

TEXAS ENVIRONMENTAL UPDATE



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TEXAS DEVELOPMENTS

Fifth Circuit Seeks Texas Supreme Court Input in Deepwater Horizon Insurance Coverage Dispute

On August 29, 2013, the United States Court of Appeals for the Fifth Circuit withdrew its opinion from earlier this year that had awarded “additional insured” coverage to BP American Production Company and affiliates (“BP”) under Transocean Holding, Inc.’s umbrella insurance policies. *In re Deepwater Horizon*, Case No. 12-30230, Slip Op. (5th Cir. Aug. 29, 2013). In its place, the Fifth Circuit certified two questions to the Supreme Court of Texas: (1) whether BP is covered as an additional insured, based solely on the language of the insurance policies; and (2) whether the contra proferentem doctrine of requiring insurance policies to be interpreted against insurers and in favor of insureds applies to sophisticated parties. *Id.* at 14. The Supreme Court of Texas accepted the certified questions for review on September 6, 2013. See <http://www.supreme.courts.state.tx.us/historical/2013/sep/090613.htm>.

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

Fifth Circuit Denies Review of EPA Title V Permit Objections

The Fifth Circuit denied review for lack of subject matter jurisdiction of EPA objections to three Title V Permits issued by the Louisiana Department of Environmental Quality (“LDEQ”) to Nucor Steel Louisiana for an iron manufacturing facility. See [*Louisiana Dep’t Env’l Quality v. U.S. Env’l Protection Agency*](#), Case No. 12-60482, Slip Op. Fifth Cir. Sept. 13, 2013. LDEQ brought suit challenging the objections, issued almost two years after the State had issued the permits. Rejecting arguments that EPA’s objections were not proper “objections” and were untimely made, the Court held that Clean Air Act Section 7661d(c) does not allow judicial review of an objection and is not final Agency action. In dicta, the Court pointed to other provisions of the Act (citizen suit provisions) as potential mechanisms for challenging an EPA objection.

Houston Air Ordinance Upheld by Texas Appeals Court

The Texas First Court of Appeals issued an opinion on August 29, 2013 holding that two Houston city air quality ordinances were not preempted by the Texas Clean Air Act (“TCAA”). *City of Houston v. BCCA Appeal Group, Inc.* (No. 01-11-00332-CV). The ordinances established a City air quality program that included a fee schedule and expanded the program’s scope to cover emission sources subject to TCEQ regulation. Reversing the trial court, the Court of Appeals found that the TCAA did not preempt Houston’s authority and that the ordinance registration and fee provisions were legal because they operated concurrently with existing state requirements. The Court also held that because the ordinances only incorporated parts of the TCAA, and did not include TCEQ discretionary enforcement powers, they did not circumvent the express goals of the Legislature to render them invalid. The court’s opinion is [available here](#).

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

Texas Court Of Appeals Finds Compensable Regulatory Taking Of Groundwater

On August 28, 2013, the Texas Fourth Court of Appeals held that groundwater permit restrictions imposed by the Edwards Aquifer Authority (the "Authority") on landowners constituted a regulatory taking. The landowners, Glenn and JoLynn Bragg, were commercial pecan growers who brought suit against the Authority after they were denied a water permit for one of their pecan orchards, and granted a limited permit for another orchard.

Applying the Texas Supreme Court's recent opinion in *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012), the Court of Appeals observed that landowners have absolute title to the water in place beneath their lands. To reach its conclusion that a taking had occurred, the Court weighed factors set forth by the U.S. Supreme Court for assessing regulatory takings in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978): the economic impact on the Braggs caused by the groundwater regulations, the groundwater regulations' interference with the Braggs' investment-backed expectations, and the nature of regulation in general. The Court went on to determine that the proper compensation for the taking was the difference in the value of the Braggs' land before and after the groundwater restrictions were applied to the orchards. The case was remanded to the trial court for a calculation of the damages. A copy of the court's opinion is [available here](#).

TCEQ Releases Additional Final Draft Modules for Flare Training

The Texas Commission on Environmental Quality ("TCEQ"), together with the University of Texas, has unveiled the fourth and fifth training modules for flare operations. According to the TCEQ website, the objective of the training is "to enhance plant personnel understanding of industrial flare operations and provide practical information about variables affecting flare performance, with the aim to maximize flare destruction and removal efficiency ("DRE") of dual-purpose assisted flares consistent with state and federal rules using existing on-site resources." The training consists of five modules and an assessment, as follows:

- Module 1 - Introduction
- Module 2 - History of Flares, Applicable Regulatory Codes and Flare Types
- Module 3 - Approaches to Monitoring Flare Emission Performance
- Module 4 - Flare Performance Parameters Investigated in Recent Industrial Flare Studies
- Module 5 - Factors that Impact Flare Performance

The training Modules are available at <http://sfot.ceer.utexas.edu/sfotmoodle/>.

Texas Audit Policy Act Guidance Updated

TCEQ has revised its Guide to the Texas Environmental, Health, and Safety Audit Privilege Act (the "Act") to reflect changes made during the 2013 Legislative Session. The changes from the 83rd Legislative Session were designed to enhance applicability of the Act in pre-acquisition contexts. Specifically, pre-acquisition audits are exempt from both the requirements for advanced notice and the six-month time-frame for completion. The Guidance incorporates these legislative changes but notes that they are not otherwise expected to "significantly affect the way the TCEQ has been implementing the Audit Act since 1995." See Guide at 3. The new Guide provides model letters for pre-acquisition audits. Exhibit G. A copy of the new guidance is available at <http://www.tceq.texas.gov/publications/rg/rg-173.html>.

Proposal to Remove Port Arthur from Air Pollution Watch List

On August 28, 2013, TCEQ proposed to remove Port Arthur from the agency's Air Pollution Watch List ("APWL") based on reductions in measured benzene levels in recent years. TCEQ added Port Arthur to the APWL in 2001 to address elevated annual average benzene concentrations at the agency's City Service Center monitor. Since that time sources in the Port Arthur APWL area implemented operational improvements that have achieved lower benzene emissions. TCEQ will host a public meeting regarding the proposal in Port Arthur on October 8, 2013, and is accepting public comment through October 11, 2013.

Additional information regarding this proposal, including information on the public meeting and how to submit comments, is available on [TCEQ's website](#).

Texas SIP Update

On September 26, 2013, the U.S. Environmental Protection Agency ("EPA") published a final rule disapproving portions of state implementation plan ("SIP") revisions relating to the Texas Emergency Orders Program that Texas submitted on August 31, 1993, December 10, 1998, February 1, 2006, and July 17, 2006 ([78 Fed. Reg. 59250](#)). EPA found that Texas' proposed Emergency Orders Program failed to meet Clean Air Act requirements for projects subject to major new source review ("NSR") by not meeting major NSR public participation requirements and the requirement that an NSR permit be issued prior to commencement of construction of a major source.

On September 9, 2013, the U.S. Environmental Protection Agency ("EPA") published two proposed rules relating to the continuing progress that the Houston/Galveston/Brazoria ("HGB") nonattainment area is making toward compliance with the 1997 ozone national ambient air quality standard ("NAAQS")([78 Fed. Reg. 55037](#) and [78 Fed. Reg. 55029](#)). EPA Region 6's news release regarding the proposals states: "The EPA is proposing to approve the State of Texas' plan for the Houston area to attain the 1997 standard for ground-level ozone pollution by 2018. This means EPA believes the emissions-cutting measures in the state's plan have put the Houston-Galveston-Brazoria area on track to meet the 1997 federal 8-hour ozone standard of 84 parts per billion by 2018." The proposals relate to SIP submittals relating to the HGB area on April 1 and 6, 2010, and May 6, 2013. Written comments on the proposals must be submitted by October 9, 2013.

On September 9 EPA also published a direct final rule regarding three revisions to the Texas SIP (submitted on December 17, 1999, October 4, 2001 and August 11, 2003) concerning the Texas Title V program ([78 Fed. Reg. 55221](#)). The direct final rule will be effective on November 12, 2013 without further notice unless EPA receives relevant adverse comment by October 10, 2013.

Upcoming TCEQ Meetings & Events

- TCEQ's **2013 Water Quality/Stormwater Seminar** will be held on October 3-4, 2013 in Austin. Along with other information, this event will provide updates on existing and upcoming rules; technical information regarding municipal, industrial, stormwater, and sludge permits; design criteria for domestic treatment facilities and collection systems; industrial and municipal effluent reuse; and water quality standards development and implementation. Additional information about this seminar is available on [TCEQ's website](#).
- The Zero Waste Network's **2013 Pollution Prevention and Lean Principles Workshops** will be held in Arlington (October 1-3, 2013), and Houston (November 5-7, 2013). The workshops will be conducted in partnership with the TCEQ, with instructors from both entities. The course will be based on the Texas Waste Reduction Policy Act which requires Pollution Prevention ("P2") planning for certain facility types. Additional information about these three-day workshops is available on [Zero Waste Network's website](#).

- TCEQ's **Industrial Emissions Inventory Workshop** will be held on January 23, 2014 in Austin. This workshop will focus on updates to the 2013 point source emissions inventory and provide a demonstration on submitting an emissions inventory update through the TCEQ's web-based reporting system. Additional Information is available on [TCEQ's website](#).

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in September 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

Multi-Agency Chemical Advisory on Ammonium Nitrate Asserts EPA Jurisdiction Under the Clean Air Act's General Duty Clause

On August 30, 2013, the Environmental Protection Agency, the Occupational Safety and Health Administration and the Bureau of Alcohol, Tobacco, Firearms and Explosives (collectively, the "Agencies") issued a chemical advisory (the "Advisory") that provides information on the hazards of ammonium nitrate storage, handling and management, and catalogs provisions of various statutes and regulations that may apply to activities involving ammonium nitrate. The Advisory follows President Obama's August 1, 2013, Executive Order: Improving Chemical Facility Safety and Security, issued in response to the tragic West Fertilizer Company ammonium nitrate explosion that occurred in West, Texas on April 17, 2013.

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

For more information on the Clean Air Act General Duty Clause, please contact Stephen Richmond at srichmond@bdlaw.com or Russell Fraker at rfraker@bdlaw.com.

Services Adopt Incremental Approach to Economic Analysis for Endangered Species Act Habitat Designations

On August 28, 2013, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) amended their regulations for designating critical habitat under the Endangered Species Act (ESA). The amended rule adopts a new "incremental" approach to preparing the economic impact analysis associated with critical habitat designations, limiting the analysis primarily to the costs for other federal agencies to consult with the Services over authorizing activities in critical habitat. Unfortunately for landowners, this will allow the Services to ignore the most significant costs that accompany critical habitat designations and may limit opportunities for stakeholders to challenge designations on economic grounds.

The incremental approach codified by the Services was adopted by the U.S. Court of Appeals for the Ninth Circuit in *Arizona Cattle Growers Association v. Salazar*, 606 F.3d 1160, 1173 (9th Cir. 2010). The rule states: "To determine the incremental impacts of designating critical habitat, the Services compare the protections provided by the critical habitat designation (the world with the particular designation) to the combined effects of all conservation-related protections for the species and its habitat in the absence of the designation of critical habitat (the world without designation, i.e., the baseline condition including listing)." In other words, the cumulative economic impacts of critical habitat designations, such as reduced water supplies and increased development costs, may be considered "baseline" effects under the rule and therefore largely ignored. The rule also

allows the Services to assess economic impacts of designations qualitatively, despite the agencies' acknowledgement that quantitative economic assessments are preferable.

The new economic impacts rule for critical habitat designations will apply nationwide, marking the end of the Services' use of a more comprehensive approach in Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming. That broader approach, which was endorsed by the U.S. Court of Appeals for the Tenth Circuit in *New Mexico Cattlegrowers Association v. FWS*, 248 F.3d 1277, 1285 (10th Cir. 2001), had required the Services to analyze "all of the impacts of a critical habitat designation, regardless of whether those impacts are attributable coextensively to other causes." Property owners and industry stakeholders had urged the Services to codify that approach nationwide, but ultimately were unsuccessful.

[The final rule](#) goes into effect on October 30, 2013. For more information on this rule, or issues involving critical habitat designations generally, please contact Parker Moore (pmoore@bdlaw.com / (202) 789-6028) or Mackenzie Schoonmaker (mschoonmaker@bdlaw.com / (212) 702-5415).

California Approves Final Green Chemistry Regulations, Disapproves Key Trade Secret Provisions

On August 28, 2013 the California Office of Administrative Law ("OAL") partially approved and partially disapproved the California Department of Toxic Substances Control's Safer Consumer Products Regulations, also known as California's Green Chemistry regulations. The approved regulations will go into effect on October 1, 2013. The disapproved provisions, without which DTSC cannot properly review claims that information submitted to the Department is entitled to trade secret protection, were sent back to DTSC to be revised. This article provides a high-level summary of the final structure of the Green Chemistry regulations and discusses the implications of OAL's rejection of the trade secrecy provisions of the regulations.

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

If you have any questions about this article, compliance with the Green Chemistry regulations, or the disclosure of trade secret information to DTSC, please contact Laura Duncan LDuncan@bdlaw.com, (415) 262-4003 or Daniel Brian DBrian@bdlaw.com, (415) 262-4016.

FIRM NEWS & EVENTS

Beveridge & Diamond Secures Summary Judgment, Settlement for Displaced Family After Mercury Cleanup

The Baltimore office of Beveridge & Diamond, P.C. recently prevailed on summary judgment in Baltimore City Circuit Court on behalf of a family that was displaced from its home for seven months because of a mercury spill. The summary judgment precipitated a favorable settlement for the family's expenses and hardship during the cleanup of its home.

The family hired a plumbing company in September 2012 to remove old heating equipment. The company sent unlicensed plumbers to perform the work who spilled and tracked mercury released from the heating equipment throughout the property. When the plumbing company and its insurance carrier refused to clean up the property or compensate the family, Beveridge & Diamond brought suit under several causes of action.

Firm Associate Jayni Lanham successfully argued that the plumbers violated the Maryland Consumer Protection Act, and also succeeded in keeping a fraud claim and demand for punitive damages as part of the case. The Firm's victory on cross-motions for summary judgment preceded the favorable settlement of the case that resulted in a judgment and monetary payment to Plaintiffs. Meanwhile, a governmental emergency cleanup enabled the family to return to their home.

The Firm undertook this case largely as a pro bono matter to assist a family in the Baltimore community, and the favorable result allowed the Firm to recover a portion of its fees. For more information, please contact Pamela Marks, Baltimore office Managing Principal, at (410) 230-1315.

Henry L. Diamond Featured at Inaugural D.C. Bar “Legends of Environmental Law” Speaker Series

Henry L. Diamond was the first speaker in the “Legends of Environmental Law” speaker series organized by the District of Columbia Bar’s Environment, Energy and Natural Resources Section. The program took place on Wednesday, September 25th from 12:15-1:30 p.m. at Beveridge & Diamond’s Washington, D.C. offices. Rachel Jacobson, Acting Assistant Secretary for Fish and Wildlife and Parks at the U.S. Department of the Interior moderated the discussion.

The “Legends of Environmental Law” speaker series provides an opportunity for conversations with renowned practitioners, academics and other legal professionals who have had a significant impact on environmental law.

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