Texas Environmental Update

BEVERIDGE & DIAMOND PC

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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 Legislative Session Winds Down

With the 81st Legislative Session in its final phase, a number of environmental bills have now been passed. A full report on the status of environmental bills of interest will be included in our June newsletter. For now, we report on the following selected measures that have been passed by both chambers:

- SB 1387 relating to the implementation of projects involving the capture, injection, sequestration, or geologic storage of carbon dioxide has been passed by both chambers and sent to the Governor for signature;
- SB 1711 relating to the use of reservoirs for sediment control or to satisfy certain environmental and safety regulations at surface mining operations has been signed by the Governor and is effective immediately;
- HB 472 relating to the effect and implementation of the law regarding reporting by a common carrier or pipeline owner or operator of contamination has been passed by both chambers and sent to the Governor for signature;
- HB 865 relating to the establishment of the Texas Invasive Species Coordinating Committee has been signed by the Governor and is effective on September 1, 2009;
- HB 1433 relating to the amount of the annual water quality fee imposed on holders of wastewater discharge permits and on users of water has been passed by both chambers and sent to the Governor for signature;
- HB 1922 relating to the authorization of certain reuse water system contributions and discharges has been passed by both chambers; and
- HB 3765 relating to the use of hazardous and solid waste remediation fee funds for lead-acid battery recycling activities has been signed by the Governor and is effective on September 1, 2009.

For additional information about the status of pending Texas environmental legislation, please see http://www.capitol.state.tx.us/Home.aspx.

TCEQ Issues Revised Guidance and Forms for Deviation Reporting and Compliance Certifications

TCEQ recently posted revised forms for submitting deviation reports and compliance certifications for Title V Operating Permits. *See* http://www.tceq.state.tx.us/compliance/field_ops/acguide.html. TCEQ notes that it will no longer accept deviation under the previous forms after June 1, 2009. The current forms were made available in June 2008.

TCEQ has also issued revised companion guidance for completing deviation reports. The revised guidance has an expanded question and answer section for completing deviation

reports that is worth reviewing.

Of particular note, TCEQ notes that the obligation to report deviations that occurred in the past and are no longer continuing is not required under its rules. *See* Guidance for Deviation Reporting Under the Operating Permits Program in Texas (Version 3, May 2009) at 15. TCEQ goes on to state that the discovery of a deviation that occurred in a prior deviation cycle does not automatically trigger a "failure to report" deviation, but should be evaluated against the permit requirements and the reasonable inquiry process. *Id*. at 16. TCEQ emphasizes that this does not shield against enforcement, but it may affect a facility's approach to compliance reporting in some cases.

Also noteworthy is the TCEQ's clarification, based on EPA guidance, that credible evidence of a violation of an OSHA Process Safety Management (PSM) program that reflects Title V deviations must be reported as deviations. *Id* at 15. While this approach is not new, in light of increased attention to PSM issues by the Obama Administration, facilities may want to ensure that OSHA PSM audits are conducted in coordination with Title V reviews to ensure that all reporting obligations are met.

The guidance also provides guidance regarding deviation reporting of emission events, maintenance, start-up and shutdown; fugtives and leak detection and repair; continuous emissions systems; the meaning of credible evidence and interface with permit compliance plans.

Texas Supreme Court Overturns $20 Million Benzene Exposure Verdict Against City of San Antonio

On May 1, 2009, the Supreme Court of Texas overturned a $20 million jury verdict against the City of San Antonio for alleged benzene exposure in *City of San Antonio v. Pollock*, 2009 Tex. LEXIS 251 (Tex. May 1, 2009). The plaintiffs, Charles and Tracy Pollock, individually and as next friends of their daughter Sarah Jane Pollock, sued the City in January 2000 claiming that benzene from a closed municipal waste disposal site migrated through the soil to their nearby home, reducing its value and causing their daughter to contract leukemia. In overturning the verdict, the court expanded its previously holding in *Coastal Transportation Co. v. Crown Central Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004) in finding that the testimony of the Pollock's experts was conclusory and therefore not subject to a trial objection.

The Pollocks asserted that their daughter's leukemia was caused by in utero exposure to benzene from the landfill. They rested their claim on the opinions of two experts: Dan Kraft, an engineer with experience in landfill management, and Dr. Mahendar Patel, one of Sarah's treating oncologists. Mr. Kraft provided expert testimony on the amount of landfill gas (including benzene) on the Pollock's property. He based his opinion on an extrapolation from samples taken from a sealed monitoring well near the Pollock's home. Dr. Patel testified that the daughter's leukemia was caused by Ms. Pollock's exposure to benzene while she was pregnant. Dr. Patel based his opinion on Mr. Kraft's testimony and several studies of cancer rates in workers occupationally exposed to benzene. The city did not object to the introduction of the testimony of either of these experts at trial, but did object to the sufficiency of the evidence to support a verdict. The jury ultimately found the city liable and awarded the Pollocks a trial court-reduced damage award of approximately $20 million, including $10 million in exemplary damages. On appeal, the court of appeals reversed the exemplary damage award, but affirmed the trial court in all other respects.

In a seven to two opinion authored by Justice Hecht, the Supreme Court of Texas reversed and rendered judgment for the city. The court found that the testimony of the two Pollock experts was conclusory, and thus there was no evidence to support the verdict. The court rejected the Pollocks' argument that the city's position spoke to the reliability of the testimony, an argument the city failed to preserve through objection at trial. Acknowledging that the experts did provide some basis for their testimony, the court noted that "even when some basis is offered for an opinion, if that basis does not, on its face, support the opinion, the opinion is still conclusory." The court found that the testimony of Mr. Kraft - that Ms. Pollock was chronically exposed to benzene concentrations of 160 ppb - had no basis in

the record, and that it was in fact contradicted by his own data showing such concentrations present only in the adjacent well and not in the ambient air. Regarding Dr. Patel's testimony, the court noted that large gaps existed between the exposure levels in the studies that he relied on and the concentrations Mr. Kraft hypothesized that Mrs. Pollock had been exposed to. The court determined that "those studies provide no basis for his opinion that the Pollocks' claimed benzene exposure caused Sarah's [leukemia]."

Justice Medina, joined by Justice O'Neill, dissented on the reversal of the personal injury claim, arguing the majority was unnecessarily blurring the distinction between unreliable expert testimony and conclusory expert testimony articulated in *Coastal*. In this case, the dissent argued, the opinions and testimony of the two Pollock experts were far removed from the "bare conclusions" they rejected as conclusory in *Coastal*.

The majority also reversed the trial court on the finding of property damage. The jury had found that the landfill was a nuisance that amounted to a taking of property without adequate compensation in violation of article I, section 17 of the Texas Constitution. The court determined that the city did not exercise the intent required under that provision, noting: "The city's negligent failure to prevent landfill gas migration in this case is no evidence that it intended to damage the Pollock's property."

Senate Confirms Commissioner Shaw

On May 5, 2009, the Texas Senate confirmed Governor Perry's appointment of Dr. Bryan Shaw to serve as a Commissioner of the TCEQ. Governor Perry initially appointed Shaw to the Commission in November 2007, filling the position vacated by Chairman Kathleen Harnett White. Commissioner Shaw's six year term will expire on August 31, 2013. Chairman Buddy Garcia, also a Governor Perry appointee, was confirmed in the last Legislative session. His term expires August 31, 2011. Commissioner Larry Soward is reaching the end of his six-year term on August 31, 2009. Commissioner Soward has often served as a dissenting vote to Chairman Garcia and Commissioner Shaw. Commissioner Soward's retirement from the Commission and the Governor's ensuing appointment could result in a new dynamic on the Commission.

TCEQ Holds Public Information Session on Revised Lead Standard

On May 15, 2009, TCEQ conducted a public information session on the revised national ambient air quality standard ("NAAQS") for lead, which became effective on January 12, 2009. The new standard of 0.15 micrograms per cubic meter (µg/m3") is ten times lower than the 1.5 µg/m3 lead standard it replaced. States' recommendations regarding areas that do not currently comply with the new standard must be submitted to EPA by October 15, 2009. Based upon available monitoring data, the only area in Texas that TCEQ expects to propose for designation as a nonattainment area for the new standard is Collin County. TCEQ received no comments in response to its invitation to submit informal public comment by May 22, 2009 regarding the implementation of the standard. The TCEQ Commissioners are scheduled to consider a nonattainment area proposal at their August 12, 2009 agenda meeting.

Implementation of the standard will include an expanded ambient lead monitoring network in Texas. Monitors must be installed by January 1, 2010 near sources that are expected to or have been shown to contribute to ambient lead concentrations in excess of the new lead NAAQS. Monitors also must be installed by January 1, 2011 in core based statistical areas with a population of 500,000 or more.

Written materials from TCEQ's public information session are available at http://www.tceq.state.tx.us/implementation/air/sip/Hottop.html, and general information about lead emissions and lead NAAQS implementation is available at http://www.tceq.state.tx.us/implementation/air/sip/lead/lead_main.html.

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TCEQ Sampling Procedures Manual Sections Posted

The TCEQ Sampling Procedures Manual is an internal agency document that addresses various aspects of the measurement of air contaminant emissions. TCEQ recently determined that it would be helpful for certain sections of that manual to be readily accessible to regulated entities. Accordingly, TCEQ has posted the following three portions of its Sampling Procedures Manual on the agency's website: Chapter 2 (Stack Sampling Facilities), Chapter 14 (Contents of Air Emission Test Reports), and Appendix P (Cooling Tower Monitoring). The posted portions of the Sampling Procedures Manual are available at http://www.tceq.state.tx.us/compliance/field_ops/acguide.html.

Recent TCEQ Enforcement Action

On May 20, 2009, the TCEQ Commissioners approved administrative penalties totaling $661,303 against 79 regulated entities. Earlier this month, at its May 6th Agenda, the Commissioners approved $675,105 in penalties against 76 entities. A summary of the Commissioners' May 20th and May 5th action can be found at http://www.tceq.state.tx.us/comm_exec/communication/media/05-09Agenda0520.html and http://www.tceq.state.tx.us/comm_exec/communication/media/05-09Agenda0506.html.

Upcoming TCEQ Meetings and Events

The *Water Rights Advisory Work Group (WRAWG)* will meet on Monday, June 8, 2009. WRAWG is a voluntary group of participants who meet quarterly to discuss water rights related issues. Additional information is available at www.tceq.state.tx.us/permitting/water_supply/water_rights/wrawg.html.

Dam Safety Workshops will be held on June 10, 11, 24, and 25 at various locations throughout Texas. TCEQ will provide an overview on new state dam safety laws and regulations, dam failure modes, and maintenance issues for all areas on a dam. For additional information, please go to www.tceq.state.tx.us/assistance/events/dam-safety.html.

Texas Rules Updates

On May 20, 2009, the TCEQ Commissioners approved a petition for rulemaking on proposed amendments to 30 TAC Chapters 210, 309 and 319 regarding bacteria effluent limitations and monitoring in domestic water quality permits. On June 3, 2009, the Commissioners are scheduled to consider petitions for rulemaking to amend 30 TAC Chapter 115 Tank and Vessel Degassing Rules. For more information on those developments, as well as other new TCEQ rule developments, please see the TCEQ website at http://www.tceq.state.tx.us/rules/whatsnew.html.

National Developments

EPA Plans to Revisit Two RCRA Rules that Currently Exclude Certain Materials from Hazardous Waste Regulation

EPA recently announced plans to revisit two Resource Conservation and Recovery Act ("RCRA") rules that were finalized during the Bush administration. Both rules have come under scrutiny from stakeholders and, in particular, environmental groups. First, the Agency will hold a public meeting in June 2009 to discuss possible revisions to the Definition of Solid Waste rule ("DSW Rule"), which became effective on December 29, 2008. Second, EPA will propose a rule withdrawing the Emission Comparable Fuel rule ("ECF Rule"), which went into effect on January 20, 2009.

Definition of Solid Waste Rule

EPA recently announced that it will hold a public meeting on possible revisions to the October 30, 2008 final rule redefining "solid waste" under RCRA by providing a conditional exclusion for certain hazardous secondary materials destined for reclamation under certain circumstances. 73 Fed. Reg. 64,668 (2008). According to the EPA website, the meeting will be held June 30, 2009.

The DSW Rule went into effect on December 29, 2008. This rule is the most recent step in a lengthy rulemaking process, as previous EPA attempts were repeatedly struck down by the U.S. Court of Appeals for the D.C. Circuit. More information about the rule is available here.

On January 29, 2009, the Sierra Club filed a petition for administrative review of the rule. Specifically, the Sierra Club asked EPA Administrator Lisa Jackson to "reconsider and repeal" the DSW Rule. Both the Sierra Club and the American Petroleum Institute ("API") have filed petitions for judicial review in the U.S. Court of Appeals for the D.C. Circuit in a now-consolidated case. The case is currently stayed. EPA and the Sierra Club have jointly moved to continue the stay for the duration of the administrative review process. API, however, has moved to go forward with a briefing schedule and to dismiss Sierra Club's petition on the grounds that its pending petition for administrative review deprives the D.C. Circuit of jurisdiction over the petition for judicial review. The Court has not yet ruled on these motions.

EPA is planning to publish in the coming weeks an agenda for the meeting that will include specific issues for which EPA is seeking stakeholder input before the Agency decides to reenter the rulemaking process.

Emission Comparable Fuel Rule

EPA also recently announced its intention to propose a rule withdrawing the ECF Rule and seeking public comment for further review of the exclusion. The proposed rule would likely be issued November 2009.

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

The new exclusion for emission comparable fuels requires similar conditions for hazardous constituent concentrations as well as conditions meant to ensure that emissions are comparable to emissions from burning fuel oil. The ECF Rule also sets specific conditions under which emission comparable fuel can be stored so that the materials are not discarded. The ECF Rule went into effect on January 20, 2009.

The rule has drawn criticism both from environmental groups who see the ECF Rule as being too lax and from industry who has objected to the burdensome conditions on the exclusion. In March 2009, two environmental groups, the Louisiana Environmental Action Network and the Sierra Club, filed a petition for judicial review of the ECF Rule in the D.C. Circuit. On May 5, 2009, the Court agreed to stay the case pending completion of the administrative review process.

For more information about these and other RCRA developments, please contact Don Patterson at dpatterson@bdlaw.com, (202) 789-6032, or Beth Richardson at erichardson@bdlaw.com, (202) 789-6066.

***Burlington Northern v. United States*: CERCLA Arranger Liability Requires Intent to Dispose of Hazardous Substances**

On May 4, 2009, the United States Supreme Court issued the Court's most recent statement

on the scope of liability and the apportionment of damages under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). *Burlington N & S.F. R. Co. v. United States*, No. 07-1601 (May 4, 2009). With respect to scope of CERCLA liability, the Court held that an entity that sells a product has not "arranged for disposal" of that product for CERCLA purposes unless the entity intended that at least a portion of the product be disposed of during the transfer process by one or more of the methods described in 42 U.S.C. § 9607(a)(3). On the issue of apportionment, the Court upheld as reasonable the trial court's method for dividing damages among multiple defendants.

In *Burlington Northern*, the Supreme Court addressed whether Shell Oil was potentially responsible as an "arranger" under CERCLA where it sold a product and knew that the product would spill or leak during the transfer of the product from buyer to seller. The Court concluded that because "arrange" implies action directed to a specific purpose, "under the plain language of the statute, an entity may qualify as an arranger under §9607(a)(3) when it take intentional steps to dispose of a hazardous substance." Consequently, "Shell's mere knowledge that spills and leaks [occurred during the transfer process] is insufficient grounds for concluding that Shell 'arranged for' the disposal" of a hazardous substance within the meaning of §9607(a)(3).

In its discussion of apportionment, the Court observed that CERCLA does not mandate joint and several liability in every cost recovery case. Citing the Restatement (Second) of Torts, the Court noted that "apportionment is proper when 'there is a reasonable basis for determining the contribution of each cause to a single harm.'" CERCLA defendants seeking to avoid joint and several liability must establish that a reasonable basis for apportionment exists. Although none of the parties before the trial court attempted to establish that the damages were subject to apportionment, the trial court itself concluded that the case "was a classic 'divisible in terms of degree' case." The trial court apportioned 9% of the damages to two railroad defendants, ultimately leaving the government to absorb the remaining 91% of the total damages. The trial court based its apportionment on the percentages of land area owned by the respective defendants, the time of ownership, and the types of hazardous substances used by the defendants in their relation to the contamination at the site. In *Burlington Northern*, the Supreme Court upheld the trial court's basis for apportionment as reasonable, even though it was inexact and at least somewhat based on estimates rather than empirical evidence.

For more information about the impact of this decision, please contact Rob Brager (rbrager@bdlaw.com, (410) 230-1310)) or Timothy M. Sullivan (tsullivan@bdlaw.com, (410) 230-1355)).

U.S. RoHS and Conflict Minerals Legislation Introduced in Congress

Legislation has recently been introduced in both the U.S. House and Senate aimed at restricting the use of certain materials in the manufacture of electrical and electronics products. H.R. 2420 proposes to amend the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 et seq., to prohibit the manufacture after July 1, 2010 of certain "electroindustry products" that exceed the maximum concentration values that are currently in place in the European Union for certain heavy metals and brominated flame retardants. S. 891 proposes to amend the Securities Exchange Act, 15 U.S.C. § 78a et seq., to require covered entities - including electronics manufacturers - to make annual disclosures to the United States Securities and Exchange Commission ("SEC") of certain activities related to the "conflict minerals" columbite-tantalite, cassiterite, and wolframite, which are used to produce metals commonly found in electronics and other products.

H.R. 2420: The Environmental Design of Electrical Equipment Act

On May 14, 2009, Rep. Michael Burgess (R-TX) introduced H.R. 2420, which proposes to amend TSCA to prohibit the manufacture after July 1, 2010 of "electroindustry products" that contain lead, mercury, hexavalent chromium, polybrominated biphenyls ("PBBs"), and polybrominated diphenyl ethers ("PBDEs") above 0.1% and cadmium above 0.01%, at the

homogeneous level. Such restrictions are currently in place for a broader range of electrical and electronic equipment under the European Union's Directive on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment, 2002/95/EC ("RoHS Directive").

The current text of H.R. 2420 limits its scope to any "electroindustry product," defined as "any product or equipment that is directly used to facilitate the transmission, distribution, or control of electricity, or that uses electrical power for arc welding, lighting, signaling protection and communication, or medical imaging, or electrical motors and generators." The bill would exempt several electroindustry products and product categories, including products or equipment designed for use with a voltage rating of 300 volts or above, medical diagnostic imaging and therapy equipment and devices, electrical wire and cable products and accessories, and high intensity discharge lamps.

The bill would also exempt from the prohibition several applications of lead, mercury, cadmium and hexavalent chromium that are currently listed as exemptions to the RoHS Directive. The Administrator of the U.S. Environmental Protection Agency ("EPA") may promulgate by rule additional exemptions, but the bill does not provide a procedure by which additional exemptions could be sought or any limitations on EPA's decision-making authority with regard to exemptions.

The bill would require the Administrator of the EPA within one year of the effective date of the Act, to "promulgate guidelines establishing test procedures for determining the concentration of lead, mercury, hexavalent chromium, cadmium, PBBs and/or PBDEs contained in an electroindustry product." In addition, the bill would broadly preempt state mandates that contain inconsistent or more stringent requirements.

H.R. 2420 has been referred to the House and Energy Climate Committee and will likely be sent to the Energy and Environment Subcommittee.

S. 891: The Congo Conflicts Minerals Act of 2009

On April 23, 2009, Senators Brownback (R-KS), Durbin (D-IL), and Feingold (D-WI) introduced S. 891, the "Congo Conflict Minerals Act of 2009" ("S. 891"). The bill would amend Section 13 of the Securities Exchange Act to require the SEC to promulgate regulations requiring the annual disclosure of certain "activities related to columbite-tantalite, cassiterite, and wolframite industries." Metals derived from these minerals are used to manufacture a wide range of electronic products, including mobile phones, digital cameras, MP3 players, and laptop computers.

Columbite-tantalite is mined for the elements niobium and, most significantly, tantalum. Electronics manufacturers rely heavily on tantalum powder, which they use to make tantalum capacitors for electronic circuits used in equipment such as GPS systems, laptops, cellular phones, DVD players, and video cameras. The development of higher charge tantalum powders has enabled the creation of smaller tantalum capacitors and, therefore, smaller electronics. The reduction in the size of cell phones, in particular, has been attributed to advances in tantalum.

Cassiterite is the primary source of tin, which manufacturers use to make tin solder. Tin solder has been used by many manufacturers as a "greener" alternative to lead solder. Wolframite is a source of tungsten, which manufacturers use in integrated circuits as an interconnect device and in wiring. Tungsten or its compounds are also used in light bulbs, cathode ray tubes, electric lamps, and LCD screens.

While these minerals are extracted from mines throughout the world, Congress is primarily interested in mines in the Democratic Republic of Congo ("DRC"). According to United Nations and nongovernmental organization ("NGO") reports, armed militia groups control certain mines in the DRC through force and violence and use profits from mineral extraction to finance their illegal activities.

S. 891 would require covered entities to report to the SEC: (1) the country of origin of the relevant minerals; and (2) if the country of origin is the DRC or an adjoining country, the

mine of origin. The reporting requirements would apply to entities already required to submit annual reports to the SEC that are: (1) engaged in the exploration, importation, exportation, extraction, or sale of the relevant minerals; or (2) use such minerals or their derivatives in the manufacture of products for sale.

These reporting requirements would potentially impose significant burdens on manufacturers with respect to managing their supply chains. If passed, the legislation would require manufacturers to determine whether any of the metals used in their products were derived from columbite-tantalite, cassiterite, and wolframite, and if so, the country of origin of these minerals, and potentially the specific mine where they were extracted. This determination is made particularly difficult because once extracted, the minerals are fungible and thus not easily differentiated from minerals mined elsewhere.

Significant civil penalties would be imposed for filing false reports or failing to report as required. Criminal penalties would also be available, but only in egregious circumstances.

The bill would require other measures that would not directly affect manufacturers but would raise public awareness of "conflict minerals" in the DRC. For example, the bill would require the State Department, in coordination with the United Nations and international NGOs, to produce and release to the public a map of mineral-rich zones and armed groups in the eastern region of the DRC. In addition, the State Department's annual human rights report on the DRC would include a description of human rights abuses associated with minerals trade and extraction in the DRC.

The bill would also require the State Department, in conjunction with the United Nations, to provide guidance to commercial entities seeking to exercise due diligence on their suppliers to ensure that raw materials used in their products do not finance armed conflict, result in labor or human rights violations, or damage the environment.

S.891 has been referred to the Senate Committee on Banking, Housing, and Urban Affairs.

For more information, please contact Paul Hagen at (202) 789-6022 (phagen@bdlaw.com) or Beth Richardson at (202) 789-6066 (erichardson@bdlaw.com).

Key documents are available below.

- H.R. 2420 (http://www.bdlaw.com/assets/attachments/HR_2420_intro_2009-05-14_(NEMA_RoHS_Bill).pdf)
- S. 891 (http://www.bdlaw.com/assets/attachments/S_891_Conflict_Minerals_intro__2009-04-23.pdf)

Mandatory Self-Disclosure of Product Problems to the CPSC

Expanded CPSC Reporting Requirements

The Consumer Product Safety Improvement Act of 2008 ("CPSIA") is now well-known for its new requirements affecting children's products, toys, and child care articles, particularly those containing lead or phthalates. Less well-recognized is the significant impact of the CPSIA on the long-standing requirement under Section 15(b) of the Consumer Product Safety Act ("CPSA") to report certain product problems to the Consumer Product Safety Commission ("CPSC" or "Commission"). Under the CPSIA, the scope of the Section 15(b) reporting requirement has expanded considerably, the CPSC has greater authority to respond to the reports, and the potential penalties for failure to report have increased exponentially. The CPSC has already begun enforcing its new Section 15 authority aggressively. In addition, the Obama Administration's proposed 71% increase in the Commission's FY 2010 budget suggests that tougher enforcement of all CPSC requirements can be expected going forward.

Congress designed Section 15 to force companies regulated by the CPSC to self-report potential product hazards, and to provide the CPSC with the authority necessary to address any such hazards. Specifically, Section 15(b) requires manufacturers, distributors,

importers, and retailers to notify the CPSC of certain potential product safety hazards, and it authorizes the CPSC to order regulated companies to take certain corrective actions when it determines that a hazard exists.

The CPSIA, enacted in August 2008, expands the scope of product safety violations that trigger Section 15(b) reporting requirements, and it grants the CPSC additional corrective action authority. This client alert describes product hazard reporting and the CPSC's authority to address product hazards before and after the enactment of the CPSIA, and then discusses recent major CPSC enforcement actions, suggesting that Section 15(b) enforcement will be a key priority for the Commission.

Section 15 Pre-CPSIA

Before the enactment of the CPSIA, "Section 15(b) Reports" were required when a regulated entity obtained information reasonably supporting the conclusion that a consumer product:

- Failed to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard upon which the Commission had relied;
- Contained a defect which could create a substantial product hazard; or
- Created an unreasonable risk of serious injury or death.

Section 15(b) applied to "consumer products," a term defined only in the CPSA and not in the Federal Hazardous Substances Act ("FHSA"), the Flammable Fabrics Act ("FFA"), the Poison Prevention Packaging Act ("PPPA"), or the Refrigerator Safety Act ("RSA").

While ambiguity existed as to whether Section 15(b) applied to the FHSA, FFA, PPPA, and RSA, CPSC interpretive regulations at 16 C.F.R. § 1115.2(d) took the position that Section 15(b) applied to those other Acts under operation of Section 30(d) of the CPSA.

Section 15(b) Reports were required to be submitted to the CPSC "immediately." The Commission interpreted this to mean generally within 24 hours of learning of a potential product hazard (see 16 C.F.R. § 1115.14(e).) Section 15(b) Reports were not required, however, if the regulated company possessed actual knowledge that the CPSC had been adequately informed of the potential product hazard.

Perhaps the most noteworthy aspect of the Section 15(b) reporting requirement -- and a source of considerable ambiguity for regulated companies -- was the requirement to submit a Section 15(b) Report when information reasonably supported a conclusion that a product either contained a defect which could create a substantial product hazard or created an unreasonable risk of serious injury or death. This precautionary standard required companies to report potentially hazardous products before an injury or death occurred. In addition, making these judgments involved a fact-intensive and subjective approach. While regulatory provisions provided a measure of guidance, no single, bright-line test existed for making these determinations.

In contrast, regulated companies were essentially required to automatically submit a Section 15(b) Report when they possessed information reasonably supporting the conclusion that a product failed to comply with a consumer product safety rule or voluntary standard under the CPSA. These determinations almost always depended upon straightforward scientific or engineering conclusions. For example, bicycle helmets must meet several safety specifications, including peripheral vision requirements. Once a regulated company knew that a helmet did not provide sufficient peripheral vision, Section 15(b) reporting obligations were automatically triggered.

CPSC interpretive regulations detailing the reporting responsibilities appear in 16 C.F.R. Part 1115, and are further explained in the CPSC's Recall Handbook, available at http://www.cpsc.gov/BUSINFO/8002.html.

Submission of a Section 15(b) Report about a product did not automatically mean that the CPSC would conclude that a product created a product hazard or that corrective action was necessary. Depending on the nature of the hazard, many reports required no further action.

If the CPSC determined that corrective action was necessary, it could order such actions, e.g., provide notice to the public, replace products, and recall products, after providing interested persons a right to a hearing. As a practical matter, however, most recalls were "voluntary," i.e., no hearing occurred and the regulated company consulted with the CPSC to develop a corrective action program. (In Fiscal Year 2008, all 563 recalls overseen by the CPSC were voluntary.)

Section 15 Post-CPSIA

Congress essentially left intact the core pre-CPSIA Section 15 requirements discussed above. Congress also increased the scope of products potentially subject to Section 15(b) reporting requirements and modestly expanded the CPSC's corrective action authority.

Among other things, the CPSIA amended the CPSA to resolve an ambiguity regarding the applicability of Section 15 outside the CPSA. The CPSIA explicitly expanded Section 15(b) reporting requirements to apply to all products covered by any statute enforced by the CPSC, i.e., the FHSA, the FFA, the PPPA, and the RSA.

The CPSIA also extended the former "automatic" reporting requirements applicable to non-compliance with consumer product safety rules and voluntary standards under the CPSC to apply to non-compliance with rules, regulations, standards, and bans enforced by the CPSC under any statute. The CPSA did not previously require a Section 15(b) Report when products did not comply with rules, regulations, standards, and bans promulgated under the FHSA, PPPA, FFA and RSA. Instead, companies, as described above, undertook the difficult task of determining whether a defect or unreasonable risk of serious injury or death existed.

The CPSIA eliminated this problem by requiring, in essence, an automatic Section 15(b) Report when a product fails to comply with any rule, regulation, standard, or ban promulgated under any CPSC-administered statute. These include, among other things, the restrictions on lead in children's products; restrictions on lead paint in toys and other articles intended for children (this standard existed pre-CPSIA); restrictions on phthalates in children's toys and child care articles; and restrictions imposed by the ASTM Toy Safety Standard. The reporting requirements also appear to apply to obligations under the CPSIA to test, certify, and label certain consumer products.

The CPSIA also granted the CPSC additional corrective action authority, after providing opportunity for a hearing (1) to cease distribution of a product, (2) to notify others in the supply chain to cease distribution, and (3) to notify State and local public health officials. (Note that the CPSIA provides that a hearing is not required, and the CPSC may take certain corrective actions, if a hazard is imminent and the CPSC has filed an action under Section 12 of the CPSA.)

The new Section 15(b) reporting requirements, along with the increase in the CPSC's budget and resources and more public awareness of consumer product hazards, may increase the frequency of recalls, according to the General Accounting Office ("GAO") report Feasibility of Requiring Financial Assurances for the Recall or Destruction of Unsafe Goods, Apr. 22, 2009, available at http://www.gao.gov/new.items/d09512r.pdf. (The GAO submitted the report to Congress pursuant to CPSIA Section 224.) This raises the question of whether regulated entities will be less willing to enter into "voluntary" agreements and will force the CPSC, before taking action, to either make an imminent hazard determination and file an action under CPSA Section 12, or conduct a hearing and determine that a substantial product hazard exists under Section 15. As indicated above, the CPSC has historically not used its authority to order notices and recalls; instead, it has entered into "voluntary" agreements with regulated entities.

With implementation of these new authorities ongoing, the precise nature of a company's new Section 15 obligations, and the CPSC's approach to implementing corrective actions, remains unclear. However, it is clear that companies, particularly those selling children's products, child care articles, and toys, will be required to submit Section 15(b) Reports to the CPSC if any of their products should fail to meet the relevant restrictions.

Section 212 of the CPSIA directed the CPSC to establish a public consumer product safety database that would be publicly available, searchable, and accessible through the Commission's website. Section 15(b) Reports are not included among the mandatory content for the database, although the CPSC may add them as "any additional information it determines to be in the public interest."

Post-CPSIA Enforcement of Section 15(b)

Section 217 of the CPSIA substantially increased the potential civil penalties for Section 15(b) violations set forth in Section 20(a) of the CPSA. It increased the maximum penalty for a knowing violation to $100,000 (from $5,000, a 20-fold increase), with penalties being assessed on a per-unit-sold basis. The CPSIA also increased the maximum penalty for any related series of violations to $15,000,000 (from $1,250,000, a 12-fold increase). The CPSC is required to issue a final regulation providing its interpretation of the enumerated penalty factors by August 14, 2009. These increased maximum penalties will take effect on that date or the date the regulation is issued, if earlier.

Section 218 of the CPSIA authorized state attorneys general to enforce certain aspects of the CPSC, as amended. This authority did not include authority to enforce the requirement to submit Section 15(b) Reports.

The CPSC has already begun implementing its new Section 15 authority. For example, in April 2009, the CPSC announced a new Section 15(b) reporting feature. See CPSC Announces New Section 15(b) Reporting Feature, available at http://www.cpsc.gov/businfo/sect15features.pdf. The feature enables regulated entities to submit Section 15(b) Reports via the CPSC's webpage, thereby streamlining how the Commission receives and processes information about potential product hazards. The creation of this feature suggests the Commission is preparing for an onslaught of Section 15(b) Reports.

In addition, two recent CPSC enforcement actions suggest that the Commission will place a high priority on the enforcement of Section 15 obligations. On April 7, 2009, the CPSC issued a press release announcing settlements with 14 companies for their failure to submit Section 15(b) Reports. The CPSC accused the settling companies of knowingly failing to report that children's hooded sweatshirts and jackets they sold had drawstrings at the hood and/or neck, a feature in children's outerwear which the CPSC had determined in May 2006 to be defective and a substantial risk of injury to children. The settling companies agreed to pay $1,055,000 in civil penalties. A press release describing the settlement is available at http://www.cpsc.gov/cpscpub/prerel/prhtml09/09188.html.

A week later, on April 14, 2009, the CPSC announced another significant settlement, one that emphasizes a company's obligation to provide to the CPSC full and updated Section 15 disclosures. The settling company agreed to pay a $1.1 million civil penalty for its failure to submit information regarding hazards presented by magnetic building sets. According to the CPSC, a predecessor company had submitted several incomplete and misleading reports to the Commission in 2005 and 2006. For example, one report attributed product problems to product misuse despite allegedly possessing over a thousand reports of product defects. Other reports only partially responded to requests for information from the CPSC. These series of events ultimately led the CPSC to issue a subpoena to obtain product and incident information. Additional information regarding the settlement is available at http://www.cpsc.gov/cpscpub/prerel/prhtml09/09193.html.

These recent actions, whose penalties do not reflect the increases that will become available under the CPSIA later this year, indicate that the CPSC will strictly enforce Section 15(b). In light of the expanded scope of violations that may potentially trigger a Section 15(b) Report and the greatly increased penalties, regulated companies should consider how their businesses may be affected by the new Section 15 obligations created by the CPSIA.

For more information about Section 15(b) reporting requirements or about the statutory and regulatory requirements enforced by the CPSC, please contact Mark Duvall (mduvall@bdlaw.com), Paul Hagen (phagen@bdlaw.com), or Bart Kempf (bkempf@bdlaw.com).

BEVERIDGE & DIAMOND PC

EPA Proposes New Renewable Fuel Standard Regulations Using Lifecycle Greenhouse Gas Analysis

The U.S. Environmental Protection Agency ("EPA") proposed regulations on May 5 to implement significant changes to the federal Renewable Fuel Standard program (known as "RFS-2"). In what may have implications for regional and international efforts to regulate renewable fuels – as well for broader climate change and energy regulation now being considered by Congress and the Obama Administration – the RFS-2 proposal represents the EPA's first-ever use of lifecycle analysis of greenhouse gas ("GHG") emissions in a regulatory program.

Required by the Energy Independence and Security Act of 2007 ("EISA") to have the new rules in place by December 19, 2008, EPA's proposal was delayed in large part due to the complexity of adding lifecycle assessments to the eligibility determination for renewable fuels. However, unlike California's recently adopted Low-Carbon Fuel Standard (LCFS), which concluded that indirect land-use changes associated with most corn ethanol contribute to a "carbon intensity" that is comparable to or greater than that of conventional gasoline,[1] EPA's proposal does not determine whether corn-based ethanol or other biofuels will ultimately qualify as "renewable fuel" under the RFS. Instead, the proposal lays out two possible options for assessing GHG emission impacts over both a 30- and 100-year time period, reflecting the Agency's assessment that the displacement of petroleum by biofuels over time can in some instances "pay back" earlier land use emission impacts.

EPA's lifecycle emissions analysis will now be subject to formal peer review and a public workshop, in addition to a 60-day public comment period on the full proposal upon its publication in the Federal Register. Background documents, including a pre-publication version of the 549-page RFS-2 proposal, are available at: http://www.epa.gov/OMS/renewablefuels/#regulations. For more information about the new proposal, or renewable fuel or climate change regulation more generally, please contact Russ LaMotte at rlamotte@bdlaw.com or Alan Sachs at asachs@bdlaw.com.

A. General Requirements and New Changes to the RFS Program

Under the RFS program, EPA sets an annual benchmark representing the amount of renewable fuel that must be used by each fuel refiner, blender, or importer ("obligated parties"). The RFS program, initiated in 2007, includes registration, recordkeeping and reporting requirements for all renewable fuel producers and obligated parties, and established a trading market in renewable fuel credits, known as Renewable Identification Numbers ("RINs").

As required by the EISA, changes under EPA's new proposal to the existing RFS program include:

- Significant expansion of the escalating volumes of renewable fuel required each year (to reach 36 billion gallons by 2022);
- Separation of the volume requirements into four categories of renewable fuel ("conventional biofuel," "advanced biofuel," "biomass-based diesel," and "cellulosic biofuel");
- Important changes to the definition of renewable fuel (including a new requirement that crops used to produce qualifying renewable fuels be harvested from agricultural land cleared or cultivated prior to December 2007);
- Expansion of the types of fuels subject to the standards to include diesel and certain nonroad fuels;[2] and
- Inclusion of specific types of waivers and EPA-generated credits for cellulosic biofuels.

EPA's proposed changes are intended to become effective on January 1, 2010. Obligated parties will remain subject to the Agency's existing RFS regulations until the new regulations are finalized.

In order to implement the RFS-2 program, parties that generate, own, transfer or use RINs will need to re-register under the RFS-2 provisions and modify their compliance approaches to accommodate the proposed changes. Regulated parties will also need to establish new contractual relationships to cover the different types of renewable fuel required under RFS-2. In addition, newly regulated parties (for example, diesel producers or importers) may now need to develop compliance systems for the RFS program for the first time.

B. New GHG Lifecycle Emissions Analysis

The 2007 EISA introduced a new eligibility requirement for corn ethanol from plants constructed after December 2007, which must now release at least 20 percent less lifecycle GHG emissions when compared to average emissions from petroleum fuels in order to qualify as a renewable fuel under the statute.[3] In addition, lifecycle GHG emissions must be at least 40 to 44 percent less than baseline lifecycle GHG emissions to qualify as an advanced biofuel, 50 percent less than baseline lifecycle GHG emissions to qualify as a biomass-based diesel, and 60 percent less than baseline lifecycle GHG emissions to qualify as a cellulosic biofuel.

Lifecycle GHG emissions are defined by the EISA to mean the aggregate quantity of GHGs related to the full fuel cycle -- from feedstock generation and extraction through distribution and delivery and use of the finished fuel. In its proposal, EPA indicates that compliance with the EISA mandate makes it necessary to assess direct and indirect impacts of petroleum-based and renewable fuels that occur both within the United States and in other countries. For biofuels, this includes evaluating significant emissions from indirect land use changes that occur in other countries as a result of the increased production and importation of biofuels in the United States.[4]

Importantly, EPA notes that although biofuel-induced land use change can produce significant near-term GHG emissions, the displacement of petroleum by biofuels over time can "pay back" earlier land conversion impacts. As a result, EPA's proposal includes two options for assessing future GHG emission impacts: a 30-year time period that values equally all emission impacts, regardless of time of emission impact; and a 100-year time period that discounts future emissions at two percent annually.

For example, assuming 100 years of corn ethanol produced in a basic dry mill ethanol production facility and using a two percent discount rate, corn ethanol represents a 16 percent reduction in GHG emissions compared to the 2005 baseline gasoline assumed to be replaced. By contrast, assuming 30 years of corn ethanol production and use and no discounting of the GHG emission impacts, EPA predicts that corn ethanol will have a five percent increase in GHG emissions compared to petroleum gasoline. EPA's proposed regulations rely on the 100-year model, identifying eight different production pathways (for example, natural gas or biomass-heated ethanol plants) under which ethanol may qualify toward an obligated party's RFS obligations. Specific types of biodiesel, cellulosic biodiesel, non-ester renewable diesel and cellulosic gasoline are also expected to meet or exceed eligibility requirements for renewable fuels under the 100-year model.

The California Air Resources Board ("CARB") has specifically noted that its recently adopted LCFS is intended to "complement" the federal RFS, which according to CARB's analysis will achieve only about 30 percent of the LCFS's anticipated GHG benefits. Unlike the California LCFS, the RFS program does not prescribe specific GHG controls on transportation fuels. Instead, it requires that obligated parties use specified volumes of renewable fuels that meet the program's lifecycle GHG reduction thresholds.

Moreover, the two programs rely on different models and assumptions to determine lifecycle GHG values, meaning that fuels qualifying under the federal RFS will not necessarily qualify under the California program. While EPA notes in its proposal that it will continue to coordinate with California on the biofuels lifecycle GHG analysis work in particular, these different models raise broader policy questions that may be further complicated by the possible adoption of a national low-carbon fuel standard or other regional mandates.

C. Additional Renewable Fuel Initiatives

On the same day EPA released its proposed regulations, President Obama signed a directive establishing a Biofuels Interagency Working Group ("BIWG"), which will be jointly chaired by the EPA Administrator and the secretaries of Agriculture and Energy. The BIWG is tasked with developing a "comprehensive" market development program, coordinating fuel infrastructure policies, and developing policies to reduce the overall environmental footprint of growing biofuel crops.

In addition, the President ordered the U.S. Department of Agriculture ("USDA") to more quickly increase distribution of federal loan guarantees and grants in the biofuels sector, while the U.S. Department of Energy ("DOE") announced that it will begin making available more than $786 million from the American Recovery and Reinvestment Act for advanced biofuels research, development and test projects.

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[1] *See* Beveridge & Diamond, P.C., "California Adopts First Low-Carbon Fuel Standard," available at: http://bdlaw.com/news-562.html.

[2] While EPA is proposing that fossil-based heating oil and jet fuel will not be included in the fuel used by a refiner or importer to calculate its renewable fuel volume obligation, renewable fuels used as or in heating oil and jet fuel may generate RINs for credit purposes.

[3] In its proposal, EPA has interpreted this "grandfathering" provision to exclude ethanol produced following an expansion of an existing ethanol facility beyond the plant's inherent capacity.

[4] EPA's proposal suggests that land use impacts of petroleum production would not have an appreciable impact on the 2005 baseline GHG emissions assessment, but the Agency notes that it will "more carefully consider potential land use impacts of petroleum-based fuel production for the final rule" and expressly invites comments that would support such an analysis.

Firm News & Events

Beveridge & Diamond, P.C. to Receive Two Major Civil Rights Awards from *Washington Lawyers Committee for Civil Rights and Urban Affairs*

We are pleased to announce that Benjamin F. Wilson, Managing Principal of Beveridge & Diamond, P.C. and separately, the Firm itself will be receiving awards for outstanding achievement in civil rights law by the *Washington Lawyers Committee for Civil Rights and Urban Affairs* at its annual awards lunch on June 16, 2009.

Mr. Wilson, along with Congressman John Lewis of Georgia, will be receiving the Wiley Branton Award, which is given to a member of the legal community whose lifetime efforts on behalf of civil rights advocacy exemplify civil rights lawyer Wiley Branton's deep commitment to civil rights issues. It is a major award in the civil rights community and reflects not only Mr. Wilson's long standing commitment to pro bono work, but his hands on undertaking of such work for many years.

Separately, Beveridge & Diamond is receiving an award for our work and highly successful outcome in which we sued the City of Manassas in connection with its unlawful efforts to drive immigrant residents from the City. The suit resulted in a settlement providing for major legal reform in the City and damages to our clients, the Equal Rights Center and 11 individual plaintiffs.

These two awards reflect Ben Wilson's and our firm's long standing commitment to pro bono work and our many achievements in our civil rights cases. For additional information about the pro bono program at Beveridge & Diamond, please see: http://www.bdlaw.com/practices-probono.html.

Product Stewardship Roundtable for Medical Device Manufacturers

Beveridge & Diamond, P.C. will host a Medical Device Product Stewardship Roundtable to be held on Thursday, June 18, 2009 at our Washington, D.C. offices. Topics to be covered include:

- Overview of Global Product Regulatory Trends
- EU RoHS Directive Primer and 2010 Restrictions
- California RoHS and Proposed U.S. RoHS Legislation
- International Initiatives Targeting Chemicals in Products
- Product Take-Back and Recycling Mandates
- Product Stewardship in Latin America
- Restrictions on Exports for Refurbishment and Recycling

The Roundtable will explore these and other developments impacting product stewardship, market access, material restrictions and the end-of-life management of medical devices in the U.S. and in key markets world-wide. The meeting will also further an exchange of information on compliance approaches and possible advocacy strategies for medical device manufacturers. As part of the discussion, former EPA General Counsel Jonathan Z. Cannon will provide an update on the environmental priorities of the Obama Administration. For more information, please contact Janine Militano at jmilitano@bdlaw.com, or Paul Hagen at phagen@bdlaw.com.

Previous Issues of Texas Environmental Update

To view all previous issues of the Texas Environmental Update, please go to http://www.bdlaw.com/publications-93.html.

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