

# TEXAS ENVIRONMENTAL UPDATE



May 2013

## TEXAS DEVELOPMENTS

### Texas Office

98 San Jacinto Boulevard  
Suite 1420  
Austin, TX 78701  
(512) 391-8000

### Daniel Berner

[dberner@bdlaw.com](mailto:dberner@bdlaw.com)

### Edward M. Grauman

[egrauman@bdlaw.com](mailto:egrauman@bdlaw.com)

### Karen Hansen

[khansen@bdlaw.com](mailto:khansen@bdlaw.com)

### Maddie Kadas

[mkadas@bdlaw.com](mailto:mkadas@bdlaw.com)

### Laura LaValle

[llavalle@bdlaw.com](mailto:llavalle@bdlaw.com)

### Bryan Moore

[bmoore@bdlaw.com](mailto:bmoore@bdlaw.com)

### Fifth Circuit Upholds Dismissal of Katrina Global Warming Suit

On May 14, the U.S. Court of Appeals for the Fifth Circuit affirmed a lower court's dismissal of a lawsuit brought by a group of Mississippi Gulf Coast residents and property owners against energy companies whose emissions they alleged contributed to global warming, which intensified Hurricane Katrina, which, in turn, damaged their property. The Fifth Circuit held that the plaintiffs' claims were barred by the doctrine of res judicata, which bars the re-litigation of a claim that has been decided on the merits in a prior action.

The case presented an unusual procedural situation. Plaintiffs originally brought their claims in Mississippi federal court in 2005. The district court dismissed the case, and a panel of the Fifth Circuit reversed and remanded, in part, the district court's decision. Before the panel opinion's mandate issued, six of this court's nine active, unrecused judges voted to rehear the case en banc, thus vacating the panel's opinion. However, before the en banc court reheard the case, an additional judge was recused, leaving the Fifth Circuit without a quorum (eight of the court's sixteen active judges having been recused). Because it lacked a quorum, the court dismissed the appeal.

After unsuccessfully seeking Supreme Court review, the plaintiffs filed a new complaint asserting substantially similar claims in the same district court in 2011. The district court dismissed the claims on several grounds, including res judicata. The Fifth Circuit affirmed, holding that although the original district court decision was never subject to meaningful appellate review, it still constituted a final judgment on the merits for purposes of res judicata.

The case is [Comer v. Murphy Oil USA, Inc., No. 12-60291 \(5th Cir.\)](#).

### Citizens Petition EPA for Review of CAA Emissions Factors

A group of Texas and Louisiana environmental groups have filed a citizens suit in the D.C. Circuit of Appeals to demand that the U.S. Environmental Protection Agency ("EPA") review emissions factors used to estimate emissions of volatile organic compounds and certain toxic air pollutants from flares, tanks and wastewater treatment systems. The group alleges that EPA has failed to review AP-42 (Compilation of Air Pollutant Emissions Factors Volume I: Stationary Point and Air Sources) since 1991, and has not reviewed the EPA Locating and Estimating Air Toxics Emissions Series since at least 2006. The groups point to numerous studies that suggest these emissions factors are out of date, inconsistent with EPA's own science, and underestimate actual emissions from refineries and petrochemical plants. They go on to request that the Court order EPA to review the emissions factors and revise them, as necessary. Any ratcheting down of emissions factors would have significant implications on compliance. An interesting aspect of the petition is that the environmental groups may agree with industry on one point at least – that existing flare rules assume 98%-99% destruction removal efficiency. Flaring issues are currently a significant enforcement

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[www.bdlaw.com](http://www.bdlaw.com)

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please send an e-mail to:  
[jmilitano@bdlaw.com](mailto:jmilitano@bdlaw.com)

initiative for EPA and the subject of significant enforcement actions being issued by EPA Region VI. See [\*Air Alliance Houston v. EPA, D.C. Cir. Case No. \\_\\_\\_\\_\\_\*](#).

## TCEQ Approves Ozone NAAQS Failure to Attain Fee Rules

On May 22, 2013, the TCEQ commissioners approved adoption of rules to implement Federal Clean Air Act provisions regarding the imposition of a penalty fee for major stationary sources of volatile organic compounds (“VOC”) located in an area that fails to attain the ozone National Ambient Air Quality Standard (“NAAQS”) by the applicable attainment date. The rule will apply to the Houston-Galveston-Brazoria (“HGB”) area because it was classified as severe for the revoked one-hour ozone NAAQS and did not achieve the standard by its November 15, 2007 attainment date.

The rules schedule the initial fee assessment after rule adoption using the 2012 emissions inventory. Major stationary sources in the HGB area will pay a fee of \$5,000 per ton in excess of 80 percent of a baseline amount of VOC and NOX, as adjusted by the consumer price index. The adjusted penalty amount for 2012 is \$9,169 per ton. The fee will be due annually until the area is redesignated attainment, has a design value of attainment, or other action is taken by the U.S. Environmental Protection Agency to end the fee program.

Additional information about the adopted rules is available on [TCEQ's website](#).

## Upcoming TCEQ Meetings and Events

The second scheduled ***Gulf Coast Ecosystem Restoration Council Meeting*** will be held from 6:00pm-8:00pm on June 10, 2013, at Texas A&M University, Galveston, 200 Seawolf Parkway, Building 3007. At that meeting, Commissioner Toby Baker, who serves as Governor Perry’s designee on the Restoration Council, will join federal officials to take public comment on the Restoration Council’s Draft Initial Comprehensive Plan to restore the ecosystem and economy of the Gulf Coast Region. The Draft Initial Comprehensive Plan and additional information about the Restoration Council are available at <http://www.restorethegulf.gov/>.

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 at <http://www.tceq.texas.gov/drinkingwater/conference.html>.

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 preliminary information about these events is available at <http://www.tceq.texas.gov/p2/events/AdvancedAirPermittingSeminar>.

## TCEQ Enforcement Orders

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

## Recent Texas Rules Updates

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

## NATIONAL DEVELOPMENTS

### **Bipartisan TSCA Modernization Bill, Chemical Safety Improvement Act, Introduced in Senate**

In a major breakthrough, bipartisan and broadly supported legislation to modernize the Toxic Substances Control Act (TSCA) has been introduced in the Senate. The Chemical Safety Improvement Act (CSIA), S. 1009, was announced on May 22, 2013 by its chief Democratic and Republican sponsors, Senator Frank Lautenberg (D-NJ) and Senator David Vitter (R-LA). This client alert provides the political context for this remarkable development, and then explains the key provisions of the bill. It concludes with comments on the prospects for passage.

[Read the full article.](#)

This client alert was prepared by Mark Duvall, [mduvall@bdlaw.com](mailto:mduvall@bdlaw.com), and Andie Wyatt, [awyatt@bdlaw.com](mailto:awyatt@bdlaw.com).

### **Genetically Engineered Crop Prevails Again in Court**

In a major development for the agricultural biotechnology industry, the U.S. Court of Appeals for the Ninth Circuit has upheld the decision of the U.S. Department of Agriculture's Animal and Plant Health Inspection Service to deregulate Monsanto's Roundup-Ready Alfalfa (RR Alfalfa). See *Center for Food Safety v. Vilsack, No. 12-15052 (9th Cir. May 17, 2013)*. The Court rejected all of plaintiffs' claims and affirmed in all respects the decision of the U.S. District Court for the Northern District of California. ([Click here for a copy of the earlier decision and our summary of it.](#))

[Read the full article.](#)

For more information on developments in this case and other agricultural biotechnology litigation, please contact Kathy Szmuszkovicz at [kes@bdlaw.com](mailto:kes@bdlaw.com) or (202) 789-6037, Jamie Auslander at [jauslander@bdlaw.com](mailto:jauslander@bdlaw.com) or (202) 789-6009, or Sean Roberts at [sroberts@bdlaw.com](mailto:sroberts@bdlaw.com) or (202) 789-6017.

### **Conflict Minerals Update: The Courts, Congress, Canada and EU Consultations**

Recent developments in the courts, Congress and in jurisdictions outside the U.S. suggest that the obligations of companies to disclose their use of "conflict minerals" will evolve further in the months and years ahead.

- In early May, the appellate court hearing the challenge to the Securities and Exchange Commission's (SEC's) conflict minerals rule transferred the case to a lower court, increasing the likelihood that the legal battle over the rule will extend into 2014.
- Congress has taken a renewed interest in assessing the impact of the conflict minerals disclosure provisions of Dodd-Frank while renewing calls for U.S. diplomatic efforts to end the conflict in the region.
- Outside the United States, both Canada and the European Union are moving forward with consideration of new legislation on the sourcing of minerals from conflict-affected areas in the Democratic Republic of Congo (DRC) and elsewhere.
- These developments come as a wide range of companies take steps to engage suppliers on the origins of conflict minerals in their supply chains.

[Read the full article.](#)

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

## **EPA Establishes June 30 Deadline for Oil and Natural Gas Companies' Submittal of Requests for Alternative Greenhouse Gas Monitoring Methods**

On May 1, 2013, the U.S. Environmental Protection Agency (EPA) published a [final rule amendment](#) moving up the deadline for petroleum and natural gas systems to submit their requests to use alternative monitoring methods to comply with the federal Greenhouse Gas Reporting Rule, 40 C.F.R. Part 98.

The Greenhouse Gas Reporting Rule was initially promulgated on October 30, 2009, and it has been amended numerous times. The rule requires annual reporting of greenhouse gas (GHG) data and other relevant information from larger sources and suppliers in the United States. Under the rule, 41 different source categories report GHG information to EPA, and EPA then uses the reported data to create a national inventory and for policy making. Each source category has separate monitoring, reporting, and recordkeeping requirements. Monitoring began in 2010 for most sources, with first reports due in September 2011. For most sources, subsequent annual reports are due by March 31 in each year.

[Read the full article.](#)

For more information on this rule, or if you have any questions about the reporting of GHG emissions in general, please contact Stephen Richmond at [srichmond@bdlaw.com](mailto:srichmond@bdlaw.com) or (781) 416-5710, or Heidi Knight at [hknight@bdlaw.com](mailto:hknight@bdlaw.com) or (410) 230-1344.

## **The Impacts of New EPA Vapor Intrusion Guidance**

EPA recently issued [two draft guidance documents](#) on vapor intrusion and will accept comments on them through May 24, 2013. If finalized in current form, these guidance documents would formalize and enhance EPA's existing practice of prioritizing vapor intrusion as a central issue in environmental remediation and could result in increases in the expense and effort required from responsible parties to achieve compliance for cleanup of contaminated sites conducted under federal authorities such as CERCLA or RCRA. They could also be highly influential in clean-ups overseen by state regulators. Lastly, while intended for use in the regulatory context, recommendations in these guidance documents may be used to establish a standard of care in litigation involving vapor intrusion (e.g., RCRA citizen suits or common law toxic tort litigation).

Vapor intrusion is the migration of hazardous vapor from contaminated soil or groundwater into an overlying building. It is considered potentially harmful to human health, creates risks in real estate transactions and financing due to potentially diminished property values and environmental liability, increases exposure in toxic tort litigation, and, in the federal regulatory context, is considered a pathway of possible exposure that must be evaluated as part of the evaluation and selection of a site remediation plan

[Read the full article.](#)

For more information please contact Karl Bourdeau at (202) 789-6019, [kbourdeau@bdlaw.com](mailto:kbourdeau@bdlaw.com), Pam Marks at (410) 230-1315, [pmarks@bdlaw.com](mailto:pmarks@bdlaw.com), Steve Jawetz at (202) 789-6045, [sjawetz@bdlaw.com](mailto:sjawetz@bdlaw.com), or Geoff Goode at (202) 789-6031, [ggoode@bdlaw.com](mailto:ggoode@bdlaw.com).

## FIRM NEWS & EVENTS

### Chambers USA 2013 Ranks Beveridge & Diamond, P.C. Among Leading Law Firms

The *Chambers USA Guide to the Legal Profession* has again ranked Beveridge & Diamond, P.C. as a leading environmental law practice, both nationally and regionally. In addition to firm-level rankings, individual lawyers from the Firm's regional offices are ranked.

Chambers ranked the Firm as a leading environmental practice nationwide and in the District of Columbia, Massachusetts, and Texas. Quotes from reviews of the Firm include:

"An extremely talented group of passionate environmental specialists."

"They have an enormous practice and every one of them is knowledgeable."

"Excellent lawyers doing excellent work."

Individual Beveridge & Diamond lawyers recognized include:

- [Karl S. Bourdeau](#) in Environment, District of Columbia
- [David M. Friedland](#) in Environment, District of Columbia
- [Jeanine L.G. Grachuk](#) in Environment, Massachusetts
- [Stephen L. Gordon](#) in Environment, New York
- [Paul E. Hagen](#) in Environment, District of Columbia
- [John N. Hanson](#) in Environment, District of Columbia
- [Bryan J. Moore](#) in Environment, Texas
- [Stephen M. Richmond](#) in Environment, Massachusetts
- [Nicholas W. van Aelstyn](#) in Environment, California

[View Beveridge & Diamond's Chambers USA 2013 listing.](#)

Since 1990, Chambers and Partners has published the leading guides to the legal profession, identifying and ranking the world's best lawyers and law firms based on in-depth, objective research. Each guide offers in-depth analysis of the legal market within a specific region (the UK, Europe, Asia, USA, Latin America).

For more information, please contact Janine Militano at [jmilitano@bdlaw.com](mailto:jmilitano@bdlaw.com).

### Beveridge & Diamond Recognized for Contributions to D.C. Access to Justice Commission Fundraising Campaign

Beveridge & Diamond, P.C. was honored this week for its contributions to the second annual [D.C. Access to Justice Commission's "Raising the Bar in D.C." fundraising campaign](#), receiving a "Silver" designation for contributing at least 0.075 percent of annual DC office revenue. The overall campaign raised \$3.6 million to help fund the provision of legal services for indigent residents of the District of Columbia.

Hal Segall, Chair of the Firm's Litigation Practice Group and its Pro Bono Committee, commented, "Along with many pro bono cases and community efforts to which our lawyers and staff give generously of their time and resources, we are proud to support the D.C. Access to Justice Commission's campaign and its vital mission of providing access to critical legal services for those in need."

Benjamin F. Wilson, Beveridge & Diamond's Managing Principal, added, "As stewards of the



law in modern society, lawyers must individually and collectively take steps to ensure that one's personal means do not limit access to our legal systems. Everyone benefits from the work of the D.C. Access to Justice Commission, and we salute the Commission's efforts and accomplishments."

The campaign received coverage in a [May 5, 2013 entry in the Blog of Legal Times](#).

## **Twelve Lawyers from Beveridge & Diamond's Maryland and Washington, DC Offices Receive Super Lawyers Recognition for 2013**

Beveridge & Diamond, P.C. is pleased to announce that 10 shareholders and 2 associates/of counsel have been selected for inclusion in the Maryland and Washington, DC *Super Lawyers/Rising Stars Edition 2013* as being among the top lawyers in their locations and areas of practice. Lawyers from Beveridge & Diamond's California, Massachusetts, New York and Texas offices selected for inclusion in *Super Lawyers* will be announced later in 2013 when those lists are published.

### **Baltimore, Maryland**

- [Rob Brager](#) (Environmental Litigation, Environmental)
- [Lindsey Selba](#) ("Rising Star" in Environmental Litigation, Environmental)

### **Washington, DC**

- [Peter C. Anderson](#) (Criminal Defense: White Collar, Criminal Defense, Environmental Litigation)
- [Gus B. Bauman](#) (Land Use/Zoning, Environmental)
- [Karl S. Bourdeau](#) (Environmental, Environmental Litigation)
- [Holly Cannon](#) (Environmental, Business/Corporate)
- [Katherine Eller Wesley](#) ("Rising Star" in Environmental Litigation, General Litigation)
- [David M. Friedland](#) (Environmental)
- [Paul E. Hagen](#) (Environmental, International)
- [W. Parker Moore](#) ("Rising Star" in Environmental, Administrative Law, Environmental Litigation)
- [Harold L. Segall](#) (Environmental Litigation)
- [Benjamin F. Wilson](#) (Environmental Litigation, Environmental, Civil Litigation Defense)

### **Office Locations:**

Washington, DC

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*Super Lawyers* is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations. Each year, no more than 5 percent of the lawyers in a given state are selected by the research team at *Super Lawyers*, and no more than 2.5 percent of the lawyers in a given state are selected for "Rising Star" designation.

For more information about Beveridge & Diamond or any of the attorneys mentioned above, please see [www.bdlaw.com](http://www.bdlaw.com) or contact Janine Militano at [jmilitano@bdlaw.com](mailto:jmilitano@bdlaw.com).