

TEXAS ENVIRONMENTAL UPDATE



June 2012

TEXAS DEVELOPMENTS

5th Circuit Court Upholds EPA Decision to Reject Texas Qualified Facilities Program

The U.S. Court of Appeals for the Fifth Circuit upheld the U.S. Environmental Protection Agency's ("EPA's") decision to disapprove the Texas Qualified Facilities Program ("QFP") submission as part of its Clean Air Act ("CAA") State Implementation Plan ("SIP"). See *BCCA Appeal Group v. EPA*, Slip. Op. 10-60459 (June 15, 2012). The Court viewed as dispositive the failure of the program to be limited explicitly to minor sources. Thus, despite a near decade delay past the time frame for approval, the court upheld EPA's disapproval of the program.

The basis for the decision is distinguishable from a companion case, *Luminant Generation Company, L.L.C. v. EPA*, Slip. Op. No. 10-60891 (March 26, 2012). In *Luminant*, the Court remanded EPA's disapproval of the pollution control project program on any other criteria than those set forth in the CAA. Both decisions are being closely watched as harbingers for the court's ruling on the Texas Flexible Permit Program.

Texas Challenges EPA's Authority to Rescind Approval of State Implementation Plan

In a brief filed June 18, 2012, in the D.C. Circuit court of appeals, the State of Texas and other petitioners challenged EPA's authority under § 110(k)(6) of the CAA to retroactively disapprove of Texas's Prevention of Significant Deterioration ("PSD") SIP submission because the Texas PSD SIP did not address greenhouse gases. In the case, captioned *Texas v. EPA*, No. 10-1425, Texas and the Texas Commission on Environmental Quality ("TCEQ") are among 16 petitioners claiming that EPA acted unlawfully when it disapproved Texas's PSD SIP submittal decades after EPA originally approved it. EPA cites CAA § 110(k)(6) as authority for the retroactive disapproval, claiming that the agency erred when it approved the Texas PSD SIP in 1992 because the SIP did not adequately address the applicability of newly-regulated pollutants in the future. But Texas, TCEQ, and the other petitioners say that § 110(k)(6) is merely "a limited error-correction provision meant to deal with minor clerical or technical errors, not carte blanche for EPA to revoke decades-old decisions that were statutorily compelled at inception but failed to predict changed EPA policy."

The lawsuit challenges an interim final rule and final rule promulgated by EPA on December 30, 2010 (75 Fed. Reg. 82,430), and May 3, 2011 (76 Fed. Reg. 25,178), respectively, which partially disapproved the Texas PSD SIP and imposed a Federal Implementation Plan for PSD regulation of greenhouse gas sources in Texas. EPA's response brief is due to be filed in the case on August 17, 2012.

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EPA Proposes Approval of Texas “PALs” Rules

On June 7, 2012, the EPA announced its proposal to approve Texas SIP revisions that provide operational flexibility by establishing site-wide emission caps known as “Plant-wide Applicability Limits,” or PALS, for existing sources. PALS require continuous monitoring for each of the units included in the cap. The proposal was published in the June 20, 2012 edition of the Federal Register (77 Fed. Reg. 36,964).

Comments must be received by EPA on or before July 20, 2012. Additional information regarding EPA’s proposal is available at <http://yosemite.epa.gov/opa/admpress.nsf/e8f4ff7f7970934e8525735900400c2e/6772c87c6fd9362185257a1600696e25!OpenDocument>.

TCEQ Proposes Changes to New Source Review Authorizations for Oil & Gas Handling & Production Facilities

On May 30, 2012, the TCEQ Commissioners approved for proposal revisions to the oil and gas handling and production facilities permit by rule (“PBR”) in 30 TAC §106.352, and the non-rule standard permit (“OGSP”) issued for such facilities on January 26, 2011. The proposed changes would discontinue applicability of the control, monitoring, and reporting requirements in 30 TAC §106.352(a) – (k) and the OGSP to Archer, Bosque, Coryell, Clay, Comanche, Eastland, Shackelford, and Stephens counties. The referenced provisions are currently applicable in these and the rest of the 23 Barnett Shale Region counties. The proposal would also allow the use of local ordinances concerning separation of facilities from residences and public buildings to meet all state separation requirements. Additionally, the PBR proposal would extend the deadline by which owners and operators must provide TCEQ notification of the facility location and method of authorization from January 1, 2013 to January 5, 2015.

TCEQ will hold a public hearing on the proposal at its Dallas/Fort Worth Regional Office on July 10, 2012. Comments on the rule must be submitted by July 16, 2012. Information about the proposal is available at <http://www.tceq.texas.gov/rules/prop.html>.

TCEQ Adopts Compliance History Rules

As anticipated, the TCEQ adopted new compliance history rules at its June 27, 2012 Agenda. The rules, developed to reflect legislative revisions, were open for public comment until March 23, 2012. <http://www.tceq.texas.gov/enforcement/history/compliance-history-test-data.html>. At the Agenda, it became clear that the full impact of the rules will not be made clear until after compliance history scores are run this fall. Significantly, the new rules include a new factor for complexity designed to reflect complexity of compliance, not reflected in existing rules. Members of the public already suggested that the rules likely will not achieve meaningful designations of compliance history and that more work would need to be done. TCEQ staff indicated that companies interested in obtaining scores before they are posted on the website could do so by engaging with compliance history staff.

Upcoming TCEQ Meetings & 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 10–11, 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 13–14, 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 June can be found on the TCEQ website here:

- June 27: <http://www.tceq.texas.gov/news/releases/6-12Agenda6-27>
- June 13: <http://www.tceq.texas.gov/news/releases/051612commissionersagenda>
- May 30: <http://www.tceq.texas.gov/news/releases/053012commissionersagenda>

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

New EU Biocidal Products Regulation Introduces Important Changes for Biocide Data Protection in Europe

Last month, the Council of the European Union formally adopted the EU's new Biocidal Products Regulation ("BPR") – which is set to replace the EU's existing Directive 98/8/EC (the "Biocidal Products Directive," or "BPD"). The BPR is set to be published in the EU's Official Journal in the coming weeks and will be effective in all Member States 20 days after publication. Among the many changes, the BPR establishes a new data protection framework for biocidal products that will have significant impacts on biocide manufacturers and distributors in European markets. These new provisions will go into effect on September 1, 2013.

To read the rest of this article online, please [click here](#).

For more information about the BPR or the regulation of biocidal products in the United States or European Union in general, please contact: Kathy Szmuszkovicz at Beveridge & Diamond, P.C. (kes@bdlaw.com or 202-789-6037), Elizabeth Richardson at Beveridge & Diamond, P.C. (emr@bdlaw.com or 202-789-6066), or Alan Sachs, Independent Consultant Attorney (ajs@bdlaw.com or 410-230-1345).

California Revises Informal Draft Safer Consumer Products Regulations

Final Rulemaking Proposal Expected in June 2012

On May 18, 2012, the California Department of Toxic Substances Control ("DTSC") released [Revised Informal Draft Safer Consumer Product Regulations](#) ("Revised Informal Draft") as part of its long running effort to implement the state's landmark 2008 Green Chemistry legislation. Manufacturers of consumer products sold in California will be significantly impacted if the Revised Informal Draft language is adopted in the final regulations. Although DTSC has solicited stakeholder feedback on the Revised Informal Draft, it does not plan to respond in writing to any comments received. DTSC is expected to initiate the formal rulemaking process, including notice and a public comment period, later this month with the release the final proposed Safer Consumer Products ("SCP") Regulations. DTSC also plans to hold a public workshop to solicit stakeholder feedback on the final SCP regulatory proposal.

To read the rest of this article online, please [click here](#). For a PDF of this article, please [click here](#).

FIRM NEWS & EVENTS

Texas Office Attorneys Speak About Air Issues at Texas Chemical Council's Annual Environmental, Health & Safety Seminar

Two of our Texas Office attorneys gave presentations at the 25th annual Texas Chemical Council EHS Seminar held on Galveston Island on June 4-7, 2012. Maddie Kadas spoke about Challenges in Flare Management and Compliance during a two-hour flare-focused panel session that included representatives from the TCEQ, EPA, and industry. Laura LaValle participated in a panel presentation with TCEQ Office of Legal Services and industry representatives regarding EPA's Cross-State Air Pollution Rule.

Chambers USA 2012 Ranks Beveridge & Diamond, P.C. Among Leading Law Firms

The *Chambers USA Guide to the Legal Profession* has again ranked Beveridge & Diamond, P.C. as a leading environmental law practice, both nationally and regionally.

Beveridge & Diamond's Practice Area rankings include:

- [Environment](#) - Nationwide
- [Environment](#) - District of Columbia
- [Environment](#) - Massachusetts

Chambers highlighted the following client reviews of the Firm:

"It has lived up to its reputation as being one of the top environmental law firms in DC."

"They are very responsive, organized and efficient; that is why I continue to go back to them."

"They have the depth and breadth of expertise to provide strong and consistent counsel on our environmental priorities."

Beveridge & Diamond lawyers recognized include:

- [Karl S. Bourdeau](#) in Environment, District of Columbia
- [Jeanine L.G. Grachuk](#) in Environment, Massachusetts
- [Stephen L. Gordon](#) in Environment, New York
- [Paul E. Hagen](#) in Environment, District of Columbia
- [John N. Hanson](#) in Environment, District of Columbia
- [Bryan J. Moore](#) in Environment, Texas
- [Stephen M. Richmond](#) in Environment, Massachusetts

To view the Chambers USA 2012 listing, please [click here](#).

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