

TEXAS ENVIRONMENTAL UPDATE



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TEXAS DEVELOPMENTS

TCEQ Announces Flare Study Draft Report Review Schedule

The Texas Commission on Environmental Quality (“TCEQ”) has announced a schedule for review and comment on a Comprehensive Flare Study Draft Final Report from the University of Texas Center for Energy and Environmental Resources (“UTCEER”). TCEQ expects to post the draft report on its website on or about May 23, 2011. The draft report will describe the results of the flare research study conducted at a test facility during September 2010 as anticipated in the Flare Task Force Draft Report that TCEQ issued on September 3, 2009. Per the Flare Task Force Draft Report, the flare research study was to examine the impact of various operational conditions on flare combustion efficiency and destruction and removal efficiency (“DRE”) in a controlled environment. Direct measurement techniques and remote sensing measurement techniques would be used to quantify flare emissions under varying waste gas flow rates, assist gas flow rates, and waste gas stream heat content.

As we noted when TCEQ issued the Flare Task Force recommendations, although the Flare Task Force’s September 2009 recommendations for enhanced monitoring and flare minimization plans could themselves be burdensome, it is this flare research study that may have the most wide-ranging, and perhaps national, implications. The September 2009 report noted, with some frankness, the difficulty of measuring flare emissions and the numerous factors that could call into question the reliability of the assumed regulatory flare DRE estimates. These factors include meteorological conditions; variable waste gas stream flow rate and composition; flare physical design characteristics and general maintenance; and flare steam or air assist operation. If the flare research study determines that existing assumed flare efficiency standards overestimate emissions reductions, a broad range of programmatic and permitting consequences could ensue.

The schedule set for the Comprehensive Flare Study Draft Final Report is as follows:

- April 18, 2011: UTCEER delivers draft final report to the TCEQ Flare Study Technical Review Panel for comments.
- May 6, 2011: TCEQ delivers comments from the TCEQ Flare Study Technical Review Panel to UTCEER.
- May 23, 2011: UTCEER delivers the revised draft final report to TCEQ. TCEQ posts the revised draft final report on the TCEQ Flare Stakeholder Web page for public comment.
- June 1, 2011: TCEQ holds a stakeholder meeting (tentative) to discuss the draft final report.
- June 6, 2011: TCEQ provides comments from both TCEQ and the public to the UTCEER.
- June 14, 2011: UTCEER submits final report to TCEQ.

Information about the Flare Task Force, including the above-referenced schedule and the September 2009 Flare Task Force Draft Report, is available on TCEQ’s website at http://www.tceq.texas.gov/airquality/point-source/stationary-rules/flare_stakeholder.html.

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TCEQ Sunset Bill Update

On April 20, 2011, the Texas House of Representatives passed the TCEQ Sunset Bill (“House Bill 2694” or “Bill”). As passed, the Bill makes a number of changes related to the agency’s enforcement process (including increases to statutory administrative penalty caps) and compliance history provisions. The Bill now also includes various changes to the contested case hearing process for permit applications. Amendments that passed during floor debate on the Bill include those that would require the Executive Director to participate in permit hearings and shift the burden of proof in such hearings from the applicant to the party challenging the permitting action. (Bill, Art. 10) A copy of the engrossed Bill is available at <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB2694>. The Bill now moves to the Texas Senate for consideration. The Senate version of the Bill (SB 657) is currently pending before the Senate Committee on Natural Resources.

Administrator Signs Final Rule for EPA to Act as Texas Greenhouse Gas Permitting Authority

On April 22, 2011, EPA Administrator Lisa P. Jackson signed notice of a final rule that will replace the December 2010 interim final rule pursuant to which EPA commenced promulgation of a federal implementation plan (“FIP”) to issue prevention of significant deterioration (“PSD”) new source review permits in Texas for greenhouse gas (“GHG”) emissions. Per the interim final FIP, EPA is acting as permitting authority for GHG-emitting sources in Texas in the absence of an EPA-approved Texas SIP that includes provisions to regulate GHG. EPA indicates that the final rule “is intended to assure that large GHG-emitting sources in Texas, which became subject to PSD on January 2, 2011, will continue to be able to obtain preconstruction permits under the CAA New Source Review (NSR) PSD program beyond the April 30, 2011, expiration date of the FIP that EPA put in place for this purpose via an Interim Final Rule.”

EPA notes that the just-signed final rule also corrects its previous full approval of Texas’ PSD program into a partial approval and partial disapproval. The correction is based upon EPA’s determination that Texas’ PSD program was flawed because the state did not address how the program would apply to pollutants that become newly subject to Clean Air Act regulation, including non-National Ambient Air Quality Standard pollutants such as GHGs. Additionally, the final rule publication contains response to public comment that EPA requested in the parallel proposal that EPA issued with the December 2010 interim final rule. This final rule will be effective May 1, 2011.

Additional information, including the text of the above-discussed final rule, is available on EPA’s website at <http://www.epa.gov/nsr/actions.html#apr11>.

TCEQ Warns It May Restrict Water Rights

Earlier this month, TCEQ warned water rights holders that the agency may need to administer water rights on a priority basis if drought conditions continue. With significant portions of the state under extreme drought conditions, TCEQ is closely monitoring the situation to ensure that water is only diverted according to permitted levels. Should restrictions become necessary, junior water rights, or those rights issued most recently, may need to be suspended or curtailed before the senior water rights in the area. Additional information is available at <http://www.tceq.texas.gov/response/drought/>.

TCEQ Seeks Comment on Oil & Gas Title V and NSR Permits

TCEQ has published proposed revisions to and renewal of the Oil and Gas Title V General Operating Permit Nos. 511 through 514 -- each of which apply in different Texas counties. Along with other changes, the proposed revisions would include the addition of references to the Standard Permits for Boilers, the non-rule Standard Permit for Oil and Gas Handling

and Production Facilities, the non-rule Standard Permit for Pollution Control Projects, and requirements from the following three New Source Performance Standards in 40 CFR Part 60: Subpart IIII (Compression Ignited Internal Combustion Engines), Subpart JJJJ (Spark Ignition Internal Combustion Engines), and Subpart KKKK (Stationary Combustion Turbines). TCEQ will hold a public hearing on these revisions in Austin on April, 28, 2011. Written comments must be submitted by May 9, 2011. The proposed changes and additional information about the proposed revisions is available on TCEQ's website at http://www.tceq.texas.gov/permitting/air/announcements/tv-announce-04-08-11.html#hearing_public.

Additionally, the deadline for comments following a series of stakeholder meetings TCEQ held regarding the agency's revision of the Oil and Gas Permit by Rule and Standard Permit has been extended to May 31, 2011. TCEQ is providing opportunity for stakeholder input on amendments to the new Oil and Gas Permit by Rule and Standard Permit for Oil and Gas Handling and Production facilities that the Commission adopted on January 26, 2011. The Commission limited current applicability of these authorizations to counties in the Barnett Shale Region in North Texas, and is considering expanding applicability to all Texas counties. Additional information is available on TCEQ's website at <http://www.tceq.texas.gov/permitting/air/announcements/nsr-announce-02-21-11.html>.

SO₂ Standard Attainment Recommendations Headed to Governor

At their April 20, 2011 agenda meeting, the TCEQ Commissioners approved the Executive Director's recommended attainment status designations for the 2010 sulfur dioxide ("SO₂") primary National Ambient Air Quality Standard ("NAAQS"). The recommendation follows from EPA's August 23, 2010 revisions of the SO₂ NAAQS to include a 2010 one-hour 75 parts per billion primary standard. With this approval, the TCEQ recommends that Jefferson County be the only county designated nonattainment; that Dallas, Ellis, El Paso, Galveston, Gregg, Harris, Kaufman, McLennan, and Nueces Counties be designated attainment; and that all other Texas counties be identified unclassifiable. TCEQ's recommendation will be sent to the governor for his consideration. The state's recommendation is due to EPA by June 2, 2011. EPA is expected to issue final designations by June 2, 2012. Additional information is available on TCEQ's website at <http://www.tceq.texas.gov/airquality/sip/criteria-pollutants/sip-so2>.

Lead Standard SIP Revision Proposed

On April 6, 2011, the TCEQ Commissioners approved proposal of a Lead Transport State Implementation Plan ("SIP") Revision for the 2008 lead National Ambient Air Quality Standard ("NAAQS"). On October 15, 2008, EPA established a new NAAQS for lead at 0.15 micrograms per cubic meter ("µg/m³") measured as a rolling three-month average, which is ten times more stringent than the previous standard of 1.5 µg/m³ measured as a quarterly average. Effective December 31, 2010, EPA designated a portion of Collin County, located in Frisco, Texas, as the only nonattainment area in Texas for the 2008 lead standard.

In the proposal, TCEQ indicates that the purpose of the SIP revision "is to document that any emissions from sources in Texas do not interfere with attainment or maintenance of the 2008 lead NAAQS in another state." The proposal provides that "[b]ased on the control strategies already in place to reduce lead emissions in the Collin County nonattainment area, modeling that predicts that lead emissions from Texas will not impact surrounding states, and lack of nonattainment or maintenance areas in the four surrounding states, Texas has adequately addressed interstate transport of lead."

TCEQ will host a public hearing on this proposal in Austin on May 17, 2011. The public comment period opened on April 22, 2011, and will close on May 23, 2011. Additional information is available on TCEQ's website at <http://www.tceq.texas.gov/airquality/sip/texas-sip/criteria-pollutants/sip-lead>.

Upcoming TCEQ Meetings and Events

- TCEQ will host its annual **Environmental Trade Fair & Conference** at the Austin Convention Center on May 3-4, 2011. A banquet will be held on the evening of May 4 during which the 2011 Texas Environmental Excellence Awards will be issued. Information regarding this event is available at <http://www.tceq.texas.gov/p2/events/etfc/etf.html>.
- The Texas Railroad Commission will hold **Oil & Gas Seminars** in Corpus Christi on May 5-6, 2011. Information about this event is available at <http://www.rrc.state.tx.us/education/seminars/og/index.php>.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in April can be found on the TCEQ website at <http://www.tceq.texas.gov/news/releases/4-11Agenda4-6>.

Recent Texas Rules Updates

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

NATIONAL DEVELOPMENTS

Senator Lautenberg Proposes Revised TSCA Legislation For 112th Congress

On April 14, 2011, Senator Lautenberg (D-NJ) introduced the “Safe Chemicals Act of 2011” (“SCA 2011”), S. 847,¹ a revised version of his 2010 legislation to overhaul the Toxic Substances Control Act (“TSCA”). Senator Lautenberg is the Chairman of the Senate Environment and Public Works Committee’s Subcommittee on Superfund, Toxics, and Environmental Health. The bill is cosponsored by four others, including Senator Boxer (D-CA), who chairs the full Committee.² More information about the similar Senate bill introduced in 2010 is available here.³

As with the previous version, SCA 2011 would place the burden of proof on chemical manufacturers and processors to show that their chemicals meet a new safety standard in order for those chemicals to enter or stay on the market. Overall, SCA 2011 is similar to the bill that was introduced in 2010, but several differences, particularly regarding mixtures and prioritization, are noted below.

Scope

- Unlike the previous version, SCA 2011 would not specifically amend the definition of “chemical substance” to include chemicals in articles. However, chemical substances imported as part of an article would be subject to the same requirements as if they had been imported in bulk, except as EPA and Customs and Border Protection could provide by rule.
- While current TSCA allows testing and reporting rules and control actions to be issued for mixtures, EPA rarely does so. SCA 2011 deletes a number of the previous version’s requirements for mixtures, staying closer to the TSCA status quo. It would allow EPA to take actions relating to mixtures in the same manner as actions relating to chemical substances if EPA determined that doing so would be reasonable and efficient.
- SCA 2011, like its predecessor, would allow EPA to determine that nanoscale versions of existing macroscale chemicals are new chemicals.⁴

New Prioritization Scheme

- EPA would have to assign 20-30 persistent, bioaccumulative, toxic, and potentially high-exposure chemicals within one year after enactment to “priority class 1” for “immediate” (within eighteen months) risk management actions.
- EPA would have to assign an undetermined number of chemicals to “priority class 2” for safety standard determinations, with new chemicals being added to this class 2 list over time as determinations are completed.
- EPA would assign the lowest risk chemicals to “priority class 3” if it determined they have “intrinsic properties” such that they would pose no risk at anticipated exposure levels and use patterns.
- Presumably, most chemicals would not fall into any of these classes.

Safety Standard

- SCA 2011 would amend the current standard for action under TSCA, “unreasonable risk of injury to health or the environment,” to require an EPA determination that a chemical presents a “reasonable certainty that no harm will result to human health or the environment,” considering aggregate exposure and, to the extent practical, cumulative exposure (including exposures from FDA-regulated uses and from house dust) and the health of vulnerable populations.
- For new chemicals, EPA could alternatively determine that the chemical (including its metabolites or degradation products) is not expected to be manufactured or released into the environment in high volumes, known to be toxic or persistent and bioaccumulative, or found in biomonitoring studies.

Minimum Data Set

- SCA 2011 would require EPA to develop, within one year, a standard minimum data set to be required from manufacturers and processors for
 - All new chemicals, to be submitted with premanufacture notifications;
 - All new uses of chemicals for which EPA has made a safety standard determination;
 - Chemicals on the priority class 1, 2, or 3 lists, to be submitted within 18 months after listing (note that only priority class 2 may have been intended); and
 - All other existing chemicals, to be submitted within five years after enactment. Most chemicals would be subject to this requirement. There would be no exemptions for low-risk chemicals, such as polymers or low volume chemicals.
- Data compensation would be available for the minimum data sets, in a manner as prescribed under the current TSCA.

Safety Determinations

- SCA 2011 would require EPA to conduct safety standard determinations of chemicals on the priority class 2 list. As with the previous version of the legislation, the burden of proof would be on manufacturers and processors to submit information within 30 months of listing showing that their chemicals meet the safety standard.
- SCA 2011 would require EPA to complete its safety determinations within one year of receiving a complete submission (extended from 180 days in the previous version) and to renew the determinations every 15 years.
- As under the previous version of the SCA, an affirmative safety determination would have to identify the uses evaluated and any conditions needed to ensure that the safety standard is met, which could include a wide variety of restrictions. Any other uses would become subject to new use notification requirements.
- A negative determination would lead to a ban on manufacture, processing, or distribution within one year unless, within that time, EPA determined that the chemical would meet the safety standard (e.g., due to intervening controls). A negative determination would not be subject to judicial review.

EPA Data Authority

- The provisions of SCA 2011 are similar to those of its predecessor with regard to information gathering. SCA 2011 would require manufacturers and processors of existing chemicals to submit to EPA within one year of enactment either a detailed declaration of current manufacture or processing, or a declaration of cessation of manufacturing or processing. The declaration of current manufacture or processing would have to be updated every three years or upon certain new information. The same declaration would be required for new uses of existing chemicals for which EPA has not made a safety determination, including uses not ongoing at the time of enactment and ongoing uses at a significantly increased volume.
- SCA 2011 would also give EPA authority to issue orders for chemical testing without having to undertake a full rulemaking process, and to make testing and other data publicly available online.

Confidential Business Information

- Like the prior version, SCA 2011 would declare certain information ineligible for confidentiality protection, including chemical identity (except for new chemicals); health and safety studies for commercial chemicals; and information indicating the presence of a chemical in a consumer article intended for use by children or to which children may reasonably be exposed.
- EPA would have to specify by rule within one year of enactment the types of information for which it would not prospectively specify the term of confidentiality. All other eligible types of information would have a maximum confidentiality protection period of five years.
- EPA would be able to determine that information previously considered to be entitled to confidentiality protection is no longer entitled to that protection.

Control Actions

- EPA's safety determinations could impose a wide range of conditions to ensure that chemicals meet the safety standard, with no express provision for notice and comment rulemaking procedures.
- If EPA were to determine that a chemical would not meet the safety standard without additional controls and another agency could take action to address the aggregate and cumulative exposures to the chemical, EPA would have to request that the other agency take action. The other agency would be required to take the action, if appropriate. If the other agency did not take action, EPA could do so.
- SCA 2011 would require EPA to identify localities subject to disproportionate exposure to toxic substances ("hot spots") and to develop action plans to reduce the disproportional exposures.
- SCA 2011 would change the current TSCA judicial review standard requiring "substantial evidence" for many TSCA actions to the more common "arbitrary or capricious" standard of review.

Other Changes to TSCA

- SCA 2011 would give EPA authority to order recalls or other actions in case of imminent harm.
- SCA 2011 would implement the Stockholm Convention,⁵ LRTAP POPs Protocol,⁶ and Rotterdam Convention,⁷ once ratified by the Senate.
- EPA would be required to establish a Children's Environmental Health Research Program, which would include biomonitoring research, and a green chemistry and engineering program to create market incentives for development of safer alternatives to existing chemicals.
- SCA 2011 would delete TSCA's current preemption provision and allow states and localities to adopt and enforce their own chemical laws, regulations, or standards unless compliance with both the state or local standards and the SCA 2011 standard would be impossible.

- EPA could require payment of fees from any person required to submit data.

Reception and Prospects

SCA 2011 comes soon after the Senate's first TSCA hearing of the 112th Congress, on February 3, 2011. At that hearing a main theme was that TSCA legislation could be passed, despite the results of the 2010 elections.⁸

However, it is clear that SCA 2011 has not resolved all of the disagreements that attended last year's TSCA legislative proposals. The American Chemistry Council for one, stated in response to the bill's release that "it appears many of our concerns have not been addressed in this new version, and the bill introduced today could put American innovation and jobs at risk."⁹ The NGO umbrella group Safer Chemicals, Healthy Families, on the other hand, said SCA 2011 showed its sponsors' "clear intention to protect families from toxic chemicals linked to serious health problems" and "predict[ed] action in this Congress despite the partisan divide."¹⁰

With the Republican majority in the House of Representatives unlikely to consider TSCA legislation this Congress, passage of SCA 2011 is unlikely. Nevertheless, SCA 2011 will probably stimulate efforts by stakeholders to educate Congress and each other on a variety of approaches to overhauling TSCA that can address the deficiencies in the current statute while obtaining sufficient support to be enacted.

For more information about the Safe Chemicals Act of 2011, please contact Mark Duvall, mduvall@bdlaw.com, or Alexandra Wyatt, awyatt@bdlaw.com.

1 The Safe Chemicals Act of 2011 is available at <http://lautenberg.senate.gov/assets/SafeChem.pdf>. A summary is available at <http://lautenberg.senate.gov/assets/SafeChem-Summary.pdf>.

2 As of the publication of this alert, the other cosponsors of SCA 2011 are Senators Franken (D-MN), Klobuchar (D-MN), and Schumer (D-NY). The 2010 SCA did not have any co-sponsors.

3 See Beveridge & Diamond, P.C., Proposed Legislation Would Overhaul TSCA, April 23, 2010, <http://www.bdlaw.com/news-852.html>; see also Beveridge & Diamond, P.C., Prospects for TSCA Legislation in the 112th Congress, Jan. 28, 2011, <http://www.bdlaw.com/news-1049.html>.

4 See Beveridge & Diamond, P.C., Proposed TSCA Amendments Would Target Nanomaterials, June 2, 2010, <http://www.bdlaw.com/news-891.html>.

5 Stockholm Convention on Persistent Organic Pollutants, 40 I.L.M. 532 (2001).

6 Protocol on Persistent Organic Pollutants to the Convention on Long-Range Transboundary Air Pollution, 37 I.L.M. 505 (1998).

7 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 38 I.L.M. 1 (1999).

8 See Beveridge & Diamond, P.C., Senate Holds First Hearing of the 112th Congress on TSCA Modernization, Feb. 15, 2011, <http://www.bdlaw.com/news-1072.html>.

9 Press Release, American Chemistry Council, ACC Responds to Introduction of Senator Lautenberg's Chemical Safety Legislation, Apr. 14, 2011, http://www.americanchemistry.com/s_acc/sec_news_article.asp?CID=206&DID=11863.

10 Press Release, Safer Chemicals, Healthy Families, "Safe Chemicals Act of 2011" Introduced Today; Legislation Would Protect American Families from Toxic Chemicals, Apr. 14, 2011, <http://www.saferchemicals.org/2011/04/safe-chemicals-act-of-2011-introduced-today-legislation-would-protect-american-families-from-toxic-chemicals.html>.

SEC Announces Delay of Final Conflict Minerals Regulations

The Securities and Exchange Commission ("SEC") has announced that it will not publish its final regulations implementing section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") concerning conflict minerals before the statutory deadline of April 15, 2011. According to the SEC's recently published timeline for its implementation of the Dodd-Frank Act, the Commission will finalize the conflicts minerals regulations sometime between August and December 2011. The SEC's timeline is available at <http://www.sec.gov/spotlight/dodd-frank/dfactivity-upcoming.shtml#08-12-11>. The delayed timeline suggests that the SEC needs more time to consider potential revisions

to the proposed rule in light of the numerous substantive comments that were submitted by industry and others during the comment period.

This delay will provide companies with fiscal years beginning between April 15 and the SEC's final regulations with additional time to prepare for their obligations because the disclosure, due diligence, and reporting requirements are effective with respect to the company's activities in the first full fiscal year following the SEC's promulgation of final regulations. On the other hand, those with fiscal years that begin soon after the SEC finalizes the regulations will have less time to prepare, which could be difficult if the final regulations differ in significant respects from the proposed regulations.

More information on the conflict minerals provisions of the Dodd-Frank Act is available at <http://www.bdlaw.com/news-910.html>. Additional details on the SEC's proposed regulations issued in December 2010 are available at <http://www.bdlaw.com/news-1025.html>.

For more information, please contact Paul Hagen at (202) 789-6022 or PHagen@bdlaw.com, Russ LaMotte at (202) 789-6080 or RLamotte@bdlaw.com, or Bethany French at (202) 789-6042 or BFrench@bdlaw.com.

FIRM NEWS & EVENTS

Beveridge & Diamond, P.C. Purchases Renewable Energy Credits Equal to 100% of Firm's Electricity Usage

Beveridge & Diamond, P.C. ("B&D"), a national law firm known for its environmental practice, has entered into an agreement to purchase renewable energy certificates (RECs) for wind-generated electricity in an amount equivalent to 100% of its annual electricity usage in all of its offices nationwide. As part of its commitment as a Green Power Leader in the ABA-EPA Law Office Climate Challenge, B&D is purchasing 1,500 megawatt hours ("mWh") of RECs from Community Energy, Inc. annually, making it one of the first firms in the country to hit the 100% mark on REC purchases. The estimated greenhouse gas reduction attributable to B&D's purchase is approximately the same as removing 203 passenger vehicles from the roadways or eliminating the carbon dioxide from 116,200 gallons of consumed gasoline.

In June of 2007, B&D enrolled in all three ABA-EPA Climate Challenge programs -- the Green Power Partnership, Energy Star, and Best Practices for Office Paper Management. B&D was the first law firm to make commitments to all three Challenge programs at all of its offices nationwide. The Green Power Partnership is an EPA program that promotes the use of renewable electricity through the purchase of credits that force "green power" to displace fossil fueled power. B&D's purchase of wind-generated electricity RECs qualifies the firm for recognition as a "Leader" under the Green Power Partnership.

Since February 2008, all of B&D's offices have been using paper that has a minimum 30% post-consumer content for all standard in-house printing and copying (with some offices using 80-100% post-consumer content paper). Since 2007, B&D has implemented paper recycling and double-sided printing as the default setting in its offices as part of its commitment under the Best Practices for Office Paper Management program of the ABA-EPA Law Office Climate Challenge.

The Firm believes that office sustainability is an ongoing process, and will continue to make investments and adopt systems designed to meet best practices of energy and environmental management consistent with the goals of the Challenge and beyond. For more information about B&D's sustainability efforts, please visit <http://www.bdlaw.com/firm-community.html>.

For more information, please contact Daniel A. Eisenberg at (202) 789-6046, or Daniel M. Krainin at (212) 702-5417.

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