

TEXAS ENVIRONMENTAL UPDATE



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TEXAS DEVELOPMENTS

TCEQ Sends Notifications Requiring Stricter Water Conservation in Brazos River Basin

On December 14, the Texas Commission on Environmental Quality ("TCEQ") sent letters to certain junior water rights permit holders (the "Permit Holders") in the Brazos River Basin below Possum Kingdom Lake, informing them that their water diversions could be suspended if they did not take significant action to reduce their water use. The letters were sent to domestic rights holders and municipal water systems and were prompted by worsening drought conditions and the fact that weather forecasts for 2013 include below normal rainfall and above normal temperatures.

Among other things, the letters informed the Permit Holders that, although junior permit holders are not required to release previously stored water, they should pass all inflows above those required to maintain sufficient water for public health, safety and welfare needs. The letters sent to municipal water systems also directed them to implement higher level mandatory use restrictions than may otherwise be required by their drought contingency plans. Restrictions are to be implemented by December 28, 2012. The letters finally state that if senior priority needs are not fulfilled as a result of existing water service suspensions, TCEQ may take additional actions to enforce the water use priority call.

More information regarding TCEQ's water conservation letters is available at: <http://www.tceq.texas.gov/news/releases/121712brazosmuniletter>

TCEQ Issues Revised NSPS Notification Form for Hydraulically Fractured Wells

TCEQ has issued a shortened interactive form for well completion/flowback notifications required by EPA's New Source Performance Standard ("NSPS") Subpart OOOO in 40 CFR §60.5420(a)(2)(i) for hydraulically fractured natural gas wells. The notification form must be submitted no later than two days prior to starting any well completion with hydraulic fracturing or refracturing at a gas well affected facility. Subpart OOOO defines "well completion" as the process that allows for the flowback of petroleum or natural gas from newly drilled wells to expel drilling and reservoir fluids and tests the reservoir flow characteristics, which may vent produced hydrocarbons to the atmosphere via an open pit or tank. "Flowback" is the process of allowing fluids to flow from a natural gas well following a treatment, either in preparation for a subsequent phase of treatment or in preparation for cleanup and returning the well to production. The flowback period begins when material introduced into the well during the treatment returns to the surface immediately following hydraulic fracturing or refracturing.

When the form is submitted by email, TCEQ will email confirmation of receipt along with a copy of the submitted form. Entities continue to have the option of submitting this notification through the State of Texas Environmental Electronic Reporting System ("STEERS").

The new notification form and additional information about its use are available at <http://www.tceq.texas.gov/assistance/industry/new-source-performance-standard-subpart-oooo-notification-and-delegation-update>.

TCEQ Releases Texas Emissions Reduction Plan Biennial Report

TCEQ has released its latest biennial report ("Report") to the Texas Legislature on the status of the Texas Emissions Reduction Plan ("TERP"). The primary objective of the TERP is "to reduce nitrogen oxides (NO_x) emissions from older heavy-duty, on-road vehicles and non-road equipment by providing grants and rebates for voluntary upgrades and replacements." (Report at v.) The program currently targets 42 Texas counties that are designated as nonattainment for ground-level ozone under the federal Clean Air Act or are otherwise areas of concern for ozone issues. Since the beginning of the program in fiscal year 2002, the TCEQ has issued approximately \$858 million under the primary TERP emissions reduction program (the Emissions Reduction Incentive Grants program ("ERIG")), representing a projected reduction of 164,966 tons of NO_x. (Report at v.)

The Report highlights the accomplishments of the many programs falling under the TERP's umbrella. These include ERIG and other grant and rebate programs aimed at promoting reduced emissions through the purchase of cleaner-burning vehicles, increased research and development, energy-efficiency measures, and other methods. The Report also lays out future considerations for these programs and describes the TERP's revenue sources and allocation of funds.

The TERP Biennial Report can be found at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&ved=0CDUQFjAA&url=http%3A%2F%2Fwww.tceq.texas.gov%2Fassets%2Fpublic%2Fcomm_exec%2Fpubs%2Fsfr%2F079_12.pdf&ei=UajcULHmMLHF0AGK9oFg&usq=AFQjCNFKer6XIJapCO4c5ZrW4DAjSt8nkA&bvm=bv.1355534169,d.dmQ.

TCEQ Adopts Infrastructure/Transport SIP Revision for 2008 Ozone National Ambient Air Quality Standards ("NAAQS")

On December 5, 2012, TCEQ adopted the Federal Clean Air Act ("CAA"), §110(a)(1) and (2) Infrastructure and Transport State Implementation Plan ("SIP") Revision for the 2008 Ozone NAAQS. The SIP Revision outlines Texas' provisions supporting the requirements of Section 110(a)(2)(A) through (M) of the CAA, which include, among other things, enforceable emissions limitation and control measures, air quality monitoring and modeling, a permitting program, adequate resources under state law to carry out the plan, emissions reporting, emergency powers, public participation and fee collection. The SIP Revision also includes a technical demonstration indicating that Texas meets the interstate transport requirements of the CAA.

More information regarding the SIP Revision is available at: <http://www.tceq.texas.gov/airquality/sip/Hottop.html>

EPA Proposes Approval of Texas SIP Revisions Regarding Public Participation

EPA has proposed approval of revisions to the Texas SIP that would require public participation in the issuance of air quality permits. Texas submitted the public participation provisions in four separate SIP revisions, starting on July 22, 1998. EPA has proposed to find that the SIP revisions are consistent with EPA policies and comply with the CAA and EPA regulations. Comments regarding the proposed approval must be received on or before February 11, 2013.

EPA's proposal may be viewed in the Federal Register, 77 Fed. Reg. 74129, available at <http://www.gpo.gov/fdsys/pkg/FR-2012-12-13/html/2012-30098.htm>.

Upcoming TCEQ Meetings and Events

A **Central Texas Environmental Summit**, co-sponsored by TCEQ and State Senator Leticia Van de Putte, will be held on January 14, 2012 in Schertz, Texas. With the theme of "Collaboration Along the Corridor," the Summit's mission is to provide stakeholders the opportunity to work together to develop solutions to environmental challenges. The event will include presentations on topics of interest in central Texas, including developments in the Eagle Ford Shale and the State's response to the ongoing drought. Attendees will also have an opportunity to visit exhibits and talk to experts from state and local agencies in attendance. Additional information about this event is available at <http://www.tceq.texas.gov/assistance/central-texas-environmental-summit>.

TCEQ will host an **Industrial Emissions Inventory Workshop** in Austin on January 15, 2013. At this workshop, TCEQ Emissions Assessment Section staff will provide information on accurate and timely emissions inventory reporting. Additional information about this event, including a draft agenda, is available at http://www.tceq.texas.gov/p2/events/etfc/Emmissions_Inventory_Workshop.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in December can be found on the TCEQ website at <http://www.tceq.texas.gov/news/releases/12-12Agenda12-5>.

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

DEA Issues Notice of Proposed Rulemaking Regarding Disposal of Controlled Substances

On December 21, 2012, the U.S. Drug Enforcement Administration ("DEA") issued a notice of proposed rulemaking to address the disposal of unused, unwanted, or expired controlled substances by ultimate users. See Disposal of Controlled Substances, 77 Fed. Reg. 75784 (Dec. 21, 2012) (available [here](#)). The rulemaking is authorized under the 2010 Secure and Responsible Drug Disposal Act ("Disposal Act" or "Act") (enacted October 2010), which amended the Controlled Substances Act. Prior to the Act, ultimate users had limited options for disposal of controlled substances (e.g., flushing or discarding in the trash, surrender of controlled substances to law enforcement, or seeking assistance of DEA). Prompted by public health and safety concerns arising from misuse of accumulated controlled substances within households, the Disposal Act sought to facilitate more convenient, secure, and responsible collection and disposal methods that would allow ultimate users to transfer unwanted controlled substances to authorized entities for destruction. DEA has also recognized that establishment of lawful alternative methods for disposal of unwanted pharmaceuticals may help to reduce the introduction of pharmaceuticals into the environment, particularly in water.

DEA's proposed rule would authorize ultimate users to dispose of unwanted controlled substances through take-back events, mail-back programs, or collection receptacles located at DEA-registered locations. Collection and disposal programs could be operated by law enforcement or certain authorized collectors.

The full text of this article is available [here](#).

For more information, please contact Mark Duvall (mduvall@bdlaw.com), Aaron Goldberg (agoldberg@bdlaw.com), or Jennifer Abdella (jabdella@bdlaw.com).

EPA Issues Revised Enforcement Guidance Regarding Use of the Bona Fide Prospective Purchaser Defense by Tenants and Model Comfort Letters for Lessees with Renewable Energy Developments

In December 2012, the United States Environmental Protection Agency (“EPA”) issued revised enforcement guidance regarding the ability of tenants who lease contaminated or formerly contaminated properties to utilize the Bona Fide Prospective Purchaser (“BFPP”) defense against liability under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). Although the guidance applies across all industries, the impetus for issuing the document stemmed from renewable energy initiatives such as EPA’s RE-Powering America’s Land Initiative, which promotes siting renewable energy on potentially contaminated land and mine sites. EPA intends to exercise its enforcement discretion, on a site-specific basis, to treat certain tenants as BFPPs even when owners do not qualify for or maintain a BFPP status. The revised guidance outlines steps that lessees must take to be eligible for such consideration.

The full text of this article is available [here](#).

A copy of EPA’s guidance, titled “Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision,” is available at <http://www.epa.gov/enforcement/cleanup/documents/policies/superfund/tenants-bfpp-2012.pdf>

For more information, please contact Pamela Marks (pmarks@bdlaw.com), or Aladdine Joroff (ajoroff@bdlaw.com).

EPA Withdraws Health & Safety Study Rule for Cadmium in Consumer Products

The U.S. Environmental Protection Agency (EPA) is withdrawing its controversial final rule, published on December 3, 2012,[1] that would have required manufacturers (including importers) of cadmium or cadmium compounds that have been or are reasonably likely to be incorporated into consumer products to report unpublished health and safety studies under section 8(d) of the Toxic Substances Control Act (TSCA).

In an email bulletin sent December 14, 2012,[2] EPA explained the reasoning behind its relatively quick reversal as follows:

Based on several letters asking questions and raising concerns about the scope and extent of the immediate final rule that indicate that there is significant confusion and uncertainty within certain industrial sectors concerning the rule, EPA has decided to withdraw the immediate final rule EPA will be considering the questions and concerns raised in response to the immediate final rule and next steps with regard to this rule. EPA will also continue to work with the Consumer Product Safety Commission (CPSC) to reduce exposure to cadmium in consumer products generally, and especially those consumer products used by or around children, such as children’s metal jewelry.

EPA did not accept comments to the docket for the rule, but information showing why the rule should be withdrawn was permitted to be submitted to EPA for 14 days after publication, or by December 17, 2012.

The full text of this article is available [here](#).

For more information, please contact Mark N. Duvall (mduvall@bdlaw.com, 202-789-6090), or Alexandra M. Wyatt (awyatt@bdlaw.com, 202-789-6086).

European Commission Releases RoHS Recast Frequently Asked Questions (FAQ) Guidance Document

In advance of the January 2, 2013 deadline for Member States to implement the RoHS Recast, the European Commission recently released a Frequently Asked Questions (“FAQ”) guidance document interpreting the revised Restriction of Hazardous Substances

Directive 2011/65/EU ("RoHS 2"). Though not legally binding, the FAQ reflect the views of the Commission's Directorate-General for the Environment on a number of key aspects of RoHS 2 including the scope of equipment covered (including cables), the timing for the transition to RoHS 2, CE marking, technical documentation, and the process for obtaining technical exemptions. Other key interpretive issues covered include the meaning of "making available on the market," and the meaning of "non-compliant."

The Commission considers the FAQ to be a "living document" and noted in the FAQ preamble that it may revise the document based on the experience and implementation of RoHS 2.

The RoHS 2 FAQ document is available [here](#).

A summary of the 2011 RoHS revisions is available [here](#).

For more information, please contact Elizabeth Richardson (erichardson@bdlaw.com), Paul Hagen (phagen@bdlaw.com), or Lauren Hopkins (lhopkins@bdlaw.com).

EPA Requires Manufacturers and Importers to Submit Studies on Cadmium in Consumer Products

On December 3, 2012, EPA published a final rule requiring manufacturers (including importers) of cadmium or cadmium compounds, including as part of an article, that have been or are reasonably likely to be incorporated into consumer products to report unpublished health and safety studies under Toxic Substances Control Act (TSCA) section 8(d). In particular, any person that imports consumer products containing cadmium or cadmium compounds is subject to the rule. The final rule becomes effective 30 days after publication, or January 2, 2013. Reporting will be due 90 days after publication, or March 4, 2013. The rule is part of a focus by EPA toward greater regulation of chemicals in articles.

EPA also plans to propose adding processors and distributors to this TSCA section 8(d) requirement through a later notice and comment rulemaking.

The full text of this article is available [here](#).

For more information, please contact Mark N. Duvall (mduvall@bdlaw.com, 202-789-6090), or Alexandra M. Wyatt (awyatt@bdlaw.com, 202-789-6086).

U.S. Postal Service Allows Some Lithium Batteries in Equipment in International Mail

In an earlier than expected reversal of a temporary ban, the United States Postal Service ("USPS") is now allowing outbound international shipment of small quantities of small lithium metal and lithium ion batteries packed in equipment.

As noted in a previous alert, a rule published May 14, 2012 temporarily prohibited the outbound international mailing of all lithium batteries and cells via USPS, regardless of quantity, size, watt hours, and whether the cells or batteries are packed in equipment, with equipment, or without equipment. This rule was intended to avoid conflict with the amended standards of the ("ICAO"), which take effect on January 1, 2013.

The full text of this article is available [here](#).

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