

TEXAS ENVIRONMENTAL UPDATE



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October 2012

TEXAS DEVELOPMENTS

Court Enjoins City of Dallas from Enforcing Flow-Control Ordinance

On October 16, 2012, the U.S. District Court for the Northern District of Texas granted a request for a permanent injunction enjoining the City of Dallas from enforcing a flow-control ordinance (Dallas City Ordinance No. 28427) that would have required all solid waste collected within the City to be disposed at a City-owned landfill or transfer station. The lawsuit was brought by several businesses that collect solid waste under franchise agreements with the City (most of whom also operate a landfill or recycling facility) as well as two industry groups and a landfill operator. Plaintiffs sued in November 2011 in order to prevent the ordinance from going into effect as scheduled on January 2, 2012.

The court granted a preliminary injunction on January 31, 2012, finding that in enacting the ordinance the City had violated the Contract Clause of the U.S. Constitution. To arrive at this result, the court first concluded that the franchise agreements gave the franchisees "the contractual right to dispose of solid waste collected within the City at any location legally authorized, or permitted, to operate as a disposal, collection, or processing facility." It then found that the ordinance "substantially impaired" the franchisees' rights under those agreements because it would eliminate their ability to dispose of waste at their own facilities and significantly increase their operating costs. Finally, the court held that the ordinance was enacted as a revenue-raising measure and that the City's desire to raise revenue through the ordinance was not "a significant and legitimate public purpose" necessary to justify the substantial impairment of the franchisees' rights.

In granting the permanent injunction, the court reaffirmed its holding on the Contract Clause violation. For similar reasons, it also found that the City violated the Due Course of Law Clause of the Texas Constitution, holding that the City had unreasonably exercised its police powers by enacting the ordinance "to raise revenue to advance its economic and proprietary interests at the expense of the Franchisees' rights." The court also held that the City had violated the Dallas City Charter because it did not provide the franchisees a fair hearing on the ordinance, but dismissed that claim as moot in light of its holding that the ordinance was unconstitutional.

The case is *National Solid Wastes Management Association v. City of Dallas*, N.D. Tex., No. 3:11-cv-3200-O. The court's opinion granting the permanent injunction is available [here](#); its order granting the preliminary injunction is available [here](#).

Jimmy Slaughter and Bryan Moore from Beveridge & Diamond's Washington and Texas offices represent amicus curiae American Forest & Paper Association. For more information, contact Jimmy Slaughter at jslaughter@bdlaw.com or Bryan Moore at bmoore@bdlaw.com.

Texas Files Petition Challenging EPA Air Standards for Hydraulic Fracturing

On October 15, 2012, the State of Texas, the Railroad Commission of Texas, and the Texas Commission on Environmental Quality filed a petition with the U.S. Court of Appeals for the District of Columbia Circuit challenging new EPA Clean Air Act requirements for hydraulic fracturing. Specifically, Texas is challenging the final rule that became effective October 15, 2012, titled "Oil and Natural Gas Sector: New Source Performance Standards and

National Emission Standards for Hazardous Air Pollutants Reviews” (77 Fed. Reg. 49490, August 16, 2012). Five industry associations and three environmental groups also filed separate petitions to challenge the rule. Texas’ petition, to which the final rule is attached, is available [here](#).

EPA Approves Texas “PAL” Program and Eight-Hour Ozone Provisions

On October 11, 2012, the U.S. Environmental Protection Agency (“EPA”) took final action to approve revisions to the Texas air permitting program for major air emissions sources under the federal Clean Air Act’s New Source Review (“NSR”) program. In addition to several key clarifications regarding the definition of facility and the emissions included in baseline emissions calculations, the package approved the following:

- Plant-wide applicability limit (“PAL”) permitting provisions and clarifications;
- Anti-backsliding of major NSR state implementation plan (“SIP”) requirements for the one-hour ozone National Ambient Air Quality Standards (“NAAQS”) in areas that are also nonattainment for the eight-hour ozone NAAQS; and
- Federal requirements for applicability of the eight-hour ozone requirements in non-attainment areas being the date of issuance of the permit.

A copy of the federal register notice is available at <http://www.epa.gov/region6/newsevents/index.html>.

TCEQ Issues Final 2016 Clean Air Interstate Rule Nitrogen Oxides Allocations

TCEQ has issued final 2016 Clean Air Interstate Rule (“CAIR”) nitrogen oxide (“NOx”) allowance allocations for electric generating units that started operating prior to January 1, 2001 or commenced commercial operation after January 1, 2001, and have operated for five or more consecutive years by January 1, 2012. The Texas CAIR annual NOx allocations (in tons) for the 2016 control period for electric generating facilities in Texas can be viewed at http://www.tceq.texas.gov/airquality/banking/Air_Banking_CAIR.html.

Upcoming TCEQ Meetings and Events

TCEQ will hold a meeting of its ***Tax Relief for Pollution Control Property Advisory Committee*** at its Austin headquarters on November 1, 2012, at 10:00 a.m. The meeting is open to the public and can be attended via conference call. The Tax Relief for Pollution Control Property Program determines whether persons are eligible to apply for a property tax exemption for capital expenditures for pollution control property or equipment. Additional information about the meeting is available at http://www.tceq.texas.gov/airquality/taxrelief/prop2_hottopics.html.

The ***Rio Grande, Rio Grande Estuary, and Lower Laguna Madre Basin and Bay Area Stakeholder Committee*** (“BBASC”) will hold its next meeting on November 7, 2012, at 9:00 a.m. at the TCEQ Region 15 office in Harlingen. Additional information about the BBASC is available at http://www.tceq.texas.gov/permitting/water_rights/eflows/rio-grande-rio-grande-estuary-and-lower-laguna-madre.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in October can be found on the TCEQ website at <http://www.tceq.texas.gov/news/releases/10-12Agenda10-17> and <http://www.tceq.texas.gov/news/releases/10-12Agenda10-31>.

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

RCRA's Hazardous Waste Manifest System Enters the Electronic Age

On October 5, President Obama signed into law an amendment to the Resource Conservation and Recovery Act (RCRA) that will establish an electronic hazardous waste manifest system. The electronic system will replace the current paper-based manifest system, which requires hazardous waste handlers to file multiple paper copies of hazardous waste manifests.

The bill, known as the [Hazardous Waste Electronic Manifest Establishment Act](#), passed both chambers of Congress by unanimous consent and enjoys support from both industry and NGOs. Sen. John Thune (R-S.D.), the bill's author, stated that the current manifest system costs regulated parties between \$200 million and \$500 million per year. EPA testified earlier this year that an electronic manifest system could save agencies and regulated parties more than \$75 million per year.

The bill requires EPA to establish user fees to fund the e-manifest system by promulgating regulations in the next year. The system itself would be operational within three years.

EPA originally proposed an optional paperless hazardous waste manifest system in 2001, but the system was never implemented. The agency noted in subsequent years that there remained "a fairly broad consensus" in favor of an electronic system but that implementation of the system depended on increased funding or the authority to collect user fees. With this Act, Congress has authorized EPA to collect user fees, and hazardous waste generators, transporters, and treatment, storage, and disposal facilities will soon be able to manage the hazardous waste manifest system electronically. Precisely how the e-manifest system will be implemented, including how the user fees will be collected, will be set forth in a proposed rule from EPA.

For more information please contact Elizabeth Richardson, 202-789-6066, ERichardson@bdlaw.com; Bethany French, 202-789-6042, BFrench@bdlaw.com; or Ryan Carra, 202-789-6059, RCarra@bdlaw.com.

FTC Issues Revised Green Guides for Environmental Marketing

On October 1, 2012, the Federal Trade Commission (FTC) issued final revisions to the Guides for the Use of Environmental Marketing Claims, known as the Green Guides. The Green Guides inform marketers and others of how the FTC applies Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive acts, to environmental marketing claims. The long-awaited revision provides important new and modified guidance to companies making or planning marketing claims related to the environmental attributes of their products or services.

The FTC's announcement marks the first revision of the Green Guides since 1998. The changes were proposed in 2010 (see our [Oct. 7, 2010 Alert](#)). The final version of the Green Guides generally adheres to the 2010 proposal, with some changes in response to the 340 unique comments received by the FTC. The October 11, 2012 Federal Register notice announcing the final updates to the Guides is [available here](#). A four-page summary of the Green Guides is [available here](#). A detailed discussion of the comments and the FTC responses is [available here](#).

For the full text of this article, please click [here](#).

For a PDF version, please click [here](#).

Beveridge & Diamond actively counsels clients on environmental marketing. For further information on this topic, please contact Mark Duvall (mduvall@bdlaw.com) or Lauren Hopkins (lhopkins@bdlaw.com).

54th Edition of IATA Dangerous Goods Regulations and Accompanying Guidance Set Forth New Requirements for Air Transport of Lithium Batteries

The International Air Transport Association (“IATA”) released the 54th edition of its Dangerous Goods Regulations (“DGR”), effective January 1, 2013.^[1] Along with the revised DGR, IATA has also published new guidance document on the transport of lithium metal and lithium ion batteries.^[2] The IATA DGR incorporates the changes adopted by the International Civil Aviation Organization (“ICAO”) in its revised Technical Instructions for the Safe Transport of Dangerous Goods by Air, also effective January 1, 2013.^[3] Because the IATA DGR incorporates all ICAO provisions as well as certain additional airline restrictions and reformats them for ease of use, it is considered a valuable compliance tool for air shippers. The new rules include more stringent requirements and narrower exceptions for shipping lithium ion and metal batteries and cells by air, which will have important impacts on transportation logistics for batteries, especially bulk shipments. . . .

For the full text of this article, please click [here](#).

For more information on the IATA Dangerous Goods Regulations for lithium batteries, please contact Aaron Goldberg, 202-789-6052, AGoldberg@BDLaw.com, Elizabeth Richardson, 202-789-6066, ERichardson@BDLaw.com, or Andie Wyatt, 202-789-6086, AWyatt@BDLaw.com.

[1] See IATA Significant Changes and Amendments to the 54th Edition (2013), http://www.iata.org/whatwedo/cargo/dangerous_goods/Documents/DGR54-Significant-Changes.pdf.

[2] IATA 2013 Lithium Battery Guidance Document, http://www.iata.org/whatwedo/cargo/dangerous_goods/Documents/Lithium-Battery-Guidance-2013-V1.1.pdf.

[3] See ICAO Dangerous Goods Panel, Working Group of the Whole on Lithium Batteries, First Meeting (Montréal, February 6-10, 2012) Report, available at <http://www.icao.int/safety/DangerousGoods/Working%20Group%20of%20the%20Whole%20on%20Lithium%20Batteries201/DGPWGLB.1.WP.015.en.pdf>.

U.S. Postal Service Proposes Phase-Out of Parcel Marking Standards for ORM-D and Consumer Commodities

On October 3, 2012, the U.S. Postal Service (“USPS”) proposed adopting new mandatory marking standards for hazardous materials sent through the mail, effective January 1, 2013, to align its mailing requirements with those of the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) within the U.S. Department of Transportation (“DOT”).

For the full text of this article, please click [here](#).

More Enforcement of Section 112(r) of the Clean Air Act

On September 28, 2012, a dairy processing company in Puerto Rico with a history of anhydrous ammonia releases, Suiza Dairy Corporation, agreed to pay a \$275,000 penalty, and undertake \$3.75 million in facility upgrades and other improvements. This settlement resolved violations of section 112(r)(1) of the Clean Air Act, known as the general duty clause, and EPA’s related Risk Management Program regulations under section 112(r)(7) of the Clean Air Act. EPA has aggressively enforced the general duty clause, which gives EPA broad authority to require companies handling extremely hazardous chemicals to institute additional controls in order to prevent accidental releases.

For the full text of this article, please click [here](#).

FIRM NEWS & EVENTS

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Beveridge & Diamond, P.C. is pleased to announce that all five Principals in the Firm's New York office have been recognized by the Super Lawyers rating service as being among the top lawyers in their areas of practice in the New York metropolitan area.

For the full text of this article, please click [here](#).