

TEXAS ENVIRONMENTAL UPDATE



October, 2008

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

Maddie Kadas
mkadas@bdlaw.com

Peter Gregg
pgregg@bdlaw.com

Lydia G. Gromatzky
lgromatzky@bdlaw.com

Laura LaValle
llavalle@bdlaw.com

TEXAS DEVELOPMENTS

TCEQ Proposes to Remove LPST Sites from TRRP

The TCEQ staff has proposed to revise Chapters 334 and 350 of the TCEQ rules to remove Leaking Petroleum Storage Tank (LPST) sites from the Texas Risk Reduction Program (TRRP). The rule revision was prompted by language in House Bill (HB) 3554, passed in the 80th Legislative Session. ([full article](#))

TCEQ Reorganizes the Remediation Division and Appoints a New Division Director

Late last week, TCEQ Executive Director Mark Vickery announced organizational changes pursuant to which the TCEQ's Remediation Division was moved from the Office of Permitting, Remediation and Registration to the Office of Compliance and Enforcement (OCE). The changes are effective immediately and were announced as part of efforts to align field and enforcement activities. The Office of Permitting, Remediation and Registration has now been renamed the Office of Permitting and Registration. ([full article](#))

TCEQ Issues Guidance on Authorizing Portable Facility Relocation

TCEQ has issued guidance regarding its approval process for relocating or changing the location of portable facilities without public notice. See Guidance Memo for the Relocations and Change of Locations of Portable Facilities (September 10, 2008), available at http://www.tceq.state.tx.us/assets/public/permitting/air/memos/portable_memo_9_10_08.pdf. Public notice is not required for the relocation or change of location of a portable facility to a site where a portable facility has been located during the previous two years and for facilities that are located temporarily in the right-of-way or contiguous to the right-of-way of a public works project. Tex. Health & Safety § 382.056(r). ([full article](#))

Upcoming TCEQ Meetings

TCEQ will be holding certain stakeholder and advisory group meetings in November and December. ([full article](#))

Texas Rules Updates

See, TCEQ website at <http://www.tceq.state.tx.us/rules/whatsnew.html> for information on new rule developments.

NATIONAL DEVELOPMENTS

EPA's Final Revisions to the Definition of Solid Waste: Recycling the Rules for Recyclable Materials

On October 30, 2008, the United States Environmental Protection Agency (EPA or the Agency) published its long-awaited final rule revising the Resource Conservation and

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

Recovery Act (RCRA) regulatory definition of solid waste (2008 Final DSW Rule), which will go into effect on December 29, 2008. See 73 Fed. Reg. 64668 (October 30, 2008). The 2008 Final DSW Rule revises EPA's regulatory definition of solid waste to exclude conditionally certain types of recycled materials and reclamation operations from the onerous RCRA hazardous waste requirements that otherwise would apply. ([full article](#))

EPA Announces Revised National Ambient Air Quality Standards for Lead

On October 16, 2008, EPA announced the first revision to the national ambient air quality standards (NAAQS) for lead in 30 years. The new standards are significantly more stringent than those previously in effect. Specifically, EPA has set both the primary standard and the secondary standard at 0.15 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$), averaged over a rolling three-month period, evaluated over a three-year period. The previous primary and secondary lead NAAQS were 1.5 $\mu\text{g}/\text{m}^3$, measured as lead in total suspended particulate matter, not to be exceeded by the maximum arithmetic mean concentration averaged over a calendar quarter. Facilities that emit one ton per year or more of lead will be required to conduct monitoring. EPA was subject to a court-ordered deadline of Oct 15, 2008 to make a determination as to whether to revise the lead NAAQS. ([full article](#))

EPA Amends Hazardous Air Pollutant Standards for Hazardous Waste Combustors

On October 16, 2008, the Administrator of the Environmental Protection Agency signed a final rule revising the National Emission Standards for Hazardous Air Pollutants for hazardous waste combustors, 40 CFR Part 63, Subpart EEE. The hazardous waste combustor rule has been controversial and has been subject to several challenges since it was first issued in 2005. ([full article](#))

FIRM NEWS & EVENTS

“Emerging Environmental Regimes for Contaminated Land in Latin America,” BNA International Reporter, Vol. 31, No. 21

Three Beveridge & Diamond attorneys, Madeleine B. Kadas, Lydia González Gromatzky, and Jackson Morrill, and Melissa Owen of Ambiente Legal, authored an article that was recently published in BNA, Inc.'s International Environment Reporter. The article, entitled “Emerging Environmental Regimes for Contaminated Land in Latin America,” provides a survey of the status of contaminated site regulations in Argentina, Brazil, Chile, Colombia, Ecuador, Mexico and Peru and highlights how very dynamic this area of law has become, while also highlighting the jurisdictional differences in the region.

To access the BNA, Inc. article, go to <http://www.bdlaw.com/assets/attachments/220.pdf>

Previous Issues of Texas Environmental Update

To view all previous issues of the Texas Environmental Update, please go to <http://www.bdlaw.com/publications-93.html>.

TEXAS DEVELOPMENTS

TCEQ Proposes to Remove LPST Sites from TRRP

The TCEQ staff has proposed to revise Chapters 334 and 350 of the TCEQ rules to remove Leaking Petroleum Storage Tank (LPST) sites from the Texas Risk Reduction Program (TRRP). The rule revision was prompted by language in House Bill (HB) 3554, passed in the 80th Legislative Session.

Background

At the November 7, 2007 agenda meeting, the commission declined to propose a rulemaking package that would amend 30 TAC §350.2(g) to remove LPST sites from TRRP and directed staff to solicit comments in the upcoming rule package amending Chapter 334. The Chapter 334 rulemaking proposal was published on May 2, 2008 and the preamble requested comments on this issue. The comment period closed on June 2, 2008, and comments were received from the regulated community in support of the removal of LPST sites from TRRP. The regulated community generally stated that the existing Chapter 334 rules and guidance adequately protect the environment, while providing appropriate regulatory flexibility, and that over 21,800 LPST site closures have been performed successfully under Chapter 334 without the added costs associated with the Chapter 350 rules.

At the adoption agenda meeting on October 8, 2008, the commission directed staff to initiate rulemaking and address the LPST issue in a comprehensive rulemaking for both Chapter 334 and Chapter 350. These proposed rule changes would amend Chapters 334 and 350, by eliminating language in both of those chapters requiring compliance with Chapter 350 for the assessment, response actions, and post-response action care for releases of regulated substances from USTs or ASTs.

Key points in the proposed rulemaking schedule:

- Anticipated proposal date: November 5, 2008
- Anticipated Texas Register publication date: November 21, 2008
- Public hearing date (if any): December 16, 2008
- Public comment period: November 21, 2008 – December 22, 2008
- Anticipated adoption date: February 25, 2009

TCEQ Reorganizes the Remediation Division and Appoints a New Division Director

Late last week, TCEQ Executive Director Mark Vickery announced organizational changes pursuant to which the TCEQ's Remediation Division was moved from the Office of Permitting, Remediation and Registration to the Office of Compliance and Enforcement (OCE). The changes are effective immediately and were announced as part of efforts to align field and enforcement activities. The Office of Permitting, Remediation and Registration has now been renamed the Office of Permitting and Registration.

Brent Wade, currently the Area Director for North Central and West Texas, has been appointed to oversee the Remediation Division during the transition to OCE. Brent began his career with the State of Texas in 1989 as an investigator in the San Angelo Office of the Texas Water Commission. Brent has held positions ranging from environmental investigator to Air, Water, Waste Programs Section Manager. In 2002, Brent moved to Austin as the Assistant Director of Field Operations with the TCEQ. In October 2003, he was selected as the Special Assistant to the Deputy of the Office of Compliance and Enforcement and held that position until October 2004, when he joined Commissioner Ralph Marquez as his Executive Assistant. Upon Commissioner Marquez's retirement in 2006, Brent moved back

to Field Operations as the Area Director of the West Texas Area Regions. Brent received his B.S. in Biology/Chemistry from Angelo State University in 1975.

TCEQ Issues Guidance on Authorizing Portable Facility Relocation

TCEQ has issued guidance regarding its approval process for relocating or changing the location of portable facilities without public notice. See Guidance Memo for the Relocations and Change of Locations of Portable Facilities (September 10, 2008), available at http://www.tceq.state.tx.us/assets/public/permitting/air/memos/portable_memo_9_10_08.pdf. Public notice is not required for the relocation or change of location of a portable facility to a site where a portable facility has been located during the previous two years and for facilities that are located temporarily in the right-of-way or contiguous to the right-of-way of a public works project. Tex. Health & Safety § 382.056(r).

The guidance provides definitions for several terms, including the change of location, portable facilities, relocation, the right-of way of a public works project and temporary facilities, and sets forth criteria for relocation approvals. Applications for relocations will be processed by TCEQ's Regional Offices.

Importantly, the guidance underscores that authorizations for relocation will not be approved to start construction at a site for which public notice has never been accomplished, regardless of how the existing facility was authorized to operate at the site and in which case a change of location process will be required. A change of location for a portable facility entails review of best available control technology (BACT) and a health impacts review.

Upcoming TCEQ Meetings

TCEQ will be holding certain stakeholder and advisory group meetings in November and December. These meetings include the following:

- November 3, 2008 meeting of the Houston-Galveston-Brazoria (HGB) Eight-Hour Ozone State Implementation Plan (SIP) Stakeholder Group. Please see TCEQ's website at http://www.tceq.state.tx.us/implementation/air/sip/hgb_stakeholder.html for additional details.
- November 13, 2008 meeting of the Mercury-Impaired Waters Advisory Group. Please see TCEQ's website at <http://www.tceq.state.tx.us/implementation/water/planning/mercurygroup/> for additional details.
- December 9, 2008 UST Management and Compliance Assistance Seminar. Please see TCEQ's website at <http://www.tceq.state.tx.us/assistance/events/ust-seminar.html> for additional details.

NATIONAL DEVELOPMENTS

EPA's Final Revisions to the Definition of Solid Waste: Recycling the Rules for Recyclable Materials

On October 30, 2008, the United States Environmental Protection Agency (EPA or the Agency) published its long-awaited final rule revising the Resource Conservation and Recovery Act (RCRA) regulatory definition of solid waste (2008 Final DSW Rule), which will go into effect on December 29, 2008. See 73 Fed. Reg. 64668 (October 30, 2008). The 2008 Final DSW Rule revises EPA's regulatory definition of solid waste to exclude conditionally certain types of recycled materials and reclamation operations from the onerous RCRA hazardous waste requirements that otherwise would apply.

The two main elements of the 2008 Final DSW Rule are new exclusions from the definition of solid waste and a new process for obtaining case-by-case determinations that specific materials are non-wastes. EPA also establishes new legitimacy criteria for purposes of assessing whether hazardous secondary materials are being legitimately recycled and,

therefore, eligible for one of the new exclusions or a non-waste determination.

The 2008 Final DSW Rule may provide some degree of regulatory relief to persons who generate, recycle, or otherwise manage certain hazardous secondary materials destined for reclamation. However, the potential benefits of the rule are uncertain, given the limited scope of the rule, the numerous conditions placed on the new solid waste exclusions, and the cumbersome process for obtaining non-waste determinations. Moreover, many States may decide not to adopt the rule, which could create complicated issues for interstate movements of hazardous secondary materials. Legal challenges to the 2008 Final DSW Rule may be filed soon in the courts, addressing the issue of whether the rule is consistent with prior rulings of the D.C. Circuit, which limit EPA's authority to materials that are truly "discarded."

A full analysis is available at <http://www.bdlaw.com/assets/attachments/223.pdf>. For additional information, please contact Donald Patterson (dpatterson@bdlaw.com), Aaron Goldberg (agoldberg@bdlaw.com), or Elizabeth Richardson (erichardson@bdlaw.com).

EPA Announces Revised National Ambient Air Quality Standards for Lead

On October 16, 2008, EPA announced the first revision to the national ambient air quality standards (NAAQS) for lead in 30 years. The new standards are significantly more stringent than those previously in effect. Specifically, EPA has set both the primary standard and the secondary standard at 0.15 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$), averaged over a rolling three-month period, evaluated over a three-year period. The previous primary and secondary lead NAAQS were 1.5 $\mu\text{g}/\text{m}^3$, measured as lead in total suspended particulate matter, not to be exceeded by the maximum arithmetic mean concentration averaged over a calendar quarter. Facilities that emit one ton per year or more of lead will be required to conduct monitoring. EPA was subject to a court-ordered deadline of Oct 15, 2008 to make a determination as to whether to revise the lead NAAQS.

States will be required to provide to EPA area designation recommendations for the new standards no later than October 15, 2009, and EPA's designation decisions will be final by October of 2011. States will have five years after the designations are made to meet the standards. The Federal Register notice that EPA will publish for this revision is available on EPA's website at http://www.epa.gov/ttn/naaqs/standards/pb/s_pb_cr_fr.html.

EPA Amends Hazardous Air Pollutant Standards for Hazardous Waste Combustors

On October 16, 2008, the Administrator of the Environmental Protection Agency (EPA) signed a final rule revising the National Emission Standards for Hazardous Air Pollutants (NESHAP) for hazardous waste combustors, 40 CFR Part 63, Subpart EEE (Subpart EEE). The hazardous waste combustor rule has been controversial and has been subject to several challenges since it was first issued in 2005.

Section 112(d) of the Clean Air Act requires EPA to promulgate emission standards to control Hazardous Air Pollutants (HAP) from new and existing major sources reflecting the maximum achievable degree of reduction in HAP emissions. The hazardous waste combustor rule affects an estimated 267 major sources of HAP, including hazardous waste incinerators, cement manufacturers, clay products manufacturers, boilers and process heaters, and hydrochloric acid production furnaces.

Following initial promulgation of a final hazardous waste combustor rule in 2005, 70 Fed. Reg. 59402 (*available at* <http://www.epa.gov/fedrgstr/EPA-AIR/2005/October/Day-12/a18824a.htm>), EPA received four separate petitions for reconsideration. In March and October of 2006, the agency agreed to reconsider a total of eight of the roughly twenty issues raised by these petitions. Shortly thereafter, the United States Court of Appeals for the D.C. Circuit issued an opinion that required EPA to adjust the methodology it had been using to establish the minimum stringency requirements for emissions control in its Section 112(d) rulemakings (known as the "MACT Floor"). See *Sierra Club v. EPA* (*available at*

<http://bulk.resource.org/courts.gov/c/F3/479/479.F3d.875.03-1202.06-1013.html>), 479 F.3d 875 (D.C. Cir. 2007). In response to the decision in *Sierra Club*, EPA issued a notice in September 2007 discussing which of the hazardous waste combustor standards it believed were consistent with the legal standard for establishing the MACT Floor, and which of those standards it believed needed to be reexamined through subsequent rulemaking in light of the *Sierra Club* decision. See 72 Fed. Reg. 54875.

The recent amendment to Subpart EEE addresses the eight issues identified for reconsideration in 2006, and responds to comments on the MACT Floor analysis solicited through the September 2007 notice. The amended rule was published in the Federal Register on October 28, 2008, and is effective immediately — leaving unchanged the October 14, 2008 compliance deadline originally established in the 2005 rule. See 73 Fed. Reg. 64067 (available at <http://www.epa.gov/fedrgstr/EPA-AIR/2007/September/Day-27/a19097.htm>).

Minor Revisions

The amended rule makes minor changes to four provisions that were contained in the 2005 rule.

1. Revised new source Particulate Matter (PM) standards for cement kilns and hazardous waste incinerators:

EPA granted reconsideration of the PM standard for new cement kilns in part because industrial petitioners argued the PM standard was derived from faulty test data from the best performing source. EPA proposed the 2005 standard was overly stringent because even the best performing source, on which the standards were based, could not achieve the emission limit. In the final amended rule, EPA increased allowable PM emissions to more accurately reflect the actual emission levels achieved by the best performing cement kilns. Another revision establishes a small increase in allowable PM emissions for new incinerators. New cement kilns and incinerators (those that commenced construction or reconstruction after April 20, 2004) must comply with the amended standards by October 28, 2008, or the date the source begins operation (whichever is later).

2. Amendments to Particulate Matter Detection System (PMDS) provisions:

In response to petitions for reconsideration, the amended rule makes a number of technical revisions to the particulate matter detection system provisions. Of note, the amended rule requires sources to establish site-specific quality assurance measures rather than comply with the Relative Response Audit (RRA) provisions of “Procedure 2,” which was required under the 2005 rule.

3. Minor revisions to health-based compliance alternative provisions for total chlorine:

The 2005 rule allowed hazardous waste combustors, other than hydrochloric acid production furnaces, to establish and comply with health-based compliance alternatives in lieu of technology based emission standards. The final amended rule affirms this health based compliance alternative, while adding minor revisions for clarification purposes.

4. Elimination of sub-categorization scheme for liquid fuel boilers:

The amended rule abandons the sub-categorization scheme that set different emission standards for liquid fuel boilers depending on the heating value of the hazardous waste burned at the facility. EPA intends to amend these standards in subsequent rulemaking.

Other Issues Reconsidered but not Revised

EPA ultimately decided not to modify the 2005 rule with respect to the other four issues for which reconsideration was granted. EPA defended its total chlorine measuring system as accurate, and affirmed its tie-breaking procedures for new source standards in the event multiple sources achieve the same best performance scores. Likewise, EPA made no changes to the “beyond the floor” analysis to consider multiple HAPs that are controlled by

a single mechanism. Finally, EPA retained the dioxin/furan standards as promulgated in the 2005 rule.

Other Actions

EPA also took the opportunity to make several clerical clarifications and corrections to various provisions of the 2005 rule. Additionally, EPA used the rule-making to gather input on its rationale for identifying those emission standards it intends to defend on the basis of the original MACT Floor determinations, and those standards that it intends to re-examine. EPA noted that all commenters but one supported EPA's analysis of the standards.

More information on the standards for hazardous air pollutants for hazardous waste combustors can be found at: www.epa.gov/osw/hazard/tsd/td/combust/finalmact/index.htm. For more information on this topic, please contact Stephen Richmond at srichmond@bdlaw.com, or Graham St. Michel at gstmichel@bdlaw.com.

Office Locations:

Washington, DC

Maryland

New York

Massachusetts

New Jersey

Texas

California

The purpose of this alert is not intended as, nor is it a substitute for, legal advice. You should consult with legal counsel for advice specific to your circumstances. This communication may be considered advertising under applicable laws regarding electronic communications.