

# TEXAS ENVIRONMENTAL UPDATE



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## TEXAS DEVELOPMENTS

### EPA Region 6 Administrator Resigns

Former EPA Region 6 Administrator, Al Armendariz, resigned from his post, effective April 30, 2012. His resignation was prompted by a firestorm of criticism for comments he made in 2010, in which he compared his enforcement strategy to Roman crucifixion. Following Armendariz's resignation, [Sam Coleman](#) was appointed as Acting Administrator for Region 6. TCEQ officials met the resignation with skepticism and tied his statements to EPA headquarters, noting that "we are under no illusions that this will change the direction of the EPA." (<http://www.tceq.texas.gov/news/releases/4-12AAStatement4-30>)

Armendariz may receive additional rebuke when he appears at a House Energy and Commerce Committee hearing about EPA enforcement priorities and practices. Although Armendariz is appearing voluntarily, Committee Republicans called for him to testify and suggested that they may seek a subpoena to compel his appearance. Armendariz will testify before the House panel on June 6, 2012.

### Texas Railroad Commissioner Announces Initiative to Modernize Flaring Rules

Texas Railroad Commissioner David Porter announced an initiative to reduce flaring and venting associated with the rapid expansion of oil and gas production in Texas. His initiative includes the following:

- Ensuring operators fully comply with current Commission flaring and venting rules;
- Amending Commission flaring and venting rules to comport with the increased production of the shale plays;
- Reviewing flaring technologies to encourage the use of efficient, environmentally protective and energy-saving flares;
- Working in partnership with all other state regulatory entities to streamline air emission rules, monitoring and reporting;
- Working in partnership with Texas electrical energy regulators to identify opportunities for using excess gas as a strategic source of power generation, especially with the threat of weather-induced power curtailment; and
- Studying a pilot program to use gas as a source of power for on-lease operations in lieu of flaring the gas.

In the May 23, 2012 press release regarding this initiative, Commissioner Porter stated that "[w]e must proactively address flaring with fair, predictable, common-sense regulations based on science and fact. If we don't, we can expect the anti-fossil fuel folks including the EPA to once again attempt to curtail oil and gas production in our state by using politically motivated rulemakings to implement their political agenda – not what is best for the people of Texas."

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If you do not wish to receive future issues of Texas Environmental Update, please send an e-mail to: [jmilitano@bdlaw.com](mailto:jmilitano@bdlaw.com)

The Railroad Commission's May 23rd press release regarding this initiative is available at <http://www.rrc.state.tx.us/commissioners/porter/press/052312.php>.

## **EPA Region 6 Issues Second Texas Greenhouse Gas Permit**

On May 24, 2012, the U.S. Environmental Protection Agency ("EPA") Region 6 issued the second greenhouse gas emissions permit in Texas since taking over permitting authority after the state refused to implement the federal New Source Review/Prevention of Significant Deterioration ("PSD") permitting program for greenhouse gases. The permit, issued nine months after the permit application was initially submitted, authorizes the Energy Transfer Company ("ETC") to add four natural gas processing plants and associated compression equipment to its existing liquids handling facility at the Jackson County Gas Plant in Jackson County, Texas. The permit limits carbon dioxide equivalent emissions from all sources to a total of 602,888 tons per year.

ETC submitted a GHG permit application on August 25, 2011, and a revised application on March 15, 2012. EPA received no comments regarding the proposed permit during the 30-day public comment period that started on March 21, 2012. The application process required submittal of a biological assessment of the potential effects of the proposed action on species protected under the Endangered Species Act ("ESA") and a National Historic Preservation Act ("NHPA") review. In connection with the application, EPA prepared an environmental justice ("EJ") analysis.

As we previously reported, on November 10, 2011, EPA issued the first Texas GHG permit to authorize a new 590-megawatt combined-cycle natural-gas-fired unit at the Lower Colorado River Authority ("LCRA") Thomas C. Ferguson Power Plant in Horseshoe Bay, Texas. With the issuance of the ETC permit, Region 6 now has twenty-three GHG permit applications that have been submitted for review.

ETC's application, the final permit, the ESA biological assessment, NHPA review, EJ analysis, and other documents associated with this permitting action are available on EPA's website at <http://yosemite.epa.gov/r6/Apermit.nsf/AirP>.

## **EPA Publishes 2008 Ozone Standard Area Designations and Deadlines**

On May 21, the U.S. Environmental Protection Agency ("EPA") published a final rule setting initial air quality designations for most areas in the United States for the 2008 primary and secondary ozone national ambient air quality standards ("NAAQS") (77 Fed. Reg. 30088). The two nonattainment areas for this standard in Texas are Dallas-Fort Worth ("DFW") with a "moderate" classification, and Houston-Galveston-Brazoria ("HGB") with a "marginal" classification.

The DFW nonattainment area includes the following counties: Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant and Wise. The two counties that EPA had recommended for inclusion that Texas did not recommend are Hood and Wise Counties, only the latter of which EPA included in the nonattainment area. The HGB nonattainment area includes the following counties: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery and Waller. Matagorda County, which EPA had included in its recommended nonattainment area (contrary to Texas' recommendation), is not included in the HGB area.

The referenced rule is available at <http://www.gpo.gov/fdsys/pkg/FR-2012-05-21/pdf/2012-11618.pdf>, and the final rule regarding 2008 ozone standard attainment deadlines, also published on May 21, 2012 (77 Fed. Reg. 30160) is available at <http://www.gpo.gov/fdsys/pkg/FR-2012-05-21/pdf/2012-11605.pdf>.

## Air Pollutant Watch List Permitting Guidance Issued

The Texas Commission on Environmental Quality (“TCEQ”) has issued a guidance document for New Source Review (“NSR”) permitting in Air Pollutant Watch List (“APWL”) areas. The guidance is intended to increase transparency regarding the APWL process and to minimize permitting delays.

The APWL is a list of geographic areas in Texas for which TCEQ has determined that specific air contaminants have been measured at levels that exceed the effects screening level (“ESL”) for that compound. An ESL is a measured level at which no health effects would be expected. Readings above an ESL trigger further investigation by TCEQ. The APWL serves a number of purposes, including to heighten awareness of such areas for interested persons (including TCEQ personnel, industry representatives and private citizens), and to encourage efforts and focus resources to reduce emissions in these areas.

In the guidance document, TCEQ recommends scheduling a pre-application meeting to discuss, along with other issues, achieving equivalent emission reductions for requested emissions increases, proposed controls, the preliminary air quality analysis (e.g., screen air dispersion modeling), and permit application contents needed address the APWL program. The guidance also discusses special considerations associated with the use of permits by rule (“PBRs”) in APWL areas.

The guidance document and other information relating to the APWL program are available at [http://www.tceq.texas.gov/toxicology/AirPollutantMain/APWL\\_index.html#permitguid](http://www.tceq.texas.gov/toxicology/AirPollutantMain/APWL_index.html#permitguid).

## TCEQ Posts Environmental Trade Fair Materials Online

The Texas Commission on Environmental Quality (“TCEQ”) has posted on its website the written materials provided at TCEQ’s Environmental Trade Fair and Conference held in Austin on May 1-2, 2012. The event included multiple presentations on various general subjects, or “tracks.” The tracks for which presentations are posted online include: *Air Permitting: New Source Review and Operating Permits; Air Quality; Compliance Assistance and Enforcement; Environmental Quality along the Texas-Mexico Border; Ethics; Introduction to Environmental Regulations; Lab Practices and Data Reporting; Oil and Gas; Underground Injection Control/Radioactive Materials and Waste Management; Underground Storage Tank; Waste Management; Waste Remediation; Wastewater Permitting; and Water Availability and Supply; Water Quality Planning*. These Trade Fair materials are available at <http://www.tceq.texas.gov/p2/events/etfc/presentations>.

## Upcoming TCEQ Meetings and Events

- A **TCEQ Commissioners’ Work Session** is scheduled to be held on June 1, 2012, from 9:30am to noon, at TCEQ headquarters in Austin. Information regarding this meeting, including the agenda with backup documents, is available at [http://www.tceq.texas.gov/agency/agendas/wk\\_sess/w\\_session.html](http://www.tceq.texas.gov/agency/agendas/wk_sess/w_session.html).
- 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 Enforcement Orders

TCEQ announcements for enforcement orders adopted in May can be found on the TCEQ website at <http://www.tceq.texas.gov/news/releases/051612commissionersagenda>.

## 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

### EPA Inspector General Recommends Classification of Additional Pharmaceuticals as Hazardous Wastes When Discarded

On May 25, 2012, the U.S. Environmental Protection Agency (“EPA”) Office of Inspector General (“OIG”) issued a report finding that inaction by the Agency in identifying pharmaceuticals that are hazardous wastes when discarded “may result in unsafe disposal and releases of dangerous pharmaceuticals into the environment.” See [EPA-OIG Report No. 12-P-0508](#). To address this concern, the OIG made specific recommendations, which the EPA Office of Solid Waste and Emergency Response must respond to within 90 days.

The OIG asserted that EPA’s hazardous waste regulations under the Resource Conservation and Recovery Act (“RCRA”) “are not keeping up with drug development,” noting that the Food and Drug Administration (“FDA”) has approved hundreds of new drugs since the current list of hazardous waste pharmaceuticals was developed in 1980, and that none of the new drugs have been evaluated for potential regulation under RCRA. To remedy this problem, the OIG recommended that EPA evaluate existing pharmaceuticals for potential regulation as hazardous wastes, and develop a process for reviewing new pharmaceuticals on a continuing basis.

The Report also expressed concern that “confusion and a lack of awareness exist among health care facilities, such as hospitals, regarding the applicability of RCRA regulations to their pharmaceutical wastes.” For this reason, the OIG also recommended that EPA develop a national outreach and compliance assistance plan to improve compliance with the existing rules.

The OIG noted that EPA proposed in 2008 to streamline the requirements for collection and transport of hazardous waste pharmaceuticals by classifying and regulating them as “universal wastes.” See [73 Fed. Reg. 73,519 \(December 2, 2008\)](#). However, the Agency subsequently determined that the 2008 proposal could not be used as a basis for a final rule. EPA is now planning to develop an alternative proposal for healthcare facility-specific regulations addressing the unique issues that such facilities face. The Agency currently expects to issue such a proposal for public comment in Spring 2013.

These developments come in the midst of increasing concerns about pharmaceuticals entering the environment, particularly through discharges into water as a result of manufacturing, use, and disposal. These issues are also complicated by the fact that many pharmaceuticals are controlled substances subject to regulation by the Drug Enforcement Administration (“DEA”).

The OIG Report and related developments are likely to affect a wide range of companies, including pharmaceutical manufacturers, retailers, healthcare facility operators, reverse distributors, and waste services companies.

For more information about the OIG Report and related RCRA and DEA developments, please contact Aaron Goldberg at [agoldberg@bdlaw.com](mailto:agoldberg@bdlaw.com). For more information about related developments under the Clean Water Act, please contact [khansen@bdlaw.com](mailto:khansen@bdlaw.com).

## Federal Guidance Issued for the First Time on E-Discovery Best Practices in Criminal Cases

Recent widespread attention to discovery problems in criminal cases such as the prosecution of Senator Ted Stevens has prompted the U.S. Department of Justice to explicitly provide guidelines for criminal discovery through a variety of [directives](#) to prosecutors. One such directive is a best practices [protocol](#) for the discovery of electronically stored information (“ESI”) in post-indictment criminal cases, released this February. The protocol is the first public guidance on criminal e-discovery by the Federal Government and was developed by the U.S. Department of Justice (“DOJ”) and Administrative Office of the U.S. Courts’ Joint Working Group on Electronic Technology in the Criminal Justice System (“JETWG”) after consultation with federal prosecutors, public defenders and representatives of the judiciary around the country over an 18 month period.

The protocol begins with ten basic principles to guide the ESI discovery process, many of which have been already adopted in civil litigation, and is then divided into three sections: (1) recommendations, (2) detailed strategies to implement the recommendations, and (3) a comprehensive “ESI Discovery Production checklist.” Each section provides practical and technical advice for achieving the principles.

The protocol emphasizes an early, organized, and open approach to managing ESI discovery, which has been the norm in civil litigation since the amendment to the Federal Rules of Civil Procedure in 2006. This cooperative approach may not be familiar territory for those who practice exclusively in the criminal arena where discovery is much more limited. For example, the JETWG recommends that government and defense attorneys meet and confer early and often about the nature, volume, and mechanics of ESI discovery. Additionally, practitioners are advised to be proactive throughout the process, for instance, ensuring access to an ESI production soon after it is received to reduce potential delay caused by technical issues with the production. The protocol details the potential types of ESI available for discovery and the various methods and formats in which ESI should be produced. Also included are definitions of common ESI terms, e.g., native file, metadata and load files, which should be appreciated by Luddites and technophiles alike, to ensure that all parties are speaking the same ESI language.

While many of the recommendations and strategies in the protocol have been adapted from civil litigation, JETWG includes specific recommendations and strategies for situations that are unique to criminal cases. For instance, the protocol provides guidance on the protection of sensitive ESI, such as grand jury materials, information affecting witness safety and information about confidential informants. The protocol also specifically addresses the manner of producing ESI that has been seized from a third party or where the producing party has limited authority to search a digital device based on the scope of a search warrant. Most significantly, the protocol limits its recommendations to the disclosure of ESI required under the Federal Rules of Criminal Procedure 16 and 26.2, Brady, Giglio, and the Jencks Act.

While the protocol is an important first step, there are many unanswered questions about how criminal law principles apply to ESI and what the resulting best practices should be. Recent cases have addressed whether and to what extent mobile phones can be legitimately seized under the Fourth Amendment “search incident to arrest” doctrine, when GPS devices can be lawfully used by the Government without a warrant, and whether it is reasonable to seize an entire hard drive when only certain files may be within the scope of a warrant. See Andrew D. Goldsmith, U.S. Department of Justice National Criminal Discovery Coordinator, [Trends – Or Lack Therof – In Criminal E-Discovery: A Pragmatic Survey of Recent Case Law](#), Vol. 59, No. 3, United States Attorneys’ Bulletin (May 2011) at 2-15 for a detailed discussion of these cases.

Aggressive and appropriate management of ESI is a critical component of criminal defense. DOJ’s protocol addresses handling of ESI, but the directives will also effectively provide parties with a unique opportunity to engage with agents and prosecutors about their case, communicate critical defense themes, and potentially learn important details regarding the government’s investigation. Today, criminal defense, particularly in complex environmental matters, requires counsel that is savvy with regard to the management and control of ESI. Lawyers in Beveridge & Diamond’s White Collar Criminal Practice bring years of experience and technical sophistication to every matter.



For more information about criminal e-discovery issues or Beveridge & Diamond's White Collar Criminal Practice, contact [Lily Chinn](mailto:Lily.Chinn@bdlaw.com) at (415) 262-4012 or [Nadira Clarke](mailto:Nadira.Clarke@bdlaw.com) at (202) 789-6069.

## U.S. Postal Service Bans International Mailing of Lithium Batteries

On May 14, 2012, the U.S. Postal Service ("USPS") published a final rule prohibiting, at least for the time being, all outbound international shipment of lithium batteries via USPS as of May 16, 2012.[1] The prohibition applies to lithium ion and lithium metal batteries and regardless of quantity, size, watt hours, and whether the cells or batteries are packed in equipment, with equipment, or without equipment. Provisions governing both domestic shipment by USPS (including United States territories) and shipment by other carriers (e.g., UPS, FedEx) are not affected by the rule.

This USPS prohibition follows discussions of the International Civil Aviation Organization ("ICAO") Working Group on Lithium Batteries. In February 2012, the Working Group agreed to amend the ICAO Technical Instructions for the Safe Transport of Dangerous Goods by Air to impose more stringent requirements for shipping lithium batteries and cells by air. At the same time, the Working Group agreed to add provisions on transport of lithium batteries by post, based on a proposal by the Universal Postal Union.[2]

The revised ICAO rules take effect on January 1, 2013. At that time, national postal authorities will be specifically authorized to permit international shipment of limited quantities of lithium metal or lithium ion batteries contained in equipment, up to four cells or two batteries per package, if the shipments meet the Section II exceptions under Packing Instructions 967 or 970, as applicable. Also starting January 1, 2013, national postal authority rules must be approved by the civil aviation authorities in each country to ensure consistent international application of the ICAO Technical Instructions.

The new USPS prohibition apparently arises out of concern that until the revised ICAO provisions take effect, U.S. mail rules would have allowed international postal shipment of lithium batteries, but the ICAO would not have explicitly allowed them. The USPS previously withdrew a rule that would have restricted the conditions under which lithium batteries could be mailed internationally from the United States, responding to a request by ICAO to review the changes and ensure consistency.[3] The USPS prohibition may therefore be revised in the future to allow international shipment of lithium batteries contained in equipment (consistent with Section II of Packing Instructions 967 or 970) once the ICAO provisions are in effect.

The prohibition will appear in the Mailing Standards of the United States Postal Service, Domestic Mail Manual 601.10.20. The USPS will also publish amendments to 39 CFR Part 111 to reflect these changes.

For more information, please contact Elizabeth M. Richardson at [erichardson@bdlaw.com](mailto:erichardson@bdlaw.com), Aaron H. Goldberg at [agoldberg@bdlaw.com](mailto:agoldberg@bdlaw.com), or Alexandra M. Wyatt at [awyatt@bdlaw.com](mailto:awyatt@bdlaw.com).

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[1] U.S. Postal Service, Mailings of Lithium Batteries, Final Rule, 77 Fed. Reg. 28259 (May 14, 2012), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-05-14/pdf/2012-11459.pdf>.

[2] See Beveridge & Diamond, P.C., "New Rules for Lithium Battery Air Transport" (Mar. 16, 2012), <http://www.bdlaw.com/news-1325.html>.

[3] See Beveridge & Diamond, P.C., "Congress Limits DOT Authority over the Transport of Lithium Batteries" (Feb. 8, 2012), <http://www.bdlaw.com/news-1298.html>.

### **Beveridge & Diamond Launches Environmental, Land Use and Litigation Law Portal**

Beveridge & Diamond, P.C. is pleased to announce the launch of its Environmental, Land Use and Litigation Law Portal. The blog-style portal is a robust database for Beveridge & Diamond's news alerts, posts, newsletter articles and other substantive content. The Portal allows easy searching using keywords, and allows visitors to sign up to receive content updates, either through an RSS feed or via e-mail. The portal also has a "contact the author" function for each post, and each item can be shared using popular social media sites (Facebook, Twitter, etc.)

The Portal can be found at [www.environmentallawportal.com](http://www.environmentallawportal.com), or using the link found on the Beveridge & Diamond homepage at [www.bdlaw.com](http://www.bdlaw.com).

We have also launched a new newsletter distribution system. If you are already on any of our newsletter distribution lists, you will continue to receive them regularly. If you would like to view our newsletters and sign up to receive any of them, please visit [www.bdlaw.com/publications-newsletters.html](http://www.bdlaw.com/publications-newsletters.html), or contact Janine Militano at [jmilitano@bdlaw.com](mailto:jmilitano@bdlaw.com).

We invite you take a look through the site and sign up for updates. We hope that you will enjoy our new online information resource, the Environmental, Land Use, and Litigation Law Portal!

For more information, please contact Daniel M. Krainin, Principal at [dkrainin@bdlaw.com](mailto:dkrainin@bdlaw.com), or Janine Militano, Marketing Coordinator at [jmilitano@bdlaw.com](mailto:jmilitano@bdlaw.com).

About Beveridge & Diamond, P.C.

Beveridge & Diamond, P.C. is a national environmental, land use, and litigation law firm that was established in Washington, DC in 1974. The firm has offices in key business markets throughout the country.

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### **Beveridge & Diamond Featured in Environmental Law Forum for Sustainability Efforts**

Beveridge & Diamond is featured in an article, *The Sustainable Firm*, from the May-June issue of the Environmental Law Institute's Environmental Forum. Beveridge & Diamond is mentioned at page 26 of the magazine as follows:

At the Washington, D.C., office of Beveridge & Diamond, P.C., an environmental law boutique, the building's pursuit of LEED certification enabled the firm to work with building managers to identify and implement improvements in office sustainability, including improvements to the building's paper recycling program, the installation of more energy efficient lighting, and the implementation of battery and electronics collection programs.

The article also includes a discussion of the ABA-EPA Law Office Climate Challenge, which was pioneered by David Friedland and Dan Eisenberg, attorneys in the Firm's Washington, DC office.

To read the article, please [click here](#).

For more information on Beveridge & Diamond's sustainability efforts, please see <http://www.bdlaw.com/firm-community.html> or contact Daniel M. Krainin at [dkrainin@bdlaw.com](mailto:dkrainin@bdlaw.com).

## Nadira Clarke Featured in Legal Bisnow article on Environmental Crimes Conference

Nadira Clarke, a shareholder in Beveridge & Diamond's Washington office and chair of the Firm's White Collar practice, spoke on a panel on responding to search warrants at the 17th annual ALI-ABA Conference on Environmental Crimes, a leading seminar on federal criminal enforcement of environmental laws. Nadira's presentation was highlighted in the May 4 issue of Legal Bisnow. To view the article, please [click here](#).

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