Texas Environmental Update

BEVERIDGE & DIAMOND PC

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Texas Developments

U.S. Supreme Court Rejects Petition to Hear Regulatory Takings Case Against State of Texas

On April 22, the U.S. Supreme Court denied a petition filed by Hearts Bluff Game Ranch (the "Ranch") for review of a Texas Supreme Court decision that denied a takings claim brought by the Ranch against the State of Texas and the Texas Water Development Board. In its petition, the Ranch argued that the Texas Supreme Court failed to perform the fact-specific analysis the U.S. Supreme Court has found to be necessary in regulatory takings cases. A report on the Texas Supreme Court decision in this case is available on the Beveridge & Diamond website.

The case is *Hearts Bluff Game Ranch, Inc. v. Texas*, case No. 12-1015 (U.S. Apr. 22, 2013). The docket report for the case is available on the Supreme Court's website.

Texas is Among States Filing Petition for Cert with U.S. Supreme Court on GHG Rules

On April 19, 2013, Texas, along with eleven other states, submitted a petition for certiorari to the U.S. Supreme Court asking the Court to reconsider aspects of its 2007 decision in which the Court held that EPA has authority to regulate greenhouse gas ("GHG") emissions as air pollutants under the Clean Air Act (*Massachusetts v. EPA*, 549 U.S. 497, 63 ERC 2057 (2007)). Along with other assertions, the petitioners argue that the Supreme Court should limit its decision in *Massachusetts v. EPA* to apply only to emissions from motor vehicles, which were the subject of that decision. They also request that the Supreme Court reconsider that decision in light of the "preposterous consequences" associated with the application of greenhouse gas regulations to stationary sources. Joining Texas in the petition are the attorneys general of Alabama, Florida, Georgia, Indiana, Louisiana, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, and South Dakota, and the Louisiana Department of Environmental Quality. The Coalition for Responsible Regulation, the Southeastern Legal Foundation Inc., the Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation, and the Glass Packaging Institute are among the other entities that filed separate petitions on April 19.

Supreme Court Invites Solicitor General to File Brief Expressing United States Views on Texas-New Mexico Water Dispute

On April 15, the U.S. Supreme Court invited the U.S. Solicitor General to file a brief expressing the views of the United States regarding a complaint filed in the U.S. Supreme Court by the State of Texas against the State of New Mexico regarding the allocation of water carried by the Rio Grande river. Texas' complaint alleges that the the Rio Grande Project Act, enacted by the U.S. Congress in 1905, and the Rio Grande Compact, signed in 1938 by Texas, New Mexico and the State of Colorado ("Colorado"), require New Mexico

to deliver specified amounts of Rio Grande water into Elephant Butte Reservoir, located near Engle, New Mexico. The complaint states that, once delivered to the Elephant Butte Reservoir, the water belongs and should be allocated to beneficiaries in southern New Mexico and Texas. According to the complaint, New Mexico is not allowing an adequate amount of water to pass through to Texas. Among other things, Texas asks that the Supreme Court declare the rights of Texas to the waters of the Rio Grande pursuant to the Rio Grande Compact and the Rio Grande Project Act and command New Mexico to deliver the Rio Grande waters to Texas in accordance with its obligations.

The case is *State of Texas v. State of New Mexico and State of Colorado*, case No. 22O141 (U.S.). The docket report for the case is available at the Supreme Court's website.

Texas Federal Court Dismisses CERCLA Contribution Claimed Based on Alleged "Re-Contamination" of Former Superfund Site

On March 28, a Texas federal court granted summary judgment to the purchasers of part of a former Superfund site in Port Arthur, Texas, on a contribution claim brought by the sellers under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The former owners of the State Marine Superfund site, Chester L. Slay and several affiliated trusts (the "Slay Parties"), had been sued by the United States in an action seeking environmental cleanup costs under CERCLA § 107. The Slay Parties in turn sued the purchasers (various affiliates of New Birmingham Resources, Inc., or "NBR"), claiming that although the site had been remediated prior to the sale, NBR had "re-contaminated" it by dredging contaminated soil in front of the property, thus exposing the Slay Parties to potential additional CERCLA cleanup costs.

The court dismissed the Slay Parties' claim, holding that they had failed to establish that NBR was liable or potentially liable under CERCLA § 107(a), a prerequisite for establishing a contribution claim under CERCLA § 113(f)(1). Of the four elements required to establish a prima facie claim under § 107(a), the Slay Parties could not establish three. First, NBR was not a "potentially responsible party" under CERCLA because, among other things, it acquired the property after completion of cleanup activities by the U.S. Environmental Protection Agency and the Texas Commission on Environmental Quality. Second, there was no evidence of a release or threatened release of a hazardous substance at the site after NBR's acquisition. Finally, because there had been no release or threatened release, the Slay Parties could not have incurred any cleanup costs as a result.

The case is *United States v. Slay*, No. 1:11-cv-263 (E.D. Tex.).

PDF of Order Adopting Report and Recommendation, March 28, 2013

PDF of Report and Recommendation, February 27, 2013

TCEQ and EPA Reach Agreement re GHG Permitting

On April 4, 2013, EPA Region 6 issued a letter that followed from lengthy debate between TCEQ and EPA regarding which agency has authority to permit non-greenhouse gas ("non-GHG") emissions above prevention of significant deterioration ("PSD") significance levels when PSD review is triggered solely by GHG emissions. EPA had initially asserted that it in those instances EPA should permit GHG emissions as well as non-GHG emissions above PSD significance levels. In response to EPA's request for TCEQ to explain its rationale for asserting authority to permit such non-GHG emissions, TCEQ issued a letter dated February 13, 2013 in which TCEQ explained the legal basis for its position. In EPA Region 6's April 4, 2013 response letter, EPA stated that based upon the representations in TCEQ's letter, "the EPA has no objection to the TCEQ's proposal to issue PSD permits for such sources that emit non-GHG pollutants when such pollutants are increased in amounts that equal or exceed the PSD significance levels."

Environmental Groups Request Probe Into Startup, Shutdown, Malfunction and Maintenance Events

In a letter submitted by the Environmental Integrity Project ("EIP"), environmental groups have asked the EPA Inspector General to undertake a probe into startup, shutdown, malfunction and maintenance emissions of 20 companies in Texas that occurred during the period of 2009 to 2012. The groups specifically request that the Inspector General review enforcement taken by USEPA and TCEQ regarding facilities reporting the largest and most frequent events, and, in particular, examine how the affirmative defense has been applied in those cases. (Letter at 2.) The groups allege that nearly 3,000 "upset" emission events during that time period from these companies has resulted in more than 49,000 tons of NOx, PM, SO2 and VOCs combined. *Id.* Of particular concern to environmental groups are alleged repeat emissions events, which the groups claim have received little agency oversight. Neither EPA nor TCEQ have yet responded. Both agencies, TCEQ in particular, may well point to the Texas New Source Review program pursuant to which maintenance, shutdown and startup ("MSS") emissions are permitted, and the increasingly limited circumstances in which the affirmative defense can be used for such emissions.

PDF of the EIP's letter

New Hydraulic Fracturing Water Recycling Rules Published in Texas Register

On April 12, 2013, new hydraulic fracturing water recycling rules (the "Water Recycling Rules") adopted by the Texas Railroad Commission on March 26, 2013 were published in the Texas Register. The Water Recycling Rules were adopted in order to encourage Texas hydraulic fracturing operators to conserve water used in the hydraulic fracturing process for oil and gas wells.

Among other things, the Water Recycling Rules eliminate the need for operators who recycle fluid on their own leases or transfer fluids to other operators' leases for recycling to obtain a recycling permit from the Railroad Commission. The Water Recycling Rules also establish five categories of commercial recycling permits, which reflect the different types of hydraulic fracturing activity taking place in Texas: (i) On-lease Commercial Solid Oil and Gas Waste Recycling; (ii) Off-lease or Centralized Commercial Solid Oil and Gas Waste Recycling; (iii) Stationary Commercial Solid Oil and Gas Waste Recycling; (iv) Off-lease Commercial Recycling of Fluid; and (v) Stationary Commercial Recycling of Fluid. In addition, the Water Recycling Rules create a tiered approach which allows for both the reuse of treated fluids in oil and gas operations and the reuse of fluid for other non-oilfield related uses.

PDF of adopted rules, as published in the Texas Register

Texas SIP Update

On April 2, 2013, EPA published approval of revisions to the Texas State Implementation Plan ("SIP") for the Houston/Galveston/Brazoria ("HGB") 1997 8-hour ozone nonattainment area (78 Fed. Reg. 19599). The action finalizes EPA's proposed approval of portions of two SIP revisions Texas submitted as meeting certain Reasonably Available Control Technology requirements for volatile organic compounds and oxides of nitrogen in the HGB area. EPA also finalized its proposal to approve the 2007 Voluntary Mobile Emission Reduction Program commitments for the HGB Area. The revisions will be effective on May 2, 2013.

On April 23, 2013, the Texas Commission on Environmental Quality ("TCEQ") adopted two revisions to the Texas SIP. The Infrastructure and Transport SIP Revision for the 2010 Sulfur Dioxide ("SO_2") National Ambient Air Quality Standard ("NAAQS") identifies basic program elements enabling Texas to meet NAAQS infrastructure requirements, and includes a technical demonstration that Texas neither contributes significantly to nonattainment nor interferes with maintenance of the SO_2 NAAQS in any other state. The HGB 1997 Eight-Hour Ozone Standard Nonattainment Area Motor Vehicle Emissions Budgets ("MVEB")

Update SIP Revision will replace MVEBs for the HGB area with MVEBs created using the EPA's latest mobile emissions estimation model, and will address outstanding contingency obligations for the HGB area and Clean Air Act requirements for transportation control measures in severe nonattainment areas.

Additional information about these SIP revisions is available at http://www.tceq.texas.gov/airquality/sip/Hottop.html.

TERP Program Rebate Grants Available

The Texas Commission on Environmental Quality ("TCEQ") is accepting applications for the Texas Emissions Reduction Plan ("TERP") Rebate Grants Program, for which $5,000,000 is currently available. Grants under this program are available for replacing or upgrading older diesel vehicles or equipment. To qualify, on-road vehicles must have a gross vehicle weight of more than 8,500 pounds, and non-road equipment must have at least a 25 horsepower engine. The grant-funded vehicles and equipment must be operated at least 75% of their annual usage in eligible geographical areas and/or designated roads. The Rebate Grants Program is non-competitive, and funding will be issued to eligible applicants in the order that applications are received. Additional information about the Rebate Grants Program is available on TCEQ's website.

Upcoming TCEQ Meetings and Events

TCEQ will host its annual ***Environmental Trade Fair and Conference*** at the Austin Convention Center from April 30 to May 1, 2013. A banquet will be held on the evening of May 2 during which the 2013 Texas Excellence Awards will be accepted. Additional information about this event is available on TCEQ's website.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in April can be found on TCEQ's website - April 10 and April 23.

Recent Texas Rules Updates

For information on recent TCEQ rule developments, please see the TCEQ website.

National Developments

Important D.C. Circuit FOIA Ruling Affirms Agencies' Obligation To Provide Substantive, Appealable Determinations Promptly in Response to FOIA Requests

The U.S. Court of Appeals for the D.C. Circuit has issued a significant decision holding that the common agency practice of providing open-ended initial responses to requests for records under the Freedom of Information Act ("FOIA") violates statutory requirements for prompt agency "determinations" and that judicial review of incomplete responses may be available after the initial 20-business-day period for agency responses to FOIA requests. The ruling should prompt agencies to provide more substantive and robust initial determinations and provide requesting parties with faster and more reliable access to federal courts to challenge an agency's failure to respond or decision to withhold records.

Citizens for Responsibility and Ethics in Washington ("CREW") v. Federal Election Commission involved the application of the statutory requirement that agencies must, within 20 business days of receipt of a FOIA request, determine "whether to comply with such

request," provide notice to the requester of the determination and "the reasons therefor," and notify the requester of the right "to appeal to the head of the agency any adverse determination." 5 U.S.C. § 552(a)(6)(A)(i). The statute allows agencies to extend this deadline to 30 business days on written notice and given certain specified "unusual circumstances," including the need to collect records from field facilities or other establishments; to search for, collect, and examine "a voluminous amount" of records; or to consult with another agency. If the agency does not issue its determination within the statutory deadline the requesting party can bring an immediate federal action to seek to compel a response from the agency. 5 U.S.C. § 552(a)(6)(C)(i). However, if the agency provides its determination within the statutory deadline, or before such an action is filed, the requesting party must first exhaust its administrative appeal remedies before seeking judicial relief. See *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 61-65 (D.C. Cir. 1990).

Find the full text of this article on Beveridge & Diamond's website.

For more information please contact Kathy Szmuszkovicz, (202) 789-6037; David Barker, (202) 789-6050; or Sean Roberts, (202) 789-6017.

Court Upholds EPA Authority to Retroactively Veto CWA Section 404 Permits

In a closely watched case of first impression, the D.C. Circuit Court of Appeals ruled on April 23, 2013 that Clean Water Act Section 404(c) "expressly and unambiguously" authorizes the U.S. Environmental Protection Agency ("EPA") to withdraw previously-approved disposal sites specified in a Section 404 permit issued by the U. S Army Corps of Engineers, after the permit has been finalized. *Mingo Logan Coal Co. v. USEPA*, No. 12-5150 (D.C. Cir. April 23, 2013). Accordingly, the Court reversed the district court's prior ruling that EPA had exceeded its authority in retroactively vetoing specified disposal sites for a mountaintop mining operation that had been authorized in a Corps 404 permit. The Court did not reach the merits of whether EPA's withdrawal of certain specified disposal sites was arbitrary and capricious or otherwise not in accordance with law, and remanded the matter to the district court for further review of that issue.

Find the full text of this article on Beveridge & Diamond's website.

For more information about this important CWA development, please contact Karen Hansen (khansen@bdlaw.com) or Parker Moore (pmoore@bdlaw.com).

EPA Proposes Changes to Storage Tank Provisions of 2012 NSPS for Oil & Natural Gas Sector

On April 12, 2013, in response to a number of industry petitions for reconsideration, EPA proposed amendments to NSPS Subpart OOOO requirements for storage vessels, 78 Fed. Reg. 22,125 (Apr. 12, 2013). The amendments provide additional time for some vessels to install controls, temporarily suspend certain monitoring requirements, provide an alternative compliance option, and make other changes to definitions, testing, and reporting requirements. The Agency will accept comments until May 13, 2013.

Storage vessel controls. After EPA issued the final Subpart OOOO rule in August 2012, the Agency received a number of petitions for reconsideration arguing that EPA had significantly undercounted the number of storage vessels affected by the rule. After reviewing both the pace of well development and the higher liquids generation that results from hydraulic fracturing, EPA agreed and revised its estimates from approximately 300 new vessels per year to 11,600 per year. EPA further agreed that compliant control devices would not be available for all of these new tanks until approximately 2016. As a result, EPA has proposed a phased schedule for storage vessel compliance with the Subpart OOOO standards: storage vessels constructed, modified, or reconstructed between August 23, 2011 and April 12, 2013 are now required only to submit a notification by October 15, 2013 (although they will be required to install controls if their emissions increase after April 12, even without a "modification"); storage vessels that are constructed, modified, or reconstructed after April 12 will be required to install compliant controls

by the later of April 15, 2014 or 60 days after startup. The Agency has asked for information on the number of storage vessels at different VOC emission levels to enable it to develop a strategy to manage higher-emission storage vessels that the proposal would allow to remain uncontrolled for extended periods.

Monitoring and testing requirements. In light of the significant increase in the number of regulated storage tanks, EPA also reevaluated the feasibility of the testing and monitoring requirements imposed under the original rule, which included an initial performance test, installation and operation of a continuous parametric monitoring system ("CPMS"), calculation of daily averages of the continuously monitored parameters, and other requirements for combustion control devices. The current proposal acknowledges that these requirements are not appropriate given the substantial increase in the number of affected storage vessels, the remoteness of well sites at which they are installed, and the various logistical and infrastructure concerns that these remote locations raise. EPA has accordingly proposed more streamlined monitoring and compliance demonstration obligations (*e.g.*, OVA and visual inspections) pending its full reconsideration of this issue, which the Agency expects to complete by the end of 2014.

Alternative compliance option. Several petitioners noted that Wyoming allows the removal of control devices once tank emissions can be demonstrated to be below the applicability threshold, and requested that EPA adopt a similar approach under Subpart OOOO. EPA agreed that this approach would be appropriate given the declining nature of well production over time, but proposed a 4 tpy (uncontrolled) threshold instead of the 6 tpy threshold for regulation under Subpart OOOO. The Agency further clarified that any vessels that were at one time "affected facilities" under Subpart OOOO (*i.e.*, vessels that at one time exceeded the 6 tpy threshold) would remain affected facilities even if their emissions dropped below the 4 tpy level.

Other proposed changes include the following:

- Owners and operators of storage vessels at all wellsites will have 30 days to determine emissions from new tanks and another 30 days to install controls. Under the current rule, these 30 day periods are limited to wellsites with no wells already in production.
- The combustor control device manufacturer test protocol will be revised to be consistent with NESHAP Subpart HH. EPA has solicited further comment on the option to comply based on manufacturer testing.
- The deadline for submitting annual reports and compliance certifications will be extended from 30 days to 90.
- The definitions of "storage vessel" and "storage vessel affected facility" will be amended to clarify that the rule is limited to vessels containing crude oil, condensate, intermediate hydrocarbon liquids or produced water (*i.e.*, not fuel tanks), and to expressly incorporate the 6 tpy emissions threshold.

The proposed rule is available at http://www.gpo.gov/fdsys/pkg/FR-2013-04-12/html/2013-07873.htm. For more information, please contact Laura McAfee, (410) 230-1330, or Aron Schnur, (410) 230-1334.

"Safe Chemicals Act," First TSCA Reform Bill of 113th Congress, Reintroduced

On April 10, 2013, Senator Frank Lautenberg (D-NJ) reintroduced the "Safe Chemicals Act" to "amend the Toxic Substances Control Act (TSCA) to ensure that risks from chemicals are adequately understood and managed."[1] The 2013 bill, S. 696, is identical to the version of the Safe Chemicals Act that was approved by Democrats in the Senate Environment and Public Works (EPW) Committee in December 2012 on a party line vote, but which died at the end of the 112th Congress having seen no further activity.

The bill would make numerous substantial changes to current law.

Find the full text of this article on Beveridge & Diamond's website.

For more information on TSCA modernization efforts, please contact Mark Duvall, 202-789-6090, or Andie Wyatt, 202-789-6086.

Safe Cosmetics and Personal Care Products Act of 2013 Mirrors TSCA Proposals, Would Greatly Expand FDA Authority Over Cosmetics

Representative Janice Schakowsky (D-IL), with fifteen co-sponsors, has introduced legislation in the House of Representatives to dramatically increase Food and Drug Administration (FDA) oversight of chemicals in cosmetics and other personal care products. The Safe Cosmetics and Personal Care Products Act of 2013, H.R. 1385, includes a number of provisions also included in the Safe Chemicals Act of 2013, S. 696, a bill to modernize the Toxic Substances Control Act (TSCA). The bill would fundamentally transform the regulation of cosmetics and their ingredients. It expands on prior proposals in a number of respects. The bill, introduced March 21, 2013, has been referred to the House Committee on Energy and Commerce and to the Committee on Education and the Workforce.

The bill would add a major new subchapter to the Federal Food, Drug, and Cosmetic Act (FFDCA) chapter on cosmetics. This new subchapter would impose significant new obligations on FDA and on "brand owners," the entities responsible for bringing a cosmetic to market, whether domestic or foreign establishments. Obligations would also be imposed on ingredient manufacturers and suppliers.

Find the full text of this article on Beveridge & Diamond's website.

For more information regarding the Safe Cosmetics and Personal Care Products Act and its relation to other chemicals management legislation and policies, please contact Mark Duvall, 202-789-6090, or Andie Wyatt, 202-789-6086.

Owner of Electronics Export Company Receives a 30-Month Prison Sentence

Washington, DC –On March 22, 2013, the Federal District Court for the Eastern District of Michigan sentenced Discount Computers, Inc. ("DCI"), a computer company, and its owner for trafficking in counterfeit goods and services and for violating environmental laws related to the fraudulent export of cathode ray tubes ("CRTs). The prosecution of DCI, along with the December 2012 prosecution of a Colorado electronics recycler for illegal exportation of CRTs, demonstrate the federal government's increased focus on using existing laws to pursue criminal enforcement to address the illegal handling and disposal of e-waste. Cynthia Giles, EPA's Assistant Administrator for the Office of Enforcement and Compliance Assurance, cautions that these criminal sentences should serve as a warning to all those who illegally export e-waste from the United States.

DCI operated as a broker of used electronic components, including computers and televisions. From its headquarters in Michigan and warehouses in Missouri and New Jersey, the company re-sold working electronic parts and disassembled broken ones for scrap. DCI also exported significant amounts of used CRTs – glass video display components of electronic devices like computer monitors or TV monitors – to countries in the Middle East and Asia. When CRTs are deposited in landfills, the lead can leach into the soil and contaminate drinking water supplies. There has been increasing concern that, in third-world and developing countries, improper recycling processes designed to extract valuable metals from CRTs without appropriate health safeguards are increasingly exposing workers to toxic materials.

Worker exposure concerns prompted Egypt to prohibit the importation of computer equipment that is more than five years old. DCI, a company that exported CRTs to Egypt, evaded this requirement by replacing original factory labels on used CRT monitors with counterfeit labels bearing more recent manufacture dates. Over a five-year period, DCI sent at least $2.1 million in shipments to Egypt, or about 300 shipments containing more than 10,000 used CRT monitors. Prosecutors charged DCI with the violation of federal laws prohibiting the knowing use of a counterfeit mark on or in connection with goods and services for the purpose of deceit or confusion. DCI was also charged with violating the Resource Conservation and Recovery Act's prohibition on the storage or disposal of hazardous waste (including the types of monitors

at issue) without appropriate permits. In 2012, Mark Jeffrey Glover, DCI's owner, pleaded guilty to these charges on behalf of himself and his company. This month the court sentenced Glover to 30 months in prison and a $10,000 fine and sentenced DCI to a $2 million fine and $10,839 in restitution.

Recyclers who seek to illegally export e-waste are believed to be motivated at least in part by a significant drop in demand for CRT glass coupled with the high cost of recycling. In the absence of greater demand or the development of less expensive processes for CRT glass recycling, U.S. recyclers are believed to be stockpiling larger and larger quantities of televisions and monitors. Through efforts such as the Cathode Ray Challenge, the electronics and recycling industries are seeking to identify new technologies for recycling and utilizing CRT glass in an environmentally responsible and cost-effective manner.

Companies managing e-waste would be wise to carefully review their disposal practices, including those where any entities are retained to handle the recycling of e-waste. Electronics recyclers should be careful to identify and comply with all applicable federal waste export laws, analogous state laws, and requirements of importing countries, many of which impose more stringent regulation on trans-boundary movements of e-waste for recycling than the United States. In addition, recyclers should be alert to legislative proposals in the United States and abroad that may expand upon existing prohibitions on e-waste exports. For example, it is anticipated that a new version of the Responsible Electronics Recycling Act, which would establish criminal penalties for the export of certain categories of e-waste from the United States, will be introduced in the 113th Congress.

For more information about Beveridge & Diamond's e-waste related litigation and compliance practice, contact a leader of Beveridge & Diamond's work with clients in the electronics sector, Dan Eisenberg, at (202) 780-6046, or the firm's White Collar Practice Group, Nadira Clarke at (202) 789-6069, Lily Chinn at (415) 262-4012, and Pete Anderson at (704) 372-7370.

Firm News & Events

Beveridge & Diamond Secures Class Certification Denial in Drinking Water Case

Litigators in Beveridge & Diamond's Washington, D.C. office secured a denial of class certification on behalf of the District of Columbia Water and Sewer Authority ("DC Water") in a major class action relating to claims of injuries due to lead allegedly found in drinking water in the city.

In *Parkhurst, et al. v. D.C. Water and Sewer Authority*, No. 2009 CA 000971 B (D.C. Sup. Ct. Apr. 8, 2013), the Superior Court of the District of Columbia denied Plaintiffs' motion seeking class certification under Superior Court Rule 23(b)(3), or in the alternative, certification of certain issues under Rule 23(c)(4)(A).

In a 34-page opinion, the Court analyzed each factor under Rule 23, and held that Plaintiffs failed to satisfy the requirements for certification under Rule 23(b)(3) of numerosity, typicality, adequacy of representation, predominance, or superiority. Among other findings, the Court concluded the threshold requirement that the proposed class be identifiable had not been met; the proposed class was both over and under inclusive; and that common issues did not predominate over individual issues, notwithstanding Plaintiffs' proposal to deal separately with common and individual issues through a bifurcated proceeding. The Court further denied Plaintiffs' request for certification of issue classes under Rule 23(c)(4)(A). Notably, the Court rejected Plaintiffs' argument that issue classes may be certified without meeting Rule 23(b)'s key requirement of predominance, observing that such an interpretation "would effectively read the predominance requirement out of Rule 23(b)(3)," and allow putative class representatives to "simply ask for certification of any common issues under [Rule 23](c)(4) and bypass [Rule 23](b)(3) altogether." *Id.* at 29.

John Guttmann, a Principal with the Firm, is quoted in a Law360 article that discusses the case, *DC Agency Won't Face Class In Lead Tap Water Suit*. Read the article here

(subscription required).

Beveridge & Diamond is lead counsel for DC Water. For more information, please contact John Guttmann, Katherine Wesley, or Bina Reddy.

Beveridge & Diamond Named to National Law Journal's "Midsize Hot List" for Third Consecutive Year

The National Law Journal has again included Beveridge & Diamond on its "Midsize Hot List." The list recognizes 20 law firms of between 50 and 200 lawyers who stand out from their peers and from larger firms with unique business strategies and practice success. 2013 marks the third consecutive year that Beveridge & Diamond has been so honored.

As noted in the introduction to the report, "As clients demand better value for their legal spend and potential laterals more satisfaction from their careers, these firms know they're in a good spot...The firms we've selected for our Midsize Hot List are led by forward-thinking attorneys who are guiding their organizations in new practice directions, amassing more business in mainstay practices and spreading into new regions."

"We are honored and gratified to again appear on the Midsize Hot List," said Benjamin F. Wilson, Beveridge & Diamond's Managing Principal. "Our clients make such recognition possible through their daily collaborations with lawyers across our national office network. We strive to innovate in the delivery of our services and to continually provide our clients with outstanding results and value."

Among the examples cited in the National Law Journal's coverage of the firm were:

- the recent arrival of former EPA General Counsel Scott Fulton
- the recent arrival of former Assistant U.S. Attorney Peter Anderson
- litigation victories in California, Pennsylvania, and Kansas

Other recent firm accomplishments include:

- Receiving a 2013 AT&T Legal Department Diversity Award
- Receiving an Excellent Supplier Award from SunCoke Energy

Read the article here (subscription to NLJ is required).

Nadira Clarke Named a "Rising Star" by *Diversity & the Bar* Magazine

Beveridge & Diamond, P.C. is pleased to announce that Nadira Clarke has been named a "Rising Star" by The Minority Corporate Counsel Association's (MCCA) *Diversity & the Bar* magazine.

According to MCCA, "Rising Star" recognition highlights those lawyer whose accomplishments and dedication will catapult them into leadership positions in the years to come and set the standards for excellence in the legal profession.

MCCA cites Ms. Clarke's accomplishments in the white collar defense field – a practice area that is not known for employing minority women – as a factor in support of her selection.

Ms. Clarke is a leader of the Firm's White Collar and Environmental Crimes Practice Group and manages complex, high-stakes criminal and civil environmental matters for companies and individuals. She is a former Assistant United States Attorney and trial lawyer with the Department of Justice Environment & Natural Resources Division.

Ms. Clarke is a graduate of Tufts University (B.A., 1988) and the University of California, Berkeley, Boalt Hall School of Law (J.D., 1992). She joined Beveridge & Diamond in 2007.

Read Ms. Clarke's Rising Stars profile here.

Beveridge & Diamond Receives Supplier Excellence Award from SunCoke

Beveridge & Diamond, P.C. has been selected as a recipient of SunCoke Energy's Supplier Excellence Award. The award recognizes firms that show outstanding support of SunCoke's 2012 business priorities and make a positive impact on the organization through savings, relationship, innovation, and other services that make an impact on their strategic drivers.

"We strive to provide enduring value to clients by understanding our clients businesses and business objectives and by providing cost-effective representation that facilitates those objectives. It is an honor to be recognized for this effort," said Rob Brager, a Beveridge & Diamond Principal who manages the Firm's relationship with SunCoke.

"We highly value our relationship with SunCoke Energy and we appreciate this recognition of our Firm's efforts to support SunCoke's business in any way we can," said Benjamin F. Wilson, Beveridge & Diamond's Managing Principal.

Office Locations:

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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.