

# TEXAS ENVIRONMENTAL UPDATE



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## TEXAS DEVELOPMENTS

### Texas Agency Key Personnel Moves

Pursuant to interim appointment by Governor Perry, former Texas Commission on Environmental Quality (“TCEQ”) Commissioner Buddy Garcia is now serving on the Railroad Commission of Texas. With this move Commissioner Garcia has filled the position vacated by Elizabeth Ames Jones in February 2012. A farewell statement by Commissioner Garcia is available on TCEQ’s website at [http://www.tceq.texas.gov/news/releases/041212buddy\\_garciastatement](http://www.tceq.texas.gov/news/releases/041212buddy_garciastatement), and information regarding his appointment to the Railroad Commission is available at <http://www.rrc.state.tx.us/pressreleases/2012/041312.php>.

TCEQ Executive Director Zak Covar has appointed Caroline Sweeney as Deputy Director for the Office of Legal Services (“OLS”) effective May 1, 2012. Caroline, who joined the agency in 1996, is currently serving as Special Counsel to the Deputy Director of OLS. Caroline has a Bachelor of Science and Bachelor of Arts from the University of Texas, and a Doctor of Jurisprudence from South Texas College of Law. As we reported last month, the Executive Director appointed the outgoing OLS Deputy Director, Stephanie Bergeron Perdue, to serve as his Special Counsel.

Covar has also selected Charles Maguire to serve as Director of the Radioactive Materials Division in the Office of Waste effective May 1, 2012. Charles currently serves as the Director of the agency’s Water Quality Division. He has a Bachelor of Science degree in Aerospace Engineering, and a Masters of Business Administration from Texas A&M University.

### EPA Withdraws Imminent and Substantial Endangerment Order Issued to Range Resources

On March 29, 2012, the U.S. Environmental Protection Agency (“EPA”) withdrew the Imminent and Substantial Endangerment Order that EPA Region VI issued to Range Resources Corporation and Range Production Company (collectively, “Range”) under Section 1431 of the Safe Drinking Water Act. The order was issued on December 7, 2010, and alleged that Range’s hydraulic fracturing operations in the Barnett Shale had caused or contributed to the contamination of two private domestic water wells in Parker County, Texas. Range challenged the order in the Fifth Circuit on multiple grounds, and EPA moved to enforce the order in the U.S. District Court for the Northern District of Texas. And the order was also the subject of yet another hearing convened by the Railroad Commission of Texas.

While the Railroad Commission proceeding reached a final resolution – a finding that Range did not cause or contribute to the alleged contamination at issue – the Fifth Circuit and Northern District of Texas proceedings were brought to an end before either court decided the merits of the parties’ claims. EPA’s withdrawal of its order mooted both federal cases, and on March 30, 2012, the parties moved to dismiss both proceedings.

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## **Cross-State Air Pollution Rule Lawsuit Oral Argument**

On April 13, 2012, the United States Court of Appeals for the District of Columbia Circuit heard oral argument in a lawsuit challenging EPA's Cross-State Air Pollution Rule ("CSAPR") (*EME Homer City Generation, L.P. v. EPA*). Petitioners from industry include EME Homer City Generation LP and Luminant Generation Company, LLC, and Texas is among the states participating in the challenge. The petitioners assert that EPA inappropriately implemented the rule through federal plans rather than allowing states to develop their own implementation plans, and that the court should vacate the rule based on EPA's methodology for determining which states make a "significant contribution" to downwind air quality problems. The parties presented oral argument before Circuit Judges Judith Rogers, Thomas Griffin, and Brett Kavanaugh.

Judge Rogers' questions leaned critical of the petitioners' arguments, and Judge Kavanaugh seemed skeptical of CSAPR. Judge Griffith, who could be the swing vote in the case, raised the question of whether during the rule's public comment period the petitioners addressed EPA's methodology for determining "significant contribution," noting that only issues brought to the agency's attention in comments can be litigated. With petitioners asserting that "significant contribution" was addressed in comments, in a March 1, 2012 brief EPA stated that petitioners were required to raise the issue "forcefully" in comments.

The final CSAPR rule, which EPA issued in July 2011, requires 28 states to reduce power plant emissions of nitrogen oxides and sulfur dioxide that cross state lines for the purpose of helping downwind states meet national ambient air quality standards for ozone and fine particulate matter. The rule is meant to replace another rule issued in 2005 called the Clean Air Interstate Rule, which the D.C. Circuit remanded to EPA in 2008. The Court issued an order granting motions to stay CSPAR only days before its compliance period was set to begin. The court's order stated that EPA is expected to continue administering the Clean Air Interstate Rule during the court's resolution of the CSPAR petitions for review. The judges are expected to issue their decision in the above-referenced case by fall of this year.

## **TCEQ and TDA Ask the IBWC to Rescind Water Delivery to Mexico**

On April 4, 2012, TCEQ Commissioner Carlos Rubinstein and Texas Department of Agriculture ("TDA") Commissioner Todd Staples requested federal action to rescind water delivery to Mexico that the commissioners contend is harmful to drought-stricken Texans. The commissioners are challenging the International Boundary and Water Commission's ("IBWC's") decision to order the early release of millions of gallons of water from the Rio Grande River to Mexico while Texas is in the midst of unprecedented drought and water shortages. A press release on the request available from TCEQ's website states that the "IBWC's action disrupts the strategic plans Texas water users have put in place to address drought; wastes water; and sets a dangerous precedent of catering to Mexico's demands for water." (see <http://www.tceq.texas.gov/news/releases/tdatceqmexicowater040412>)

Members of the Rio Grande Compact Commission, which works to ensure Colorado, New Mexico, and Texas receive equitable shares of water from the Rio Grande River, have also voiced opposition to the IBWC decision.

## **TCEQ Proposes Flow Standards for Rivers**

On April 13, 2012, TCEQ published in the Texas Register proposed environmental flow standards for the Colorado and Lavaca rivers and Matagorda and Lavaca bays and the river basin and bay system of the Guadalupe, San Antonio, Mission, and Aransas rivers and the Mission, Copano, Aransas, and San Antonio bays. Additionally, the rulemaking proposes to amend the schedule for the revision of standards for the Sabine and Neches rivers and Sabine Lake Bay. A public hearing on the proposal will be held on May 8, 2012, at 2:00 p.m. in Building E, Room 201S, at TCEQ Headquarters in Austin. The deadline for public comment on the proposed standards is May 14, 2012. Additional information on the

proposal is available from TCEQ's website (Rule Project No. 2011-059-298-OW, available at <http://www.tceq.texas.gov/rules/prop.html>).

## Stage II Vapor Recovery Program SIP Revision

On April 11, 2012, The Texas Commission on Environmental Quality ("TCEQ") approved the proposal of a State Implementation Plan ("SIP") revision that requests a waiver of Stage II vapor recovery ("Stage II") requirements in five counties (Ellis, Johnson, Kaufman, Parker, and Rockwall, the "Five Counties") that were reclassified as "serious" ozone nonattainment areas on January 19, 2011. Stage II is a Clean Air Act ("CAA") program, applicable in nonattainment areas with "moderate" or worse national ambient air quality standard designations, that requires the recapture of gasoline vapors generated during the refueling of motor vehicles. Waivers from Stage II implementation are available for areas where it is determined that on-board refueling vapor recovery ("ORVR") systems are in widespread use. The SIP revision will request a Stage II waiver based on widespread ORVR use in the Five Counties.

Notably, the SIP revision, which is due to the Environmental Protection Agency ("EPA") by January 30, 2013, might be rendered redundant by a proposed EPA rule (the "Proposed Rule") that would result in Stage II waivers for any nonattainment area classified as "serious" or worse after January 1, 2011. The Proposed Rule, which the EPA has indicated may be finalized by July 2012, is premised on the determination that ORVR will be in widespread use throughout the national motor vehicle fleet by June 30, 2013. TCEQ has indicated that it will withdraw its waiver request if the Proposed Rule is adopted. If the Proposed Rule is not adopted and the waiver request in the SIP revision is denied by EPA, TCEQ will address Stage II requirements in a future rulemaking and SIP revision action.

The SIP Revision may be accessed at [http://www.tceq.texas.gov/airquality/mobilesource/vapor\\_recovery.html](http://www.tceq.texas.gov/airquality/mobilesource/vapor_recovery.html).

## TCEQ Posts Air Permitting 101 Course Materials

TCEQ has posted on its website an online training course entitled "Air Permitting 101," which provides an overview of the functions of the Air Permits Division and the air permit issuance process. The course is split into five modules, which provide information on the organizational structure of the Air Permits Division, the purpose of the New Source Review and Title V Operating Permits programs, the mechanics of the permit issuance process, the use of air permits data, and the mechanisms available for locating permits. While intended as a training program for new permit reviewers, the course serves as a useful primer on the mechanics of the air permit issuance process for air permit applicants.

The Air Permitting 101 course materials may be accessed at <http://www.tceq.texas.gov/permitting/air/training/apd-training.html>.

## Public Comment Period for TCEQ Toxicity Factor Development

The public comment period for the TCEQ Guidelines to Develop Toxicity Factors has begun and will close on June 8, 2012. The Toxicity Factor Guidelines will replace TCEQ's Guidelines to Develop Effects Screening Levels, Reference Values, and Unit Risk Factors, which were issued in 2006.

The Toxicity Factor Guidelines may be accessed at <http://www.tceq.texas.gov/toxicology/esl/guidelines/about.html#revisions>.

## Upcoming TCEQ Meetings and Events

- TCEQ will host its annual **Environmental Trade Fair & Conference** at the Austin Convention Center on May 1-2, 2012. A banquet will be held on the evening of May

2 during which the 2012 Texas Environmental Excellence Awards will be accepted. Information regarding this event is available at <http://www.tceq.texas.gov/p2/events/etfc/etf.html>.

- TCEQ will host **workshop four in the series *Beyond Science and Decisions: From Issue Identification to Dose-Response Assessment***, presented by the Alliance for Risk Assessment, at its Austin headquarters on May 22–24, 2012. Information regarding this workshop is available at <http://www.tceq.texas.gov/toxicology/workshop-presented-by-the-alliance-for-risk-assessment>.
- The Houston-Galveston Area Council will host the annual **Meeting of the Bacteria Implementation Group (“BIG”)** for the Houston-Galveston Area in Houston on May 22, 2012. The BIG, of which TCEQ is a member, has developed a plan to implement TMDLs to reduce bacteria concentrations that affect the recreational uses of several waterways in the Houston-Galveston area. Information about the meeting is available at <http://www.tceq.texas.gov/waterquality/tmdl/big2012>.

### TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in April can be found on the TCEQ website at <http://www.tceq.texas.gov/news/releases/4-12agenda4-11>.

### 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>.

## NATIONAL DEVELOPMENTS

### U.S. Fish and Wildlife Service Issues Final Land-Based Wind Energy Guidelines for Wildlife Protection

On March 23, 2012, the U.S. Department of the Interior’s Fish and Wildlife Service (“FWS”) released the “U.S. Fish and Wildlife Service Land-Based Wind Energy Guidelines.” The new voluntary Guidelines provide a tiered, scientific process for addressing potential wildlife impacts during the various stages of land-based wind energy project development. The Guidelines take effect immediately, replacing the interim guidance that had been in place since 2003.

The Guidelines apply to all utility-scale, community-scale, and distributed land-based wind energy projects on private or public land and aim to assist developers in complying with the Endangered Species Act (“ESA”), the Migratory Bird Treaty Act (“MBTA”), and the Bald and Golden Eagle Protection Act (“BGEPA”). FWS has designed the Guidelines to address potential collisions with wind turbines, habitat loss and fragmentation, wildlife disturbances, and indirect effects. The Guidelines also identify best management practices for project sponsors to use during site development, construction, retrofitting, repowering, and decommissioning.

Although compliance with the Guidelines is voluntary, FWS will consider a developer’s documented efforts to communicate with the government and adhere to the prescribed protocol if a violation of the MBTA or BGEPA occurs. Because FWS may enforce unlawful takings of protected species under those statutes on a strict liability basis, this consideration may offer an important measure of protection to wind energy developers.

The Guidelines reflect an iterative decision-making process for assessing potential adverse effects to species of concern and their habitats. Accordingly, the Guidelines include five separate Tiers, where subsequent Tiers refine and build upon issues raised and efforts undertaken in previous Tiers. At the completion of each Tier, project proponents must determine whether to continue with the project or whether additional information is needed to make that determination.

For the pre-construction Tiers (Tiers 1, 2, and 3), developers must identify, avoid, and minimize risks to species of concern.

Tier 1 involves preliminary site evaluations based on publicly available data obtained in consultation with FWS. Those evaluations include landscape-scale screening of all project sites under consideration early in the project conception process. Project proponents must assess possible project sites to identify the presence of protected species, important habitat areas, or migration routes. They also must determine whether applicable laws or conservation restrictions prohibit the planned site development and whether the proposed project may cause habitat fragmentation on the sites under consideration.

Tier 2 involves site characterization of the project sites deemed feasible in the Tier 1 review based on information available from public agencies, NGOs, and other publicly available sources. A qualified biologist must visit each site under consideration to confirm the presence or absence of species of concern, the likelihood of habitat fragmentation associated with the project, the possibility of birds and bats using the site, and the potential for adverse impacts to protected species. If the evaluations indicate that the project likely will affect protected species, the proponent may be required to apply for an incidental take permit under the ESA or BGEPA and propose a habitat conservation plan or eagle conservation plan.

Tier 3 requires project proponents to conduct “quantitative and scientifically rigorous” field studies of the proposed project site. FWS intends for those studies to assess, among other things, the distribution, abundance, behavior, and use of the site by the species identified in the Tier 1 and Tier 2 evaluations. The studies may include acoustic monitoring and mist netting, and they may be required to be supported by data compiled over several seasons. In addition, Tier 3 studies must assess the potential degree of adverse impacts to protected species and their habitat, how those impacts may be mitigated, and whether to initiate project impact studies that will continue during and after construction of the project.

For the post-construction Tiers (Tiers 4 and 5), developers must assess whether actions taken in Tiers 1 through 3 to avoid and minimize impacts are achieving those goals and, when necessary, identify additional steps to compensate for impacts.

Tier 4 involves post-construction studies to verify the accuracy of pre-construction study predictions concerning direct and indirect impacts to protected species and their habitats. Studies under Part A of Tier 4 focus on species fatality monitoring to determine how the fatality rate of protected species at the project site compares to other nearby projects. Studies under Part B of Tier 4 assess direct and indirect impacts of habitat loss, degradation, and fragmentation; evaluate whether those impacts were expected based on the Tier 3 studies; and determine whether the impacts can be mitigated.

Tier 5 applies only when (a) actual project impacts are deemed to be significant or are greater than expected, (b) project mitigation has not been effective, or (c) project impacts likely will cause protected species populations to decline. FWS will require additional studies and action under Tier 5 tailored specifically to the conditions observed, but those requirements will vary project-by-project.

In issuing the Guidelines, FWS indicated that not every project will be subject to every Tier or every element of a given Tier. For example, FWS anticipates that many distributed or community developments may not need to follow the Guidelines beyond Tiers 1 and 2 because it believes such projects will not identify an action-level risk to protected species. FWS also anticipates that Tier 5 will not be necessary for most wind energy projects.

The Guidelines stress that developers should consult with FWS as early as possible in the development of a wind energy project. FWS states that early consultation will help developers avoid areas where development is precluded or where wildlife impacts are likely to be high and difficult or costly to remedy or mitigate at a later stage, thereby avoiding upper-Tier project reviews.

Finally, the Guidelines provide mitigation guidance for project developers. FWS will require mitigation for any project expected to cause a significant impact to a protected species.

But developers may not simply resort to mitigation alone to address project impacts. The Guidelines allow for mitigation only if an expected impact is unavoidable and has been minimized to the extent possible. When mitigation is appropriate, it may include such measures as turbine siting and limiting turbine operation during certain months (e.g., migration periods). In addition, FWS may require compensatory mitigation for “replacement of project-induced losses of fish and wildlife resources.”

The Guidelines were developed in cooperation with the Wind Turbine Guidelines Advisory Committee. A copy of the final Guidelines is available [here](#).

For more information on the Guidelines or its implications for a specific project, please contact Parker Moore at (202) 789-6028, [pmoore@bdlaw.com](mailto:pmoore@bdlaw.com); Tim Sullivan at (410) 230-1355, [tsullivan@bdlaw.com](mailto:tsullivan@bdlaw.com); or Linda Tsang at (202) 789-6073, [ltsang@bdlaw.com](mailto:ltsang@bdlaw.com).

## **DOT Requests Comment on Harmonizing Lithium Battery Transport Rules with New ICAO Rules**

The U.S. Department of Transportation (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) is seeking comment on aligning U.S. standards with the newly revised standards of the International Civil Aviation Organization (ICAO). This new solicitation of comments from stakeholders is a follow-up to PHMSA’s controversial 2010 proposal to greatly increase the safety requirements for air transport of lithium cells and batteries.<sup>1</sup> Comments must be received by May 11, 2012.<sup>2</sup>

In the 2010 notice of proposed rulemaking, PHMSA had proposed to eliminate, in all but a few limited instances, the current exceptions from Class 9 requirements for transport of small lithium batteries by aircraft. Industry comments generally indicated that the proposed stricter regulations would have a more serious impact on supply chains than PHMSA had predicted, in part because they diverged from international standards.<sup>3</sup> In response, Congress passed legislation in February 2012 to prohibit DOT from issuing or enforcing any regulation regarding the transport of lithium batteries by aircraft that is more stringent than the requirements of the ICAO Technical Instructions.<sup>4</sup>

Shortly thereafter, ICAO agreed to amend its Technical Instructions, effective January 1, 2013, to significantly limit the current exceptions from Class 9 requirements for all but the smallest lithium batteries not packed with or inside equipment. Batteries not packed with or inside equipment that were formerly excepted would fall under a new intermediate provision between the more limited exception and full Class 9 requirements. That intermediate provision, Section IB, would allow non-UN specification packagings and alternative written documentation, but that would otherwise impose all other Class 9 requirements as well as a lithium battery handling label requirement.<sup>5</sup>

In a Federal Register notice published April 11, 2012, PHMSA is seeking comment on the effects of the ICAO amendments and on whether it should harmonize U.S. regulations with those amendments. Specifically, PHMSA requests input on the following questions relating to cells and batteries shipped separately (not in or with equipment), particularly those with up to 1 gram lithium per lithium metal cell and 2 grams per lithium metal battery, or those that are up to 20 Watt hours (Wh) per lithium ion cell and 100 Wh per lithium ion battery:

1. How many lithium cells, batteries, and packages that were previously excepted from full hazardous materials packaging and labeling requirements would now be subject to additional requirements?
2. What impacts would arise from allowing use of non-UN Specification packaging for cells and batteries to be shipped under the proposed Section IB of ICAO Packing Instructions 965 and 968?
3. What impacts would result if PHMSA chooses not to harmonize its regulations?
4. Will harmonization result in any modal impacts or diversions, and if so, what would be the quantitative effects?

5. If PHMSA were to harmonize the regulations, what would be the projected burden (time and/or cost) for compliance, and are there other Paperwork Reduction Act related activities that PHMSA should consider?
6. Could PHMSA reduce regulatory burden or cost of implementation, for example, by a delayed effective date?

PHMSA also welcomes any other relevant information that it should consider before harmonizing with ICAO's standards for lithium cells and batteries.

For more information, please contact Elizabeth Richardson at [erichardson@bdlaw.com](mailto:erichardson@bdlaw.com), Aaron Goldberg at [agoldberg@bdlaw.com](mailto:agoldberg@bdlaw.com), or Alexandra Wyatt at [awyatt@bdlaw.com](mailto:awyatt@bdlaw.com).

<sup>1</sup> 77 Fed. Reg. 21714 (Apr. 11, 2012), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-04-11/pdf/2012-8550.pdf>.

<sup>2</sup> Comments may be submitted to Document ID PHMSA-2009-0095-0242 at <http://www.regulations.gov/#!docketDetail:dct=FR%252BPR%252BN%252BO%252BSR%252BPS:rpp=250:so=DESC:sb=postedDate:po=0:D=PHMSA-2009-0095>.

<sup>3</sup> See Comment Docket Folder, "Hazardous Materials Revision to Requirements for the Transportation Lithium Batteries," <http://www.regulations.gov/#!submitComment:D=PHMSA-2009-0095-0242>.

<sup>4</sup> See Beveridge & Diamond P.C., Congress Limits DOT Authority over the Transport of Lithium Batteries (Feb. 8, 2012), <http://www.bdlaw.com/news-1298.html> (discussing H.R. 658, FAA Modernization and Reform Act of 2012, § 828).

<sup>5</sup> See Beveridge & Diamond P.C., "New Rules for Lithium Battery Air Transport" (Mar. 16, 2012), <http://www.bdlaw.com/news-1325.html>.

## FIRM NEWS & EVENTS

### Beveridge & Diamond Named to National Law Journal's Midsize Hotlist For Second Year in a Row

The National Law Journal has named Beveridge & Diamond, P.C. to its "2012 Midsize Hotlist," marking the second year in a row that Beveridge & Diamond has received this honor from the country's leading legal publication. The list, released on April 23, recognizes twenty law firms in the 50- to 150-lawyer range with exceptional records of accomplishment and respect from their clients and peers.

"We are delighted to receive recognition two years running from the National Law Journal for both our strong environmental and litigation practices," said Benjamin F. Wilson, Managing Principal at Beveridge & Diamond.

The feature article describes how "lawyers at Beveridge & Diamond, which boasts it is the nation's oldest and largest environmental law firm, relish tackling dirty subjects but believe in fighting clean," and quotes a major client's appraisal that the Firm's lawyers are "smart, savvy and strategic.... On our litigation matters, they are truly team players with our in-house counsel team, mindful of our business and litigation strategies, and always at the ready."

To read the article, please click see <http://www.bdlaw.com/assets/attachments/BD%20Makes%20NLJ%20Hot%20List%20.pdf>.

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