Texas Environmental Update

BEVERIDGE & DIAMOND PC

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Texas Developments

Public Citizen Sues TCEQ to Force Regulation of CO2 Emissions

On October 6, 2009, Public Citizen, Inc. filed a lawsuit against the Texas Commission on Environmental Quality ("TCEQ") in Travis County District Court in Austin requesting that TCEQ be directed to regulate carbon dioxide ("CO_2") emissions pursuant to the Texas Clean Air Act ("TCAA"). Asserting that CO_2 is, by definition, an "air contaminant" that TCEQ is required to regulate under the TCAA, Public Citizen has requested that the Court declare: (1) that TCEQ rules are invalid to the extent they allow unlimited emissions of CO_2 by coal and petcoke-fuelled power plants; (2) that TCEQ rules cannot be applied to preclude parties from presenting evidence regarding CO_2 emissions and climate change in contested case hearings before the State Office of Administrative Hearings ("SOAH"); and (3) that air quality permits for power plants cannot be issued without findings regarding CO_2 emissions. In the petition, Public Citizen references three contested case hearings regarding power plant air permit applications in which persons opposing the application unsuccessfully attempted to offer evidence regarding CO_2 emissions. Looking forward, Public Citizen predicts that in the next twelve months TCEQ could issue permits for at least five new power plants that could increase annual CO_2 emissions by a total of approximately 37 million tons. The petition can be accessed at http://www.citizen.org/texas/.

TCEQ Responds to EPA's Proposal to Reject Texas SIP Submittals

As reported last month, on September 23, 2009 the U.S. Environmental Protection Agency ("EPA") published three separate proposals to disapprove various Texas State Implementation Plan ("SIP") revision submittals based upon EPA's position that they fail to meet federal Clean Air Act requirements. On October 8, 2009, the first in an anticipated series of meetings with TCEQ and EPA staff was held in Austin. Participants in the meeting included EPA's Assistant Administrator for the Office of Air and Radiation, and TCEQ Commissioners and executive management. Although the TCEQ/EPA meeting was closed to the public, on that date EPA also met with representatives of environmental groups and industry representatives to discuss the EPA proposals. EPA has indicated that the agency will consider scheduling public meetings regarding the proposals if sufficient public interest exists.

As requested by EPA at the above-referenced meeting with TCEQ, by letter dated October 23, 2009, TCEQ's Executive Director provided EPA's Assistant Administrator for the Office of Air and Radiation a written response to seven requests that EPA recently made relating to the proposed SIP disapprovals. Specifically, EPA requested that TCEQ (1) advise industry that it would be unwise for new permit applicants to seek flexible permits or to become qualified facilities because of the long-term ramifications if EPA's final action on the proposals is consistent with the proposals; (2) set a timeline for TCEQ to proposed rules addressing the EPA's proposals, including emergency rulemaking for re-establishing Prevention of Significant Deterioration ("PSD"); (3) publish a strategy to reform existing permits should proposed disapprovals become final; (4) initiate rulemaking to provide for a 30-day public comment period and opportunity for public hearing on the air quality impact of major and minor source draft permits, and provide the opportunity for a public hearing for new or modified sources subject to PSD; (5) increase the transparency of new and re-issued Texas Title V permits by including requirements of any pre-existing federal

permits, identifying permit conditions incorporated by reference from underlying permits and identifying State only requirements; (6) submit a schedule for correcting EPA-identified deficiencies in two Title V permit petitions; and (7) clarify the legal meaning of Texas minor source program terms in comparison to federal definitions.

EPA Initiates Process to Redesignate Harris County as Nonattainment for 1997 PM2.5 NAAQS

On October 8, 2009, Larry Starfield, Acting Regional Administrator, EPA Region VI, notified Governor Perry that EPA is initiating the process under Clean Air Act section 107(d)(3) to redesignate Harris County and nearby contributing areas as nonattainment for the 1997 annual PM2.5 NAAQS. EPA requests that Texas provide its recommendations for such redesignation within 120 days.

EPA's action is based on air quality monitoring data for PM2.5 for a three-year time period that reflects that one monitor in Harris County is now violating the 1997 annual PM2.5 NAAQS. Recognizing that the three-year data includes some data that TCEQ views as influenced by sources outside the state, EPA has indicated that it will determine whether data for certain days should be excluded.

TCEQ will be accepting informal comments on the proposed attainment designation recommendations until November 23, 2009. The agency will also hold an informational meeting for public input on November 19, 2009. Additional information about submitting comments and the informational meeting is available at http://www.tceq.state.tx.us/implementation/air/sip/Hottop.html.

If EPA determines that this area does not meet the PM2.5 NAAQS, Texas will be required to submit a State Implementation Plan that includes control strategies and assures the public health protections intended by the standards. A copy of EPA's letter to Governor Perry is available at www.bdlaw.com/assets/attachments/EPA_Letter_to_Governor_Perry.pdf.

TCEQ Pharmaceutical Study Underway

TCEQ has begun implementation of Senate Bill 1757 ("Bill") requiring that the agency complete a study on methods of disposal of unused pharmaceuticals so that they do not enter a wastewater system. The agency is required to provide a report of its results and recommendations to the Texas Legislature by December 1, 2010.

The Bill requires that TCEQ consider: (i) the disposal methods currently used in the state; (ii) any alternative disposal methods used in other states; and (iii) the effects on public health and the environment of the various disposal methods. In conducting the study, TCEQ may solicit input from various interested parties including, among others, pharmaceutical manufacturers, health care providers, solid waste management service providers, water suppliers and local governments.

Based on a staff report provided during the Drinking Water Advisory Work Group meeting held on October 20, 2009, the agency's study team is being led by Elston Johnston and Jessica Huybregts of TCEQ's Public Drinking Water Section and includes participation by various TCEQ staff in other programs. The agency study team is in the process of identifying interested external stakeholders to participate in an advisory group designed to obtain input on this issue. Additional details on the work of the agency study team are available at TCEQ's website at http://www.texasadmin.com/cgi-bin/amtnrcc.cgi.

Railroad Commission of Texas Completes Sunset Self-Evaluation Report

The Railroad Commission of Texas (RRC), along with a number of other agencies in the 2009-2011 review cycle, filed its Self-Evaluation Report with the Sunset Advisory Commission last month. The Self-Evaluation Report, a key component of the Sunset review process, includes information about the agency's history, operations and program functions as well as an identification of policy issues that merit consideration.

The policy issues identified by the RRC include those related to: (i) consolidation of state energy programs at the RRC; (ii) revision of the agency's funding structure to ensure consistent but flexible funding streams; (iii) changing the name of the agency to the Texas Energy Commission to more accurately reflect its jurisdiction; (iv) changing the structure of the RRC's governing body to a single elected commissioner; and (v) expanding the agency's authority to enforce damage prevention laws for the movement of earth near pipelines to include interstate pipelines.

The Self-Evaluation Report for the RRC and those of most other agencies under this review cycle are currently available at http://www.sunset.state.tx.us/82.htm. The Self-Evaluation Report for TCEQ, which is also under the 2009-2011 review cycle, will be available later this month. The next step in the Sunset review process involves an extended evaluation by Sunset Advisory Commission staff that includes public input on recommended management and legislative changes.

TCEQ Announces Availability of New TERP Grants

On October 14, 2009, TCEQ announced the availability of $26 million in grants under the Texas Emissions Reduction Plan ("TERP") Rebate Grants program. The Rebate Grants program is intended to provide a simplified first-come, first-serve grant program to upgrade or replace diesel heavy-duty vehicles or equipment in Nonattainment and Near-Nonattainment areas (Houston-Galveston-Brazoria; Dallas-Fort Worth; Beaumont-Port Arthur; Tyler-Longview; Austin; and San Antonio). The Rebate Grants program offers the advantage of a shorter application form and eligible reimbursement amounts that are predetermined based on default usage rates (miles/hours). Once an application is determined complete and eligible, the grant is awarded and a contract issued, without review, ranking, or selection.

TCEQ is currently accepting applications for funding under the program. Applications are being processed, and awarded on a first-come-first-serve basis, and can be submitted to TCEQ until March 31, 2010 or until all funding has been distributed. As of October 26, 2009, approximately $19 million in funding remained available. More information about the TERP Rebate Grants program can be found at http://www.tceq.state.tx.us/implementation/air/terp/rebate.html#counties.

TCEQ Requests Comment on Renewal of MSW Landfill Title V General Operating Permit

TCEQ is requesting comments on the renewal of Title V General Operating Permit (GOP) Number 517 for Muncipal Solid Waste Landfills. The GOP renewal is federally required and will incorporate recent federal and state rule changes. A hearing on the renewal permit will be held on December 7 2009 at 1:30 pm in Room 201A, Bldg. B of the TCEQ offices in Austin, Texas. Comments may be submitted until December 11, 2009. For additional information, please go to http://www.tceq.state.tx.us/permitting/air/announcements/nsr_announce_10_09_09.html.

H204Texas: The Water Event

"H204Texas: The Water Event" will be held on Nov. 16-17, 2009 at the Omni Hotel in Fort Worth, Texas. The purpose of the conference is to "increase public awareness of the critical water shortfalls facing Texas and begin mobilizing support for full implementation of the State Water Plan." The conference is sponsored by State Sen. Kip Averitt, chair of the Senate Natural Resources Committee, and State. Rep. Allan Ritter, chair of the House Natural Resources Committee, in cooperation with the Texas Water Foundation. Robert Glennon, author of "Unquenchable: America's Water Crisis and What to Do About it," will be the keynote speaker. Other scheduled speakers include Lieutenant Governor David Dewhurst, Texas Department of Agriculture Commissioner Todd Staples, and Texas Water Development Board Chairman James Herring. Registration for the event is available at http://www.texaswater.org/waterfortexas.

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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

Chemical Plant Security Legislation Advances with Companion Bill on Drinking Water Utilities

Congress prevented the Department of Homeland Security's temporary authority to regulate chemical plant security from expiring as originally scheduled on October 4, 2009. In recent weeks Congress has worked both to extend the temporary authority and to draft permanent authority. Key recent developments include:

- Congress approved, and the President signed, an extension in the temporary authority until October 31, 2009.
- Congress approved and sent to the President for approval an extension in the temporary authority until October 4, 2010.
- The permanent authority bill in the House, which had been reported by the Homeland Security Committee, has now been reported by the Energy and Commerce Committee as well. It still has a provision on inherently safer technology, but the citizen suit provision has been cut back. It still needs to be reported by the Judiciary Committee before it can go to the full House of Representatives for a vote.
- A companion bill to address security at drinking water facilities was reported by the Energy and Commerce Committee.
- The Obama Administration has provided its principles for chemical plant security legislation.

The Senate still has not introduced a bill, so next session the issues debated in the House are likely to be reconsidered in the Senate.

This alert explains those developments in greater detail, available at http://www.bdlaw.com/assets/attachments/2009-10-26%20CFATS%20Water.pdf.

Circuits Avoid Conflict in Climate Change Nuisance Cases; District Court Diverges

On September 21, the Second Circuit issued its *Connecticut v. Am. Elec. Power Co.* decision reinstating public nuisance tort actions against private emitters of greenhouse gasses ("GHGs"), holding that they did not present non-justiciable political question or Article III standing problems. See the Beveridge & Diamond client alert regarding this game-changing decision, available at http://www.bdlaw.com/news-669.html. We noted there that the case likely would influence several related cases pending in other circuits. Two of those cases, *Native Village of Kivalina v. ExxonMobil Corp.*, No. CV-08-1138, (N.D. Cal. Sept. 30, 2009) and *Comer v. Murphy Oil USA, Inc., et al.*, No. 07-60756 (5th Cir. Oct. 16, 2009), have since been decided. This article evaluates those decisions as they relate to *Conn. v. AEP* and the revival of nuisance law. In short:

- In *Comer*, The Fifth Circuit agreed with the Second Circuit that climate change nuisance claims do not present non-justiciable political questions and that the plaintiffs had Article III standing to bring their nuisance claims. *Comer* explicitly found that standing exists for private individuals, affirming *Conn. v. AEP*'s expansion of the *Mass. v. EPA* standing doctrine. Also significant is that Comer concerned a tort suit for damages, whereas the plaintiffs in *Conn. v. AEP*, a coalition of state and local governments and three land trusts, sought only injunctive relief.
- In *Kivalina*, the District Court's decision squarely conflicts with *Conn v. AEP* (and *Comer*). There, the court found that Article III standing was *not* present and that the claims presented non-justiciable political questions. The *Kivalina* decision acknowledges the Second Circuit's decision in *Conn v. AEP*. With respect to that court's conclusion that "federal courts are competent to deal with these issues", it

comments, "[t]his Court is not so sanguine." *Kivalina* at 12.

- Because both cases were decided on the pleadings, neither case resolved the causation issues that likely will present the largest hurdles to plaintiffs seeking to win climate change nuisance actions. One of the three judges on the *Comer* panel went as far as to say that if the lower court's decision had rested on causation grounds he would have affirmed the motion to dismiss.

For more details, go to http://www.bdlaw.com/news-711.html. For more information, contact Nico van Aelstyn at nvanaelstyn@bdlaw.com or Russ LaMotte at rlamotte@bdlaw.com.

EPA Proposes to Uphold Johnson Memorandum

On October 7, 2009, EPA proposed to issue a rule that would uphold the Bush Administration's "Johnson Memorandum." 74 Fed. Reg. 51,535 (Oct. 7, 2009). Issued in 2008, the Johnson Memorandum reflected EPA's position that carbon dioxide (CO_2) and other greenhouse gases (GHGs) are not considered pollutants "subject to regulation" under the Clean Air Act (CAA), thus exempting these pollutants from "Best Available Control Technology" (BACT) requirements under the Prevention of Significant Deterioration (PSD) program. The Obama Administration had previously indicated that it would reconsider the Johnson Memorandum, in order to allow for public comment. This proposal now begins that public comment process. The new Administration's preferred interpretation, however, would retain the Bush Administration's approach.

Background

The current proposal, once finalized, will resolve an issue first raised in 2007, when the Supreme Court's decision in Massachusetts v. EPA concluded that CO2 and other GHGs were "air pollutants" under the CAA. In light of this decision, various environmental groups concluded that if GHGs were "air pollutants" under the CAA, they must also be "pollutants subject to regulation" under the PSD program. Because PSD permits must require BACT for all "pollutants subject to regulation" under the CAA, these groups began challenging PSD permits that did not require BACT for GHGs. *See, e.g., In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB Nov. 13, 2008). These challenges met with partial success: in *Deseret Power*, the EAB rejected the Sierra Club's claim that EPA must regulate GHGs, but at the same time found that the Agency had not sufficiently explained the basis for its conclusion that GHGs were not "pollutants subject to regulation." The EAB accordingly ordered EPA to reconsider the issue.

In response to this decision, the Bush Administration issued the so-called "Johnson Memorandum." Memorandum from Stephen Johnson, EPA Administrator, to EPA Regional Administrators, RE: EPA's Interpretation of Regulations that Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program (Dec. 18, 2008). The Johnson Memorandum set forth a more detailed explanation of EPA's official interpretation: that only those pollutants that were subject to actual emissions controls were "subject to regulation" under PSD.

This clear statement of policy was short-lived. On December 31, 2008, Sierra Club and others petitioned EPA to reconsider the Johnson Memorandum. On February 17, 2009, the new Obama Administration granted the Petition and announced its intent to conduct a rulemaking on the issue to allow for public comment.

The New Proposal

EPA's proposal presents five potential interpretations of the phrase "subject to regulation." These include:

- The interpretation set forth in the Johnson Memorandum, i.e., that only those pollutants subject to an "actual control" requirement will be considered "subject to regulation" under PSD.
- A pollutant will be considered "subject to regulation" if EPA regulations require "monitoring or reporting" of that pollutant.

- A pollutant will be considered "subject to regulation" if it is regulated under any State Implementation Plan (SIP).
- A pollutant will be considered "subject to regulation" at the time of an endangerment finding for that pollutant under the CAA.
- A pollutant will be considered "subject to regulation" as soon as EPA grants a waiver under section 209 of the CAA, which allows California to establish its own automobile emission standards in some situations.

EPA states that it favors retaining the interpretation set forth in the Johnson Memorandum, because it "best reflects [EPA's] past policy and practice, is in keeping with the structure and language of the statute and regulations, and best allows for the necessary coordination of approaches to controlling emissions of newly identified pollutants." 74 Fed. Reg. at 51,539. However, the Agency has requested comments on all five interpretations. EPA also requested comments on several other related issues, including whether the CO_2 monitoring and reporting requirements established under the Acid Rain Program were regulations promulgated "under the Act," the timing of when PSD regulatory requirements should apply, whether EPA should codify the final interpretation of "subject to regulation" in relevant CAA regulations, and the consequences of a given interpretation on the scope and timing of the triggering of the PSD program for GHGs.

EPA is accepting comments on this proposal until December 7, 2009. At the end of the day, if EPA issues its final light duty vehicle GHG emission standards before the "Johnson Rule" is final, the rule will have little impact on regulation of GHGs for purposes of PSD (because the light duty standards would be the actual control requirements the Johnson Rule proposes as the triggering mechanism). Still, however, the rule could apply to any new pollutant that EPA seeks to regulate in the future, so the principles are important for the regulated community. Therefore, companies should consider filing comments on the proposal.

For additional information, or if you have any questions, please contact David Friedland at dfriedland@bdlaw.com or (202) 789-6047; Laura McAfee at lmcafee@bdlaw.com, (410) 230-1330; or Sean Roberts at sroberts@bdlaw.com or (202) 789-6017.

EPA Shifts Policy on Aggregation of Sources in Oil and Gas Industry

The Environmental Protection Agency (EPA) has rescinded its 2007 policy for making major stationary source determinations in the oil and gas industry. In accordance with a Memorandum issued on September 22, 2009 by Gina McCarthy, Assistant Administrator for the Office of Air and Radiation (McCarthy Memorandum), EPA will no longer simplify the stationary source determination process in the oil and gas industry by focusing primarily on geographic proximity. Instead, the agency will apply its standard stationary source analysis to determine whether emission units in the oil and gas industry belong to what EPA has traditionally viewed as the same facility. Generally, this policy shift is expected to result in more aggregation of facilities in the oil and gas industry and therefore a higher likelihood that oil and gas exploration and production activities will require major source air permits.

EPA has traditionally analyzed source aggregation under the New Source Review construction permitting program (NSR) and the Title V operating permit program (Title V) by considering the following factors: (1) whether the activities are under the control of the same person (or persons under common control); (2) whether the activities are located on one or more contiguous or adjacent properties; and (3) whether the activities belong to the same industrial grouping. EPA has then applied these factors on a case-by-case basis, with a fairly aggressive interpretation of when aggregation is appropriate. There is a significant body of published guidance and applicability determinations applying these aggregation factors.

The terms "contiguous or adjacent" imply a geographic test for whether two or more facilities constitute a single source. And, indeed, EPA originally interpreted the test in this manner. In the original 1980 preamble, for example, EPA noted that the "source" would *not* include "activities that would be many miles apart along a long-line operation," and that facilities 20

miles apart would be too far to be considered a single source. 45 Fed. Reg. 52,676, 52,695 (Aug. 7, 1980). Over time, however, this geographic approach has been largely superseded in EPA guidance by a functional test that also includes factors such as operational dependence and proximity. This broader "functional" test has allowed the Agency to find that two facilities are part of the same source, even though they are many miles apart; geographic distance has become relevant to EPA only if it is so great that it prevents the two facilities from operating as a single plant. The "functional" approach has enabled the Agency to find a single source over much greater geographic distances than appears to have been contemplated in the 1980 preamble.

On January 12, 2007, EPA's Acting Assistant Administrator William Wehrum attempted to clarify how EPA would assess sources within the oil and gas industry, *i.e*. whether and when exploration and production activities should be aggregated into a single "stationary source" under NSR and Title V (the Wehrum Memorandum). The Wehrum Memorandum first noted that even where facilities are under common control and within the same SIC Code, the "unique geographical attributes of the oil and gas industry" (*e.g.*, well sites located hundreds of miles from the natural gas processing plant; production fields many square miles in size; and the separation of surface and subsurface property rights) require a detailed, complex analysis of whether the facilities can be considered "contiguous or adjacent." Given the importance of these geographical considerations, the Wehrum Memorandum concluded that it would be appropriate to focus first on geographic proximity in making source determinations. The Memorandum thus suggested that permitting authorities begin their analysis by evaluating whether each individual surface site would qualify as a separate stationary source; it further explained that two or more sites should be aggregated only if the sites are under common control and in close proximity to each other. This was significant because it moved away from the more subjective "functional" approach set forth in other Agency determinations, and instead moved back toward the original focus on geographic proximity and "common sense notions of a plant."

The McCarthy Memorandum rescinds this approach. Instead, EPA now explains that source determinations within the oil and gas industry must follow the same analysis of the three "fundamental criteria" as other source categories. Specifically, EPA instructs permitting authorities to conduct source determinations for the oil and gas industry by applying the three traditional aggregation criteria in a manner that is consistent with historical EPA permitting practice, *i.e*., on a case-by-case basis. The simplified aggregation analysis for single source determinations under NSR and Title V that was adopted in the Wehrum Memorandum is no longer acceptable to EPA.

For additional information on this development, please contact Stephen Richmond at srichmond@bdlaw.com, Laura McAfee at lmcafee@bdlaw.com, or Anne Finken at afinken@bdlaw.com.

EPA Announces Plan to "Revamp" CWA Enforcement Approach

On October 15, 2009, U.S. Environmental Protection Agency (EPA) Administrator Lisa Jackson announced an EPA plan to intensify enforcement under the Clean Water Act (CWA). EPA's Clean Water Act Enforcement Action Plan ("the Action Plan") describes current enforcement challenges and identifies three action items to "revamp[] enforcement" and address those challenges.

The Action Plan was developed by the EPA Office of Enforcement and Compliance Assurance (OECA) in response to a July 2, 2009 memorandum from Administrator Jackson that called on EPA to improve transparency, "raise the bar for clean water enforcement performance," and update EPA's use of technology. OECA developed the Action Plan following consultation with other EPA offices, states, industry and trade associations, environmental advocacy groups, and the general public.

To read the full article, please go to http://www.bdlaw.com/news-705.html. For further information, contact Richard Davis at (202) 789-6025, rdavis@bdlaw.com; Karen Hansen at (202) 789-6056, khansen@bdlaw.com; or Jennifer Abdella at (202) 789-6005, jabdella@bdlaw.com.

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Harmonizing Hazard Communication: OSHA Proposes to Implement the Globally Harmonized System

The hazard communication standard is the principal federal requirement governing labels and material safety data sheets for hazardous chemicals used in the workplace. On September 30, 2009, the Occupational Safety and Health Administration issued a proposed rule that would substantially modify the HCS to conform with the Globally Harmonized System of Classification and Labeling of Chemicals of the United Nations. OSHA's proposed modifications to the existing HCS include minor changes in terminology and definitions, revised criteria for classification of chemical hazards, revised labeling provisions, a specified format for safety data sheets, and requirements for employee training on labels and safety data sheets. Comments on the proposed rule are due by December 29, 2009. OSHA plans to schedule an informal public hearing on the proposed rule. This alert reviews the key aspects of the proposal.

For more information, contact Mark Duvall, mduvall@bdlaw.com. To read the full alert, please go to http://www.bdlaw.com/assets/attachments/BD%20Client%20Alert%20-%20OSHA%20Proposes%20to%20Implement%20the%20Globally%20Harmonized%20System.pdf.

OSHA Launches National Emphasis Program on Injury and Illness Recordkeeping

On September 30, 2009, the Occupational Safety and Health Administration initiated a national emphasis program on workplace injury and illness recordkeeping. Pursuant to this national emphasis program, OSHA will conduct inspections in selected industries to identify and correct under-reporting of workplace injuries and illnesses. The national emphasis program is a significant component of OSHA's efforts to address claims of inaccurate recording of occupational injuries and OSHA's overall efforts to heighten enforcement of workplace safety and health standards.

For more information, contact Mark Duvall, mduvall@bdlaw.com. For the full details of OSHA's National Emphasis Program on Injury and Illness Recordkeeping, please go to http://www.bdlaw.com/assets/attachments/BD%20Client%20Alert%20-%20OSHA%20Launches%20National%20Emphasis%20Proram%20on%20Injury%20Illness%20Reporting.pdf.

U.S., EU, Japan and Canada Conclude Third International Meeting on Cosmetics

The International Cooperation on Cosmetic Regulation ("ICCR") held its third annual meeting ("ICCR-3") September 9-11, 2009 in Tokyo, Japan to discuss issues relating to "cosmetics and cosmetic-like drug-products." The ICCR is an international group of cosmetics regulatory authorities consisting of the U.S. Food and Drug Administration ("FDA"), the Ministry of Health, Labour and Welfare of Japan, the European Commission Directorate General Enterprise, and Health Canada. ICCR aims "to maintain the highest level of global consumer protection, while minimizing barriers to international trade."

Previous ICCR meetings yielded several notable benchmarks including the members' pledge to follow the international guidelines of ISO International Standard 22716 (for the production, control, storage, and shipment of cosmetic products) wherever possible and to exchange information on cosmetic ingredient and product safety, including reports of serious adverse events. This year, ICCR members focused on the following topics:

- Industry groups' proposal for oversight of ingredient safety;
- Results of the EU workshop on nanotechnology in Ispra, Italy (July 2009);
- Industry groups' proposal for future ICCR work relating to cosmetics labeling;
- ISO activity on sunscreen standards;

- ICCR expansion; and
- Regulators' liaison to the Industry Technical Working Group.

To read the full article, please go to http://www.bdlaw.com/news-692.html. For more information, please contact Mark Duvall at mduvall@bdlaw.com.

Task Force Releases Interim Report Charting New Ocean Policy

On September 10, 2009, the newly-formed Interagency Ocean Policy Task Force released an interim report recommending a national ocean, coastal, and Great Lakes policy, an implementation strategy to meet suggested policy goals, and a coordination framework to ensure integration across jurisdictional lines. The Interim Report of the Interagency Ocean Policy Task Force was issued just 90 days after President Obama established the Interagency Ocean Policy Task Force on June 12, 2009, led by Nancy Sutley, Council on Environmental Quality Chair, and composed of senior government officials from the U.S. Committee on Ocean Policy. President Obama instructed the Task Force to recommend a national policy that both ensures the protection, maintenance, and restoration of ocean, coastal, and Great Lakes ecosystems and supports sustainable ocean and coastal economies, and a framework for coastal and marine spatial planning that addresses economic activity, conservation, user conflict, and sustainable use of ocean, coastal, and Great Lakes resources. The Interim Report is open for public comment until October 17, 2009.

The Proposed National Ocean Policy

In the Interim Report, the Task Force proposes a national policy that takes a comprehensive approach to stewardship that is a model of "balanced, productive, efficient, sustainable, and informed ocean, coastal, and Great Lakes use, management, and conservation within the global community." To this end, the Task Force recommends several general principles including sustainable, secure, and productive uses of the oceans, our coasts, and the Great Lakes in a manner that prevents or minimizes adverse environmental effects, while also harmonizing competing ocean, coastal, and Great Lake uses. To implement the draft national policy, the Interim Report advocates adopting an ecosystem-based management approach and utilizing coastal and marine spatial planning and management. Task Force members believe that coastal and marine spatial planning is an objective way to balance ocean, coastal, and Great Lakes uses and reduce cumulative impacts on the water environment from multiple human uses. The Task Force also identifies areas of special emphasis for implementation of its policy, including: climate change and ocean acidification, regional ecosystem protection and restoration, and water quality and sustainable land use.

This Task Force is the latest effort in a series of recent efforts to finally develop a comprehensive U.S. oceans policy. The Interim Report builds upon reports developed by the U.S. Commission on Ocean Policy and the Pew Oceans Commission in 2004 and 2003, respectively. After the U.S. Commission concluded, President George W. Bush issued Executive Order 13366 establishing the U.S Committee on Ocean Policy to advise the President on implementation of ocean policies. The new Task Force suggests modifying the structure of this existing Committee to give it a stronger mandate and direction. It proposes creating a National Ocean Council co-chaired by the Council on Environmental Quality Chair and the Director of the Office of Science and Technology Policy.

Marine Spatial Planning

In addition to the national policy mandate, President Obama directed Task Force members to recommend a comprehensive framework for coastal and marine spatial planning that addresses economic activity, conservation, user conflict, and sustainable use of ocean, coastal, and Great Lakes resources by the end of 2009. Marine spatial planning, an ecosystem management and planning tool that can be used to appropriately manage marine waters and minimize user conflicts, is used in Europe and is also being developed in Rhode Island and Massachusetts, among other states.

Opportunities to Comment

The Task Force is accepting public comments on its Interim Report on its website until October 17, 2009. Go to: http://www.whitehouse.gov/administration/eop/ceq/initiatives/oceans/interimreport/. The Interim Report and more information about the Task Force, as well as the President's June 12, 2009, memorandum are available at: http://www.whitehouse.gov/administration/eop/ceq/initiatives/oceans/. The Task Force also hosted public meetings across the cournty to solicit feedback on what should be included in a national policy. Hundreds of people attended the most recent meetings. The final two meetings will be held in Cleveland, OH, and New Orleans, LA, and will be announced at: http://www.whitehouse.gov/administration/eop/ceq/initiatives/oceans.

For additional information about the Task Force's recommendations and next steps, please contact Peter Schaumberg (pschaumberg@bdlaw.com) or Ami Grace-Tardy (agrace@bdlaw.com).

EU Council Revamps Commission's Proposal to Revise RoHS and WEEE Directives

European Union Member States are considering revisions to the RoHS[1] and WEEE Directives[2] beyond those first proposed by the European Commission in December 2008. See EU Commission Issues Proposed Changes to RoHS and WEEE Directives (B&D, December 8, 2008). The President of the European Council recently released a revamped RoHS Directive text that includes significant changes from the Commission's proposal, while the Council's changes to the WEEE Directive proposal were minimal.

1. Scope of RoHS Directive Redefined

The Council has proposed a potentially significant expansion of the scope of products covered by RoHS. Currently, apart from a few RoHS-specific exemptions, the RoHS and WEEE Directives apply to the categories of "electrical and electronic equipment" listed in Annex IA of WEEE Directive, with examples of covered products listed in Annex IB of the WEEE Directive. The Commission had proposed last year that the RoHS Directive apply to a fixed list of products in certain categories. The Council now appears to have rejected the Commission's fixed list of products and eliminated the RoHS Directive's reliance on product categories altogether. The Council's text would apply the RoHS restrictions to all "electrical and electronic equipment," with specific product exemptions to be set forth in an Annex. The current Council draft does not provide such an Annex, but the Council President calls on Member State delegations to suggest possible exemptions, which will likely be discussed during Council meetings in October 2009.

The Council appears to have accepted the Commission's proposal that RoHS cover medical devices as of 2014, monitoring and control equipment as of 2014, in vitro diagnostic medical devices as of 2016, and industrial monitoring and control equipment as of 2017. The Council's text also includes the list of 20 exemptions for specific applications of the restricted substances in these equipment categories that the Commission proposed last year.

2. RoHS Substance Restrictions

The RoHS Directive currently restricts market access in the European Union for a broad range of electrical and electronic equipment that exceed certain allowable concentrations of heavy metals (lead, mercury, cadmium, and hexavalent chromium) and some brominated flame retardants (polybrominated biphenyls (PBB) and polybrominated diphenyl ethers (PBDE)).

The Commission's December proposal would have required review and consideration of possible future restrictions for four additional substances: the phthalates Bis (2-ethylhexyl) phthalate (DEHP), Butylbenzylphthalate (BBP), and Dibutylphthalate (DBP), and the brominated flame retardant Hexabromocyclododecane (HBCDD). The Council's revised text eliminates mandatory review of these substances, but adds a process for expanding the list of restricted substances based on regulatory procedures similar to the current process of adding technical exemptions. Such a process would likely make it easier for additional

substances to be added to the RoHS Directive's restrictions.

3. RoHS Compliance Measures

The Council largely accepted the Commission's proposed new compliance measures for the RoHS Directive. These measures could require a significant change from current compliance practices. The existing Directive contemplates that by the act of putting covered equipment on the market, the manufacturer or importer has effectively declared they are RoHS compliant. The new measures, however, would require a compliance declaration, CE marking, and a host of conformity procedures to be performed before products can be sold on the EU market. In the event a non-compliant product is put on the market, the proposal would require disclosure to Member States in some cases. Member States would also be required to conduct market surveillance as part of their enforcement program.

4. WEEE Directive Revisions

The WEEE Directive requires mandatory end-of-life collection and recycling of a broad range of electrical and electronic equipment. Under the Council's revised text, the WEEE Directive would continue to be limited to the product categories set forth in Annex IA, although Member States are permitted to bring additional products into the scope of their WEEE implementing legislation.

Producers are currently required to finance collection, treatment, and recycling. The Council kept the Commission's proposal for a collection target of 65% by weight of all covered electrical and electronic equipment put on the market to go into effect in 2016, but it recognized there were some significant differences in Member State views on the feasibility of this target for all categories of equipment that may be addressed in upcoming Council discussions. In addition, recovery and reuse/recycling targets would increase across the board. For example, by 2011, recovery targets would be increased from 75% to 80% and reuse/recycling targets for components/materials from 65% to 70% by average weight of the appliance for IT equipment.

5. Timing for Adoption

The RoHS and WEEE legislation must be approved by both the Council and European Parliament before it becomes effective at the EU level; it must then be transposed into national law at the Member State level. It had been previously thought that agreement of both the Council and Parliament could be achieved by the end of 2009 or early 2010, but that no longer appears possible. The Council's proposed texts for the RoHS and WEEE Directives are scheduled for policy debate in the Environment Council's October 21, 2009 meeting with political agreement scheduled to be reached by the Environment Council's December 22, 2009 meeting. The Parliament is expected to consider the Council's decision in the Parliament's Environment Committee in April 2010, with review in the Parliament's plenary session scheduled for May 2010. Any amendments proposed by the Parliament will be sent to the Council for adoption or conciliation.

For more information about the proposed EU legislation, please contact Paul Hagen (phagen@bdlaw.com) or Elizabeth Richardson (erichardson@bdlaw.com).

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[1] Directive 2002/95 EC of the European Parliament and of the Council of 27 January 2003 on the restriction of the use of certain hazardous substances in electrical and electronic equipment.

[2] Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment.

EPA Office of Pesticide Programs to Conduct Rulemaking on Pesticide Inert Ingredient Disclosure

On September 30, 2009, EPA responded to petitions filed by 15 states and several environmental interest groups seeking EPA action to require disclosure of the identity of pesticide inert ingredient on pesticide product labels. (Letter from Debra Edwards (Director,

Office of Pesticide Programs) to K. Leval, E. Brown, Jr., and C. Tebbutt dated Sept. 30, 2009. Click here to view the press release on EPA's website.) The petitions sought disclosure of more than 350 pesticide ingredients claimed by petitioners to be "hazardous." In acting on the petitions, EPA indicates it will fundamentally change long-standing practices for disclosing pesticide inert ingredients.

EPA grants these petitions, in part, by stating its intention to initiate a rulemaking that will "increase public availability of hazardous inert ingredient identities for specific pesticide formulations." At the same time, EPA rejects the petitions' request that EPA undertake chemical-by-chemical determinations and product-by-product reviews because such an approach would be slow, resource intensive, and likely to generate many individual challenges. EPA states that products containing "hazardous" inert ingredients have a less favorable cost/benefit ratio than products lacking such ingredients and that public availability of such information will likely reduce use of such ingredients in pesticide formulations.

EPA will proceed by publishing an Advance Notice of Proposed Rulemaking, expected to be issued by year's end. The Agency indicates that it anticipates "effecting a sea change in how inert ingredient information is available to the public," potentially resulting in disclosure beyond that sought by the petitioners. EPA acknowledges that these fundamental disclosure changes raise complex issues for which the Agency must gather information and views from all potentially affected stakeholders. EPA identifies these critical issues: establishing criteria for determining which ingredients should be made public, whether ingredient concentration should affect disclosure requirements, how disclosures should made (labeling versus other means), and terminology for ingredient disclosures. The Agency's letter fails, however, to emphasize issues involving trade secrets and confidential commercial information which will be implicated.

These changes to regulation of pesticide inert ingredients come as EPA expands inert ingredient safety reviews and data requirements, and struggles to implement a corresponding system for inert ingredient data compensation. Given the time and cost required to change inert ingredients and reformulate pesticide products, pressures on inert ingredient use will bear close watch by registrants and their customers relying on pesticide products.

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Firm News & Events

Holly Cannon & Donald J. Patterson Contribute U.S. Chapter to Getting the Deal Through - Environment 2010

Getting the Deal Through - Environment 2010 provides a comprehensive analysis of the environmental legal issues that corporate lawyers face while managing global transactions. The 2010 edition covers 27 countries. Beveridge & Diamond, P.C. lawyers Holly Cannon and Donald J. Patterson, Jr. played a leading role in the development of this edition, contributing the chapter on U.S. environmental requirements.

To read the chapter, go to http://www.bdlaw.com/assets/attachments/Getting%20the%20Deal%20Through%20-%20Environment%202010%20-%20US%20Chapter%20Holly%20Cannon%20Donald%20Patterson.pdf.

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