

# TEXAS ENVIRONMENTAL UPDATE



July 2012

## TEXAS DEVELOPMENTS

### Beveridge & Diamond Texas Office Expands

Beveridge & Diamond, P.C. is pleased to announce the arrival of three new lawyers in the Firm's Texas Office.

- **Karen Hansen**, a Principal joining our Austin-based team from the firm's Washington, D.C. Office, has returned to her native Texas where she will continue her national practice spanning a variety of regulatory programs including water quality and use, with an expanded focus on Texas issues.
- **Daniel Berner**, formerly a litigation associate with Cleary Gottlieb Steen & Hamilton LLP in New York City, supports litigation and contested case matters. Daniel, a native of São Paulo, Brazil and fluent in Spanish and Portuguese, is also a member of our Latin American Region practice group.
- **Edward Grauman**, an associate from our New York Office, has relocated to Austin with his family. Edward will continue his national environmental, litigation, and insurance recovery practice. Bilingual in Spanish, Ed is also a member of the Latin American Region practice group. *(NOTE: Edward Grauman is a member of the New York and District of Columbia bars. His application for admission to the State Bar of Texas is pending.)*

These lawyers join Madeleine Kadas, Laura LaValle, and Bryan Moore. Laura is the Managing Principal and a founder of the Texas Office, and Co-Chair of the Firm's Air Practice Group. She maintains a state and federal Clean Air Act and enforcement defense practice. Madeleine, a Principal and founder of the Texas Office, is Chair of our Latin American Region Practice Group and Co-Chair of the Firm's International Practice Group. She divides her time between international and domestic compliance and strategic counseling on a range of air, waste and product stewardship topics. Bryan Moore, a litigation Principal, expands the litigation services of the Texas Office, bringing with him deep civil and administrative trial and appeal experience.

### Environmental Groups File Notice of Intent to Sue EPA Under the Clean Air Act

On July 18, 2012, coalitions of environmental groups led by the Environmental Integrity Project ("EIP") and Earth Justice submitted two 60-day citizen suit notices of intent to sue EPA for failing to review rules and standards under the Clean Air Act. The [first notice](#) alleges that EPA has failed to revise air toxics rules for refineries as required by federal Clean Air Act Section 112, citing to recent flaring settlements with Marathon Petroleum Company and BP as examples of the types of improved technologies that are feasible. The [second notice](#) alleges that EPA has failed to update emission factors for flares, tanks, and wastewater treatment systems, resulting in significant underestimation of emissions calculations. On the same date, EIP issued a [report](#) entitled "Accident Prone: Malfunctions and 'Abnormal' Emission Events at Refineries, Chemical Plants, and Natural Gas Facilities in Texas, 2009-2011" outlining its view that startup, shutdown and malfunction emissions are improperly unregulated, unmonitored and underreported.

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## Travis County District Judge Upholds TCEQ's Denial Of Greenhouse Gas Rulemaking Petition

On July 9, 2012, Judge Gisela Triana of the 200th Travis County District Court in Austin, Texas, issued a letter ruling in *Angela Bonser-Lain v. TCEQ*, No. D-1-GN-11-002194. The case concerns TCEQ denial of a petition for rulemaking that requested TCEQ to promulgate rules regulating greenhouse gases. Judge Triana reasoned that, because whether TCEQ has authority to regulate greenhouse gases under the Texas Clean Air Act is an issue involved in a separate case that is on appeal to the Third Court of Appeals, “the legal landscape is uncertain” and “the Commission’s refusal to exercise its authority based on current litigation is a reasonable exercise of its discretion.”

Judge Triana’s letter ruling received much press due to her finding regarding the public trust doctrine: “The Court will find that the Commission’s conclusion, that the public trust doctrine is exclusively limited to the conservation of water, is legally invalid. The doctrine includes all natural resources of the State.” The lawsuit was brought against TCEQ as part of a campaign in a dozen states by an Oregon-based nonprofit group, Our Children’s Trust. The group wants the courts to declare that the atmosphere is a public trust entitled to special protection. Whether Judge Triana’s letter ruling furthers that goal remains to be seen; the statement may be viewed as legal dicta and given little, if any, weight, as it was made in the context of a ruling upholding TCEQ’s denial of a rulemaking petition.

Judge Triana’s July 9, 2012 letter ruling is available on the [website](#) for Our Children’s Trust.

## Registration Period for Advanced Review of Compliance History Has Begun

The Texas Commission on Environmental Quality (“TCEQ”) has opened the registration period for regulated entities to designate representatives who will be entitled to view the entity’s compliance history online before it is made available to the public. Up to five representatives of each regulated entity will be allowed to review their compliance history for 30 days prior to its public availability. This preliminary review period has been adopted pursuant to the Advanced Review of Compliance History revision to 30 Texas Administrative Code Chapter 60 (Compliance History), which was adopted at TCEQ’s June 27, 2012 agenda meeting. The registration period for representatives ends at midnight on August 31, 2012.

TCEQ will calculate compliance history ratings on September 1, 2012. Once compliance history information is available for review, an email will be sent to registered representatives with instructions on how to access the information. The information will become available to the public on November 15, 2012.

Regulated entities may register representatives at the following website: <http://www2.tceq.texas.gov/ch/archsignup/>.

## Third Court of Appeals Affirms TCEQ Order Granting Landfill Permit

On June 28, 2012, the Third Court of Appeals ruled in favor of TCEQ and TX Landfill, LP (“IESI”) in an appeal of TCEQ’s decision to issue IESI a permit for new municipal solid waste landfill near Jacksboro, Texas. The case, captioned *City of Jacksboro v. Two Bush Community Action Group*, No. 03-10-00860-CV, had been remanded to TCEQ by the district court for further evidentiary proceedings regarding a special provision in the landfill permit. The special permit provision required the installation of additional groundwater monitoring wells to the perimeter of the landfill.

The district court ruled that there was no evidence to support the special condition. But the appellate court reasoned that even if there was no evidence in the record to support the special condition, the district court’s reversal of TCEQ’s order was not proper because the plaintiff had failed to show how its substantial rights were prejudiced by TCEQ’s addition of the special provision. The Third Court held that IESI’s permit application, as originally submitted without the additional wells required by the special provision, met the applicable requirements of TCEQ’s groundwater monitoring rules. The special provision, to which

IESI agreed, added groundwater monitoring wells that were not required by TCEQ's rules. "We cannot see . . . how Two Bush has been harmed by TCEQ's adopting a permit that provides more groundwater monitoring than is required by the rules."

The Third Court also confirmed that TCEQ has the authority to add special provisions to municipal solid waste permits after the close of a contested case hearing so long as the agency's decision to add the special provision does not prejudice substantial rights. The court's opinion is available on the Third Court's [website](#).

### **EPA Agrees to Take Action on Plan for Texas Ozone Nonattainment Areas**

Pursuant to a [consent decree](#) (the "Consent Decree") filed in the United States District Court for the District of Columbia, the U.S. Environmental Protection Agency ("EPA") has agreed to take actions to approve, disapprove, or partially approve the various portions of Texas' State Implementation Plan ("SIP") for the Houston-Galveston-Brazoria and Dallas-Fort Worth eight-hour ozone nonattainment areas. The Consent Decree settles a lawsuit brought by the Sierra Club against Lisa Jackson, in her official capacity as EPA Administrator, on March 2, 2012, alleging that, in failing to act on Texas' ozone nonattainment areas, EPA had failed to take action pursuant to certain nondiscretionary duties under the Clean Air Act.

For each different portion of Texas' SIP submittal, the Consent Decree sets forth deadlines for EPA to sign for publication in the Federal Register (1) a notice of its *proposed action* to act on the SIP submittal portion, and (2) notice of its *final action* to act on the SIP submittal portion. The deadlines in the Consent Decree range from February 1, 2013 to January 17, 2014.

### **Certain Texas MSS Emissions Permit Applications Due January 2013**

A broad collection of facility types will be subject to a January 5, 2013 deadline to submit Texas New Source Review ("NSR") permit applications to authorize maintenance, startup and shutdown ("MSS") emissions. A facility will only qualify for the affirmative defense to all claims in enforcement actions brought for MSS emissions if the facility owner or operator files an application to authorize the facility's MSS emissions by the deadlines in 30 TEX. ADMIN. CODE § 101.222(h), which are based on standard industrial classification ("SIC") code.

The MSS permitting schedule provides for the following facility types to have already filed applications by the noted deadlines: Petroleum Refining (SIC 2911) by January 5, 2007; Chemicals and Allied Products (SIC 28 except 2895) by January 5, 2008; Carbon Black (SIC 2895) by January 5, 2010; and Electric Services (SIC 4911) by January 5, 2011. The schedule provides for the following oil and gas facilities to file by January 5, 2014: Crude Petroleum and Natural Gas (SIC 1311); Natural Gas Liquids (SIC 1321); Crude Petroleum Pipelines (SIC 4612); Refined Petroleum Pipelines (SIC 4613); Natural Gas Transmission (SIC 4922); and Natural Gas Transmission and Distribution (SIC 4923). The January 5, 2013 deadline noted above applies to all facilities for which an SIC code is not listed.

Identifying all MSS activities, quantifying associated emissions, and preparing an MSS permit application can take a good bit of time. Accordingly, facilities subject to the January 5, 2013 application deadline that have not yet submitted an application should be implementing plans to complete an application during the five months remaining for submittal by the deadline. Information about MSS permitting is available at TCEQ's website at <http://www.tceq.texas.gov/permitting/air/mss.html>.

### **UST Operator Training Due August 8, 2012**

Pursuant to TCEQ regulations issued last year, August 8, 2012, is the deadline by which every underground storage tank ("UST") facility must have at least one trained operator in each of three operator classes. (See Title 30 TEX. ADMIN. CODE, Chapter 334, Subchapter N.)

A Class A operator (typically a facility owner or manager) is a person with “primary responsibility for ensuring the proper operation and maintenance of the UST systems,” particularly with respect to maintaining compliance with UST regulations. 30 TEX. ADMIN. CODE § 334.602(b)(1)(A). A Class B operator “ensures the implementation of all applicable requirements of [the UST] regulations in the field and implements the day-to-day aspects of the operation and maintenance of, and recordkeeping for, UST systems.” *Id.* § 334.602(b)(2)(A). A Class C operator “typically controls the dispensing of fuel at the facility and is responsible for initial response to alarms, releases, spills, overfills or threats to the public or to the environment.” *Id.* § 334.602(b)(3)(A). Class A and Class B operators must complete a TCEQ-approved operator training course. Class C operators must be trained by Class B operators.

Additional information is available on TCEQ’s website at [http://www.tceq.texas.gov/remediation/pst\\_rp/ust\\_training](http://www.tceq.texas.gov/remediation/pst_rp/ust_training).

### **TCEQ Announces Availability of Clean Vehicle TERP Grants**

On July 9, 2012, TCEQ announced the availability of \$18 million in grant funds to eligible businesses, governmental entities, school districts and individuals to replace older medium-duty or heavy-duty gasoline or diesel vehicles with natural gas vehicles or repower the vehicles with natural gas engines. To qualify, a project must reduce nitrogen oxides (“NO<sub>x</sub>”) emissions by 25%, and the grant recipient must commit to operate the grant-funded vehicles in specified eligible Texas counties for at least 75% of the annual mileage for four years or 400,000 miles, whichever occurs first. TCEQ will accept applications until May 31, 2013 or until all of the grant funds are awarded, whichever occurs first. Information about the program, including a map of eligible counties, is available at <http://www.tceq.texas.gov/airquality/terp/tngvqp.html>.

Information about other Texas Emission Reduction Program (“TERP”) program grants, including funds available pursuant to the Texas Clean Fleet Program, is available on the TERP website at <http://www.tceq.texas.gov/airquality/terp>.

### **TCEQ Announces Possible Water Rights Restrictions**

On July 24, 2012, TCEQ announced that it had informed water rights holders that “the agency may need to administer water rights on a priority basis, if drought conditions persist.” In order to avoid shortages during periods of drought, TCEQ gives priority to those water rights issued earlier in time, and may suspend or adjust more recently issued water rights. TCEQ stated that it would closely monitor conditions and would be ready to impose restrictions if necessary. The TCEQ press release is available at <http://www.tceq.texas.gov/news/releases/7-12rightscurtailment7-24>. More information is available at TCEQ’s Drought Information Page: <http://www.tceq.texas.gov/response/drought/>.

### **TCEQ is Accepting Texas Environmental Excellence Awards Applications**

TCEQ is accepting applications through October 5, 2012 for the 2013 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, and Individual. The 2013 awards will be presented at the next Texas Environmental Excellence Awards Banquet, which will be hosted by TCEQ in Austin on May 1, 2013, 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 at <http://www.teea.org/>.

## Upcoming TCEQ Meetings and Events

- TCEQ will host its **2012 Public Drinking Water Conference: Information and Tools for Public Water Systems and Utilities** on August 7–8, 2012 in Austin. Information regarding this event is available at <http://www.tceq.texas.gov/drinkingwater/conference.html>.
- TCEQ will host its annual **Advanced Air Permitting Seminar** and an **Oil and Gas Facilities Workshop** in Austin on September 10 and 11, 2012. Information regarding these events is available at <http://www.tceq.texas.gov/p2/events/advancedairpermittingoilandgasfacilitiesseminar>.
- TCEQ will host its annual **Water Quality/Storm Water Seminar** in Austin on September 13 and 14, 2012. The seminar will provide information on applying for municipal, industrial, storm water, CAFO and sludge permits; and updates on homeland security, reclaimed water, pretreatment, and environmental management systems. Information regarding this event is available at <http://www.tceq.texas.gov/p2/stormwater>.

## TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in July can be found on the TCEQ website at <http://www.tceq.texas.gov/news/releases/072512commissionagenda>.

## 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

### DOT Asks for Comments on Potential Streamlining of Transport Rules for “Reverse Logistics” Involving Products That Are Hazardous Materials

On July 5, 2012, the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) within the U.S. Department of Transportation (“DOT”) issued an Advanced Notice of Proposed Rulemaking (“ANPRM”) seeking public comments on whether there is a need to simplify the existing Hazardous Materials Regulations (“HMR”) as they apply to “reverse logistics” for products that qualify as hazardous materials. See [77 Fed. Reg. 39,662 \(July 5, 2012\)](#). Comments on the ANPRM are due on October 3, 2012.

As described by PHMSA, reverse logistics is the process by which products go backwards in the distribution chain (e.g., from customers, to retailers, distributors, and/or manufacturers), for purposes of credit, recall, replacement, and possibly recycling or disposal. Information previously provided to PHMSA suggests that a significant percentage of all products distributed enter the reverse logistics stream in some way, and that the percentage is increasing as online transactions continue to expand their market share. Potentially affected products that may qualify as hazardous materials include electronics, batteries, pharmaceuticals, medical devices, automotive parts, and a variety of other consumer and industrial products.

Based on past experience, including enforcement efforts, PHMSA believes that returned products are frequently shipped in ways that do not comply with existing regulatory requirements, such as with inappropriate or damaged packaging, inadequate labeling and/or documentation, insufficient segregation of products with incompatible hazards, lack of training of relevant personnel, etc. PHMSA is considering modifying the current rules, so as to clarify and simplify them, while ensuring transportation safety.

The ANPRM is particularly timely, because of ongoing developments relating to the rules for transport of “consumer commodities” that are hazardous materials. Current rules allow limited quantities of such materials to be reclassified as “Other Regulated Materials”

(“ORM-D”) and to be eligible for significantly reduced transportation requirements. However, in early 2011, PHMSA amended the HMR in order to phase out the ORM-D classification, in favor of “limited quantity” rules that are better harmonized with the international dangerous goods regulations. See [76 Fed. Reg. 3308 \(January 19, 2011\)](#). The phase-out of ORM-D is currently scheduled to be completed on January 1, 2013 for materials transported by aircraft, or January 1, 2014 for materials transported by other modes (i.e., truck, rail, or vessel). However, DOT recently proposed to extend the later deadline until December 31, 2015. See [77 Fed. Reg. 31,274 \(May 25, 2012\)](#); [Beveridge & Diamond PC, “DOT Proposes to Extend Transitional Period for New Rules for Transporting Consumer Commodities \(ORM-D\) That Are Hazardous Materials.”](#)

To assist in the potential development of a future proposal, PHMSA is seeking public comments on a number of specific issues, mostly focused on the following key topics:

- The nature and magnitude of current and anticipated future reverse logistics shipments for products that are hazardous materials;
- The extent of any actual safety concerns associated with such reverse logistics shipments; and
- Potential solutions for facilitating reverse logistics shipments, while maintaining transportation safety.

The ANPRM was issued as part of DOT’s Retrospective Regulatory Review (“RRR”) Plan developed under Executive Order 13563 on Improving Regulation and Regulatory Review. See [76 Fed. Reg. 3821 \(January 21, 2011\)](#). It was also developed in part as a response to two rulemaking petitions that PHMSA had received, one from the Council on the Safe Transport of Hazardous Articles Inc. (“COSTHA”) and the other from the Battery Council International.

For more information about these developments, please contact Aaron Goldberg at [agoldberg@bdlaw.com](mailto:agoldberg@bdlaw.com) or Elizabeth Richardson at [erichardson@bdlaw.com](mailto:erichardson@bdlaw.com).

## **Will FDA Get New Authority to Regulate Cosmetics?**

### **Introduction**

Drug and medical device manufacturers must receive advance approval from the U.S. Food and Drug Administration (“FDA”) before marketing their products to the public. In contrast, cosmetic companies are individually responsible for substantiating the safety of their products before they go to market. Despite the cosmetics industry having experienced significant change with the inclusion of more complex ingredients in products, FDA’s authority to regulate cosmetics has not changed in decades. Several bills have been introduced in Congress to change that, but cosmetics reform remains uncertain. This Client Alert discusses the current regulatory framework for cosmetics and provides an overview on the various cosmetics reform bills proposed in Congress.

*To read the full text of this article, please go to [www.bdlaw.com/news-1386.html](http://www.bdlaw.com/news-1386.html).*

## **EPA Continues to Improve Regulation of Public Health Antimicrobials**

The U.S. Environmental Protection Agency (EPA) has made a number of changes in recent years to improve regulation of antimicrobial pesticide products, particularly those related to public health. EPA’s regulation of public health antimicrobials has long faced criticism, especially focused on the agency’s efficacy testing and data review processes. In response, EPA has made significant efforts since 2009 to improve regulation of public health antimicrobials. The agency has worked to update testing guidelines, increase the rate of product testing, clarify enforcement protocols for ineffective products, and streamline regulatory processes. Manufacturers can now base tests of the efficacy of public health antimicrobials on the 810 Series test guidelines, finalized in 2012. Manufacturers are likely also relying on the Data Requirements rule that EPA proposed in 2008, although the draft final rule is still pending review by the Office of Management and Budget (OMB).

This client alert provides updates on EPA's regulation, testing and enforcement activities related to public health antimicrobials since May 2009. It supplements Beveridge & Diamond's 2008 and 2009 antimicrobials client alerts on this topic.

To read the full text of this article, please go to [www.bdlaw.com/news-1385.html](http://www.bdlaw.com/news-1385.html).

## SEC Announces August Meeting to Consider Final Conflict Minerals Rule

The Securities and Exchange Commission ("SEC") has announced that it will hold an open meeting on August 22, 2012 to consider adopting a final rule to implement the conflict minerals disclosure requirements of Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The final rule was originally due in April 2011, and the SEC has recently come under pressure from members of the House of Representatives over the delay. The meeting, which is open to the public, will begin at 10:00 a.m. and will be held in the SEC Auditorium, Room L-002, 100 F Street, NE, Washington, DC.

The announcement follows a letter from fifty-eight Democratic members of the House of Representatives to SEC Chairman Mary Schapiro on June 22, 2012 expressing concern that the SEC has not yet finalized rules to implement the conflict minerals provisions of the Dodd-Frank Act. The letter urged Chairman Schapiro either to schedule a vote on the conflict minerals rule by July 1, 2012, or to respond by June 29, 2012 with an explanation for the delay and a definitive date for a vote on the rule.

The final rule is expected to detail new SEC disclosure requirements for publicly traded companies using specified minerals or their derivatives which will in turn entail the adoption of due diligence policies and procedures throughout the supply chain.

To read the full text of this article, please go to [www.bdlaw.com/news-1387.html](http://www.bdlaw.com/news-1387.html).

## FIRM NEWS & EVENTS

### Firm Holds Fourth Latin American Region Environmental Roundtable

Beveridge & Diamond was honored to hold its Fourth Latin American Region Environmental Roundtable. The Roundtable, held on June 14, 2012 at the Firm's Headquarters Office in Washington D.C., included a day of lively exchange on issues relating to product stewardship, contaminated sites, Brazilian hot topics, insurance issues, environmental tribunals among other key topics. The Keynote Speaker was Luis Bernal Jiménez, Executive Director of the Energy Affairs Administration of Puerto Rico. The Roundtable concluded with a festive dinner at local Latin restaurant, La Ceiba. Our Latin American Region practice group is planning a series of webinars for 2013.

### Lily N. Chinn Selected For 2012 Leadership Council on Legal Diversity (LCLD) Fellows Program

Lily N. Chinn of Beveridge & Diamond's San Francisco office was accepted into the 2012 Leadership Council on Legal Diversity (LCLD) Fellows Program. Inaugurated in 2011, the LCLD's Fellows program is an ambitious, highly-structured mentoring program that is designed to increase diversity at the leadership level of the nation's law firms and corporate legal departments. Beveridge & Diamond is a founding member of LCLD. For more information about LCLD, please click [here](#).

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