

# TEXAS ENVIRONMENTAL UPDATE



August 2013

## TEXAS DEVELOPMENTS

### Fifth Circuit Panel Hears Oral Argument in Whooping Crane Lawsuit Appeal

A three-judge panel of the Fifth Circuit Court of Appeals heard oral arguments in early August on the appeal of the decision rendered by the U.S. District Court for the Southern District of Texas in *The Aransas Project v. Shaw*. The district court's decision, issued on March 11, 2013, held that the Texas Commission on Environmental Quality's ("TCEQ's") water management policies constituted a "taking" of whooping cranes in violation of Section 9 of the Endangered Species Act ("ESA"). The district court's decision was based on a small line of cases under the ESA finding that governmental regulatory action under certain circumstances can trigger ESA liability for a "take." The court also found "proximate cause" under the ESA between TCEQ's issuance of water rights permits and the harm or death of up to 23 whooping cranes in the winter of 2008-2009.

This merits ruling is controversial, as is the remedy – which is currently stayed -- ordered by the lower court. In particular, the court enjoined TCEQ from approving new water permits for the Guadalupe and San Antonio Rivers until the State of Texas (the "State") provides reasonable assurances to the court that such permits would not constitute a "take" of whooping cranes in violation of the ESA. The State and various intervenors appealed the district court's ruling, and expedited briefing and oral argument followed the [Fifth Circuit's granting of a stay](#) of the lower court's ruling earlier this summer.

At oral argument before the Fifth Circuit, the State focused on two primary legal issues. First, the State asserted that its role in permitting private conduct (namely, issuing water rights permits under which separate legal entities then conduct water withdrawals) is not, in and of itself, an act that can violate the ESA. In support of this position, the State argued that the ESA line of cases relied upon by the district court are simply wrongly decided as a matter of law. The State also analogized the implications of the lower court's ruling, arguing by extension of the district court's reasoning that ESA "take" liability could be triggered by routine State functions such as issuing drivers' licenses when it cannot be ruled out that individual drivers might harm or kill endangered species in the ordinary course of driving. The State's second primary argument was that the chain of causation between the State's issuance of water rights permits and the death of or harm to the whooping cranes in the winter of 2008-2009 was too attenuated to constitute proximate cause under the ESA as a matter of law. Thus, even if all of the factual allegations made by plaintiffs were true, which the State contested, liability under the ESA was still not triggered by the TCEQ's issuance of water rights permits. In connection with this argument, and responding to panel questions of whether the district court's causation analysis was too narrow (e.g., did not fully consider drought conditions that were occurring at the relevant time), the State highlighted the fact that the court had adopted almost wholesale the plaintiff's findings of fact.

The State's arguments were supported by arguments by the Intervenors that focused on the lower court's refusal to abstain, under the Burford doctrine, from addressing the myriad of Texas Water Code issues implicated by the ESA claims. Particular emphasis was made on the complex process the State has been undertaking under Senate Bill 3 (enacted by the Texas legislature in 2007) for extensive water planning, including environmental flows for species protection, and on the draconian practical impacts that the lower court's ESA ruling would have on the State process (e.g., no new water rights permits absent federal court

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approval and a lengthy and indeterminate process associated with the ESA relief ordered by the district court). In this respect, Intervenor's pointed out that there are state-based solutions and that Plaintiff's concerns over species could be addressed consistent with the Supremacy Clause by challenges in state court or petitions for TCEQ rulemakings.

Plaintiffs/Appellees defended the district court's consideration of causation issues and highlighted particular testifying experts' opinions at trial. During this last segment of the oral argument, the panel continued its focus on whether the district court fully considered all causation factors that may have affected the lack of water and resulting lack of food sources in the whooping cranes' habitat. In addition, Appellees challenged the basis for Intervenor's Burford abstention arguments, asserting in contrast that there was no process with TCEQ whereby the whooping cranes could be protected under state law. There was also considerable interest by the panel during Appellee's oral argument on the scope and appropriateness of the remedy ordered by the district court.

A recording of the oral argument is available at <http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx>.

### **Texas Supreme Court Affirms TCEQ Discretion to Grant Contested Case Hearings**

The Texas Supreme Court recently affirmed TCEQ's discretion to determine when a contested case is "authorized by law" under its public participation rules. In doing so, the Court denied the City of Waco's request for a contested case hearing on a dairy farm application for a water permit amendment. See *Tex Comm'n on Env'l Quality v. City of Waco*, No. 11-0729, slip op. at 27 (Tex. Aug. 23, 2013).

The Court held that even when a person qualifies as an "affected person" for the purposes of requesting a hearing, the Commission maintains discretion to deny the hearing if it is not otherwise authorized by law. *Id.* The Court went on to agree with the Commission's technical findings that because the proposed permit amendment would not "significantly increase or materially change the authorized discharge of waste," it was exempt from the types of water permit amendments for which a contested case may be granted under the Texas Water Code. *Id.*

Importantly, as part of its holding, the Court also recognized an earlier Third Court of Appeals decision in *Collins v. Tex. Natural Res. Conservation Comm'n*, 94 S.W.3d 876, 884-85 (Tex. App.—Austin 2002, no pet.), which held that determinations on requests for contested cases need not necessarily be conducted through contested case hearings. The Supreme Court agreed that decisions on affected party status can be decided through less formal proceedings before the Commission, as anticipated through Commission enabling statutes and rules.

### **Application for Advanced Review of Compliance History Due August 31**

Registration for TCEQ's Advanced Review of Compliance History ("ARCH") program will end on August 31, 2013. The ARCH program enables regulated entities to review and comment on their compliance history information during a 30-day period prior to such information being published on TCEQ's website. Compliance history ratings and classifications are determined by TCEQ as of September 1 and will be available for ARCH users' review and comment for 30 days beginning on September 15, 2013. Further information regarding the ARCH program is available on [TCEQ's website](#).

### **Section 185 Fee Baseline Amount Submittal Deadline for Houston Area Sources**

By September 19, 2013, major stationary sources of nitrogen oxides and/or volatile organic compounds in the Houston-Galveston-Brazoria nonattainment area must submit

information to establish baseline amounts for the federal Clean Air Act Section 185 failure to attain fee. Information regarding this requirement, including instructions and forms regarding the establishment of baseline amounts, is available on [TCEQ's website](#).

## **TCEQ's Proposed Water Quality Standards Open for Comment Until October 24**

Proposed revisions to TCEQ's water quality standards ("WQS") are currently out for public comment as part of the triennial review process required by the Clean Water Act ("CWA") and the delegated TPDES program in Texas. Changes in WQS that TCEQ finalizes after the public comment period could affect specific TPDES permits on a case-by-case basis if the adopted WQS alter requirements for the receiving waters for a particular industrial discharge. Changes driven by the new WQS could include best management practices and/or modified treatment requirements, depending on whether a standard has been lowered or increased. These types of changes are typically implemented as part of the TPDES permit renewal process for point source dischargers.

WQS changes of a more general nature that will likely impact industry include TCEQ's proposals: (1) specifying that industrial cooling water areas are exempt from certain numeric temperature criteria; (2) modifying certain mixing zone criteria and clarification that mixing zones may vary for different types of numeric criteria; and (3) significantly lowering mercury criteria in both freshwater and saltwater in response to EPA's 2011 disapproval of TCEQ's current mercury water column criteria.

Public comment on the proposed WQS is open until October 24, 2013, with a possible public hearing (if requested) scheduled for October 17, 2013. TCEQ's anticipated adoption date for the finalized WQS modifications is early February 2014.

## **Latest Development on Brazos River Senior Water Rights Call**

Water rights seniority and priority of uses continue to be active issues affecting the Brazos River system. In November 2012, the senior water rights holder on the Brazos made a priority call, asserting it could not obtain all of the water it was entitled to due to diversions by upstream users. The TCEQ responded with an order suspending all junior water rights on the Brazos except for municipal users and power generation. The Texas Farm Bureau sued, challenging TCEQ's authority to issue the order pursuant to the State's drought curtailment rules. Although the TCEQ lifted the curtailment in January 2013, the litigation was not mooted.

On June 6, 2013, a bench ruling from the Travis County district court granted the Farm Bureau's motion for summary judgment, finding that TCEQ's drought curtailment rules exceed the agency's authority by allowing deviation from the water rights seniority system and exempting certain preferred uses. TCEQ appealed this ruling to the Third Court of Appeals, which suspended the bench ruling pending appeal. The Farm Bureau sought but was initially denied a remand to the district court to hear evidence on the alleged impact the suspended order would have on at-risk crops. However, the Thirteenth District Court of Appeals recently remanded the matter to the trial court for an evidentiary hearing on whether the order restricting TCEQ action under the drought curtailment rules should be suspended pending appeal.

Amidst these controversial legal proceedings, on June 26, 2013, the Brazos River senior water rights holder again issued a priority call, and TCEQ again responded on July 2, 2013 with a similar suspension order, curtailing junior water rights except for municipalities and power generation. Along with the case *The Aransas Project v. Shaw* discussed in the first article above, the Brazos River situation continues to be a key case to watch regarding the impact of limited water supplies and competing uses during Texas' ongoing drought conditions.

## Insurer Required to Defend Waste Disposal Well Operator in Lawsuits Arising from Sinkhole Collapse

On August 1, 2013, the Texas Court of Appeals (Thirteenth District) held that an insurer owed a duty to defend a waste disposal well operator in four lawsuits arising from damage caused by the collapse of a sinkhole at the well site. The plaintiffs in the underlying suits alleged that their property had been damaged as a result of contamination from harmful substances injected by the well operator. The insurer, which had issued a commercial general liability policy to the operator, declined coverage on several grounds, including that coverage was excluded by the policy's Total Pollution Exclusion ("Pollution Exclusion") and Oil and Gas Amendatory Endorsement ("Oil and Gas Endorsement"). The operator argued that those exclusions should not apply, as they would render illusory the coverage for blowout and cratering hazards provided under the policy's Blowout and Cratering Coverage Endorsement ("Blowout Endorsement").

The court agreed with the operator. Reasoning that the Pollution Exclusion and Oil and Gas Endorsement effectively excluded coverage for all occurrences arising from a hazardous substance release or other pollution, the court found that applying those exclusions would nullify the Blowout Endorsement because a blowout or cratering event as defined under the policy could not arise in the absence of pollution.

The court also rejected the insurer's argument that coverage for certain of the underlying suits was excluded because those suits arose solely from groundwater damage, which was not covered by the Blowout Endorsement. Construing the allegations in the underlying complaints liberally in favor of the insured, the court found that the underlying suits also alleged above-ground property damage, thus triggering the insurer's duty to defend the entirety of those suits.

The opinion is available here: [Century Surety Co. v. DeLoach, No. 13-12-00072-CV \(Tex. App. 13th Dist. Aug. 1, 2013\)](#).

## EPA Proposes Victoria County SIP Revision Approval

On August 8, 2013, EPA published its proposal to approve and direct final rule revisions to the Texas State Implementation Plan ("SIP") consisting of a maintenance plan for Victoria County required to ensure continued attainment of the 1997 eight-hour ozone National Ambient Air Quality Standard ("NAAQS"). EPA is approving Texas' Victoria County SIP submittal as a direct final rule without prior proposal because EPA views the submittal as noncontroversial and anticipates no adverse comments. This SIP revision will go into effect without further action on October 7, 2013 if EPA receives no adverse comments by September 9, 2013. The proposed rule was published at [78 Fed. Reg. 48373](#), and the direct final rule was published at [78 Fed. Reg. 48318](#).

## U.S. Fish & Wildlife Service Acts Regarding Central Texas Species

On August 20, 2013, the U.S. Fish and Wildlife Service ("USFWS") published notice of its determination of endangered species status for the Austin blind salamander (*Eurycea waterlooensis*) and threatened species status for the Jollyville Plateau salamander (*Eurycea tonkawae*) pursuant to the Endangered Species Act ([78 Fed. Reg. 51278](#)), and its designation of critical habitat for these species in Travis and Williamson Counties, Texas ([78 Fed. Reg. 51328](#)). These rules will be effective on September 19, 2013. Also on August 20 the USFWS announced a six-month extension of the final determination regarding whether to list the Georgetown salamander (*Eurycea naufragia*) and Salado salamander (*Eurycea chisholmensis*) as endangered or threatened species, and reopened the comment period on its previously-proposed rule to list these species, extending the comment period to September 19, 2013 ([78 Fed. Reg. 51129](#)).

## TCEQ Accepting Texas Environmental Excellence Awards Applications

TCEQ is accepting applications through October 4, 2013 for the 2014 Texas Environmental Excellence Awards (“TEEA”).

Each year since 1993 the TEEA program has honored outstanding waste reduction and pollution prevention projects, with the goal of protecting Texas human and natural resources by ensuring clean air, clean water and the safe management of waste. Awards for public and private entities and individuals are available in the following categories: Innovative Operations/Management, Civic/Community, Water Conservation, Pollution Prevention, Agriculture, Education, Youth, Individual, and Technical/Technology. The 2014 awards will be presented at the next Texas Environmental Excellence Awards Banquet, which will be hosted by TCEQ in Austin during the first week of May 2014 in conjunction with the agency’s annual Environmental Trade Fair and Conference.

Information about the Texas Environmental Excellence Awards program, including application materials, is available on the [TEEA website](#).

## Upcoming TCEQ Meetings & Events

- TCEQ will conduct its annual **Advanced Air Permitting Seminar** and **Oil and Gas Facilities Workshop** on September 25 and 26, 2013, respectively, at the Austin Convention Center. The Oil and Gas Facilities Workshop will focus on air permitting issues associated with such facilities. Additional information about these events is available on [TCEQ’s website](#).
- TCEQ’s **2013 Water Quality/Stormwater Seminar** will be held on October 3-4, 2013 in Austin. Along with other information, this event will provide updates on existing and upcoming rules; technical information regarding municipal, industrial, stormwater, and sludge permits; design criteria for domestic treatment facilities and collection systems; industrial and municipal effluent reuse; and water quality standards development and implementation. Additional information about this seminar is available on [TCEQ’s website](#).
- The Zero Waste Network’s **2013 Pollution Prevention and Lean Principles Workshops** will be held in Austin (September 17-19, 2013), Arlington (October 1-3, 2013), and Houston (November 5-7, 2013). The workshops will be conducted in partnership with the TCEQ, with instructors from both entities. The course will be based on the Texas Waste Reduction Policy Act which requires Pollution Prevention (“P2”) planning for certain facility types. Additional information about these three-day workshops is available on [Zero Waste Network’s website](#).
- TCEQ will host a **Dallas/Fort Worth Nonattainment Area SIP Meeting** on September 5, 2013 to provide information on the development of revisions to the state implementation plan (“SIP”) for the 2008 ozone National Ambient Air Quality Standard (“NAAQS”) in the 10-county Dallas/Fort Worth nonattainment area. The meeting will take place at the North Central Texas Council of Governments (“NCTCOG”) Transportation Council Room in Arlington. Additional information about this meeting is available on [TCEQ’s website](#).

## TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in August can be found on [TCEQ’s website](#).

## Recent Texas Rules Updates

For information on recent TCEQ rule developments, please see [TCEQ’s website](#).

## NATIONAL DEVELOPMENTS

### Senate TSCA Hearing Highlights Perils of Path Forward for Updated Chemicals Management Framework

A Senate Environment and Public Works Committee hearing held on July 31, 2013 provided lawmakers with a breadth of perspectives on Toxic Substances Control Act (TSCA) reform.<sup>1</sup> It also gave observers a window into the possible future of the bipartisan Chemical Safety Improvement Act (CSIA), S. 1009.<sup>2</sup> The hearing featured three panels comprising nineteen witnesses in total, including Beveridge & Diamond principal Mark Duvall, appearing in his personal capacity to offer perspective on preemption issues in the bill.<sup>3</sup>

In opening the hearing, Committee Chairman Barbara Boxer (D-CA) expressed opposition to the CSIA, preferring instead the Safe Chemicals Act (SCA), S. 696, introduced earlier this year by Senator Lautenberg (D-NJ, who died shortly afterward) with only Democratic support.<sup>4</sup> In contrast, some other Senators showed eagerness to use the CSIA, with some changes, as the Senate's vehicle for TSCA modernization. Ultimately, Senator Boxer, too, indicated that she intends to work with stakeholders and other Senators to seek improvements to the CSIA.

Read the full text of this article on [B&D's website](#).

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### GAO Advocates for Increased Attention on Adapting to the Effects of Climate Change

The US Government Accountability Office (GAO), the federal government's non-partisan internal auditor, has jumped into the climate change fray, arguing that the federal government must improve how it is addressing the effects of climate change, in addition to and irrespective of any actions taken to prevent or reverse it. In two reports issued earlier this year, the GAO describes shortcomings in federal efforts to address the "significant financial risks" from climate change and recommends both macro and micro level changes to address these risks.

Read the full text of this article on [B&D's website](#).

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### 7th Circuit Decision on Application of Statute of Limitations to PSD Violations Could Hinder EPA Enforcement Initiative

The Seventh Circuit Court of Appeals' July 8, 2013 decision in *United States v. Midwest Generation, LLC*, Case Nos. 12-206 & 12-1051, could have implications on EPA's longstanding Flaring Enforcement Initiative. In *Midwest Generation*, the Seventh Circuit held that the failure to obtain a preconstruction permit and install best available control technology ("BACT") in accordance with the Clean Air Act's Prevention of Significant Deterioration ("PSD") provisions are not continuing violations and that lawsuits alleging noncompliance with those requirements are time-barred five years after construction is completed. As a consequence of this decision, EPA may encounter difficulty when threatening facilities with enforcement over alleged NSR and PSD violations as a means of imposing more stringent flaring obligations that go far beyond the regulatory requirements.

Read the full text of this article on [B&D's website](#).

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## FIRM NEWS & EVENTS

### **Beveridge & Diamond Announces Leadership Role in Law Firm Sustainability Network**

Washington, D.C. -- Beveridge & Diamond, PC ("B&D") proudly announces its leadership role in and support for the newly incorporated Law Firm Sustainability Network ("LFSN"). As a founding member of LFSN, the Firm helps steer the Network by serving on its Leadership Council and its Board of Directors.

As one of the nation's leading environmental law firms, B&D advises a number of clients on sustainability strategies and interacts with numerous environmental organizations on sustainability issues. In that spirit, the Firm supports the LFSN's mission to develop key performance indicators, foster knowledge-sharing, develop best practice guidelines, and recognize innovation regarding environmental sustainability.

B&D's participation with the LFSN marks the latest in a long series of proactive steps the firm has taken to further sustainability inside the Firm and in the legal profession more broadly.

The Firm helped develop the ABA-EPA Law Office Climate Challenge, which focuses on concrete steps law offices of all sizes can take to conserve energy, minimize waste, and promote recycling and renewable energy.

B&D became the first law firm in the nation to commit to all three components of the Climate Challenge for all of its offices nationwide and serves as the primary contact for all firms participating in the Climate Challenge.

The B&D Green Team, which includes representatives from all of the Firm's offices, promotes sustainability with a variety of operational changes, educational events and employee engagement activities.

The Firm received Bisnow's Green Leadership Award in 2008 for its leadership on sustainability issues in Washington, D.C.

#### **Articles about LFSN and Beveridge & Diamond's involvement:**

- "[Leading Firms Establish Network to Push for Sustainability](#)", Greenwire, August, 8 2013
- "[Law Firm Network Is Striving To Make It Easier To Be Green](#)", New Jersey Law Journal, August, 8 2013

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### **Beveridge & Diamond Wins Preemption of County Solid Waste Limits in California Court of Appeal**

Litigators from the Firm's California and Washington offices won a major ruling in the California Court of Appeal on July 31 when a unanimous panel ruled that California law preempted a voter initiative that sought to limit solid waste imports into Solano County California. The decision in *Sierra Club v. County of Solano*, 2013 Cal. App. Unpub. LEXIS 5475, also rejected arguments that intervening legislation should not be given effect while the case was on appeal, and rejected arguments for preserving the attorney fee award to the environmental petitioners that sought to enforce the voter initiative against Beveridge & Diamond's client, the Potrero Hills Landfill.

The opinion has been the subject of articles in BNA Daily Environment Report (quoting Firm Principal Jimmy Slaughter), Westlaw Journal, and Law360. For more information, contact

## **Benjamin F. Wilson to Receive ABA's Environment, Energy, and Resources Dedication to Diversity and Justice Award**

Beveridge & Diamond, P.C. is pleased to announce that Benjamin F. Wilson, the Firm's Managing Principal, will receive the 2013 Dedication to Diversity and Justice Award, presented by the American Bar Association (ABA) Section of Environment, Energy, and Natural Resources at the ABA Annual Meeting on August 11 in San Francisco, CA. (Read the [ABA press release](#))

The ABA selected Mr. Wilson, along with fellow award recipients Quentin Pair, (U.S. Department of Justice), and Nicholas Targ (Holland & Knight LLP), for their roles in establishing the Howard Energy and Environmental Law Society (HEELS) at Howard University School of Law.

HEELS was established in 2003 to create an environmental law curriculum that promotes environmental justice and future leaders. HEELS derives from the idea that environmental justice is the civil rights issue of the 21st century. Howard University's longstanding leadership on civil rights issues made it the natural home for such a program.

"Ben Wilson has been a leader on diversity within the environmental law bar – and the legal profession in general – for many years. We are delighted to see ABA recognize his work with Howard University," said Paula Schauwecker, the Firm's Diversity Principal.

A number of Beveridge & Diamond attorneys have been involved with HEELS since its inception:

Mr. Wilson continues to support HEELS by partnering with the student organization's officers to put on an annual career panel, hosted at the firm. Mr. Wilson also teaches a class on Environmental Justice at Howard with Quentin Pair (DOJ) and Daria Neal (DOJ).

- David Friedland has taught a course on the Clean Air Act.
- Daphne Rubin-Vega was the president of the organization during her last year of law school.
- Stacey Sublett was a member of HEELS while a student at Howard.

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The ABA Section of Environment, Energy, and Resources is the premier forum for strategies and information for environmental, energy and resource lawyers. The Diversity & Justice award recognizes the accomplishments of a person, entity or organization that has made significant accomplishments or demonstrated recognized leadership in the areas of environmental justice and/or a commitment to gender, racial and ethnic diversity in the environment, energy and natural resources legal area.