

# TEXAS ENVIRONMENTAL UPDATE



January 2012

## TEXAS DEVELOPMENTS

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### D.C. Circuit Orders Stay of Cross-State Air Pollution Rule

On December 30, 2011, the United States Court of Appeals for the District of Columbia Circuit issued an order (available at [www.bdlaw.com/assets/attachments/CSAPR%20Stay%20Order.pdf](http://www.bdlaw.com/assets/attachments/CSAPR%20Stay%20Order.pdf)) granting motions to stay EPA's Cross-State Air Pollution Rule ("CSPAR"), only days before CSPAR's compliance period was set to begin (*EME Homer City Generation, L.P. v. EPA*, D.C. Cir., No. 11-1302). The court's order states that EPA is expected to continue administering the Clean Air Interstate Rule during the court's resolution of the CSPAR petitions for review.

A briefing schedule (available at [www.bdlaw.com/assets/attachments/CSAPR%20Briefing%20Schedule%20Order.pdf](http://www.bdlaw.com/assets/attachments/CSAPR%20Briefing%20Schedule%20Order.pdf)) and oral argument have been set in the CSPAR appeal. The petitioners' initial briefs are due February 9, EPA's response brief is due March 1, and the petitioners' reply briefs are due March 12. The case is scheduled for oral argument (see [www.bdlaw.com/assets/attachments/CSAPR%20Oral%20Argument%20Order.pdf](http://www.bdlaw.com/assets/attachments/CSAPR%20Oral%20Argument%20Order.pdf)) on April 13, at 9:30 a.m., before Circuit Judges Rogers, Griffin, and Kavanaugh.

### TCEQ Authorizes Publication of Proposed Revisions to Compliance History Rules

On January 25, 2012, the Texas Commission on Environmental Quality ("TCEQ") Commissioners authorized publication of proposed revisions to the agency's compliance history rules. The proposed rules would implement Articles 4.01 - 4.05 and 4.07 of the TCEQ Sunset Bill (House Bill 2694). The purpose of the proposed rulemaking, as described by TCEQ, is to allow the Commission to use new standards for evaluating and using compliance history instead of the existing uniform standard. In addition, the proposed rules would modify the components and formula for calculating compliance histories, with the agency's stated intent being to provide a more accurate measure of a regulated entity's performance.

The proposed revisions to TCEQ's compliance history rules are available on the agency's website at <http://www.tceq.texas.gov/rules/prop.html>. TCEQ will hold a public meeting on the proposed rules on March 6, 2012, and the public comment period on the proposed rules will end on March 12, 2012.

### Texas Railroad Commission Approves Draft Rules to Increase Penalties for Safety Violations

On January 24, 2012, the Texas Railroad Commission ("RRC") approved draft rules that would implement new or amended penalty matrixes for use by the RRC in determining the amount of penalties for safety violations in the following regulatory categories: oil and gas, pipeline, liquefied petroleum gas, compressed natural gas, liquefied natural gas, and underground pipeline damage prevention. The proposed rules include new penalties, increases in existing penalties, and penalty enhancements for repeat offenders. If finalized,

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the new rules would represent the first update to the RRC's penalty guidelines since 2004, and the first time that the RRC has adopted penalty guidelines as official rules, with the exception of the RRC's rules for pipeline safety violations.

The proposed rules are available on the RRC's website at <http://www.rrc.state.tx.us/rules/proposed.php>. The public comment period on the proposed rules closes at noon on March 12, 2012.

### **TCEQ Authorizes Publication of Proposed 2012 Texas Nonpoint Source Management Program**

On January 25, 2012, TCEQ authorized publication of the Proposed 2012 Texas Nonpoint Source Management Program. The program is required by Clean Water Act § 319(b). The program outlines the State's comprehensive strategy to protect and restore water quality impacted by nonpoint sources ("NPS") of pollution, and is jointly administered by TCEQ and the Texas State Soil and Water Conservation Board. The program describes the State's plans to address NPS pollution and provides for the coordination of NPS-related activities, establishment of statewide goals, prioritization of assessment and implementation activities, and tracking and reporting of program activities. The Texas Nonpoint Source Management Program was last approved by EPA in 2005.

The proposed 2012 Texas Nonpoint Source Management Program is available on TCEQ's website at <http://www.tceq.texas.gov/waterquality/nonpoint-source/mgmt-plan/index.html#proposed-2012-texas-nonpoint>. TCEQ will hold a public meeting on the proposed program on February 23, 2012, from 9:00 a.m. to noon, in Building F, Room 2210, of TCEQ's headquarters in Austin. The public comment period on the proposed program ends at 5:00 p.m. on March 12, 2012.

### **Galena Park Air Pollutant Watch List Area Expanded**

TCEQ has expanded the Galena Park Air Pollutant Watch List ("APWL") area based upon the agency's determination that significant benzene sources located outside of the previous Galena Park APWL boundary have the potential to affect annual average benzene concentrations at the Galena Park and Pasadena North monitoring sites. After consideration of public comment on the proposed boundary revision, TCEQ extended the Galena Park APWL boundary to include additional sources of benzene. The revised map and TCEQ's responses to comments regarding this change are available at <http://www.tceq.texas.gov/toxicology/AirPollutantMain/APWL.html#galenapark>.

### **Texas SIP Update**

By letter dated January 11, 2012, TCEQ commented on the U.S. Environmental Protection Agency ("EPA") response to the State of Texas' recommendations for 2008 ozone national ambient air quality standard ("NAAQS") nonattainment designations. TCEQ asserts that EPA has no scientific justification for its proposal to expand the Houston-Galveston-Brazoria ("HGB") area to include Matagorda County, or for its proposal to expand the Dallas-Fort Worth area ozone nonattainment area to include Hood and Wise Counties. TCEQ's comment letter and prior documents relating to the consideration of nonattainment designations are available at <http://www.tceq.texas.gov/airquality/sip/eighthour.html>.

On January 25, 2012, TCEQ commissioners adopted an El Paso State Implementation Plan ("SIP") revision that incorporates a revision to the agency's 2001 memorandum of agreement with the City of El Paso relating to alternative control measures for particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers ("PM10"). The SIP revision also includes changes to 30 Texas Administrative Code Chapter 111 in a concurrent rulemaking. Information about this SIP revision is available at [http://www.tceq.texas.gov/airquality/sip/stakeholders/pb\\_stakeholder](http://www.tceq.texas.gov/airquality/sip/stakeholders/pb_stakeholder).

## TCEQ Seeks Public Comment on Development Support Documents

TCEQ's Toxicology Division is accepting public comment on two proposed development support documents. A development support document ("DSD") summarizes how chemical-specific toxicity values were derived based on published guidelines. Comments on the following DSDs will be accepted until April 9, 2012: (1) Arsenic and Inorganic Arsenic Compounds, and (2) n-Butane and Isobutane. For additional information about the proposed DSDs and procedures for submitting comments, please see [http://www.tceq.texas.gov/toxicology/dsd/dsds\\_about.html](http://www.tceq.texas.gov/toxicology/dsd/dsds_about.html).

## Upcoming TCEQ Meetings and Events

- TCEQ will host its annual **Environmental Trade Fair & Conference** at the Austin Convention Center on May 1-2, 2012. A banquet will be held on the evening of May 2 during which the 2012 Texas Excellence Awards will be accepted. Information regarding this event is available at <http://www.tceq.texas.gov/p2/events/etfc/etf.html>.
- TCEQ has scheduled a **Tax Relief for Pollution Control Program Advisory Committee Meeting** to be held on February 15, 2012 in Austin. Information regarding this meeting is available at [http://www.tceq.texas.gov/airquality/taxrelief/prop2\\_hottopics.html](http://www.tceq.texas.gov/airquality/taxrelief/prop2_hottopics.html).
- A series of TCEQ-hosted **Drought Emergency Planning Workshops** will be held during February at various locations as follows: Kerrville (February 7), New Braunfels (February 9), Liberty (February 16), Midland (February 28), and Lubbock (February 29). Each meeting will include a presentation about the continuing drought, the emergency process, financial assistance, and emergency planning. The presentation will be followed by a question and answer session with representatives from TCEQ, the Texas Division of Emergency Management, and the Texas Water Development Board.

## TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in January can be found on the TCEQ website at <http://www.tceq.texas.gov/news/releases/011112CommissionersAgenda> and <http://www.tceq.texas.gov/news/releases/012512CommissionersAgenda>.

## 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

### EIP and CCAN Drop NPDES Ash Transport Water Permit Appeal

Both the Environmental Integrity Project ("EIP") and the Chesapeake Climate Action Network ("CCAN") have voluntarily dismissed an appeal pending before the Maryland Court of Special Appeals, challenging Maryland's application of the United States Environmental Protection Agency's ("EPA") Steam Electric standards established for ash transport water. In an appeal that contested a power plant's National Pollutant Discharge Elimination System ("NPDES") permit issued by the Maryland Department of the Environment, appellants asserted that a state must impose its own more stringent effluent limitations, rather than apply EPA's effluent limitation guidelines that EPA established under that categorical standard. EIP and CCAN dropped their appeal before filing a reply brief because they could not find a way to undermine a key procedural argument of first impression in Maryland: that there was no jurisdiction to hear the appeal under a new Maryland statute that established the procedure for review of environmental permits.

In a briefing before the Maryland Court of Special Appeals, Beveridge & Diamond, P.C. explained that the Court lacked jurisdiction because there is no statutory right to an appeal from the decision of the Circuit Court (the trial level court in Maryland), when that court conducted judicial review of an administrative agency decision on an environmental permit. "It is an often stated principle of Maryland law that appellate jurisdiction, except as constitutionally authorized, is determined entirely by statute, and that, therefore, a right of appeal must be legislatively granted." (citations omitted). There were only three possible statutory bases for the appeal: (1) a general right to an appeal, (2) the appeal provided in the Maryland Administrative Procedure Act ("APA") for judicial review of contested cases, and (3) the underlying statute providing the right to judicial review. Beveridge & Diamond's brief addressed each of these three possible sources of a right to appeal, and why none are available under current law.

Maryland's environmental permit review procedures had been statutorily revised in recent years, and this revision eliminated the appeal right. Under the old procedure, the State's APA explicitly provided a right to an appeal. The former right of appeal under the APA was extinguished as of January 1, 2010, when the new, streamlined procedure for most environmental permitting went into effect. That streamlined procedure entirely eliminated APA contested case hearings for permits and provided a direct appeal to a Maryland Circuit Court. The new law did not provide any right of further appeal.

Under Beveridge & Diamond's analysis, without any explicit statutory basis for further appeal, none exists. Apparently EIP and CCAN were unable to find any way around this result. In response to the briefing of this legal issue, the State is expected to introduce emergency legislation to be introduced in the Maryland legislative session that convenes January 11, 2012. The emergency legislation would re-establish a right to appeal to the Maryland Court of Special Appeals for challenges to Maryland Department of the Environment permitting decisions.

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