

# TEXAS ENVIRONMENTAL UPDATE



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## **TEXAS DEVELOPMENTS**

### **TCEQ Extends Enforcement Discretion for Refinery MSS Permits**

The TCEQ has issued a policy memorandum, available at [www.bdlaw.com/assets/attachments/TCEQ\\_Memo\\_-\\_MSS\\_Permits.pdf](http://www.bdlaw.com/assets/attachments/TCEQ_Memo_-_MSS_Permits.pdf), extending its enforcement discretion for refineries that have submitted timely applications to permit planned maintenance, start-up and shutdown (MSS) activities. The grace period expired on January 7, 2008; however, the TCEQ does not expect to issue the majority of the permits for the twenty-six refineries that submitted applications until April 2009. Under the policy, enforcement discretion will be used for unauthorized emissions under the following conditions:

- the permit applicant provides written acceptance of its draft permit to the TCEQ by March 31, 2009;
- all unauthorized emissions from MSS activities are recorded and reported to the TCEQ for consideration of enforcement discretion; and
- owners/operators demonstrate sufficient progress for obtaining authorization by meeting the requirements of 30 TAC § 106.263 or filing a permit amendment application after notice from a Regional office or after self-discovery of the need for authorization.

### **TCEQ Publishes Revised ESL List & Seeks Comment on Additional ESL Changes**

On February 13, 2009, the TCEQ Toxicology Division issued a new Effects Screening Level ("ESL") list and new Decision Support Documents ("DSDs") that reflect updated ESLs for 1, 4-dichlorobenzene, vinyl chloride, m-xylene, o-xylene, p-xylene, and mixtures of these xylene isomers. Additionally, the public comment period for the TCEQ's proposed DSD for silica ended in January 2009. The TCEQ is in the process of reviewing and revising that proposed silica DSD based on comment received during the comment period.

ESLs are ambient air concentration guidelines used to gauge the potential of constituents associated with modification of an existing facility or construction of a new facility to cause adverse health or welfare effects. They are permit review screening tools, the exceedence of which triggers a more in-depth health effects review. "Short-term" ESLs generally have a one-hour averaging period, and "long-term" ESLs have annual averaging periods. The purpose of a DSD is to provide a summary of information on the TCEQ's ESL development process and the key toxicity studies/information used to derive toxicity factors. The revised ESL list ([http://www.tceq.state.tx.us/implementation/tox/esl/list\\_main.html](http://www.tceq.state.tx.us/implementation/tox/esl/list_main.html)) and the new DSDs (<http://www.tceq.state.tx.us/implementation/tox/dsd/final.html>) are available on the TCEQ website.

The Toxicology Division is currently accepting toxicity information to be considered in developing ESLs for the following chemicals: acetic acid, acetone, acrylic acid, butyl acetate, carbonyl sulfide, chlorine, isobutane, isohexane (AKA: 2-methylpentane), methanol, methyl tert-butyl ether, particulate matter compounds, petroleum coke (contains 1,000 ppm

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PAHs), portland cement, limestone (calcium carbonate), soda ash (sodium carbonate), soda lime glass, fibrous glass, black grit/slag abrasive, non-metallic pigments, pentane, phenol, propionaldehyde, trichloroethylene, vinyl acetate, 4-vinyl cyclohexene, and vm&p naphtha [UDEX Raffinate (lactol spirit, solvent naphtha, light aliphatic)]. The TCEQ will accept information for these chemicals from interested parties until August 6, 2009. A list of these chemicals and information about submitted comments is available on the TCEQ website at <http://www.tceq.state.tx.us/implementation/tox/esl/develop.html#submission>.

### **TCEQ Proposes “Air Pollutant Watch List” Changes**

The TCEQ Toxicology Division has requested public comment regarding proposed changes to its Air Pollutant Watch List (“APWL”), which is a list of geographic areas in Texas where the TCEQ has determined that specific air pollutant levels have been measured at levels of concern. 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. Specifically, the TCEQ is proposing to remove hydrogen sulfide from APWL Site No. 1002 (Beaumont, Jefferson County); to remove 1,3-Butadiene from APWL Site No. 1004 (Port Neches, Jefferson County); and to remove 1,3-Butadiene and add styrene to APWL Site No. 1207 (Milby Park, Harris County). Comments on these proposed changes must be submitted to TCEQ by March 6, 2009. Information about submitting comments is available on the TCEQ website at [http://www.tceq.state.tx.us/implementation/tox/AirPollutantMain/APWL\\_index.html#consideration](http://www.tceq.state.tx.us/implementation/tox/AirPollutantMain/APWL_index.html#consideration).

### **TCEQ Publishes Its Border Initiative**

The TCEQ has published a 2009 Border Initiative (available at [www.bdlaw.com/assets/attachments/TCEQ\\_Border\\_Initiative.pdf](http://www.bdlaw.com/assets/attachments/TCEQ_Border_Initiative.pdf)). The initiative catalogues the Commission’s existing state and local border-related efforts and then sets forth a series of activities, organized by media, to enhance those efforts. Although many of the actions cited are for enhanced monitoring and information dissemination, the efforts also include the potential for significant legal developments. These include defining “extraordinary drought” for the Rio Grande Basin to prevent the delays that occurred in settling Mexico’s Rio Grande water debt of 1.5 million acre-feet to the U.S. and developing the proposed Annex VI to the La Paz Agreement to call for environmental compliance assistance and enforcement.

### **TCEQ Adopts Revisions to TCEQ Rules to Remove LPST Sites from TRRP**

At its February 25, 2009 Agenda, the TCEQ adopted revisions to Chapters 334 and 350 of the TCEQ rules removing Leaking Petroleum Storage Tank (LPST) sites from the Texas Risk Reduction Program (TRRP). Beveridge & Diamond previously reported on the development of the proposed rule in the October 2008 issue of Texas Environmental Update, available at [http://www.bdlaw.com/assets/attachments/October\\_2008\\_Texas\\_Environmental\\_Update.pdf](http://www.bdlaw.com/assets/attachments/October_2008_Texas_Environmental_Update.pdf). The adopted revisions eliminate language in Chapters 334 and 350 requiring compliance with Chapter 350 for the assessment, response actions, and post-response action care for releases of regulated substances from USTs or ASTs. The rules were adopted without changes to the proposal published in the Texas Register on November 21, 2008.

### **TCEQ Adopts Regional Haze SIP Revision**

At their February 25, 2009 agenda meeting, the TCEQ commissioners adopted a revision to the Texas state implementation plan (“SIP”) to address visibility impairment due to regional haze in Class I Federal areas. The Regional Haze SIP revision is the plan Texas must submit to the United States Environmental Protection Agency (“EPA”) to show how Texas will reduce regional haze to natural conditions. The adopted revision implements Federal Clean Air Act requirements to make reasonable progress in reducing visibility impairment at Class I Federal areas, including Big Bend and Guadalupe Mountains National Parks, resulting

from man-made pollution. The adopted regional haze plan addresses the core requirements in 40 CFR §51.308(d), including reasonable progress goals, calculations of baseline and natural visibility conditions, long-term strategy for regional haze, monitoring strategy, and other implementation plan requirements. The plan also addresses Best Available Retrofit Technology (“BART”) requirements in 40 CFR §50.308(e). Information regarding this SIP revision is available on the TCEQ website at [http://www.tceq.state.tx.us/implementation/air/sip/bart/haze\\_sip.html](http://www.tceq.state.tx.us/implementation/air/sip/bart/haze_sip.html).

## **Texas Legislative Update**

With the March 13th deadline for bill filing approaching, a number of environmental bills of interest have been filed in recent weeks. Subjects addressed by recent bills include, among others, air permitting, revisions to the Texas Emissions Reduction Plan, water quality fees and renewable energy. For highlights of these bills, please see the chart located at [http://www.bdlaw.com/assets/attachments/Texas\\_Legislature\\_-\\_Bills\\_of\\_Interest.pdf](http://www.bdlaw.com/assets/attachments/Texas_Legislature_-_Bills_of_Interest.pdf).

## **Upcoming TCEQ Meetings and Events**

The TCEQ’s annual “Environmental Trade Fair and Conference” will be held May 12 through 14 at the Austin Convention Center. Additional information about this year’s event can be found at <http://www.tceq.state.tx.us/assistance/events/etfc/etf.html>.

A Stakeholder input meeting related to rulemaking for Section 185 of the Federal Clean Air Act (FCAA) penalty fee will be held on March 4, 2009 at 2 p.m. at the Houston-Galveston Area Council (3555 Timmons, Room A /Houston, TX 77027). For additional information, please see TCEQ’s website at <http://www.tceq.state.tx.us/implementation/air/sip/Hottop.html>

The TCEQ will conduct hearings to receive comments on actions the commission should take to protect the Edwards Aquifer from pollution, as required under Texas Water Code, 26.046, on Wednesday, March 4, 2009 at 1:00 p.m. at the TCEQ San Antonio Regional Office, 14250 Judson Road, San Antonio, and on Thursday, March 5, 2009, at 9:00 a.m. at the TCEQ Park 35 Office Complex, 12100 Park 35 Circle, Building E, Room 201S, Austin. Further information is available at [http://www.tceq.state.tx.us/assets/public/compliance/field\\_ops/eapp/2009publicnotice.pdf](http://www.tceq.state.tx.us/assets/public/compliance/field_ops/eapp/2009publicnotice.pdf)

## **Texas Rules Updates**

For new the TCEQ rule developments, including the proposed rules increasing water fees, please see the TCEQ website at <http://www.tceq.state.tx.us/rules/whatsnew.html>.

# **NATIONAL DEVELOPMENTS**

## **UNEP Governing Council Launches Binding Mercury Treaty Negotiations**

Earlier this month, the United Nations Environment Programme (UNEP) Governing Council adopted a mandate for the initiation of negotiations on a legally binding agreement on mercury. The U.S. reversal of its prior position was a critical factor in ensuring that the Governing Council reached agreement.

### **The Mandate**

The mandate directs UNEP to convene an International Negotiating Committee (INC) to begin work on a legally binding mercury treaty. The scope of the mandate covers all uses and potential sources of mercury emissions, including mercury in products and processes, and mercury-containing wastes.

The mandate usefully recognizes that different sources of mercury emissions may warrant

different priorities, different restrictions, and different time frames for implementation. In addition, it notes that some countries may need flexibility in implementing their commitments under the treaty. Some of the other guiding principles in the mandate may prove useful during the negotiation of the treaty to those parties interested in ensuring that the resulting agreement reflects a cost-effective, risk-based and science-based framework. For example, it calls for consideration of the technical and economic availability of mercury-free alternative products and processes, recognizing the necessity of the trade of essential products for which no suitable alternatives exist.

The mandate is limited in one key respect: it focuses only on mercury, notwithstanding attempts by the EU and some other countries to include a mechanism that would allow for the treaty to include other heavy metals of concern in the future. Unless the UNEP Governing Council amends the mandate in the future, therefore, the treaty negotiating process will focus exclusively on mercury. In this sense, the treaty is likely to be “narrow but deep.”

### **Products are Included, and May Even Receive Early Attention**

Even though fossil fuel-burning utilities are a far bigger source of mercury emissions than, for example, emissions from products containing mercury, controlling fossil fuel emissions through a global agreement is expected to be extremely complicated. Other significant sources of mercury emissions likewise present complex political and technical challenges. Those challenges are likely to drive certain countries to press for early action on mercury in products as an area that they perceive as “low hanging fruit” for available reductions.

A recent report by a group of NGOs, “Mercury Rising: Reducing Global Emissions from Burning Mercury-Added Products,” (available at [http://mercurypolicy.org/wp-content/uploads/2009/02/final\\_mercuryrising\\_feb2009.pdf](http://mercurypolicy.org/wp-content/uploads/2009/02/final_mercuryrising_feb2009.pdf)) will likely reinforce the focus on products during the upcoming negotiations. Although it acknowledges that mercury-containing products account for only about 10% of all anthropogenic sources of mercury emissions (compared to 50% for fossil fuel combustion), the report stresses that mercury-added products are “the largest contributor to mercury in the waste stream.” The report proposes two main actions to address this issue: phasing out the manufacture, sale and use of mercury-containing products; and eliminating the disposal of mercury-containing products in landfills or through incineration.

### **Timetable**

An Open-Ended Working Group will meet in the second half of 2009 to prepare for a first INC meeting in 2010. Work will then continue with the goal of being completed in time for the meeting of the UNEP-GC scheduled for 2013.

### **Potential Industry Response**

The upcoming treaty negotiations and the eventual treaty are likely to drive the development of new regulations on mercury at the national and sub-national levels for many years to come, particularly in developing countries that have not yet initiated significant domestic mercury action to date. For manufacturers and distributors of mercury-containing products, moreover, there is a likelihood that control measures adopted under the treaty may ultimately lead to market access restrictions.

Potentially affected industry sectors may therefore wish to consider engaging directly or through a coalition in the treaty negotiations. (As civil society stakeholders, industry and business groups can participate as active observers in the treaty negotiations.) Indeed, for some sectors the treaty may even offer the possibility of developing harmonized approaches to certain controls on mercury that currently are not well coordinated among differing jurisdictions.

Beveridge & Diamond, P.C. has significant experience in guiding industry groups through multilateral environmental treaty negotiations. We also have significant substantive experience with environmental regulatory requirements applicable to mercury emissions and mercury-containing products throughout their lifecycle. Please contact us if you are

interested in learning more about opportunities for business and industry engagement in the mercury treaty process.

For more information, please contact Aaron Goldberg at [agoldberg@bdlaw.com](mailto:agoldberg@bdlaw.com), Paul Hagen at [phagen@bdlaw.com](mailto:phagen@bdlaw.com), or Russ LaMotte at [rlamotte@bdlaw.com](mailto:rlamotte@bdlaw.com).

## **EPA Issues Notice For Reconsideration of Agency's Denial of California Clean Air Act Waiver Request**

On February 6, 2009, the Environmental Protection Agency (EPA) issued a notice for public hearing and comment in the Federal Register on the Bush administration's denial of California's application for a preemption waiver under the Clean Air Act (CAA). The waiver would allow the state to set strict automobile greenhouse gas emission and fuel efficiency standards. EPA's notice follows President Obama's January 26, 2009 executive order directing the agency to revisit its prior denial of California's waiver request. For more detail on the waiver application, EPA's prior denial of the waiver, and Obama's executive order, see <http://www.bdlaw/news-news-468.html>.

President Obama's executive order last week directed EPA to reconsider its prior denial of the waiver. Language in EPA's notice suggests the agency is leaning toward overturning the denial. It states, "EPA believes that there are significant issues regarding the Agency's denial of the waiver. The denial was a substantial departure from EPA's longstanding interpretation of the Clean Air Act's waiver provisions and the history of granting waivers to California for its new motor vehicle emission program." The notice goes on to note that many parties, members of Congress, scientists, and other stakeholders have raised concerns about the denial of the waiver. A copy of the notice can be accessed at [http://www.bdlaw.com/assets/attachments/EPA\\_CA\\_Waiver\\_Notice\\_\(2\\_6\\_09\).pdf](http://www.bdlaw.com/assets/attachments/EPA_CA_Waiver_Notice_(2_6_09).pdf).

EPA's notice will disappoint the State to some degree though, as EPA did not do as California Air Resources Board Chair Mary Nichols had suggested in a January 21 letter to EPA Administrator Lisa Jackson and skip a public hearing on the waiver request. Rather, in accordance with CAA Section 209(b)(1)'s requirement of "notice and opportunity for a public hearing," the EPA notice provides for a 60-day comment period and a public hearing to be held in Washington, DC on March 5, 2009. Interested parties should take advantage of the opportunity to participate in the public process on this issue. EPA will accept written comments on the waiver request until April 6, 2009.

EPA's notice leaves at least two major issues unresolved that may pose significant hurdles to the agency overturning its prior waiver denial. (These issues are described in more detail in B&D's January 27, 2009 Client Alert). First, for EPA to reverse its prior decision, it will have to develop a legal rationale for a complete reversal of its prior legal analysis. It is unclear how EPA can justify reversing its prior legal analysis if it ultimately grants the waiver request.

Second, it is not clear how EPA's reconsideration of the waiver will affect or be reconciled with California's pending lawsuit in the U.S. Court of Appeals for the District of Columbia (*California v. E.P.A.*, appeal docketed, No. 08-1178 (D.C. Cir. May 5, 2008)). That case, brought by California to challenge former EPA Administrator Stephen Johnson's denial of the waiver request, has been briefed, and the decision to dismiss or remand it to the district court at this point lies solely with the Court of Appeals and not the parties. As of today, the parties have not filed a motion to stay or remand the case.

Interestingly, the court issued an order yesterday granting a motion to extend the time for reply briefs and revising the schedule that has the last brief filed in early April. The government defendants may request a stay of the case based on EPA's reconsideration process, but it is unclear how the court would view such a request. It may come down to whether and how the automobile industry, which has been granted intervenor party status, responds. The government and automakers may use the reconsideration process and pending litigation as an opportunity to structure a compromise, one which may be tied to the anticipated federal bail-out legislation.

For more information, please contact Nicholas van Aelstyn at [nvanaelstyn@bdlaw.com](mailto:nvanaelstyn@bdlaw.com) or Tom Richichi at [trichichi@bdlaw.com](mailto:trichichi@bdlaw.com).



## FIRM NEWS & EVENTS

### Edward J. Ciechon, Jr. Joins Beveridge & Diamond, P.C.

Beveridge & Diamond, P.C. is pleased to announce that Edward J. Ciechon, Jr. has joined the Firm as Of Counsel, and will work with our Environmental and Litigation Practice Groups. Mr. Ciechon joins the Firm from the legal department of Sunoco, Inc., where he served as Chief Counsel, Environmental Law. While at Sunoco, Mr. Ciechon addressed a full range of environmental law regulatory matters involving air, water, waste, and remediation issues, including establishing compliance programs, conducting compliance audits and internal investigations, and resolving major enforcement matters.

"We are delighted that Ed Ciechon has joined our Firm. The experience he offers to our clients is exceptional" says Ben Wilson, the Managing Principal of Beveridge & Diamond, P.C.

Mr. Ciechon's experience includes negotiating and drafting consent orders, permits, and agreements involving Resource Conservation and Recovery Act (RCRA) Corrective Action, the Clean Water Act, the Clean Air Act, and Superfund.

Mr. Ciechon is licensed to practice in Pennsylvania and New Jersey, and holds a J.D. and a B.S. from Villanova University.

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