

TEXAS ENVIRONMENTAL UPDATE



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TEXAS DEVELOPMENTS

TCEQ Schedules Stakeholder Meeting Regarding Enforcement Rules Development

On August 2, 2011, TCEQ will host a stakeholder meeting in Austin to discuss rulemaking to implement “a general enforcement policy that describes the commission’s approach to enforcement” pursuant to Texas Water Code § 7.006 as revised by the TCEQ Sunset Bill (House Bill 2694, 82nd Regular Session). At the Commissioners’ July 5, 2011 Work Session, Agency staff presented questions with corresponding possible language options for various portions of such a rulemaking. Among the ten questions presented were whether the following should be included in TCEQ’s enforcement rules at 30 TAC Chapter 70:

- Criteria describing when a no-penalty order is warranted.
- Criteria explaining when a Findings Order is warranted.
- Criteria describing the circumstances for which violations may be referred to the Attorney General for civil penalty.
- A description of how economic benefit is considered in assessing penalties.
- A description of how culpability is evaluated.
- A description of how good faith efforts to comply are evaluated.

Live webcast viewing of the meeting will be available at <http://www.texasadmin.com/tceqa.shtml>. During the live webcast, stakeholders will be able to submit questions and comments via e-mail to pen_rule@tceq.texas.gov. After the meeting, and through August 30, 2011, TCEQ will accept written comments and questions at the same email address. Additional information is available at http://www7.tceq.state.tx.us/uploads/eagendas/Worksession/2011-07-05/Enforcement_Policy.pdf.

TCEQ Posts Flare Study Report Revisions Summary

TCEQ has posted on its website a document that outlines revisions to the 2010 Flare Study Draft Final Report that resulted from informal comments submitted to the Agency as of June 20, 2011. TCEQ expects to post the final report on its website on August 1, 2011.

TCEQ indicates that the revisions will add citations and links to combustion zone gas net heating value studies and will determine whether additional combustion zone gas net heating value analysis can be added to the report. Along with other changes, the final report will include information/analysis of wind effects on flare performance and additional flare measurement data analysis. A summary of anticipated changes is available in the Revisions to the 2010 Flare Study Final Report Based on Informal Comments link on the TCEQ Flare Task Force Stakeholder Group webpage at http://www.tceq.texas.gov/airquality/stationary-rules/flare_stakeholder.html.

TCEQ Adopts Renewal of Multi-Sector General Permit

On July 20, 2011, TCEQ approved the renewal of the Multi-Sector General Permit (MSGP)

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authorizing the discharge of storm water associated with industrial activity. The MSGP addresses the facilities that: (i) require permit coverage; (ii) are eligible for exclusion from permit requirements; (iii) do not require the filing of a Notice of Intent to be authorized; and (iv) will require authorization under an individual permit. The MSGP will become effective on August 14, 2011. Information about the MSGP, the Fact Sheet and Response to Comments is available at <http://www.tceq.texas.gov/permitting/stormwater/TXR05whattodo.html>.

EPA Approves Portion of Texas Surface Water Quality Standards

On June 29, 2011, EPA Region 6 approved certain aspects of the Texas Surface Water Quality Standards (“Standards”) adopted by TCEQ in 2010. Standards still under review include nutrient criteria for reservoirs, numeric criteria for protection of aquatic life, the framework for assigning the presumed use of secondary contact recreation 1 for certain unclassified water bodies and the use attainability analyses (UAAs) for Cypress Creek and Lavaca River. EPA disapproved the human health criterion of 0.7 mg/kg (measured in fish tissue) for mercury and requested that TCEQ provide a timeline for submitting a revised criterion for EPA approval. EPA also disapproved the high-flow exemption for bacteria criteria under 30 TAC § 307.9(e)(3). A copy of the EPA action letter is available at http://www.tceq.texas.gov/assets/public/permitting/waterquality/standards/docs/TSWQS2010/2010_epa_approval_letter_june_2011.pdf.

Governor Perry Renews Disaster Proclamation and TCEQ Restricts Junior Water Rights in Llano River Basin

Governor Perry has renewed the disaster proclamation issued in December of last year arising from drought conditions posing an extreme fire hazard and threat of imminent disaster in various Texas counties. Under the renewed proclamation issued on July 5, 2011, Governor Perry directs that all measures necessary to address drought conditions that have reached historic levels threatening water supply and delivery systems in many parts of the state be implemented. A copy of the proclamation is available at <http://www.tceq.texas.gov/response/drought/proclamation-july2011>.

In addition, having previously restricted junior water rights in the Brazos River Basin, TCEQ has now notified water rights holders in the Llano River Basin that water rights will be administered on a priority basis. Suspended water rights include those under term and temporary water rights permits in the Llano River Basin above the City of Llano with a priority date of 1950 or later. Additional information about Texas drought conditions is available at TCEQ’s website at <http://www.tceq.texas.gov/response/drought>.

Texas SIP News

TCEQ has extended the comment period for the Dallas-Fort Worth and Houston-Galveston-Brazoria state implementation plan (“SIP”) revisions and associated rulemakings from July 25, 2011 to August 8, 2011. Additional information is available on TCEQ’s website at <http://www.tceq.texas.gov/airquality/sip/dfw/dfw-latest-ozone> and <http://www.tceq.texas.gov/airquality/sip/hgb/hgb-latest-ozone>.

On July 18, 2011, EPA published a proposed rule (76 Fed. Reg. 42078) (available at www.bdlaw.com/assets/attachments/Revisions%20to%20New%20Source%20Review%20SIP%2076%20FR%2042078.pdf) to withdraw its prior proposed disapproval of SIP revisions relating to the definition of “modification of existing facility” in the Texas new source review (“NSR”) program general definitions and two provisions that have been superseded by subsequently-submitted SIP revisions. Comments on the proposal must be submitted to EPA by August 17, 2011.

On July 25, 2011, EPA published a final rule (76 Fed. Reg. 44271) (available at www.bdlaw.com/assets/attachments/Rule%20and%20Regs%20for%20Control%20of%20Air%20Pollution%20by%20Permits%20for%20New%20Construction%20or%20Modification%2076%20FR%2044271.pdf) approving three Texas SIP submittals involving revisions to

Texas' NSR rules in 30 of the TAC Chapter 116. The August 31, 1993 revision creates Sections 116.174 and 116.175, which provide for the use of emission reductions as offsets in NSR permitting. The July 22, 1998 revision creates Section 116.116(f), which allows for using discrete emission reduction credits ("DERCs") to exceed permitted allowable emission limits and updates regulatory citations in Section 116.174. The October 5, 2010 revision amends regulatory citations in Section 116.116(f).

Upcoming TCEQ Meetings and Events

- TCEQ will hold a **Water Quality/Storm Water Seminar** on September 8-9, 2011 in Austin. Additional information about the seminar is available at <http://www.tceq.texas.gov/p2/events/stormwater.html>.
- TCEQ will hold a meeting of the advisory committee for the **Tax Relief for Pollution-Control Program** at TCEQ headquarters offices in Austin on August 22, 2011. Additional information about the meeting is available at http://www.tceq.texas.gov/airquality/taxrelief/advisory_group.html.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in July can be found on the TCEQ website at <http://www.tceq.texas.gov/news/releases/commissionersagenda072011>.

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

Federal Interagency Task Force Announces National Strategy for Electronics Stewardship

On July 20, 2011, the U.S. Interagency Task Force on Electronic Stewardship ("Task Force") announced the release of its National Strategy for Electronics Stewardship ("National Strategy"). President Obama created the Task Force by Presidential Proclamation in November 2010 to develop a national strategy for electronics stewardship and improve the federal government's management of used electronics products and electronic waste. The Task Force is co-chaired by the White House Council on Environmental Quality, U.S. Environmental Protection Agency (EPA) and General Services Administration (GSA).

EPA Administrator Lisa Jackson, GSA Administrator Martha Johnson, and CEQ Chair Nancy Sutley announced the National Strategy with representatives from several electronics companies that voluntarily committed to participate in an EPA-industry partnership aimed at promoting environmentally sound management of used electronics. See EPA Press Release (July 20, 2011).

The federal government is the world's largest consumer of electronics products. To address management of its used electronics, the Task Force identified four overarching goals:

1. Build incentives for design of greener electronics, and enhance science, research, and technology development in the United States.
2. Ensure that the federal government leads by example.
3. Increase safe and effective management and handling of used electronics in the United States.

4. Reduce harm from US exports of e-waste and improve safe handling of used electronics in developing countries.

Under each goal, the Task Force also identified a number of Action Items, which are further supported by specific projects identified in an on-line annex of benchmarks (“Benchmarks Annex”). Some notable action items include; for example:

- In support of the first goal, the Task Force commits to federal agency engagement in expansion of the Electronic Product Environmental Assessment Tool (“EPEAT”) program, a procurement standard that allows manufacturers to register products according to their performance against numerous environmental criteria. EPEAT currently applies only to laptops, desktops and monitors, though a standard for printers and other imaging devices is under development.
- Under the second goal, the Task Force recognizes that the federal government is the largest generator of used electronics in the United States and commits to strengthening policies that govern the disposition of used electronics by the federal government. This action item aims to create a comprehensive and transparent government-wide policy that, among other things, ensures that all federal electronics are processed by certified recyclers and aligns federal management of used electronics with best management practices that favors reuse of functional devices, requires use of certified recyclers for non-functioning devices and consistent data destruction procedures, and prohibits the disposal of any used federal electronics devices in landfills.
- In support of the third goal, increasing the safe and effective management and handling of used electronics in the United States, the Task Force commits to launching a voluntary partnership with the electronics industry to increase the collection and handling of used electronics using recyclers that have been certified under a third-party certification program (R2 or e-Stewards). The Task Force indicates that use of certified recyclers will be “a floor” for voluntary initiatives to increase the safe handling and management of used electronics.
- Under the fourth goal, the Task Force commits to supporting ratification of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

The Benchmarks Annex identifies specific projects directed at achieving each action item and goal. For each project, the Benchmarks Annex also identifies lead agencies and target dates for completion. Notable near-term projects include:

- EPA will seek commitments from the electronics industry to use certified recyclers and provide data in a transparent manner by summer 2011;
- EPA and other agencies will convene stakeholder groups to address green design of electronics in fall 2011;
- EPA and GSA will support development of new standards addressing products not currently covered by EPEAT.
- EPA and other agencies will share with exporters concerns on the unsafe handling of used electronics exports abroad by December 31, 2011; and
- EPA will work with the US Department of State to “explore options for strengthening US participation in the Basel Convention, including options that would enable ratification” through ongoing efforts.

The National Strategy expands the federal government’s efforts to promote product stewardship for electronics. It complements existing federal green procurement initiatives addressing many types of electronic devices and EPA rules governing the management and export of used cathode ray tube devices. In the absence of a comprehensive federal regulatory framework for e-waste, twenty-five states have enacted e-waste legislation covering the recovery and disposition of certain IT and consumer electronics such as computers, televisions, monitors, and printers. In Congress, H.R. 2284 has recently been

introduced with a companion bill in the Senate to restrict the export of certain used electronic equipment and e-waste to developing countries.

At the international level, parties to the Basel Convention are preparing new technical guidelines aimed at improving the management of e-waste under the Convention. While the U.S. is not a party to the Convention, the U.S. has become more active in negotiations on the new e-waste technical guidelines. The guidelines are aimed at ensuring the environmentally sound management of used and end-of-life electrical and electronic equipment and will be taken up at the COP-10 meeting planned for Cartagena, Columbia in October 2011.

For more information, please contact Paul Hagen at phagen@bdlaw.com or Jennifer Abdella at jabdella@bdlaw.com.

Court Finds No Irreparable Harm to Desert Tortoise and Allows Ivanpah Solar Project to Go Forward

On June 30, 2011, a federal judge denied a plaintiff's attempt to obtain a temporary restraining order ("TRO"), to halt the development of BrightSource Energy Inc.'s Ivanpah solar electric energy facility in the Mojave Desert. Applying the well-established legal standard for an injunction, the court determined that plaintiff had not met its burden of proof. The court's order is available at <http://www.bdlaw.com/assets/attachments/2011-06-30%20Order%20Denying%20Plaintiffs%20Application%20for%20TRO.pdf>.

At issue is the construction of a 370-megawatt solar thermal power plant to be located on 3,582 acres of land leased by the United States Bureau of Land Management ("BLM"). In April, the Department of Energy approved a loan guarantee for the project. Despite apparent forward momentum, in April, BLM temporarily suspended activity on much of the construction citing issues about protection of the desert tortoise, which is on the federal endangered species list. BLM later allowed the construction to resume, after the U.S. Fish and Wildlife Service issued a new biological opinion, and adjusted both the take limits and tortoise handling procedures. In a detailed arrangement for protecting the tortoise, the government's biological opinion sets forth a plan for "translocation" of desert tortoises to a suitable alternative habitat, away from the construction site. Monitoring of the tortoises after relocation would continue for at least five years.

Plaintiff Western Watersheds Project's complaint asserts that "in an ill-conceived rush to accommodate massive renewable energy projects vying for multi-billion dollar federal tax credits" the federal defendants rushed to approve the solar thermal power plant. Plaintiff asserts violations of the National Environmental Policy Act, the Endangered Species Act, the Federal Land Policy and Management Act and the Administrative Procedure Act over alleged deficiencies in the government's environmental review of the project, and in seeking a TRO, plaintiff cited information about the tortoise population that the government had not considered.

However, in its June 30, 2011 opinion, the court observed that, "Plaintiff's evidence that one tortoise has died as a direct result of fence-building at Ivanpah falls well short of a showing of likely irreparable harm for purposes of granting a TRO." With a full hearing to be held in August at which the court will more broadly assess the impacts of the Ivanpah project, the court has kept the door open for plaintiff to try again to press its claims.

For more information on alternative energy development projects, please contact Pamela Marks at (410) 230-1315 or pmarks@bdlaw.com; Stephen Richmond at (781) 416-5710 or srichmond@bdlaw.com; or Peter Schaumberg at (202) 789-6043 or pschaumberg@bdlaw.com.

EPA Proposes Revised Definition of Solid Waste Rule

On June 30, 2011, the United States Environmental Protection Agency ("EPA") signed a RCRA Subtitle C definition of solid waste proposed rule ("2011 DSW Proposed Rule")

pursuant to a settlement agreement between the Sierra Club and EPA in the Sierra Club's challenge to EPA's October 2008 definition of solid waste ("DSW") rule. In addition to making significant changes to the October 2008 rule, the 2011 DSW Proposed Rule would also expand EPA's reach over recycling beyond the regulations that were in place prior to October 2008.

Key aspects of the 2011 DSW Proposed Rule include the following:

1. Legitimacy Criteria.

- Recyclers must demonstrate that all four legitimacy factors are met (the 2008 regulations required that two factors be addressed and two, including the so-called "toxics along for the ride" ("TARs") factor, only be considered).
- All entities relying on any recycling "exclusions or exemptions from the hazardous waste regulations or alternate regulatory standards" will be required to make and document a legitimacy determination (2008 regulations only applied the new regulatory legitimacy criteria to the new exemptions and determinations adopted in that rule).
- The TARs factor requires that the levels of hazardous constituents in the products made from secondary materials be "comparable to or lower than" the levels in "analogous" products (the 2008 regulations required that the levels of hazardous constituents not be "significantly elevated" from those found in analogous products).
- Recyclers must petition EPA or a state agency for a legitimacy variance if the "valuable commodity" or TARs factors cannot be met.

2. Elimination of Transfer Based Exclusion.

- The "transfer based" exclusion in the October 2008 rule would be eliminated.
- In the alternative, EPA proposes to subject recyclers that would have been eligible for the transfer based exclusion to full Subtitle C regulation, with the exception that EPA would allow the accumulation of recyclable materials for up to one year (if notification and reclamation plan requirements are met).

3. Modification of "Generator Control" Exclusion.

- EPA proposes a regulatory definition of the "contained" condition (which would also apply to the "valuable commodity" legitimacy factor).
- EPA adds notification and labeling/log requirements.
- EPA adds recordkeeping requirements for tolling contractors.

4. Modifications to Variance and Determination Requirements.

- EPA proposes a number of changes to the variance and determination requirements.

5. Re-Manufacturing Exclusion

- EPA requests comment on a new exclusion for the transfer of 18 higher-value solvent secondary materials generated in the pharmaceutical, organic chemical, plastics and resins, and paints and coating sectors from one manufacturer to another.

6. Potential Additional Requirements Applicable to Pre-2008 Recycling Exclusions and Exemptions

- In addition to proposing to apply the legitimacy criteria to all other recycling exemptions, EPA seeks comment on applying the contained condition and periodic notification requirements to 32 existing recycling exclusions and exemptions.

The proposal has not yet been published in the Federal Register. The comment period will extend for 60 days beyond the date of publication of the 2011 DSW Proposed Rule. If you



have questions about the 2011 DSW Proposed Rule, please contact Don Patterson at (202) 789-6032, dpatterson@bdlaw.com or Beth Richardson at (202) 789-6066, erichardson@bdlaw.com.

FIRM NEWS & EVENTS

Beveridge & Diamond Named to National Law Journal's 2011 Midsize Hotlist

The National Law Journal has named Beveridge & Diamond, P.C. to its "2011 Midsize Hotlist." The list, released on July 11, recognizes twenty law firms in the 50- to 150-lawyer range around the country that have "proven they can continue to thrive in this troubled economy."

"We are delighted to receive recognition from the National Law Journal for not only our strong environmental practice, but also for our commitment to diversity and pro bono responsibilities" said Benjamin F. Wilson, Managing Principal at Beveridge & Diamond.

The article notes that the selected firms have, among other things, demonstrated excellence in the courtroom or boardroom; spotted a niche that eluded competitors; developed innovative management, billing or training structures; and set the standard for midsize practice.

To read the article, please go to <http://www.bdlaw.com/assets/attachments/BD%20Named%20to%20NLJ%20Hotlist.pdf>

Beveridge & Diamond Litigation Victory Featured in Westlaw Journal

Westlaw Journal Environmental's current issue covers Beveridge & Diamond's recent win for the City of Los Angeles, securing a preliminary injunction for the City that allows L.A. and other major Southern California wastewater utilities to continue to recycle biosolids (treated sewage sludge) on farmland in California's Central Valley. Litigators Jimmy Slaughter and Gary Smith from Beveridge & Diamond's Washington and California offices lead the Beveridge & Diamond team. To read the article, please go to <http://www.bdlaw.com/assets/attachments/WLJ%20Los%20Angeles%20Biosolids%20Win.pdf>.

Laura LaValle and Lydia González Gromatzky Speaking at Texas Environmental Superconference

Laura LaValle will provide a presentation on Air Quality Impact Review and Lydia González Gromatzky will provide a presentation on Product Stewardship during the *23rd Annual Texas Environmental Superconference* which will be held from August 3-5, 2011 at the Four Seasons Hotel in Austin, Texas. For additional information about the conference, please see <http://www.texenrls.org/about.cfm>.

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