

TEXAS ENVIRONMENTAL UPDATE



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TEXAS DEVELOPMENTS

EPA Approves Texas Request to Reclassify Houston Ozone Nonattainment Area

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TCEQ Updates Guidance for Hurricane Ike Response and Cleanup

TCEQ has posted and continues to update guidance relating to Hurricane Ike response and cleanup activities. ([full article](#))

TCEQ Issues Revised ESLs and Requests Development Support Document Comments

On September 15, 2008, the Toxicology Section of TCEQ's Chief Engineer's Office issued a revised list of Effects Screening Levels ("ESLs"). The revision replaces the ESL list that the agency released in January 2008. ([full article](#))

Administrative Case Law Update

Peter Gregg presented at the 20th Annual Texas Environmental Superconference held August 6th - 8th at the Four Seasons in Austin, Texas. Peter presented the Administrative Case Law Update to the approximately 550 participants at the conference. ([full article](#))

Upcoming TCEQ Meetings

TCEQ will be holding certain stakeholder and advisory group meetings in October and November. ([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

OMB Completes Review of EPA's Proposed Revisions to RCRA Definition of Solid Waste

On September 17, the White House Office of Management and Budget announced that it had completed its review of EPA's highly-anticipated proposal to modify the definition of solid waste under the Resource Conservation and Recovery Act (<http://www.reginfo.gov/public/do/eAgendaViewRule?ruleID=287110>). According to a report by BNA, Inc., an EPA

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spokeswoman said the promulgation of the final rule will now occur “in a few weeks.” ([full article](#))

EPA Issues Multi-Sector General Permit

EPA has announced the issuance of the new Multi-Sector General Permit (MSGP) regulating discharges of stormwater from industrial activities. It replaces the MSGP issued in 2000 and covers an estimated 4,100 industrial facilities in 29 different industrial sectors. ([full article](#))

EPA Proposes Air Toxics Standards for Chemical Manufacturing Area Sources

On September 25, 2008, EPA announced proposed rules to implement national emissions standards for hazardous air pollutants (“NESHAPS”) for the following nine chemical manufacturing area source categories: agricultural chemicals and pesticides manufacturing; cyclic crude and intermediate production; industrial inorganic chemical manufacturing; industrial organic chemical manufacturing; inorganic pigments manufacturing; miscellaneous organic chemical manufacturing; plastic materials and resins manufacturing; pharmaceutical production; and synthetic rubber manufacturing. ([full article](#))

EPA Stays Reconsiders Petroleum Refinery NSPS

On September 26, 2008, EPA granted a 90-day stay of portions of the Petroleum Refinery NSPS Subpart Ja in response to requests for reconsideration brought by several industry associations (the American Petroleum Institute, the National Petrochemical and Refiners Association, and the Western States Petroleum Association) and Hovensa, LLC. ([full article](#))

Ninth Circuit Upholds Tolerances For Four Pesticides and Questions Tolerances For Three Others

On September 19, the Ninth Circuit Court of Appeals upheld EPA's choice of a safety factor and thus EPA's tolerance decisions for four pesticides (fenhexamid, halosulfuron-methyl, isoxadifen-ethyl, and zeta-cypermethrin). *Northwest Coalition for Alternatives to Pesticides v. EPA*, No. 05-07255 (9th Cir. Sept. 19, 2008). However, in the same opinion, the Court held that EPA had failed to justify its decision to deviate from a tenfold child safety factor for tolerances for three pesticides (acetamiprid, mepiquat, and pymetrozine) and remanded the Agency's decisions to EPA for further proceedings consistent with the Court's opinion. ([full article](#))

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>.

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Pursuant to the reclassification, the HGB area's new attainment date for the 1997 eight-hour ozone standard is June 15, 2019. Additionally, EPA is setting April 15, 2010 as the deadline for Texas to submit a revised state implementation plan ("SIP") addressing federal Clean Air Act requirements applicable to severe ozone nonattainment areas. The reclassification will be effective 30 days after the final rule is published in the Federal Register.

TCEQ Updates Guidance for Hurricane Ike Response and Cleanup

TCEQ has posted and continues to update guidance relating to Hurricane Ike response and cleanup activities. Topics of interest to regulated entities in affected areas that are addressed include guidance on management of storm debris, fuel waivers, wastewater treatment facility and laboratory sampling issues. For additional information, please see TCEQ's website at <http://www.tceq.state.tx.us/response/hurricane.html>.

TCEQ Issues Revised ESLs and Requests Development Support Document Comments

On September 15, 2008, the Toxicology Section of TCEQ's Chief Engineer's Office issued a revised list of Effects Screening Levels ("ESLs"). The revision replaces the ESL list that the agency released in January 2008. The new list contains revised ESLs for twelve constituents, including butadiene, 1,3- (odor); butene, 1- (odor); butene, 2- (odor); ethylene; formaldehyde; isobutene (odor); styrene, monomer (odor); tetrachloroethylene; Texanol (odor); and toluene (odor). ESLs are ambient air concentration guidelines used to gauge the potential of constituents associated with modification of an existing facility or construction of a new facility to cause adverse health or welfare effects. They are permit review screening tools, the exceedence of which triggers a more in-depth health effects review. "Short-term" ESLs generally have a one-hour averaging period, and "long-term" ESLs have annual averaging period. The new ESL list can be accessed on TCEQ's website at http://www.tceq.state.tx.us/implementation/tox/esl/list_main.html#esl_1.

The Toxicology Section is accepting comments through January 5, 2009 on the agency's proposed Development Support Documents ("DSDs") prepared in connection with its review of the ESLs for the following constituents: 1,4-Dichlorobenzene; silica (all forms); vinyl chloride; and xylenes (all isomers). The proposed DSDs are available at http://www.tceq.state.tx.us/implementation/tox/dsd/dsds_about.html#when. Review of the ESLs for additional groups of constituents will follow.

Administrative Case Law Update

Peter Gregg presented at the 20th Annual Texas Environmental Superconference held August

6th - 8th at the Four Seasons in Austin, Texas. Peter presented the Administrative Case Law Update to the approximately 550 participants at the conference. The following is a link to the written material that accompanied his presentation: http://www.bdlaw.com/assets/attachments/ADMINISTRATIVE_CASE_LAW_UPDATE_Paper_August_7_2008.pdf. The material discusses approximately twenty-five state and federal decisions issued within the past year addressing administrative law issues potentially important to environmental practitioners. The decisions include the Texas Supreme Court opinion in *Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation District No. 1*, 51 Tex. Sup. J. 971, 2008 Tex. LEXIS 513 (Tex. May 30, 2008), in which the court held that while Chapter 36 of the Texas Water permits a water district to grandfather historic or existing uses of groundwater resources, the statute also requires that the district consider the purpose of the use (instead of just the quantity of the use) when assessing whether or not it qualifies as a historic and existing use. The paper also summarizes *CleanCOALition v. TXU Power*, 2008 U.S. App. LEXIS 15392 (5th Cir. July 21, 2008), in which the Fifth Circuit rejected the use of the Clean Air Act's citizen suit provisions to redress alleged pre-permit, preconstruction, and pre-operation CAA violations.

Upcoming TCEQ Meetings

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

- October 1, 2008 meeting of the stakeholder group on rulemaking to implement SB 1604 and HB 3838 relating to the transfer to TCEQ of regulatory authority for commercial radioactive waste processing, source material recovery and by-product material disposal. For more information, please see TCEQ's website at <http://www.tceq.state.tx.us/permitting/radmat/sb1604group.html>.
- October 6, 2008 stakeholder informational meeting on TCEQ vehicle idling rules. For more details, please see TCEQ's website at <http://www.tceq.state.tx.us/implementation/air/sip/vehicleidling.html>.
- October 7, 2008 meeting of the Southeast Texas Photochemical Modeling Technical Committee, an advisory group formed to assist TCEQ in addressing technical and scientific air quality issues in the Houston/Galveston/Brazoria and Beaumont/Port Arthur areas. For additional information, please see http://www.tceq.state.tx.us/implementation/air/airmod/committee/pmtc_set.html.
- 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.

NATIONAL DEVELOPMENTS

OMB Completes Review of EPA's Proposed Revisions to RCRA Definition of Solid Waste

On September 17, the White House Office of Management and Budget announced that it had completed its review of EPA's highly-anticipated proposal to modify the definition of solid waste under the Resource Conservation and Recovery Act (<http://www.reginfo.gov/public/do/eAgendaViewRule?ruleID=287110>). According to a report by BNA, Inc., an EPA spokeswoman said the promulgation of the final rule will now occur "in a few weeks."

Under RCRA, to be considered a hazardous waste, a hazardous secondary material must first be determined to be a solid waste. EPA first proposed changes to the definition of solid waste to exclude hazardous secondary materials that are recycled from being regulated as solid (and therefore hazardous) wastes on October 28, 2003. That promulgation was largely in response to the decision of the DC Circuit Court in *Association of Battery Recyclers v.*

EPA (208 F.3d 1047 (DC Cir. 2000). The October 28, 2003 proposal focused on excluding from the definition of solid waste any material generated and reclaimed in a continuous process within the same industry. After evaluating comments received on the proposal, EPA revised its approach and promulgated the resulting March 27, 2007 supplemental proposal (“Supplemental Proposal”). The Supplemental Proposal would exclude a broader category of material from the definition of solid waste. The proposed rule provides three exclusions:

1. an exclusion for materials that are reclaimed under the control of the generator (including materials reclaimed at the generating facility, at a different facility that the generator owns and operates, or according to certain types of generator “tolling” (i.e., contractual) arrangements);
2. materials that are transferred by the generator to another company for the purpose of reclamation (the “transfer-based exclusion”); and
3. a case-specific petition process for obtaining “non-waste determinations.”

Consistent with the current regulatory scheme, the proposed definition would not exclude hazardous secondary materials that are burned for energy recovery, that are used “in a manner constituting disposal,” or that are inherently waste-like.

The proposal also contains provisions for assessing the “legitimacy” of hazardous material recycling practices. Those provisions generally track what EPA proposed on October 28, 2003. However, instead of specifying four criteria that would need to be considered on a case-by-case basis, EPA’s Supplemental Proposal would make two of the criteria mandatory requirements. Those two requirements are: (1) the hazardous secondary material being recycled must provide a useful contribution to the recycling process or to the product of the recycling process; and (2) the recycling process must produce a valuable product. The other two criteria, which address management of materials prior to recycling, and “toxics along for the ride” in recycled products, would still need to be considered on a case-by-case basis under the Supplemental Proposal.

A copy of the Supplemental Proposal and other information about the rule package can be found at <http://www.epa.gov/epaoswer/hazwaste/dsw/>. Beveridge & Diamond, P.C. will issue an alert upon the promulgation of the final rule.

EPA Issues Multi-Sector General Permit

EPA has announced the issuance of the new Multi-Sector General Permit (MSGP) regulating discharges of stormwater from industrial activities. It replaces the MSGP issued in 2000 and covers an estimated 4,100 industrial facilities in 29 different industrial sectors. Permit coverage is provided in those areas and for those classes of discharges that are outside the scope of a state’s authorized NPDES program. For additional information relating to the MSGP, please see EPA’s website at <http://cfpub.epa.gov/npdes/stormwater/msgp.cfm>.

EPA Proposes Air Toxics Standards for Chemical Manufacturing Area Sources

On September 25, 2008, EPA announced proposed rules to implement national emissions standards for hazardous air pollutants (“NESHAPS”) for the following nine chemical manufacturing area source categories: agricultural chemicals and pesticides manufacturing; cyclic crude and intermediate production; industrial inorganic chemical manufacturing; industrial organic chemical manufacturing; inorganic pigments manufacturing; miscellaneous organic chemical manufacturing; plastic materials and resins manufacturing; pharmaceutical production; and synthetic rubber manufacturing. To be subject to the proposed NESHAPS, a chemical manufacturing operation must process, use or produce one or more of the following hazardous air pollutants (“HAPs”): acetaldehyde, arsenic compounds, butadiene, cadmium compounds, chloroform, chromium compounds, dichloropropene, ethylene dichloride, hexachlorobenzene, hydrazine, lead compounds, manganese compounds, methylene chloride, nickel compounds, or quinoline.

The Clean Air Act requires that EPA establish NESHAPS for major sources and area sources of "HAPs. Area sources are stationary sources that emit less than 10 tons per year ("tpy") of a single HAP or less than 25 tpy of any combination of HAPs. Instead of establishing a maximum achievable control technology ("MACT") standard for each area source, this EPA proposal would establish a generally available control technology ("GACT") level and management practices for all process vents, storage tanks, equipment leaks, transfer operations, and cooling tower systems. The management practices would include quarterly leak inspections, controls for liquid spills during transfer operations, and inspection and response plans for leaks in cooling water systems. The proposed GACT levels would require 95% control of emissions from continuous process vents with vent streams, and 90% control of batch vessel process vent emissions. Vents emitting HAP metals would be required to achieve 95% control. The proposed rule would also require removal of organic HAPs from wastewater streams and quarterly monitoring for cooling tower systems.

Facilities in the chemical manufacturing industry would be required to submit one-time notifications regarding the applicability of and compliance with these NESHAPS. The proposed rule would exempt the area sources subject to the proposed NESHAPS from Clean Air Act Title V operating permit requirements, except where an affected facility is required to obtain a Title V permit for reasons other than being subject to the proposed rule. EPA estimates that the proposed rule would affect 450 existing area sources, and reduce annual HAP emissions by approximately 270 tons and annual fine particulate matter emissions by 360 tons. EPA estimates that the annual cost to implement these area source standards would be approximately \$5.5 million.

Pursuant to a court-ordered deadline, EPA must issue NESHAPS for ten area source categories by December 15, 2008. EPA indicates that it will propose NESHAPS for the tenth category in a separate rulemaking. Information about the proposed NESHAPS described above is available at <http://www.epa.gov/ttn/oarpg/new.html>.

EPA Stays Reconsiders Petroleum Refinery NSPS

On September 26, 2008, EPA granted a 90-day stay of portions of the Petroleum Refinery NSPS Subpart Ja in response to requests for reconsideration brought by several industry associations (the American Petroleum Institute, the National Petrochemical and Refiners Association, and the Western States Petroleum Association) and Hovensa, LLC. 73 Fed. Reg. 55751-55752 (September 26, 2008). In particular, EPA stayed the controversial flaring requirements, specifically: (1) the definition of modification; (2) the definition of flare; (3) the fuel gas combustion device sulfur limits; (4) the flow limit for flare systems; and (5) the total reduced sulfur and flow monitoring requirements for flares.

EPA justified the stay by conceding that its final rule represented "significant changes" from proposal, noting that "[f]acilities had no chance to comment on these new requirements in the final rule." *Id.* at 55752. EPA also stayed the NO_x limit for process heaters which the Agency will take up to reconsider whether the standard is achievable and represents the best demonstrated technology. *Id.* The stay will last 90 days, until December 25, 2008.

EPA also received petitions for reconsideration from environmental groups, including the Environmental Integrity Project, Sierra Club and the Natural Resources Defense Council, which challenged EPA's decision not to regulate greenhouse gas emissions. EPA noted it will respond to those request for reconsideration in a future notice, however.

Ninth Circuit Upholds Tolerances For Four Pesticides and Questions Tolerances For Three Others

On September 19, the Ninth Circuit Court of Appeals upheld EPA's choice of a safety factor and thus EPA's tolerance decisions for four pesticides (fenhexamid, halosulfuron-methyl, isoxadifen-ethyl, and zeta-cypermethrin). *Northwest Coalition for Alternatives to Pesticides v. EPA*, No. 05-07255 (9th Cir. Sept. 19, 2008). However, in the same opinion, the Court held that EPA had failed to justify its decision to deviate from a tenfold child safety factor

for tolerances for three pesticides (acetamiprid, mepiquat, and pymetrozine) and remanded the Agency's decisions to EPA for further proceedings consistent with the Court's opinion. The case is important, both in terms of the Court's rulings on the specific requirements of the tolerance law as well as the Court's views on the extent to which EPA, and other federal agencies, must explain the basis for administrative decisions.

Northwest Coalition involved a challenge to EPA's Final Order denying a number of petitions asserting that EPA had failed to adequately address children's health when it established tolerances for seven pesticides. Under the Food Quality Protection Act of 1996 (FQPA), Congress directed EPA to use a tenfold margin of safety to account for exposure and toxicity to infants and children when setting pesticide tolerances. 21 U.S.C. §346a(b)(2)(C). However, Congress also gave EPA the authority to deviate from this tenfold safety margin if "on the basis of reliable data, such margin will be safe for infants and children." *Id.* EPA used a 3x safety factor for four of the pesticides, and did not apply a children's safety factor for the remaining three. Slip Op. at 13,245.

The Ninth Circuit rejected Petitioners' arguments that computer modeling does not constitute "reliable data." *Id.* at 13,249-52. According to the Court, EPA had adequately explained why computer modeling does yield reliable data and Petitioners had presented no evidence to suggest that EPA's explanation was "faulty or suspect." *Id.* at 13,252. The Ninth Circuit also rejected Petitioners' claims that EPA should have waited to promulgate the tolerances until after it had the results of certain studies on neurotoxicity that the Agency had earlier requested. *Id.* at 13,252-54. The Court held that EPA was entitled to change its mind regarding whether the studies were necessary to its tolerance decisions. *Id.* at 13,254.

As to three of the pesticides, however, the Court held that EPA's Order was too "vague" to determine whether its decision to reduce the safety factor was supported by reliable data. *Id.* at 13,254. EPA had indicated that the data did not demonstrate increased sensitivity for children or developing fetuses, but the Court found that EPA did not provide reasoning for the specific safety factor that it ultimately selected. *Id.* at 13,255. Without an explanation from EPA, the Court held that it was unable to conclude whether EPA's tolerance decisions for these three pesticides were supported by reliable data and remanded the decisions to EPA. *Id.* at 13,258. Judge Ikuta dissented from this final portion of the opinion, reasoning that Petitioners had failed to raise this argument before the Agency. *Id.* at 13,258-66. Judge Ikuta further asserted that the record did provide an adequate basis to conclude that EPA's selection of safety factors was not arbitrary. *Id.* at 13,267-70.

This case is important both because it is one of the very few cases interpreting how EPA is to implement FQPA's 10x children's safety factor, and because it adds to the body of case law on the important issue of the extent to which agencies, and EPA in particular, must explain the basis for their decisions.

If you would like further information or to discuss the implications of this decision in more detail, please contact Kathy Szmuszkovicz at 202-789-6037 or kes@bdlaw.com or Bethany French at 202-789-6042 or bfrench@bdlaw.com.

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