, claiming that a compliance order is "final" agency action under the APA, thus allowing judicial review of the order. But the lower courts, following years of precedents, dismissed the case, stating that the Clean Water Act precludes pre-enforcement judicial review of compliance orders, and EPA had not attempted to enforce the order by initiating a civil suit against the Sacketts in federal court.

The Supreme Court wasted little time in reversing, ruling that such orders are clearly "final" agency actions. Justice Scalia, writing for the Court, said a citizen should not have to "wait for the agency to drop the hammer" of suing the citizen in order for that citizen to get the threshold issue of disputed wetlands jurisdiction in front of a federal judge. He went on to rule that nothing in the Clean Water Act expressly precludes judicial review under the APA.

This emphatic decision puts to an end EPA's heavy-handed practice under the CWA of forcing citizens either to comply, with no judicial recourse, with an arguably illegal order or, if the citizen refuses, to face a federal lawsuit along with mounting penalties for every day the citizen declines to adhere to the agency's compliance order. But the decision may have broader implications. EPA issues administrative compliance orders under other federal environmental statutes, including the Clean Air Act, Resource Conservation and Recovery Act, and Toxic Substances Control Act. Like the CWA, those statutes do not expressly preclude judicial review of compliance orders. As a result, though narrowly worded, the *Sackett* decision may affect EPA's enforcement activities under those laws as well as how lower courts apply *Sackett* to them.

A copy of the Supreme Court decision (and concurring opinions by Justices Ginsburg and Alito) can be found at http://www.bdlaw.com/assets/attachments/Supreme%20Court%20Rules%20Property%20Owners%20May%20Challenge%20Compliance%20Orders.pdf.

For more information, please contact Gus Bauman at 202-789-6013, gbauman@bdlaw.com;

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or Parker Moore at 202-789-6028, pmoore@bdlaw.com.

EPA Targets Articles Containing Action Plan Chemicals

Under the Toxic Substances Control Act (TSCA), EPA has mostly given articles containing chemicals a free ride by exempting them from regulatory requirements otherwise applicable to those chemicals. EPA took a sharply different direction in three proposed rules released on March 20, 2012, which would subject manufacturers and processors of articles containing the chemicals at issue to full obligations. Some of the chemicals are used in consumer products.

Since announcing its Enhanced Chemicals Management Program in September 2009, EPA has issued ten chemical action plans. In the March 20 proposals, EPA tackled half of them. It proposed significant new use rules (SNURs) for polybrominated diphenyl ethers (PBDEs), hexabromocyclododecane (HBCD), certain benzidine-based chemicals, a short-chain chlorinated paraffin (SCCP), and a phthalate, di-n-pentyl phthalate (DnPP). Those related to PBDEs, HBCD, and benzidine-based chemicals would apply to articles containing those chemicals, while those for the SCCP and DnPP would exempt articles. In addition, EPA proposed a test rule for some PBDEs. Together, these rulemakings are a significant step in EPA's implementation of its action plans for those chemicals. Comments are due within 60 days after publication of the proposals in the Federal Register, which should occur shortly.

To read the full article, please see http://www.bdlaw.com/news-1327.html.

Update on TSCA Developments in Congress and at EPA

The Toxic Substances Control Act (TSCA) remains a focus of political attention, particularly with respect to the authority it gives the Environmental Protection Agency (EPA) to manage "existing" chemicals that are already on the market in the United States. While legislation to amend TSCA is generally considered to be on hold, EPA continues to implement and update its "enhanced" approach under existing law. This report provides an update from our previous report on both legislative and administrative developments under TSCA.

See http://www.bdlaw.com/assets/attachments/BD%20Client%20Alert%20-%20Update%20on%20TSCA%20Developments%20in%20Congress%20and%20at%20EPA.pdf to read the report.

EPA Proposes New Notice and Reporting Requirements for Cathode Ray Tube (CRT) Exporters as Part of Broader Effort on E-Waste

The U.S. Environmental Protection Agency ("EPA") is proposing to expand the requirements for cathode ray tube (CRT) exports to "allow the Agency to better track exports of CRTs for reuse and recycling" and to "gather more information in shipments of CRTs that are sent for reuse." In a March 15th Notice in the Federal Register, EPA proposes to clarify which entities are responsible for fulfilling the CRT exporter duties and to institute additional notice and reporting requirements for the export of CRTs for recycling and reuse. This action is one component of the Administration's broader effort to control certain e-waste exports, collect more information on exports of used and end-of-life electronic equipment and insure compliance through civil or criminal enforcement actions where appropriate.

The export requirements in the CRT rule will apply to any "CRT Exporter", which EPA proposes to define as "any person in the United States who initiates a transaction to send used CRTs outside the United States or its territories for recycling or reuse, or any intermediary in the United States arranging for such export." For situations with multiple "CRT Exporters," EPA encourages parties to assign the exporter responsibilities among themselves, but indicates that parties will be jointly and severally liable for failing to comply with the export requirements.

CRTs Exported for Recycling

EPA is proposing to require exporters of used CRTs sent for recycling to file an annual report (in addition to the notice already required), including the quantities, frequency of shipment, and ultimate destination(s) of all CRTs exported for recycling during the previous calendar year. The reports will also include the name, EPA ID number (if applicable), mailing and site address of the CRT exporter, and be accompanied by a signed certification. EPA seeks to confirm the amount of CRTs actually shipped for recycling (as compared to the notices) and that the shipments "occurred under the terms approved by the receiving country." EPA is also proposing to require exporters to state the name and addresses of the recycler or recyclers and the estimated quantity to be sent to each, along with any alternative recyclers.

CRTs Exported for Reuse

EPA is proposing to replace the existing one-time notice requirement for exporters of fully intact CRTs for reuse with a notification for export activities over a twelve month period (or less). The proposed notice will require detailed information about the exporter, the frequency and amounts of exports, the means of shipment, and various details regarding the point of departure and entry of the CRTs, their ultimate destination and the manner in which they will be reused. The notice will also need to be accompanied by a certification signed by the exporter. EPA is also considering whether each individual shipment for reuse should be accompanied by a notice; or whether the twelve-month notice will suffice.

EPA is also soliciting comments on whether to require exporters to retain particular types of documents (e.g., contracts, invoices, and/or shipping documents) for purposes of demonstrating that each shipment of exported CRTs will be reused. Under the existing rules, exporters must keep copies of normal business records demonstrating that each shipment will be reused.

Finally, EPA has also requested comments on whether to require annual reporting for exporters of CRTs for reuse.

"Bare" CRTs

EPA has requested comments on whether "bare" CRTs that have been removed from a monitor whose vacuum has not been released are likely to be exported for recycling and, if so, whether such CRTs should be eligible for the exclusion for processed CRT glass sent for recycling.

Opportunity for Public Comment

Stakeholders who will be impacted by this proposal are encouraged to comment. Comments, which are due on or before May 14, 2012, can be submitted by a number of methods, including through www.regulations.gov (Docket ID No. EPA-HQ-RCRA-2011-1014) and by email to RCRA-docket@epa.gov, Attention Docket ID No. EPA-HQ-RCRA- 2011-1014. Companies managing cathode ray tubes for export should review the proposed changes to the CRT Rule to ensure compliance with all new reporting and notice requirements once they are finalized.

Part of Broader Action on E-waste

This CRT proposal is one of a series of actions by the federal government in recent years focused on the management of e-waste. The Whitehouse Council on Environmental Quality (CEQ) has established an Interagency task Force on Electronics Stewardship that is co-chaired by EPA, the General Services Administration (GSA) and CEQ. As part of this effort, GSA recently announced new requirements governing the recycling and disposal of federal electronic equipment assets.

EPA has also stepped up enforcement of RCRA rules governing certain waste exports. This past year marked the first time criminal charges have ever been filed against an exporter of e-waste, and the Environmental Crimes Section of the U.S. Department of Justice has identified e-waste as a criminal enforcement priority for the near term. Investigations of used equipment and e-waste export flows are also being undertaken by EPA, the United States International Trade Commission (USITC), and the North American Commission on Environmental Cooperation (CEC). Legislation has also been introduced in Congress to

prohibit the export of hazardous e-waste from the U.S. to developing (non-OECD) countries. Much of the activity in the U.S. coincides with recent efforts in Europe to expand controls on international shipments of used and end-of-life equipment and ongoing negotiations on the management of used and end-of-life electrical and electronic equipment under the Basel Convention.

For more information about these developments or Beveridge & Diamond's e-waste related compliance and litigation practice, contact Paul Hagen at phagen@bdlaw.com, Aaron Goldberg at agoldberg@bdlaw.com or Beth Richardson at erichardson@bdlaw.com.

New Rules for Lithium Battery Air Transport

The International Civil Aviation Organization (ICAO) Working Group on Lithium Batteries has agreed to new, more stringent requirements for shipping lithium ion and metal batteries and cells by air.[1] These new requirements, which will take effect January 1, 2013, will have important impacts on transportation logistics for batteries, especially bulk shipments.

Background

Currently, the ICAO Technical Instructions separately regulate air shipments of lithium batteries by whether they are lithium ion or lithium metal and whether they are contained in equipment, packed with equipment, or shipped separately from equipment, for a total of 6 applicable Packing Instructions. Within each of those Packing Instructions, batteries below certain size thresholds are excepted from regulation as Class 9 dangerous goods as long as they meet the Packing Instructions' standards regarding packaging safety. Controversy has been ongoing with regard to whether those Packing Instructions, particularly for batteries not accompanied by or installed in equipment, adequately protect safety.

At the October, 2011 meeting of the 23rd ICAO Dangerous Goods Panel (DGP/23), the United States Federal Aviation Administration (FAA) Technical Center had given a presentation on lithium battery safety test results and offered controversial proposals to require all lithium batteries outside equipment to be transported as Class 9 dangerous goods. Because of the lack of time to analyze the proposals, no agreement was reached at the DGP/23 meeting, but it was agreed that the whole subject of lithium batteries needed to be reviewed, particularly as to bulk shipments. Thus, a meeting of a Working Group on Lithium Batteries was held on February 6-10, 2012 to complete the carry-over work from the DGP/23 meeting.[2]

Overview of Current Packing Instructions

The Working Group restructured Packing Instructions 965 (lithium ion or lithium polymer batteries not contained in or packed with equipment) and 968 (lithium metal or lithium alloy batteries not contained in or packed with equipment). Under Section II in each of the current Instructions, cells and batteries that are packed in a manner that meets the safety standards in the Packing Instructions and that are below the following thresholds are excepted from regulation as Class 9 dangerous goods:

Size Limits

- Lithium ion cells: ‹ 20 Watt-hour rating (Wh)
- Lithium ion batteries: ‹ 100 Wh
- Lithium metal cells: lithium metal content ‹ 1 gram
- Lithium metal batteries: lithium metal content ‹ 2 grams

Quantity Limits

- Lithium ion cells and batteries: 10 kg per package
- Lithium metal cells and batteries: 2.5 kg per package

In turn, Section I of the current Packing Instructions 965 and 968 fully regulates cells and batteries that are above these thresholds as Class 9 dangerous goods.

Revisions to Packing Instructions 965 and 968

Under the revised Packing Instructions 965 and 968, to be excepted from regulation as Class 9 dangerous goods under Section II, the following significantly reduced quantity limits will apply:

- Small lithium ion cells/batteries ‹ 2.7 Wh, or small lithium metal cells/batteries with lithium metal content ‹ 0.3 gram: 2.5 kg per package
- Lithium ion cells rated between 2.7 and 20 Wh, or lithium metal cells with lithium metal content between 0.3 and 1 gram: 8 cells per package
- Lithium ion batteries rated between 2.7 and 100 Wh, or lithium metal batteries with lithium metal content between 0.3 and 2 grams: 2 batteries per package

Section I of Packing Instructions 965 and 968 has been divided into two new subsections, IA and IB.

The new Section IB applies to some batteries that formerly would have been excepted from regulation as Class 9 dangerous goods due to size and quantity. This new Section is intended as a compromise to alleviate some of the burden on battery shippers that would result from full Class 9 regulation.

Under Section IB, the following batteries must be shipped as Class 9 dangerous goods but are eligible for certain reduced requirements if these quantity limits are met:

- Lithium ion cells ‹ 20 Wh and lithium ion batteries ‹ 100 Wh: 10 kg Gross
- Lithium metal cells with lithium metal content ‹ 1 gram and lithium metal batteries with lithium metal content ‹ 2 grams: 2.5 kg Gross

These cells and batteries can use non-UN specification packagings, and alternative written documentation may be used in lieu of the standard dangerous goods transport document. However, all other Class 9 requirements, including employee training, apply. Also, each package must also be labeled with a lithium battery handling label in addition to the Class 9 hazard label. The Section IB requirements represent a substantial new burden on companies whose battery shipments were previously excepted.

The new Section IA applies to all cells and batteries that do not qualify for the reduced requirements in Section IB or the exceptions in Section II. Section IA requires full compliance with Class 9 dangerous goods requirements. Provisions from current Section I are mostly unchanged in new Section IA; maximum net quantity per package remains 2.5 kg for lithium metal batteries for passenger aircraft, 5 kg for lithium ion batteries for passenger aircraft and 35 kg for cargo aircraft for both battery types.

Revisions to Packing Instructions for Batteries Contained In or Packed With Equipment

The Working Group also made the following changes to the provisions for lithium cells or batteries packed with or contained in equipment (Section II of Packing Instructions 966, 967, 969, and 970):

A net quantity per excepted package limit of 5 kg is imposed for both passenger and cargo aircraft.

Under Packing Instructions 966 and 969 (cells or batteries packed with equipment), the equipment must be secured against movement within the outer packaging and must be equipped with an effective means of preventing accidental activation.

The Working Group also added provisions on transport of lithium ion and lithium metal batteries by post, based on a proposal by the Universal Postal Union. For lithium ion or lithium metal cells and batteries contained in equipment and otherwise meeting the Section II exceptions under Packing Instructions 967 and 970, up to four cells or two batteries can be mailed in a single package, subject to the requirements imposed by designated national authorities.

For more information on the ICAO Technical Instructions for lithium batteries, please contact Aaron Goldberg, 202-789-6052, agoldberg@bdlaw.com, Elizabeth Richardson, 202-789-6066, erichardson@bdlaw.com, or Andie Wyatt, 202-789-6086, awyatt@bdlaw.com.

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[1] ICAO Dangerous Goods Panel, Working Group of the Whole on Lithium Batteries, First Meeting (Montréal, February 6-10, 2012) Report, available at http://www.icao.int/safety/DangerousGoods/Working%20Group%20of%20the%20Whole%20on%20Lithium%20Batteries201/DGPWGLB.1.WP.015.en.pdf.

[2] See ICAO Dangerous Goods Panel, Working Group of the Whole on Lithium Batteries (Montreal, 6 to 10 February 2012), available at http://www.icao.int/safety/DangerousGoods/Pages/Working-Group-of-the-Whole-on-Lithium-Batteries.aspx.

CEQ Finalizes Guidance to Improve NEPA Reviews

On March 12, 2012, the White House Council on Environmental Quality ("CEQ") published final guidance entitled "Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act." It is intended to highlight existing legal tools to simplify and expedite NEPA review of major federal actions and encourage agencies to adopt such strategies. The final guidance does not materially differ from draft guidance issued on December 13, 2011.

The final guidance reiterates several key principles to guide agencies' NEPA reviews. These concepts include "straightforward and concise reviews," NEPA integration into early project planning, use of existing analyses, early scoping, timelines for review, and proportionate responses to comments. CEQ describes nine strategies to accomplish these goals, such as concise documentation (as opposed to "an encyclopedia of all applicable information"), interagency cooperation, concurrent (rather than sequential) reviews, incorporation by reference of preexisting information, and adoption of other agencies' NEPA documents. The guidance recognizes the need for "clear time lines for NEPA reviews," but stops short of specifying a reasonable timeframe or instructing agencies to establish a firm schedule in every case.

Perhaps the most significant aspect of the final guidance is its suggestion that regulatory procedures applicable to an Environmental Impact Statement ("EIS") should also apply to a less detailed Environmental Assessment ("EA"). By their terms, CEQ and other agencies' regulations frequently require certain steps, such as formal scoping and public comment on draft documents, only for an EIS. The guidance suggests that scoping, early public participation, and other opportunities to improve the NEPA process for an EIS should likewise apply to an EA. Finally, the guidance does not address tiering issues, reserving that topic for future guidance.

In practical terms, the guidance admittedly announces no new interpretations or strategies, and thus likely will not result in substantially altered administration of NEPA by agencies. However, the guidance does reorient agencies and the public on the intended scope and purpose of NEPA reviews, and hopefully will result in measurable improvements. Moreover, prompted by the final guidance, agencies may revisit and consistently modify their own NEPA implementing regulations to facilitate timely, effective, and efficient NEPA reviews. Thus, the full effects of this new guidance are yet to be determined.

A copy of the final CEQ guidance can be found at http://www.bdlaw.com/assets/attachments/CEQ%20Final%20NEPA%20Review%20Guidance%20-%2077%20FR%2014473.pdf.

For more information on this guidance or its implications for a specific project, please contact Peter Schaumberg at (202) 789-6043, pschaumberg@bdlaw.com; Parker Moore at (202) 789-6028, pmoore@bdlaw.com; or James Auslander at (202) 789-6009, jauslander@bdlaw.com.

Firm News & Events

Bryan Moore Selected as "Texas Rising Star"

Beveridge & Diamond, P.C. is pleased to announce that Bryan J. Moore, a Principal in the

Firm's Austin office, has been named a 2012 "Texas Rising Star" in environmental law by Texas Monthly. Bryan was also recognized as a "Texas Rising Star" in 2007, 2008, 2009, and 2011. His practice includes a wide range of environmental matters, from waste, water, and air permitting and compliance counseling, to enforcement defense and litigation. Bryan's profile is available on our website at http://www.bdlaw.com/attorneys-180.html.

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