

TEXAS ENVIRONMENTAL UPDATE



June 2013

TEXAS DEVELOPMENTS

2013 Texas Environmental Legislation Summary

The 2013 Texas legislative session resulted in a number of significant changes to environmental laws, among which are developments of broad interest relating to Texas greenhouse gas permitting and the Texas Environmental, Health and Safety Audit Privilege Act. Governor Perry signed a number of these bills on June 14, 2013, two days before the June 16th deadline for him to sign or veto bills passed during the regular legislative session. Select noteworthy statutory revisions already in effect or set to go into effect on September 1, 2013 are summarized below.

- *TCEQ to Develop & Implement Greenhouse Gas Permitting Program*

In an ironic but beneficial twist for GHG permitting in Texas, on June 14, 2013 Governor Rick Perry signed into law Texas [House Bill 788](#) which requires TCEQ to implement a federal PSD greenhouse gas (“GHG”) permitting program for sources in Texas. The law provides that TCEQ must adopt rules to transition Texas GHG permitting from EPA Region 6, and provides that the permitting process for GHGs is not subject to Texas contested case hearings. Perry signed this bill in the wake of broad support from the industrial/business interests concerned about additional requirements and potential delay associated with EPA permitting, while at the same time the State of Texas continues to oppose federal GHG regulation in pending litigation. Consistent with Texas’ position against GHG regulation, the new Texas Health & Safety Code Section 382.05102 requires Texas to repeal the GHG permitting program if at any point federal law no longer requires such permitting. House Bill 788 went into effect immediately with the governor’s signature.

The adoption of this law raises many questions, among which are how the transition from EPA permitting to TCEQ permitting will be implemented, and how long that transition will take. In a June 25, 2013 announcement TCEQ explained that, “EPA will remain the permitting authority for GHG emissions in Texas until rulemaking is completed, EPA approves the SIP and then withdraws the FIP. TCEQ will be coordinating with EPA regarding the transition period for accepting and processing GHG applications, and will make that information available as it develops.” TCEQ also noted that several Texas Administrative Code chapters will need to be amended, and that, “[a]fter the necessary rule changes are adopted by the TCEQ, they must be approved by EPA as part of the Texas State Implementation Plan (SIP) before TCEQ can begin reviewing applications and issuing permits for GHG emissions.”

Given that the transition’s procedures and timing will necessarily impact prospective applicants’ near-term permitting strategy, we will stay in communication with TCEQ and EPA and will provide updates as information becomes available.

- *Texas EHS Audit Privilege Act Expansion*

[Senate Bill 1300](#) provides a welcome expansion of the applicability of the Texas Environmental, Health and Safety Audit Privilege Act to violations discovered when

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performing a due diligence audit conducted to evaluate a potential acquisition of an existing regulated facility or operation. Disclosure of a violation discovered in the course of a pre-acquisition audit will be considered voluntary for purposes of qualifying for immunity from administrative or civil penalty if the disclosure is made within 45 days after the acquisition closing date. Pre-acquisition audits will be exempt from the requirement to provide advance notice to TCEQ that the entity plans to conduct an audit. An entity that starts an audit prior to a purchase may continue the audit after the closing date if, by the 45th day after the closing date, the entity submits notification of intent to continue the audit. With that notification, the audit must be completed within a reasonable time not to exceed six months after the acquisition closing date, unless an extension is granted. These changes, which roughly mirror pre-acquisition tailored benefits for new owners associated with EPA's Audit Policy, will go into effect on September 1, 2013.

- *Expedited Air Permit Processing Option*

Senate Bill 1756 creates an option to request "expedited processing" of air permit applications. To qualify for such processing, the applicant must demonstrate that "the purpose of the application will benefit the economy of this state or an area of this state." Expedited processing does not affect public notice/public participation requirements or timing, including the opportunity for a contested case hearing. New Texas Health & Safety Code Section 382.05155 also allows TCEQ to use and pay for compensatory time, overtime and contract labor to process expedited applications, and allows TCEQ to add a surcharge to the application fee in an amount sufficient to cover such expenses. The bill became effective immediately with the governor's signature on June 14, 2013.

- *Texas Emissions Reduction Program Expansion*

Senate Bill 1727 includes a number of changes to the Texas Emissions Reduction Plan ("TERP") Program, which provides financial incentives (rebates/grants) to eligible businesses, local governments and individuals to reduce emissions from qualifying vehicles and equipment. Along with other changes, it expands the universe of programs for which TERP Program funds must be used, and provides TCEQ with the flexibility to establish and administer other grant or funding programs that further TERP Program objectives without obtaining specific authorization from the legislature. The bill became effective immediately with the governor's signature on June 14, 2013.

- *Oil and Gas Drilling Liquids Transfer: Ownership and Liability Provisions*

House Bill 2767 addresses ownership of and liability for fluid oil and gas waste. For purposes of this bill, "fluid oil and gas waste" is defined as "waste containing salt or other mineralized substances, brine, hydraulic fracturing fluid, flowback water, produced water, or other fluid that arises out of or is incidental to the drilling for or production of oil or gas." Unless otherwise provided by legally binding document, when fluid oil and gas waste is transferred to a person for treatment for a subsequent beneficial use, the transferred material becomes the property of the person who takes possession until that person transfers the waste or treated waste to another person for disposal or use. A person who takes possession of such waste, produces from it a treated product for use in connection with the drilling for or production of oil or gas, and transfers the treated product to another person for use in connection with drilling for or production of oil or gas, is not liable in tort for a consequence of the subsequent use of that treated product by the person to whom the treated product is transferred or by another person. This liability provision does not affect the liability of the person who treats fluid oil and gas waste for beneficial use in an action brought by a person for damages for personal injury, death, or property damage arising from exposure to fluid oil and gas waste or a treated product. House Bill 2767 will go into effect on September 1, 2013.

- *Texas Department of Transportation Federal Delegation Authorization*

Senate Bill 466 authorizes the Texas Department of Transportation to be delegated federal authority from the U.S. Department of Transportation under the National

Environmental Policy Act (“NEPA”) and other federal environmental programs. Advocates for the change indicated that such delegation in other states has resulted in a substantial reduction in the amount of time required for certain environmental reviews and expedited construction of many transportation projects. The bill was signed by the governor and immediately effective on May 18, 2013.

- *Class III Injection Wells: Changes to Contested Case Hearing Provisions*

House Bill 1079 amends Texas Water Code provisions regarding production area authorizations for Class III injection wells, making fewer applications for production area authorizations subject to contested case hearing requirements. The bill was signed by the governor and immediately effective on June 14, 2013.

- *Co-Generation Facilities Allowed to Sell Electric Power at Retail*

House Bill 2049 amends the Texas Utilities Code to allow a qualifying cogenerator to sell electric energy at retail to more than one purchaser of the cogenerator’s thermal output. It also provides that selling electric energy at retail to more than one purchaser would not, as a result of that sale, subject a qualifying cogenerator to regulation as a retail electric provider, power generation company, or retail electric utility, under specified conditions. The bill was signed by the governor and immediately effective on June 14, 2013.

- *Municipal Solid Waste Fee Reduction & Reallocation*

House Bill 7 reduces the municipal solid waste (“MSW”) fee from \$1.25 to \$0.94 per ton received for disposal at an MSW landfill if the solid waste is measured by weight, and from \$0.40 to \$0.30 per cubic yard if measured by volume. It also reduces the fee from \$0.25 to \$0.19 per cubic yard for uncompacted solid waste if received for disposal at an MSW landfill. Additionally, the bill increases the percentage of the revenue received from these fees that is dedicated to the MSW permitting program from 50% to 66.7%; and reduces the percentage that is dedicate to local and regional solid waste projects from 50% to 33.3%. The bill was signed by the governor and immediately effective on June 14, 2013.

- *New Financing Options for Energy and Water Efficiency Projects*

Senate Bill 385 authorizes municipalities and counties to designate regions and establish property assessed clean energy (“PACE”) programs that allow businesses to borrow money from private lenders for energy efficiency and water efficiency improvements, and repay the loan by annual property tax assessments. The bill was signed by the governor and immediately effective on June 14, 2013.

- *Pollution Control Equipment Property Tax Abatement Changes*

House Bill 1897 includes a number of procedural changes associated with the property tax exemption for pollution control property, and creates a pollution control equipment property tax exemption for landfill-generated gas conversion facilities through December 31, 2015. The bill was signed by Governor Perry on June 14, 2013, and will go into effect on September 1, 2013.

If you would like further information regarding any of these bills, please contact Laura LaValle at llavalle@bdlaw.com or (512) 391-8020.

U.S. Supreme Court Sides with Oklahoma In Dispute with Texas Water District

On June 13, 2013, the U.S. Supreme Court unanimously upheld lower court rulings in *Tarrant Regional Water District v. Hermann*, holding that Oklahoma water laws validly barred the export of state water. The petitioner in the case is the Tarrant Regional Water District; the appellees are officers of the Oklahoma Water Resources Board and the Oklahoma Water Conservation Storage Commission. The litigation centered on the conflict between Oklahoma statutes regarding water use which, among other things, prevents Oklahoma

state entities from selling water for out-of-state use, and the Red River Compact among Oklahoma, Texas, Arkansas and Louisiana, which allocates the water in the Red River Basin among those states and was ratified by the U.S. Congress in 1980.

The petitioners sought a judgment declaring that the certain Oklahoma statutes violated the Commerce and Supremacy Clauses of the U.S. Constitution, and an injunction to prevent application of the Oklahoma statutes. Both the trial court and the 10th Circuit dismissed petitioner's claims. In the [opinion](#) the Supreme Court upheld the lower courts, finding that the Oklahoma statutes are not preempted by the Red River Compact.

Texas Supreme Court Declines to Reconsider Air Act Preemption Decision

On June 14, 2013, the Texas Supreme Court declined to reconsider an earlier ruling that the Texas Clean Air Act ("TCAA") preempts a Houston ordinance specifying location requirements for concrete-crushing operations. In February of this year, the court ruled in favor of a company that had obtained an air quality permit from TCEQ to move a concrete-crushing facility to a new location but had been denied a municipal permit by the City of Houston pursuant to a local ordinance. The court found that the ordinance was preempted by a provision of the TCAA stating that "[a]n ordinance enacted by a municipality . . . may not make unlawful a condition or act approved or authorized under [the TCAA] or the [TCEQ's] rules or orders." Tex. Health & Safety Code § 382.113(b). It interpreted this language as demonstrating "the Legislature's clear intent that a city may not pass an ordinance that effectively moots a [TCEQ] decision." (Opinion at 6.)

The case is [Southern Crushed Concrete, LLC v. City of Houston, No. 11-0270 \(Tex.\)](#).

Fifth Circuit Holds that Dallas Taxicab Rule is Not Preempted by the Clean Air Act

On June 13, 2013, the Fifth Circuit Court of Appeals issued an [opinion](#) upholding a 2010 Dallas city ordinance that allows taxi cabs powered by compressed natural gas ("CNG") to have priority over gasoline-powered taxi cabs in lines for passengers at Dallas' Love Field airport. The Association of Taxicab Owners, which represents gasoline-powered taxis in the Dallas/Fort Worth area, challenged the ordinance on the basis that it was preempted by the federal Clean Air Act, as it constituted a backdoor manner of regulating new vehicle emissions. A three judge panel of the Fifth Circuit upheld the ordinance, finding that it did not impose emissions controls either directly or through its indirect effects, as it did not create a mandatory standard compelling the conversion of taxi cabs to CNG and taxi cabs had alternative available methods to recover any losses derived from losing a place in line at Love Field.

TCEQ Approves Proposal of Haze Reduction Progress Report

On June 18, 2013, TCEQ approved proposal of the 2014 Five-Year Regional Haze State Implementation Plan Revision, which would provide a progress report on visibility protection at Class I federal areas (i.e., many national parks and wilderness areas) in Texas. Now that the proposal has been approved, the next steps involve federal and public comment periods and a public hearing. The progress report is scheduled to be adopted by TCEQ in February 2014.

More information is available on [TCEQ's website](#).

Upcoming TCEQ Meetings and Events

2013 Public Drinking Water Conference: "Information and Tools for Public Water Systems and Utilities"

Water operators, attend to earn CEU credits. August 6-7, 2013, Austin. This free two-day seminar will bring you up to date on all you need to know about operating a public drinking water system or water utility in Texas.

Read more on [TCEQ's website](#).

Advanced Air Permitting Seminar & Oil and Gas Facilities Workshop

Designed to provide updates on air permitting rules, requirements, and issues for a variety of industries. The Oil and Gas Facilities Workshop on September 26 will focus on current air permitting issues as they relate to oil and gas facilities. designed to provide updates on air permitting rules, requirements, and issues for a variety of industries. The Oil and Gas Facilities Workshop on September 26 will focus on current air permitting issues as they relate to oil and gas facilities.

Austin Convention Center, September 25-26, 2013.

[Read more on TCEQ's website.](#)

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in June can be found on TCEQ's website:

- [Wednesday, June 5, 2013 - TCEQ approves fines totaling \\$659,583](#)
- [Tuesday, June 18, 2013 - TCEQ Approves Fines Totaling \\$655,055](#)

Recent Texas Rules Updates

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

FIRM NEWS & EVENTS

Legal 500 US Ranks Beveridge & Diamond, P.C. Among Leaders in Environmental Litigation, Transactional, and Regulatory Matters

The *Legal 500 United States* has again ranked Beveridge & Diamond, P.C. as a leading national environmental law practice, noting the Firm's [environmental litigation](#) capabilities as well as its [transactional and regulatory](#) capabilities.

In addition, Legal 500 recommended three Beveridge & Diamond lawyers:

- [Harold Segall](#)
- [Karl Bourdeau](#)
- [Paul Hagen](#)

The *Legal 500 United States* provides in-depth, comprehensive analysis of law firms across the U.S.

For more information, please contact Janine Militano at jmilitano@bdlaw.com.

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