

TEXAS ENVIRONMENTAL UPDATE



July 2013

TEXAS DEVELOPMENTS

TCEQ Plans GHG Permitting Takeover as DC Circuit Dismisses Texas' GHG Permitting Challenge

The Texas Commission on Environmental Quality ("TCEQ") is preparing to work with the U.S. Environmental Protection Agency ("EPA") to develop a process to transition the prevention of significant deterioration ("PSD") greenhouse gas ("GHG") permitting program for sources in Texas from EPA Region 6 to TCEQ. The transition will be accomplished pursuant to Texas [House Bill 788](#) which Governor Perry signed into law on June 14, 2013. Consistent with Texas' position against GHG regulation, new Texas Health & Safety Code Section 382.05102 created by House Bill 788 requires Texas to repeal the GHG permitting program if at any point federal law no longer requires such permitting. With the District of Columbia Circuit Court of Appeal's [July 26, 2013 opinion](#) dismissing for lack of jurisdiction lawsuits filed by Texas and others challenging EPA rules that require implementation of GHG permitting, it is unlikely that the Texas program repeal provision will be triggered, at least any time soon.

TCEQ's proposed and arguably ambitious timeframe for initiating a GHG permitting program is to publish proposed rules by the end of October 2013, adopt rules by April 2014, and submit the rules to EPA by June 2014 for review and incorporation into the Texas state implementation plan ("SIP") by the end of 2014. While this schedule is susceptible to delay, staff at TCEQ and EPA expect that both agencies will look for ways to expedite the transition. In the interim, Region 6 staff has confirmed that EPA will continue to process GHG permit applications until a Texas GHG permitting program is approved into the Texas SIP. How already-issued permits, pending applications and the overall permit program transfer are to be handled will be among the subjects of discussion and negotiation between TCEQ and EPA. We will provide updates as information becomes available.

For more information, contact Laura LaValle at lvalle@bdlaw.com or at (512) 391-8020.

Texas Among States Alleging EPA Noncompliance with FOIA Regarding Records of Negotiation/Settlement with NGOs

On July 16, 2013, the Texas Attorney General, along with eleven other states, filed a [complaint](#) against the United States Environmental Protection Agency ("EPA") to compel compliance with the Freedom of Information Act ("FOIA"). See *Pruitt v. EPA*, Docket No. 5:13-cv-0726 (W.D. Okla. 2013). Earlier this year, the States had filed FOIA requests relating to EPA's negotiations with nongovernmental organizations ("NGOs") under the Clean Air Act Regional Haze program, given concerns that EPA's policy of settling lawsuits via consent decree was effectively excluding the States from the intended cooperative implementation process. In May 2013, EPA denied the FOIA request as overly broad. The States now seek an order requiring EPA to process the States' FOIA request, conduct a thorough search for responsive records, disclose the requested records, and waive the processing fee. Additional information on this action can be found on the [Oklahoma Office of the Attorney General's website](#).

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Texas Railroad Commission Well-Plugging Program Audited

On July 8, 2013, the Texas State Auditor's Office issued an [audit report](#) regarding the Texas Railroad Commission's ("RRC's") program for plugging abandoned oil and gas wells. Through its Oil and Gas Regulation and Cleanup Program, the RRC uses industry fees to plug abandoned wells and remediate abandoned sites that pose high pollution risks. The report found that the RRC creates annual plugging goals for its district offices and that those offices follow RRC policies and procedures to prioritize and recommend wells that should be plugged. The report also found that the RRC generally has effective processes and controls to collect required financial assurances from oil and gas well operators, but that it should strengthen certain controls to ensure that it can collect on those financial assurances before they expire. Finally, the report found that the RRC generally has adequate information technology policies, but that certain information technology controls should be strengthened. Additional information about the audit report is available on the [RRC's website](#).

For more information, contact Edward M. Grauman at egrauman@bdlaw.com or at (512) 391-8025.

U.S. Fish and Wildlife Service Makes Critical Habitat Designations for Six West Texas Aquatic Invertebrate Species

On July 8, 2013, the U.S. Fish and Wildlife Service made critical habitat designations for six west Texas aquatic invertebrate species under the Endangered Species Act. These species, which were listed as endangered in the July 9, 2013 Federal Register, are: Phantom springsnail (*Pyrgulopsis texana*), Phantom tryonia (*Tryonia cheatumi*), diminutive amphipod (*Gammarus hyalleloides*), Diamond tryonia (*Pseudotryonia adamantina*), Gonzales tryonia (*Tryonia circumstriata*), and Pecos amphipod (*Gammarus pecos*). The designated critical habitat units are the San Solomon Spring, the Giffin Spring, and the East Sandia Spring in Reeves County; the Phantom Lake Spring in Jeff Davis County; and the Diamond Y Spring System in Pecos County. Additional information on this action is in the [July 9, 2013 issue of the Federal Register](#).

For more information, contact Daniel Berner at dberner@bdlaw.com or at (512) 391-8015.

U.S. Fish and Wildlife Service Delays Endangered Species Act Designation of Lesser Prairie-Chicken

On July 9, 2013, the U.S. Fish and Wildlife Service announced a six month extension of the final determination regarding the listing of the lesser prairie-chicken (*Tympanuchus pallidicinctus*) as a threatened species. The extension was prompted by the Fish and Wildlife Service's finding that there is substantial disagreement regarding the sufficiency or accuracy of available data relevant to this determination. For this reason, the Fish and Wildlife Service's comment period on this matter was extended for 30 days until August 8, 2013. Additional information on this action is in the [July 9, 2013 issue of the Federal Register](#).

For more information, contact Daniel Berner at dberner@bdlaw.com or at (512) 391-8015.

TCEQ Approves New Mechanism to Authorize MSS Emissions at Oil & Gas Facilities

On July 26, 2013, the TCEQ commissioners approved the adoption of a new permit by rule ("PBR") to authorize air contaminant emissions from planned maintenance, startup and shutdown ("MSS") activities at oil and gas handling and production facilities. Specifically,

the action will add the PBR at 30 TAC Section 106.359, which can be used along with other state New Source Review mechanisms to authorize such emissions by and after the January 5, 2014 statutory deadline for permitting planned MSS emissions at oil and gas facilities. The new PBR will go into effect on September 10, 2013. Information about this action, including the text of the PBR, is available on [TCEQ's website](#).

For more information, contact Laura LaValle at llavalle@bdlaw.com or at (512) 391-8020.

TCEQ Toxicology News

TCEQ is proposing to remove the area in Harris County near the Lynchburg Ferry from the Air Pollutant Watch List ("APWL"). The area was initially added to the APWL based on monitored levels of benzene and styrene. TCEQ removed benzene from the Lynchburg Ferry APWL in 2010, and is now proposing to remove styrene because the agency has determined that monitoring data shows that ambient styrene concentrations are no longer at levels of potential concern. TCEQ will hold a public meeting on the proposed action on August 19, 2013, and will accept public comment on the proposed delisting through August 23, 2013. Additional information about the proposal and these opportunities for public participation are available on [TCEQ's website](#).

The TCEQ Toxicology Division is now accepting toxicity information for use in developing toxicity factors for diethanolamine, triethanolamine, and C7 and C12 alkanes. Data must be submitted to TCEQ by October 18, 2013. Information about TCEQ toxicity factor development and this opportunity to provide constituent-specific data is available on [TCEQ's website](#).

During July 2013 TCEQ issued separate health effect reviews for 2012 ambient air network monitoring data for Austin, Dallas/Fort Worth, Houston and Midland. The agency issued 2012 monitoring data reviews in June for Beaumont, Harlingen, San Antonio and Tyler. All of these reviews are available on [TCEQ's website](#).

For more information, contact Laura LaValle at llavalle@bdlaw.com or at (512) 391-8020.

Upcoming TCEQ Meetings and Events

TCEQ will host its **2013 Public Drinking Water Conference** entitled "Information and Tools for Public Water Systems and Utilities" on August 6-7, 2013 in Austin. Information and registration for this free event is available on [TCEQ's website](#).

TCEQ will conduct its annual **Advanced Air Permitting Seminar** and **Oil and Gas Facilities Workshop** on September 25 and 26, 2013, respectively, at the Austin Convention Center. The Oil and Gas Facilities Workshop will focus on air permitting issues associated with such facilities. Additional information about these events is available on [TCEQ's website](#).

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in July can be found on [TCEQ's website](#).

Recent Texas Rules Updates

For information on recent TCEQ rule developments, please see [TCEQ's website](#).

NATIONAL DEVELOPMENTS

EPA Targets Combined Animal Feeding Operations for Criminal Enforcement

This month, the U.S. Environmental Protection Agency (EPA) published a criminal enforcement alert (EPA CAFO alert) warning that Clean Water Act (CWA) violations by combined animal feeding operations (known as CAFOs) will be prioritized for aggressive enforcement and criminal prosecution, including fines and incarceration. The alert, which is available [here](#), outlines EPA's national enforcement initiative to reduce water pollution from CAFOs – an initiative that has resulted in numerous criminal enforcement actions involving knowing or negligent discharges of animal wastes.

For more information on EPA's enforcement initiatives against CAFOs, as well as how Beveridge & Diamond, P.C. can perform compliance assessments, assist in correcting ongoing violations, or developing an enforcement response plan, please contact Peter C. Anderson at panderson@bdlaw.com, Karen M. Hansen at khansen@bdlaw.com, Lily N. Chinn at lchinn@bdlaw.com, or Mackenzie S. Schoonmaker at mschoonmaker@bdlaw.com.

Read the complete text of this article on [B&D's website](#).

Recycling Company Fined \$4.5 Million for Illegal Export of Electronic Waste; Executives Receive Prison Sentences

Executive Recycling, Inc., a U.S. electronic waste recycling business, and two company executives were sentenced this month by U.S. District Court Judge William J. Martinez for defrauding customers and illegally shipping electronic waste ("e-waste") overseas. The corporation was fined \$4.5 million and sentenced to 3 years on probation. CEO and owner Brandon Richter was ordered to serve 30 months in federal prison, followed by 3 years on supervised release. Judge Martinez also ordered Richter to pay approximately \$77,000 in fines and restitution and to forfeit over \$140,000 in assets. Richter and Executive Recycling received their sentences one week after the corporation's Vice President of Operations, Tor Olson, was sentenced to 14 months in prison and fined \$20,000.

For more background on the Executive Recycling case, [click here](#). For information on another recent enforcement action against an e-waste recycler for the illegal and fraudulent export of e-waste, [click here](#).

For more information about Beveridge & Diamond's e-waste-related litigation and compliance practice, contact leaders of the firm's White Collar Practice Group, [Nadira Clarke](#) at (202) 789-6069, [Lily Chinn](#) at (415) 262-4012, and [Pete Anderson](#) (704) 372-7370, or leaders of the firm's work with clients in the electronics sector, [Paul Hagen](#) at (202) 789-6022 and [Dan Eisenberg](#) at (202)789-6046.

Read the complete text of this article on [B&D's website](#).

Federal Judge Rejects Challenges to SEC Conflict Minerals Rule

In an opinion released Tuesday, July 23, Judge Robert Wilkins of the D.C. Federal District Court rejected the challenges that several industry groups brought against the conflict minerals provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Securities and Exchange Commission (SEC) rule implementing those provisions. For the full text of the court's opinion, [click here](#). The rule has remained in effect during the pendency of the challenge, and with Tuesday's ruling the conflict minerals rule and its reporting requirements are likely to remain in effect throughout the first reporting period. However, the long-term outlook remains uncertain in light of the potential for appeal of the ruling to the U.S. Court of Appeals for the D.C. Circuit.

For more information about these and other developments related to conflict minerals due diligence and disclosure, please contact Paul Hagen (phagen@bdlaw.com), Russ LaMotte (rlamotte@bdlaw.com), Graham Zorn (gzorn@bdlaw.com), or Lauren Hopkins (lhopkins@bdlaw.com).

Read the complete text of this article on [B&D's website](#).

President Obama Releases Climate Action Plan

On June 25, 2013, President Obama announced his Climate Action Plan which sets forth a sweeping strategy to curb domestic carbon emissions, bolster the resiliency of communities and infrastructure, and lead international efforts to combat global climate change. While a large portion of the plan summarizes activity already underway, the President also introduced new goals and initiatives for executive action over the next several years.

A copy of the President's Climate Action Plan can be found [here](#).

If you would like to discuss the President's Climate Action Plan and how it may impact your operations and business, please contact David M. Friedland at dfriedland@bdlaw.com or (202) 789-6047 or Linda Tsang at ltsang@bdlaw.com or (202) 789-6073.

Read the complete text of this article on [B&D's website](#).

D.C. Circuit's Decision Remanding PM-2.5 Implementation Rules Is Not Preventing Redesignation of PM-2.5 Nonattainment Areas

The District of Columbia Circuit Court of Appeals' January 4, 2013 decision in [Natural Resources Defense Council vs. EPA, Case No. 08-1250](#) created significant uncertainty regarding regulatory requirements governing the implementation of National Ambient Air Quality Standards (NAAQS) for fine particulate matter (PM-2.5). Despite this uncertainty, EPA has concluded that it can proceed to redesignate a number of PM-2.5 nonattainment areas that have otherwise attained the standards. Redesignation will avoid leaving these areas, and in particular emissions sources subject to NAAQS for PM-2.5, in regulatory limbo.

For more information, please contact Michael Murphy at (212) 702-5436, mmurphy@bdlaw.com or Kari Twaite at (202) 789-6063, ktwaite@bdlaw.com.

Read the complete text of this article on [B&D's website](#).

King County, Washington Enacts Pharmaceutical Take-Back Program

On June 20, 2013, the King County, Washington Board of Health passed the Secure Medicine Return Rule and Regulation ("SMRRR") establishing a product stewardship program to collect and safely dispose of unwanted household medicines. The law requires drug manufacturers to fund and implement a drug collection and disposal program. Leftover, expired, and unneeded drugs must be collected from residents free-of-charge at drop boxes located at retail pharmacies and law enforcement offices. Drug producers must transport the medicines in accordance with federal and state laws for disposal at permitted incineration facilities.

King County is located in the western part of Washington state and encompasses Seattle. According to the 2010 census, King County has almost two million residents and is the fourteenth most populous county in the United States. King County is the second jurisdiction to pass a mandatory pharmaceutical product stewardship law in the U.S. The first was Alameda County, California, which passed a similar law last year. The Pharmaceutical Research and Manufacturers of America and other trade groups have filed a lawsuit in federal court challenging the constitutionality of the Alameda County law.

Related Federal Developments

DEA is currently developing regulations which are intended to expand options for disposal of controlled substances by ultimate users. Current law restricts return of controlled substances to law enforcement drop-off sites or collection events. As authorized by the 2010 Secure and Responsible Drug Disposal Act, DEA issued a proposed rule in December 2012 which would allow users to dispose of unwanted controlled substances through take-back events, mail-back programs, or collection receptacles located at DEA-registered locations. Collection and disposal programs could be operated by law enforcement or certain authorized collectors (registered manufacturers, distributors, reverse distributors, and retail pharmacies). The public comment period closed in February 2013 and DEA has not provided an anticipated date for the final rule. Because the rule will likely simplify collection of controlled substances through pharmaceutical take-back programs, local or state programs may be expected to follow closely after DEA's final rule is published.

The U.S. Environmental Protection Agency ("EPA") is currently developing regulations to address pharmaceutical disposal at healthcare facilities. Many pharmaceutical wastes are subject to regulation as hazardous wastes under the federal Resource Conservation and

Recovery Act (“RCRA”). In an effort to reduce applicable RCRA requirements, in 2008 EPA proposed classifying hazardous pharmaceutical wastes as “universal wastes.” EPA since decided not to finalize its 2008 proposal, and is now developing a proposal for new standards for the management and disposal of hazardous waste pharmaceuticals that are generated by healthcare-related facilities. This proposal is currently expected to be issued in August 2013.

For more information, contact Paul Hagen at (202) 789-6022, phagen@bdlaw.com; Bina Reddy at (202) 789-6082 breddy@bdlaw.com; or Sara Vink at (202) 789-6044, svink@bdlaw.com.

Read the complete text of this article on [B&D’s website](#).

FIRM NEWS & EVENTS

Beveridge & Diamond Assists San Antonio Water System in Negotiating \$1.1 billion Clean Water Act Settlement

On Tuesday, July 23, 2013, the U.S. Environmental Protection Agency (EPA), the U.S. Department of Justice (DOJ) and the State of Texas lodged in federal district court in San Antonio a proposed consent decree with the San Antonio Water System (SAWS) resolving claims regarding sanitary sewer overflows (SSOs). SAWS is a public utility owned by the City of San Antonio, providing sewage treatment and wastewater services to the city.

Karen M. Hansen, a Principal in Beveridge & Diamond’s Texas office, led the Firm’s team that represented SAWS. The team also included Washington office Principal and former EPA Assistant Administrator for Enforcement & Compliance Assurance, Steve Herman.

This negotiated Clean Water Act (CWA) Consent Decree represents the latest settlement in the federal government’s longstanding “wet weather” enforcement initiative. SAWS will spend approximately \$1 billion over the 12 year term of the consent decree on various SSO reduction measures including focused inspection, cleaning and testing of pipe in the sewer collection system and targeted capital programs focused on SSOs caused by verified condition and capacity issues. SAWS already has reduced its sewage spills by 30 percent since adopting a remediation plan more than two years ago.

Read the complete text of this article on [B&D’s website](#).

Beveridge & Diamond, P.C. Receives Minority Corporate Counsel Association’s Thomas L. Sager Award for Diversity Accomplishments

Citing the firm’s leadership and accomplishments in hiring, promoting, and retaining diverse and women attorneys, the [Minority Corporate Counsel Association \(MCAA\) awarded Beveridge & Diamond a 2013 Thomas L. Sager Award](#) on July 15, 2013.

“We are deeply honored to receive this recognition from MCCA,” said Paula J. Schauwecker, Beveridge & Diamond’s Diversity Principal. “We strive to enhance diversity and inclusion in our firm, and in collaboration with our clients and advocates like MCCA.”

The Sager Award marks the second time in 2013 that Beveridge & Diamond has been recognized for its leadership on diversity and inclusion. In January 2013, the Firm received an AT&T Legal Department Diversity Award.

For more information, please contact Paula J. Schauwecker, Chair of our Diversity & Inclusion Committee at pschauwecker@bdlaw.com, (212) 702-5407.

Read the complete text of this article on [B&D’s website](#).

Beveridge & Diamond Obtains Affirmance of Dismissal of Challenge to Client’s Solid Waste Facility Operating Agreement in New York Appellate Court

A panel of the New York State Appellate Division, Third Department has unanimously affirmed a trial court’s dismissal of a petition seeking an annulment of a client’s 25-year operating agreement with the Town of Colonie, New York. *Connors v. Town of Colonie*, __ A.D.2d __, 2013 N.Y. App. Div. Lexis 4944 (3d Dept. July 3, 2013). Michael Murphy, a Principal in Beveridge & Diamond’s New York Office, represented the client in the trial court and on appeal. The published decision establishes important law in New York that landfill operating agreements are not

leases and are therefore not subject to state permissive referendum requirements, allowing municipalities greater flexibility for solid waste management planning.

The agreement upheld by the decision was the culmination of a thorough RFP process that was undertaken pursuant to NYS General Municipal Law (“GML”) §120-w and sought proposals from qualified waste management companies to manage and operate the Town’s solid waste management facilities, including an active landfill.

A copy of the appellate court’s decision may be found [here](#). To read the lower court’s decision, please click [here](#). Press coverage of the decision includes this [article in Albany Times Union](#).

Mr. Murphy was assisted by associates Nicole Weinstein and John Paul and by James Slaughter, a Principal in the Firm’s Washington office. For more information, please contact Michael Murphy at mmurphy@bdlaw.com.

Read the complete text of this article on [B&D’s website](#).

Beveridge & Diamond Wins Affirmance in D.C. Court of Appeals of Trial Court Victory on Tort Claims

The District of Columbia Court of Appeals on July 3 unanimously affirmed a defense judgment for Beveridge & Diamond client DC Water, agreeing with the trial court that the Plaintiffs failed to prove that that drinking water supplied to apartment buildings owned by the plaintiffs caused pinhole leaks in the plumbing in the buildings. The Court of Appeals’ ruling followed a three week bench trial in District of Columbia Superior Court in 2011, which centered on extensive expert testimony on water chemistry, water distribution and corrosion science.

The Court of Appeals ruled that the evidence supported the trial court’s conclusion that DC Water’s “actions or inactions . . . could not have been a substantial factor—or even a factor at all—in causing the pinhole leaks in appellants’ properties.” DC Water’s experts explained that many factors under the control of the building owner cause pinhole leaks in copper pipes, including poor workmanship and improperly maintained hot water heaters. The *Cormier* case establishes important precedent that will protect utilities and other water suppliers. Press coverage of the decision includes a [BNA Daily Environment Report article](#) quoting Jimmy Slaughter, and an online [article in Legal Times](#).

[Jimmy Slaughter](#), [Nadira Clarke](#), and [Kate Wesley](#), Principals in Beveridge & Diamond’s Washington office, assisted by Associate [Brandon Harrell](#), led the appellate and trial teams. The Court of Appeals’ opinion in *Cormier v. District of Columbia Water & Sewer Authority* is reported at ___ A.3d ___, 2013 D.C. App. LEXIS 387 (D.C. 2013) and the trial court opinion is reported at 2011 D.C. Super. Lexis 7, 139 Daily Wash. Law Rptr. 2157 (D.C. Super. Ct. 2011). To read the Court of Appeals’ opinion in *Cormier v. DC WASA*, please click [here](#).

For more information, please contact Jimmy Slaughter at jslaughter@bdlaw.com, Nadira Clarke at nclarke@bdlaw.com, or Kate Wesley at kwesley@bdlaw.com.

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