Texas Environmental Update

BEVERIDGE & DIAMOND PC

October 2011

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

Maddie Kadas
mkadas@bdlaw.com

Laura LaValle
llavalle@bdlaw.com

Bryan Moore
bmoore@bdlaw.com

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

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

Texas Developments

Texas Included in EPA's Proposed Cross-State Air Pollution Rule Revisions

On October 14, 2011, the U.S. Environmental Protection Agency ("EPA") published proposed revisions to the controversial Cross-State Air Pollution Rule ("CSAPR") that EPA promulgated on August 8, 2011. CSAPR, which replaces the 2005 Clean Air Interstate Rule ("CAIR"), requires that 27 states reduce power plant emissions of sulfur dioxide ("SO2") and nitrogen oxides ("NOx") emissions that EPA has determined would contribute to ozone and/or fine particulate matter National Ambient Air Quality Standard exceedences in downwind states. Numerous companies and several states, including Texas, filed lawsuits challenging CSAPR by the October 7, 2011 filing deadline.

EPA's proposed revisions would increase the emissions budgets for annual NOx, ozone-season NOx and SO2 in Texas and eight other states. The largest increase would be for Texas' SO2 emissions budget, which would increase by 70,067 tons (nearly 29 percent). Texas' annual NOx, ozone-season NOx budgets would increase by 1,375 tons.

Comments on the proposed revisions must be submitted by November 15, 2011. Information about CSAPR, including links to the final rule and EPA's proposed rule revision, is available on EPA's website at http://www.epa.gov/airtransport/.

TCEQ to Consider Adoption of TPDES General Pesticides Permit

In a letter to the Texas Commission on Environmental Quality ("TCEQ") dated October 7, 2011, the U.S. Environmental Protection Agency ("EPA") issued its determination that Texas' draft Texas Pollutant Discharge Elimination System ("TPDES") general pesticides permit meets Clean Water Act requirements. A copy of the letter is available at www.bdlaw.com/assets/attachments/October%202011%20-%20EPA%20Letter%20to%20TCEQ.pdf. The proposed permit would authorize the application of biological pesticides or chemical pesticides that leave a residue in water when such applications are made into or over, including near, waters of the United States. The TCEQ commissioners will consider the proposed permit for adoption at their November 2, 2011 agenda meeting. The draft permit was published on December 17, 2010 (35 Tex. Reg. 11418). Additional information about the general pesticides permit is available on TCEQ's website at http://www.tceq.texas.gov/permitting/stormwater/pesticidegp_stakeholder_group.html.

TCEQ Proposes Rules for the Temporary Suspension of Water Rights During Droughts

On October 18, 2011, the TCEQ Commissioners approved for proposal and publication regulations authorizing the TCEQ Executive Director to temporarily suspend water rights or adjust water diversions during drought conditions or other emergency shortages of water. Such rules are required to be promulgated by Section 5.03 of the TCEQ Sunset Bill (House Bill 2694). The proposed rules will be published in the Texas Register on November 4, 2011, and the public comment period for the rulemaking will end on December 5, 2011. TCEQ will hold a hearing on the proposal on December 1 at 2:00 p.m., in Room 201 of Building E at

TCEQ's headquarters in Austin. TCEQ currently anticipates adopting final rules by April 11, 2012. The proposed regulations and additional information are available on TCEQ's website at http://www.tceq.texas.gov/rules/prop.html.

TCEQ Adopts 2008 Lead Standard Infrastructure SIP Revision

On October 5, 2011, the TCEQ adopted the Lead Infrastructure State Implementation Plan ("SIP") Revision for the 2008 Lead National Ambient Air Quality Standard ("NAAQS"). The adopted SIP revision, available at http://www.tceq.texas.gov/assets/public/implementation/air/sip/lead/infrastructure/11016SIP_ado.pdf, will document how the infrastructure elements listed in Federal Clean Air Act Section 110(a)(2) are addressed in the Texas SIP. Additional information on this SIP revision is available on TCEQ's website at http://www.tceq.texas.gov/airquality/sip/Hottop.html.

Texas Water Development Board to Consider Adoption of 2012 State Water Plan

The Texas Water Development Board will consider adopting its draft 2012 State Water Plan at the Board's meeting on November 17, 2011. The draft plan was available for public comment from September 26, 2011 through October 25, 2011. The public comment period is now closed. The final plan will be delivered to the Texas Governor and Legislature by January 5, 2012. A copy of the plan and additional information are available on the Board's website at http://www.twdb.state.tx.us/wrpi/swp/draft.asp.

Upcoming TCEQ Meetings and Events

- TCEQ will host its first ***Central Texas Environmental Summit*** at the Schertz Civic Center in Schertz, Texas, on November 3, 2011. Information about the event is available on TCEQ's website at http://www.tceq.texas.gov/assistance/centxenvsummit.

- The ***Texas Environmental Flows Science Advisory Committee*** will meet on November 2, 2011 at 9:00 a.m., in Room 2210 of Building F of the Texas Commission on Environmental Quality's headquarters in Austin. The Committee was created by Senate Bill 3 in 2007 to serve as an objective scientific body, advising and making recommendations to the Texas Environmental Flows Advisory Group on issues relating to the science of environmental flow protection. The following day, November 3, 2011 (at 2:00 p.m., in Room 201, Building E) TCEQ will host a rule stakeholder meeting to obtain input from the public prior to proposing environmental flow standards for the Colorado and Lavaca Rivers and Matagorda and Lavaca Bays, and for the Guadalupe, San Antonio, Mission, and Aransas Rivers, and Mission, Copano, Aransas, and San Antonio Bays.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in October can be found on the TCEQ website at http://www.tceq.texas.gov/news/releases/10-11Agenda10-18.

Recent Texas Rules Updates

For information on recent TCEQ rule developments, please see the TCEQ website at http://www.tceq.state.tx.us/rules/whatsnew.html.

BEVERIDGE & DIAMOND PC

National Developments

New SEC Conflict Mineral Rules May Require First-Ever Disclosure for Certain Pesticides Used In Downstream Product Manufacturing Processes

On December 23, 2010, the U.S. Securities and Exchange Commission ("SEC") issued proposed regulations that would require public companies using any of four so-called "conflict minerals" in their product manufacturing processes to disclose whether those minerals originated in the Democratic Republic of Congo ("DRC") or adjoining countries.[1] To date, the SEC has received over 500 comments on the proposal, has conducted a public roundtable, and has extended the comment period. Final regulations are anticipated before the end of 2011.

Although many electronics and consumer products companies have begun to focus intensively on the rule and its impact on their supply chains, the potential reach of the rules is sweeping, and could affect several sectors that are unlikely to have focused on the rules to date. One such sector is organotin pesticide manufacturers, as well as downstream manufacturers of other products (such as textiles) that may use those pesticides in their own manufacturing processes.

Organotin pesticides (such as tributyltin oxide, triphenyltin (fentin), tributyltin benzoate, tributyltin maleate, and fenbutatin oxide) contain tin which may be derived from cassiterite – one of the four conflict minerals subject to the proposed rules. If the final rules follow the SEC's proposed rule and do not include a de minimis or "materiality threshold," manufacturers of both the pesticides and the products that incorporate such pesticides could be covered by the disclosure requirements. This requirement might have important commercial implications for downstream manufacturers who must decide which pesticides should be incorporated into their own products. It may also serve as a precedent for future efforts by the U.S. Environmental Protection Agency ("EPA") or other federal agencies seeking to subject use of specific pesticides of "concern" by a wide range of food, paper, or other product manufacturers to similar public disclosure requirements.

A. Overview of the SEC's Proposal: Disclosing the Use of Conflict Minerals in Manufactured Products

The four conflict minerals subject to the SEC's pending reporting requirements are cassiterite (used to produce tin), columbite-tantalite (used to produce tantalum), gold, and wolframite (used to produce tungsten). In its proposal, the SEC described numerous products that may incorporate these minerals, including mobile telephones, computers, videogame consoles, digital cameras, carbide tools, jet engine components, jewelry, aerospace equipment, and lighting, electronic, electrical heating and welding applications. According to the SEC, it is anticipated that the new requirements will "apply to many companies and industries."[2]

Under the proposed regulation, all manufacturers that file annual reports with the SEC under the Securities Exchange Act of 1934 must determine whether any of the four conflict minerals or their derivatives "are necessary to the functionality or production of a product" that they manufacture.[3] If so, the manufacturer must next determine through a "reasonable country of origin inquiry" whether its conflict minerals originated in the DRC countries. If so (or if the origin of the conflict minerals cannot be determined), the manufacturer must publicly disclose this conclusion and furnish a "Conflict Minerals Report" identifying its products as "not DRC conflict free," unless it is able to determine that the products did not "directly or indirectly finance or benefit armed groups" in the DRC countries.[4] Even if the manufacturer determines that its conflict minerals did not originate in the DRC countries, however, the manufacturer must still publicly disclose this determination in the body of its annual report to the SEC and on its website.

In its proposal, the SEC did not define when a conflict mineral will be considered "necessary to the functionality or production of a product" and thus trigger the reporting requirements.[5] The SEC did explain, however, that if a mineral is "necessary," the product would be covered by the proposed rules irrespective of the "amount" of the mineral involved. Under

the proposed rule, therefore, the disclosure obligation is not limited to manufacturers who purchase conflict minerals, but extends to downstream manufacturers incorporating manufactured products that contain conflict minerals into their own products. In addition, although only companies that file reports with the SEC will directly be affected by this obligation, even privately held or overseas companies may be indirectly affected if they sit in the supply chain of downstream customers who will face reporting requirements.

B. Implications for Pesticide Manufacturers and Users: Organotin Pesticides Under the Proposed Requirements

The SEC's proposed requirements may be of particular interest to pesticide manufacturers because organotin pesticides – which contain tin that may be derived from cassiterite – would appear to come under the purview of the proposed rules. Organotin pesticides (including tributyltin oxide, triphenyltin (fentin), tributyltin benzoate, tributyltin maleate, and fenbutatin oxide) are registered under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") by nearly two dozen companies for a wide range of uses in the United States, including use as a wood preservative, biocide, miticide, water treatment, textile preservative, crop fungicide, and building material fungicide.

1. Is Tin "Necessary" to the Functionality or Production of Organotin Pesticides?

Although not specifically identified in the SEC's discussion of its proposal, organotin pesticide manufacturers using tin derived from cassiterite must determine as an initial step whether the tin is "necessary to the functionality or production" of the pesticide product. If so, such products could come under the proposal's reporting requirements.

The SEC's requirements may also apply to pesticide registrants who contract with other companies to manufacture their products as long as they, under the terms of the SEC's proposed rule, "have any influence regarding the manufacturing of those products."[6] Of special relevance to the pesticide industry, the SEC has also explained that its requirements will apply to generic companies – regardless of whether the generic companies "have any influence over the manufacturing specifications of those products" – as long as there is a contract in place between the generic company and the product manufacturer directing the manufacture of the products for the generic company.

2. Is Tin Necessary to the Functionality or Production of Textiles and Other Products That Incorporate Organotin Pesticides as Preservatives?

Beyond the direct applicability of the SEC's proposed reporting requirements to manufacturers of organotin pesticides themselves, the phrase "necessary to the functionality or production" may also place reporting obligations on a wide range of downstream companies that use organotin pesticides in their own product manufacturing processes. For example, an organotin pesticide purchased by a textile manufacturer for incorporation into the production of mattress covers as a material preservative might be considered "necessary to the functionality or production" of that manufacturer's mattress covers and thus trigger the SEC's conflict mineral disclosure requirements – separate from and even in addition to any reporting obligations placed directly on the pesticide's manufacturer.

To date, downstream manufacturers that incorporate pesticides into their own products as material preservatives intended solely to protect those products themselves have generally not been required to publicly disclose information regarding the pesticides used in their products. Under FIFRA, a product is considered to be a pesticide and thus require registration if it is intended to prevent, destroy, repel or mitigate a pest. Pesticides – including manufactured products that incorporate registered pesticides and make claims to provide consumers with antimicrobial or other pesticidal protection – must be labeled in accordance with EPA's regulatory requirements, which include identification of the name and percentage by weight of a pesticide's active ingredient.

However, those manufactured products that incorporate registered pesticides for the sole purpose of providing ongoing protection to the product itself (for example, certain textiles or kitchen utensils treated with antimicrobial pesticides, or paints incorporating antimicrobial preservatives) are expressly exempt from FIFRA's registration and labeling requirements pursuant to the "treated articles exemption."[7] Such products may make limited claims about

their incorporation of a pesticide to protect the product, but are not required to disclose the identity of the incorporated pesticide or comply with any other FIFRA requirements. In the case of manufacturers using registered organotin products in the production processes of textiles and other products, however, the SEC's proposal may now require compliance with the annual conflict minerals reporting and disclosure requirements.

3. New Supply Chain Communication Requirements

While certain voluntary organic certifications have provided manufacturers with an option to disclose the absence of pesticides used in their products, requiring textile and other product manufacturers to publicly report the use of tin-containing pesticides in their products would represent the first disclosure requirement of its kind in the United States.

Companies that may be affected by these requirements will therefore have to consider taking steps both to identify whether their products contain tin and to put in place steps to conduct the required "reasonable country of origin inquiry." The SEC's proposal states that receipt of a "reasonably reliable" representation from the facility that processes the conflict minerals may be sufficient, and that such representations may come directly from the facility or indirectly through the manufacturer's suppliers, as long as the manufacturer "reasonably believe[s] these representations to be true based upon the facts and circumstances."[8] Whether or not a downstream product manufacturer may be able to rely on representations obtained from the pesticide manufacturer, for example, or whether further investigation into the direct source of the tin is warranted, may depend on an analysis of the reliability of those representations in each case.

Finally, the impacts of the SEC's new disclosure requirements on manufacturers who use organotin pesticides may be viewed as a test case for federal agencies or non-governmental organizations that seek to more broadly require manufacturers to disclose their use of other pesticides to address a variety of humanitarian, trade, health, or environmental concerns. Given the diversity of industries that incorporate pesticides in their product processes -- including food products and packaging, plastics, adhesives, paper, textiles, wood, and paint – implementation of the SEC's rules, and future related developments, should be watched very carefully by pesticide manufacturers and downstream users alike.

For more information about the SEC's conflict mineral rules and its potential implications for pesticide manufacturers and users, please contact Russ LaMotte at Beveridge & Diamond, P.C. (rlamotte@bdlaw.com or 202-789-6080) or Alan Sachs, Independent Consultant Attorney (asachs@bdlaw.com or 410-230-1345).

---

[1] 75 Fed. Reg. 80948 (Dec. 23, 2010).

[2] Id. at 80950.

[3] Id.

[4] Id.

[5] Id. at 80593.

[6] Id. at 80952.

[7] 40 C.F.R. § 152.25(a) (exempting from all provisions of FIFRA "[a]n article or substance treated with, or containing, a pesticide to protect the article or substance itself (for example, paint treated with a pesticide to protect the paint coating, or wood products treated to protect the wood against insect or fungus infestation), if the pesticide is registered for such use").

[8] 75 Fed. Reg. at 80957.

First-Ever Criminal Charges Filed Against Exporter of Electronic Waste

On September 15, 2011, a federal grand jury in the District of Colorado indicted an environmental waste recycling company, its chief executive officer, and its former vice president of operations on charges of wire and mail fraud and various environmental crimes for the company's improper handling of electronic waste ("e-waste"). This marks the first time that criminal charges have been brought against an e-waste exporter in the United States.

The indictments (see http://www.ice.gov/doclib/news/releases/2011/110916denver.pdf) against Colorado-based Executive Recycling Inc. and two of its executives were announced by EPA's Criminal Investigation Division and the Homeland Security Investigations unit of U.S. Immigration and Customs Enforcement. Executive Recycling, an e-waste recycling business located in Englewood, Colo. with affiliated locations in Utah and Nebraska, collects e-waste from private households, businesses, and government entities and was registered with the Colorado Department of Public Health and Environment as a "Large Quantity Handler of Universal Waste." The company was featured in an e-waste exposé on CBS's 60 Minutes.

Summary of the Indictment

The indictment includes charges for wire and mail fraud, failure to file a Notice of Intent to Export with EPA in violation of the Resource Conservation and Recovery Act ("RCRA"), smuggling of goods from the United States, and destruction of records. Executive Recycling was the exporter of record in more than 300 exports from the United States between 2005 and 2008, including the export of over 100,000 cathode ray tubes ("CRTs"). CRTs are glass video display components of an electronic device – usually a computer monitor or a television – and contain a large amount of lead.

The company and its officers are charged with defrauding business and government entities that sought to properly dispose of their e-waste. The defendants allegedly represented falsely to customers that they would dispose of e-waste in an environmentally friendly manner, in the United States rather than overseas, and in compliance with all local, state and federal laws and regulations. Contrary to such representations, the company allegedly sold e-waste to brokers for export overseas to China and other countries. The ongoing 30-month investigation included cooperation from law enforcement agencies in the United States, Hong-Kong and Canada.

Penalties for a violation of the RCRA charge alone include imprisonment for up to two years and fines of up to $500,000, or $50,000 per day of the offense. A conviction for destruction of records during the course of EPA's administrative process carries a penalty of up to 20 years in prison and a fine of up to $250,000.

Significance

The federal government's willingness to bring criminal charges against an e-waste processor signals an escalation in the government's environmental enforcement activities in the area of e-waste management and this change may be indicative of future criminal enforcement actions. The case certainly indicates that e-waste exports is an area receiving increasing national attention, consistent with EPA's stated policy priorities. States have also begun to step-up enforcement of improper disposal of e-waste. This past March, the Target Corporation agreed to pay $22.5 million in penalties to settle a case brought against the company by several California law enforcement agencies alleging that for years the company improperly disposed of hazardous waste, including electronics and batteries (see http://www.alcoda.org/news/archives/2011/mar/target_corp_to_pay_225_million). On the international front, Canada, several EU member states and other countries have also intensified enforcement of laws governing the export of e-waste in recent months.

The most significant e-waste litigation to date involved a challenge to a sweeping New York City product take back law passed in 2008, over the objection of Mayor Michael Bloomberg, which required manufacturers of consumer electronics to directly manage and pay for the collection and recycling of certain types of e-waste throughout the city, including pickup of e-waste at consumers' homes. Beveridge & Diamond, P.C. filed suit on behalf of a number of affected parties, including the Consumer Electronics Association and the Information Technology Industry Council. Drawing significantly on industry expertise, the lawsuit demonstrated the burdensome nature of the new law and highlighted its constitutional, statutory and administrative defects. The City's law was ultimately preempted by a state law before arguments could be heard.

The New York City law is one particularly onerous example of a growing class of product take back laws across the country focused on end-of-life electronic products, batteries,

used carpet, paint and other consumer products. The Obama Administration formed the "Interagency Task Force on Electronics Stewardship" in November 2010, and the task force released its 35-page "National Strategy for Electronics Stewardship" in July 2011 (available at http://www.epa.gov/osw/conserve/materials/ecycling/taskforce/docs/strategy.pdf). Legislation is also pending in Congress to further restrict the export of e-waste from the U.S. to developing countries. *See* The Responsible Electronic Recycling Act of 2011 (HR 2284 / S1270).

In light of the heightened concern about e-waste issues, companies managing used and end-of-life consumer electronics and IT equipment would be wise to review their disposal practices, including the practices of any entities retained to handle the recycling of e-waste. In the Executive Recycling case, there is evidence that the recycler's clients were affirmatively misled. Under different circumstances, companies doing business with an errant disposal contractor could potentially face civil or criminal liability for conspiracy to engage in unlawful disposal practices. Electronics recyclers should be careful to identify and comply with applicable federal waste exports laws, similar requirements in several states as well as the requirements of importing countries, many of which impose more stringent regulation on transboundary movements of e-waste for recycling than the United States.

For more information about Beveridge & Diamond's e-waste related litigation and compliance practice, contact the co-chairs of Beveridge & Diamond's White Collar Practice Group, Nadira Clarke at (202) 789-6069 and Lily Chinn at (415) 262-4012 or Paul Hagen who leads the firm's work with clients in the electronics sector at (202) 789-6022.

Department of Energy Exempts Many Small-Scale Energy Projects From NEPA Review

On October 3, 2011, the U.S. Department of Energy ("DOE") announced a final rule under which many small-scale energy projects can avoid detailed environmental review under the National Environmental Policy Act ("NEPA"). *See* U.S. Dept. of Energy, NEPA Implementing Procedures, available at http://energy.gov/nepa/downloads/notice-final-rulemaking. The rule establishes discrete new categorical exclusions for defined projects and revises several existing categorical exclusions in DOE's NEPA regulations. DOE anticipates that the changes will better align its categorical exclusions with the agency's current activities and experience; modernize its regulations to reflect advancing technology, operational practices, and regulatory requirements; and facilitate NEPA compliance by allowing for more efficient environmental reviews. Due to the limited applicability of the exclusions, however, it is uncertain whether those effects will be particularly far-reaching.

Background

NEPA requires federal agencies to prepare an environmental impact statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). When an agency determines that a certain type of action does not normally have a significant individual or cumulative effect on the environment, the agency may issue a categorical exclusion, which allows qualifying activities to bypass the EIS requirement. In that way, agencies may conserve limited resources and focus their attention on actions that are most likely to cause significant environmental effects.

DOE's NEPA Rule

DOE's NEPA rule establishes twenty new categorical exclusions. The new categorical exclusions include exclusions for stormwater runoff control; small-scale indoor research and development projects using nanoscale materials; experimental wells for injection of small quantities of CO2; small-scale renewable energy research and development and pilot projects; solar photovoltaic systems; solar thermal systems; wind turbines; biomass power plants; and methane gas recovery and utilization systems – among others. Each new categorical exclusion has defined qualification criteria (e.g., acreage, location, and height limitations) to ensure that the covered actions normally would not have the potential to cause significant effects.

Before DOE may apply a categorical exclusion to a particular proposed action, the agency

must determine that (1) the proposed action meets the requirements of an established exclusion, (2) there are no extraordinary circumstances related to the proposal that may affect the significance of its environmental effects, and (3) the proposal is not "connected" to other actions with potentially significant effects, is not related to other actions with cumulatively significant effects, and has not been improperly segmented to created an appearance of insignificant environmental effects. Actions that do not satisfy these requirements must undergo traditional NEPA review.

Implications

While DOE estimates that the changes to its NEPA regulations will result in $100 million in savings over the next decade and will streamline the environmental review process, it is uncertain whether the new categorical exclusions will make a substantive difference to many in the energy industry. The qualification criteria attached to the exclusions render each narrowly drafted and limited in scope.

For example, the new categorical exclusion for wind turbines applies to the installation, modification, and removal of "a small number" of commercially available wind turbines. DOE explains that it considers "a small number" of turbines to be "generally not more than 2," and that each of those turbines "generally" must have a total height less than 200 feet (measured from ground to maximum vertical blade rotation). In addition, the turbines must be located on land, "within previously disturbed or developed areas," more than 10 nautical miles from an airport or aviation navigation aid, and more that 1.5 nautical miles from a federal government weather radar. Finally, the proposed action must not have the potential to cause significant impacts on bird or bat populations or to people (from effects such as shadow flicker, other visual effects, or noise).

The above wind turbine restrictions are similar in type and effect to restrictions that apply to almost all of DOE's categorical exclusions, and consequently most commercial energy projects will not qualify for an exclusion. As a result, those projects will remain subject to NEPA's more detailed environmental review requirements. For those actions that do qualify for a categorical exclusion, however, DOE's new rule offers the possibility of cost and resources savings.

For more information on these categorical exclusions or their implications for a specific project, please contact Parker Moore at (202) 789-6028, pmoore@bdlaw.com or Stephen Richmond at (781) 416-5710, srichmond@bdlaw.com.

EPA Sues MotorScience, Inc. for Falsifying CAA Engine Certifications

In a suit filed September 29, 2011,1 the United States EPA has accused MotorScience, Inc., an engine consulting service that works with engine importers to ensure compliance with EPA engine certification requirements, of falsifying engine certification records in violation of the Clean Air Act. Due to MotorScience's malfeasance, EPA was forced in 2010 to void engine certificates submitted on behalf of four Chinese importers. As a result, the companies imported 24,478 off-road motorcycles and all-terrain vehicles engines without valid engine certificates, in violation of Clean Air Act Requirements.2 In addition to certification violations, EPA also contents that MotorScience violated recordkeeping requirements for failing to maintain records related to the falsified Clean Air Act certificates.3

Under the Clean Air Act, all vehicles and engines manufactured or imported in model year 2006 or later must receive certificates of compliance from EPA stating that they satisfy Clean Air Act emissions requirements.[4] In June of 2010, EPA voided twelve MotorScience certificates submitted on behalf of four of its clients based on suspicions that the emissions information was either incomplete or falsified. The four clients were Hensim USA, Loncin USA, Peace Industry Group, and Seaseng.[5] According to EPA, the MotorScience certificates were the first certificates for off-road motorcycles and all-terrain vehicles that EPA had ever voided.[6] EPA claims that the vehicles imported pursuant to the voided certificates violate the Clean Air Act.[7]

EPA's complaint seeks injunctive and monetary relief for MotorScience's violations. The requested monetary penalty is the statutory maximum: $32,500 for each violation or each

day of violation, as applicable. The complaint also named as defendants MotorScience Enterprise, Inc., which was the corporate predecessor of MotorScience, Inc., and Chi Zheng, the owner of both companies.

Since voiding the certificates in 2010, EPA has focused its enforcement efforts on MotorScience, Inc. But EPA also has the authority to bring enforcement actions against any person or company importing or selling engines without valid EPA certificates of compliance.[8] For questions on how EPA's focus on engine certification requirements may impact your business or products, contact Amy Lincoln (alincoln@bdlaw.com) or Daniel Brian (dbrian@bdlaw.com).

---

[1] See Complaint, available at www.bdlaw.com/assets/attachments/2011-9-29%20MotorScience%20Complaint.pdf.

[2] 40 C.F.R. Parts 1051 and 1068.

[3] 40 C.F.R. Section 1051.250.

[4] See 40 C.F.R. §§ 1051.105 and 1051.107.

[5] The companies were the U.S. arms of four Chinese manufacturers: Chongqing Hensim Group Co., Chongqing Longting Power Equipment Co., Zhejiang Peace Industry and Trade Co., and Zhejiang Chesheng Industry and Trade Co., respectively.

[6] *See* EPA Voids Certificates Approving Import of Up to 200,000 Small Recreational Vehicles / Agency may levy penalties, available at http://yosemite.epa.gov/opa/admpress.nsf/6424ac1caa800aab85257359003f5337/536947c975312e39852577520063c927!OpenDocument.

[7] 40 C.F.R. Section 1068.101.

[8] 40 C.F.R. § 1068.101(a)(1) ("You may not sell, offer for sale, or introduce or deliver into commerce in the United States or import into the United States any new engine or equipment . . . unless it has a valid certificate of conformity.")

Firm News & Events

Bryan Moore Joins Texas Office of Beveridge & Diamond, P.C.

Beveridge & Diamond, P.C. is pleased to announce that Bryan J. Moore has joined the Firm's Texas office as a Principal and member of its Environmental and Litigation Practice Groups. Mr. Moore joins the Firm from Vinson & Elkins, where he was Counsel.

"We are fortunate to have Bryan Moore join our Firm. His arrival is a major addition to our Texas-based practice, and our clients in Texas and beyond will be extremely well-served by Bryan," says Ben Wilson, Managing Principal of Beveridge & Diamond, P.C.

"We are delighted to have Bryan join our Austin-based team." said Laura LaValle, Managing Principal of the Firm's Austin, Texas office, and Co-Chair of the Firm's Air Practice Group. "He is an accomplished attorney whose litigation experience and multi-media regulatory practice complement and expand the range of assistance we are able to provide from our Texas office."

Bryan's practice includes a wide range of environmental matters, from waste, water, and air permitting and compliance counseling, to enforcement defense and litigation. In matters arising under nearly every major federal and Texas environmental program, Bryan has represented clients in federal and state courts and before various agencies, such as the United States Environmental Protection Agency, the Texas Commission on Environmental Quality, the Texas Parks and Wildlife Department, and the Railroad Commission of Texas.

In addition to permitting and enforcement matters, Bryan has assisted clients in rulemaking proceedings and in preparing comments on proposed agency rules at both the state and federal level. Bryan has also counseled clients on environmental audit issues, under both the Texas audit law and federal policy.

Bryan has extensive experience in contested permitting proceedings and enforcement actions, and represents clients in each phase of those matters, from the agency process, to the administrative hearing, and ultimately before the applicable state or federal court to which an appeal may be taken. Bryan has argued cases in forums ranging from the D.C.

Circuit to the Texas State Office of Administrative Hearings. Although his litigation practice has included various types of matters, Bryan's core substance matter expertise is in solid waste permitting, regulation, and enforcement. In that area, Bryan has litigated numerous contested permitting matters resulting in expansions of solid waste landfill facilities throughout Texas, and has represented clients in RCRA enforcement proceedings in multiple EPA regions.

Bryan is a graduate of Tulane Law School, where he received a Certificate in Environmental Law, served as Editor in Chief of the Tulane Environmental Law Journal, and was a recipient of the Haber Joseph McCarthy Environmental Law Award. Prior to attending law school, Bryan earned a degree in geology from the University of Alabama, where he was a recipient of the school's Legacy Environmental Scholarship.

All of the Principals in Beveridge & Diamond's New York Office Receive "Super Lawyers" Recognition

Beveridge & Diamond, P.C. is pleased to announce that all five Principals in the Firm's New York office have been recognized by the Super Lawyers rating service as being among the top lawyers in their areas of practice in the New York metropolitan area.

Stephen Gordon was named to the 2011 New York metro area Super Lawyers list in the Environmental practice area, ***John Kazanjian*** was named to the list for his work in the Insurance Coverage area, ***Daniel Krainin*** for his work in Environmental Litigation, and ***Michael Murphy*** for his work in Energy and Natural Resources. The New York Office's newest shareholder, ***Paula Schauwecker***, was identified by the magazine as a "Rising Star" -- a designation given to top "up and coming" lawyers who are 40 years old or younger, or who have been practicing 10 years or less -- in the field of Environmental Litigation. Messrs. Gordon and Kazanjian have been named to the annual list multiple times in the past. Messrs. Krainin and Murphy and Ms. Schauwecker were recognized by the publication for the first time this year.

Super Lawyers is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations.

Other Beveridge & Diamond lawyers named to the 2011 Super Lawyers list include the following:

- In Washington, DC, ***Robert Brager*** and ***Karl Bourdeau*** are recognized for their work in the Environmental and Environmental Litigation practice areas, and ***Paul Hagen*** is recognized for his work in the Environmental and International areas.
- In Wellesley, Massachusetts, ***Brian Levey*** is recognized for his work in Land Use/ Zoning, ***Stephen Richmond*** in the Environmental and Energy and Natural Resources practice areas, and ***Marc Goldstein*** is named as a Rising Star for his work in Land Use/ Zoning, Environmental Litigation, and Real Estate.
- In San Francisco, California, ***Gary Smith*** is recognized for his Environmental Litigation, Environmental, and Civil Litigation Defense work, and ***Nicholas van Aelstyn*** for his work in the Environmental practice area.

For more information about Beveridge & Diamond or any of the attorneys mentioned above, please see www.bdlaw.com or contact Janine Militano at jmilitano@bdlaw.com.

Beveridge & Diamond Wins Defense Judgment After Three Week Trial

Litigators from the Firm's Washington, D.C. Office secured a defense judgment following a three week bench trial in District of Columbia Superior Court. The Court rejected a $5,000,000 tort and UCC claim that drinking water supplied to the Plaintiffs caused pinhole leaks in five large apartment buildings. The case centered on extensive

expert testimony on water chemistry, water distribution and corrosion science. Jimmy Slaughter and Nadira Clarke, Principals with Beveridge & Diamond, led the trial team. To read the opinion in *Cormier v. DC WASA*, please go to http://www.bdlaw.com/assets/attachments/2011-09-30%20Findings%20of%20Fact%20and%20Conclusions%20of%20Law.pdf. To read the case report in the Daily Washington Law Reporter, go to http://www.bdlaw.com/assets/attachments/DWLR%20Oct%2013%202011.pdf.

For more information, please contact Jimmy Slaughter at jslaughter@bdlaw.com, Nadira Clarke at nclarke@bdlaw.com, or Ben Wilson at bwilson@bdlaw.com.

Beveridge & Diamond Ninth Circuit Win Featured in Westlaw Journal

Westlaw Journal Environmental's current issue covers Beveridge & Diamond's recent win for California solid waste and recycling companies, securing a unanimous decision from a Ninth Circuit panel reversing a district court decision that Younger abstention required dismissal of a Commerce Clause challenge to a local voter initiative. The Court of Appeals held that a pending mandamus action in state court that sought to enforce the voter initiative was not a state interest that warranted a federal court abstaining from hearing a challenge to the voter initiative. *Potrero Hills Landfill et al. v. Solano County*, ___ F.3d ___, 2011 U.S. App. LEXIS 18866 (9th Cir. Sept. 13, 2011). Litigator Jimmy Slaughter from Beveridge & Diamond's Washington office argued the case, and represents the waste companies along with Lily Chinn and Gary Smith from the Firm's California office. To read the article, please go to http://www.bdlaw.com/assets/attachments/WLJ_HAZ3206_Article_Slaughter.pdf.

Office Locations:

Washington, DC

Maryland

New York

Massachusetts

New Jersey

Texas

California

Copyright 2011
Beveridge & Diamond, P.C.
All rights reserved

The purpose of this update is to provide you current information on Texas and federal environmental regulatory developments. It is not intended as, nor is it a substitute for, legal advice. You should consult with legal counsel for advice specific to your circumstances. This communication may be considered advertising under applicable laws regarding electronic communications.