

TEXAS ENVIRONMENTAL UPDATE



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TEXAS DEVELOPMENTS

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First Greenhouse Gas Permit in Texas Approved by EPA for Gas-Fired Power Plant

On November 10, 2011, the U.S. Environmental Protection Agency (“EPA”) issued the first greenhouse gas emissions permit in Texas since taking over permitting authority after the state refused to implement the federal New Source Review Preventions of Significant Deterioration (“PSD”) permitting program for greenhouse gases. The permit authorizes a new 590-megawatt combined-cycle natural gas-fired unit at the Lower Colorado River Authority (“LCRA”) Thomas C. Ferguson Power Plant in Horseshoe Bay, Texas. The permit provides greenhouse gas emission limits for two combined-cycle natural gas-fired combustion turbine-generators rated at approximately 195 megawatts each (including limits for startup and shutdown activities), fugitive natural gas emissions from piping components, a diesel-fired emergency generator, a diesel-fired fire water pump, and sulfur hexafluoride insulated electrical equipment. Limits on startup and shutdown emissions from the combustion turbines are also specified. The permit limits carbon dioxide emissions from all sources to a total of just over 1.8 million tons per year.

LCRA submitted the permit application on March 15, 2011. EPA received no comments regarding the proposed permit during the 30-day public comment period that started on September 28, 2011. The application process required submittal of a biological assessment of the potential effects of the proposed action on species protected under the Endangered Species Act (“ESA”) and a National Historic Preservation Act (“NHPA”) review. In connection with the application EPA prepared an environmental justice (“EJ”) analysis. LCRA’s application, the final permit, the ESA biological assessment, NHPA review, EJ analysis, and other documents associated with this permitting action are available on EPA’s website at <http://yosemite.epa.gov/r6/Apermit.nsf/AirP>.

TCEQ Proposes Amendments to Contested Case Hearing Rules

At their November 2, 2011, agenda meeting, the TCEQ Commissioners approved for publication proposed rules revising certain of the Commission’s regulations concerning contested case hearings and the procedures for contesting applications. The rulemaking is proposed to implement the following provisions of Article 10 of the TCEQ Sunset Bill (House Bill 2694): a limitation on the ability of various state agencies to contest permit or license applications; a requirement that the TCEQ Executive Director be a party to all contested case hearings; and a deadline for discovery in certain contested case hearings in which prefiled written testimony is used. The proposed rules were published in the Texas Register on November 18, 2011, and the public comment period for the rulemaking will end on December 19, 2011. TCEQ will hold a hearing on the proposal on December 12 at 10:00 a.m. in Room 201S of Building E at TCEQ’s headquarters in Austin. TCEQ currently anticipates adopting final rules by April 11, 2012. The proposed regulations and additional information are available on TCEQ’s website.

For more information about our firm, please visit www.bdlaw.com

If you do not wish to receive future issues of Texas Environmental Update, please send an e-mail to: jmilitano@bdlaw.com

TCEQ To Consider Converting Enforcement Policies Into Rulemaking

The Texas Commission on Environmental Quality is hosting a public stakeholder meeting on Dec. 6, 2011 at its Austin Headquarters to discuss placing a general enforcement policy into rule. Staff proposals were presented to commissioners at the July 5, 2011 work sessions and again at the November 2, 2011 agenda meeting. In August, the Executive Director solicited comments on ten questions regarding rulemaking and has now issued a memo outlining its recommendations. http://www.tceq.texas.gov/assets/public/comm_exec/agendas/comm/marked/2011/111102.Mrk.pdf. Key proposed recommendations for the rulemaking include: (1) articulation of a general enforcement policy; (2) criteria for determining findings orders; and (3) criteria for referring enforcement cases to the Attorney General. Many of the other proposals, including the identification of economic benefit and culpability, were not recommended for rulemaking which are addressed in the agency's Enforcement Policy, recently noticed for comment and approved in September.

TCEQ Restricts Junior Water Rights in One Basin and Eases Restrictions in Another

On November 10, 2011, in response to a priority call on surface water from a senior water-right holder, the Texas Commission on Environmental Quality ("TCEQ") notified certain Neches River Basin junior water-right holders that their right to divert water has been suspended. The suspended water rights include those with a priority date of August 13, 1913 or later, and term and temporary water-right permits, in the Neches River Basin. Water rights with municipal uses and those for power generation were not suspended. Landowners with property adjacent to watercourses in the Neches River Basin may also continue to divert water for domestic and livestock use as part of their inherent riparian rights. TCEQ has asked all Neches River water-right holders to take steps to conserve water, implement their drought contingency plans, and prepare for additional suspensions or curtailments should drought conditions persist.

Conversely, in the Llano River Watershed, TCEQ has eased restrictions previously placed on some junior water-rights holders. On October 26, 2011, TCEQ notified those junior water-rights holders they can resume diversions because the City of Llano has rescinded its priority call. On July 5, certain non-municipal diversions with a priority date of 1950 or later were suspended in the Llano River Watershed due to a priority call on surface water from the City of Llano, a senior water right holder. Because the priority call was rescinded, TCEQ notified the affected junior water-rights holders that they can resume diversions if they have not already met the limits of their permits.

TCEQ Accepting Comments on Proposed Lynchburg Ferry Air Pollutant Watch List Boundary Change

TCEQ has conducted a boundary reevaluation of the Lynchburg Ferry Air Pollutant Watch List ("APWL") area for styrene. Based upon that reevaluation, TCEQ is proposing to reduce the size of the Lynchburg Ferry APWL area to facilitate focus on styrene sources that potentially contribute to exceedances of the odor-based styrene air monitoring comparison values. The comment period started on October 31, 2011, and will continue through December 23, 2011. Additional information regarding this proposal is available at http://www.tceq.texas.gov/toxicology/AirPollutantMain/APWL_index.html#consideration.

TCEQ Approves Changes to Field Citation Enforcement Program

At its November 2, 2011 agenda, the TCEQ Commissioners approved all changes proposed by the Executive Director to the Field Citation program. The key changes including amending the policy to reflect changes to statutory maximum penalties and to add violations currently contained in the program to include new violations to petroleum storage tanks, municipal solid waste, outdoor burning, landscape irrigation and several water rights violations. <http://www7.tceq.state.tx.us/uploads/eagendas/Agendas/2011/11-2-2011/2011-1917-MIS.pdf>. The field citation program, made a permanent feature of the TCEQ enforcement program in 2007, allows TCEQ field investigators to issue on-the-spot citations for a limited set of specific violations. The program offers a reduced penalty assessment as an incentive to forgo traditional enforcement procedures.

Texas SIP Update

At the TCEQ Commissioner's December 7, 2011 agenda meeting, the TCEQ Executive Director is scheduled to recommend adoption of a Houston-Galveston-Brazoria (HGB) Reasonably Available Control Technology (RACT) Analysis Update State Implementation Plan (SIP) Revision for the 1997 Eight-Hour Ozone Standard, and Dallas-Fort Worth (DFW) Reasonable Further Progress ("RFP") SIP Revisions for the 1997 Eight-Hour Ozone Standard. Information regarding these agenda items is available at <http://www.tceq.texas.gov/airquality/sip/Hottop.html>.

TCEQ has postponed consideration of the adoption of the proposed Collin County Lead Attainment Demonstration SIP Revision and the associated Agreed Order with Exide Technologies, Inc. from December 7, 2011 to the spring of 2012. The delay will allow TCEQ time to address comments received from the public and EPA. This SIP revision is due to the EPA by June 30, 2012. Information regarding this matter is available at <http://www.tceq.texas.gov/airquality/sip/dfw/dfw-latest-lead>.

On November 2, 2011, EPA published approval of portions of three Texas State Implementation Plan ("SIP") revisions submitted by Texas in 1993, 1998 and 2010 (76 Fed. Reg. 67600). The SIP revisions include amendments and additions to Texas' new source review ("NSR") permitting rules in 30 Texas Administrative Code Chapter 116. The August 31, 1993 revision creates two new sections (30 TAC §§116.174 and 116.175) for the use of emission reductions as offsets in NSR permitting. The July 22, 1998 revision provides in 30 TAC §116.116(f) for using Discrete Emission Reduction Credits ("DERCs") to exceed permitted emission limits and updates citations to other Texas regulations. The October 5, 2010 revision updates citations to other Texas regulations in 30 TAC §116.116(f).

Sierra Club Issues Notice of Intent to Sue EPA Alleging Texas SIP Review Failures

On October 27, 2011, the Sierra Club issued a notice of intent to sue the U.S. Environmental Protection Agency ("EPA") alleging failure to take action on 26 Texas state implementation plan ("SIP") submittals by various deadlines from December 15, 2008 to October 1, 2011. The Sierra Club's notice also alleges EPA failure to issue notices of failure to Texas for unfiled SIP elements relating to the Houston/Galveston/Brazoria and Dallas/Fort Worth 1997 ozone nonattainment areas. Those elements include moderate nonattainment new source review ("NSR") rules for both areas, and a severe nonattainment NSR rule for the Houston area due April 15, 2010. Additional information about this action is available on the Lone Star Chapter Sierra Club's website at <http://texas.sierraclub.org/press/newsreleases/20111028.asp>.

Upcoming TCEQ Meetings and Events

- **Public Meeting on Proposed Rainwater Harvesting Rules.** To comply with HB 3372, HB 3391, and SB 1073, TCEQ staff is proposing the creation of a new Subchapter I, 30 Texas Administrative Code Chapter 290, Public Drinking Water. TCEQ is holding a rule stakeholder meeting and will be inviting input from the public on the rulemaking required by HB 3372, HB 3391, and SB 1073. The meeting will be held on Tuesday, December 6, 2011, from 9:00 a.m. to 12:00 noon, Building F, Room 2210, TCEQ, 12015 Park 35 Circle, Austin 78753.
- **Public Meeting on Enforcement Rulemaking.** The Texas Commission on Environmental Quality is hosting a public stakeholder meeting on Dec. 6, 2011 to discuss placing a general enforcement policy into rule. The meeting will begin at 9:30 a.m., at the TCEQ headquarters, 12100 Park 35 Circle, Room 201S, Building E, Austin.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in November can be found on the TCEQ website at <http://www.tceq.texas.gov/news/releases/commissionersagenda110211>.

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>.

FIRM NEWS & EVENTS

Beveridge & Diamond Receives Top Tier Rankings in Environmental Law and Environmental Litigation from U.S. News & World Report and Best Lawyers

Washington, DC -- U.S. News Media Group and Best Lawyers have awarded Beveridge & Diamond, P.C. several top tier rankings in environmental law on the 2011 Best Law Firms list. In the nationwide rankings, the Firm received a Tier 1 ranking for its environmental litigation practice. In the regional rankings which covered a wider range of environmental and natural resources practice areas, the Firm's practices in Washington, D.C., Boston, and San Francisco were also recognized with the highest ranking.

"We are very pleased to see receive this top tier ranking of our environmental litigation practice from U.S. News and Best Lawyers," said Ben Wilson, the Firm's Managing Principal. "Our diverse and growing client base requires our firm to maintain cutting edge capabilities in environmental law and litigation, product stewardship, and toxic tort litigation, nationwide and internationally."

The Firm received prominent recognition for its environmental, litigation, natural resources, real estate, and land use practices in several key markets:

Tier 1

- Litigation – Environmental: Nationwide
- Environmental: Washington, DC
- Litigation – Environmental: Washington, DC
- Natural Resources Law: San Francisco, CA
- Litigation - Land Use & Zoning: Boston, MA

Tier 2

- Land Use & Zoning Law: Boston, MA
- Environmental Law: San Francisco, CA
- Litigation – Environmental: San Francisco, CA

Tier 3

- Oil & Gas: Washington, DC
- Real Estate Law: Washington DC

According to U.S. News and Best Lawyers, "achieving a high ranking is a special distinction that signals a unique combination of excellence and breadth of expertise."

U.S. News and Best Lawyers released the 2011 Best Law Firms rankings on November 1, 2011, marking the second edition of this annual analysis. These rankings showcase 9,633 different law firms ranked in one or more of 75 major legal practice areas. Full data are available online for the law firms that received rankings.

To view our rankings on the U.S. News Best Law Firms website, please visit <http://bestlawfirms.usnews.com/firms/beveridge-diamond-pc/overview/13605/>.

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