

TEXAS ENVIRONMENTAL UPDATE



February 2013

TEXAS DEVELOPMENTS

GHG Permitting Take-Back Bills Filed in Texas Legislature

The Texas Legislature is addressing two identical, companion bills ([Senate Bill 536](#) and [House Bill 788](#)) that would require the Texas Commission on Environmental Quality (“TCEQ”) to implement a New Source Review (“NSR”) prevention of significant deterioration (“PSD”) permitting program for greenhouse gas (“GHG”) sources in Texas, as well as a “Title V” federal operating permits program for GHGs. Currently, U.S. Environmental Protection Agency (“EPA”) Region 6 is accepting applications and has issued PSD permits for Texas GHG sources. EPA implemented its program pursuant to a federal implementation plan (“FIP”) in response to the State of Texas’ opposition and still-pending legal opposition to EPA’s regulation of GHGs. Although EPA is issuing PSD permits for GHGs, neither TCEQ nor EPA is issuing Title V permits for GHG-related requirements.

Bills such as those submitted were anticipated given wide concern within Texas industry regarding the need to obtain NSR/PSD authorization from EPA for GHGs while at the same time separately needing to secure NSR authorization from TCEQ. In addition to the extra burden and potential delay from obtaining pre-construction authorization from two agencies, the fact that EPA as a federal agency is issuing the GHG permits triggers additional review regarding the potential effects of the proposed action on species protected under the Endangered Species Act (“ESA”) and the potential impact on historic properties pursuant to the National Historic Preservation Act (“NHPA”), as well as other potentially applicable impacts review requirements.

The two bills were referred to the House Environmental Regulation Committee and the Senate Natural Resources Committee on February 18 and 20, respectively. With the deadline for filing bills (other than local bills, emergency appropriations, and bills declared emergency by the governor) during the ongoing legislative session being March 8, 2013, additional bills relating to GHG permitting could be filed.

Texas Railroad Commission Republishes Revised Proposed Oil & Gas Rules

On January 29, 2013, the Texas Railroad Commission withdrew proposed amendments to 16 TAC §§3.13, 3.99, and 3.100 that had been published in the September 7, 2012 *Texas Register* (37 Tex. Reg. 7021), and approved a revised set of proposed amendments. The proposed amendments address the transfer of the Groundwater Advisory Unit from the Texas Commission on Environmental Quality to the Railroad Commission, revise the requirements for all wells, consolidate the requirements for well control and blow-out preventers, and update requirements for drilling, casing, cementing, and fracture stimulation, along with other changes. The revised proposal was published in the *Texas Register* on February 15, 2013 (38 Tex. Reg. 733), and is available at the [Texas Secretary of State’s website](#). The 45-day comment period for the revised proposal will end at noon on Monday, April 1, 2013.

Texas Office

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

[Daniel Berner](#)

dberner@bdlaw.com

[Edward M. Grauman](#)

egrauman@bdlaw.com

[Karen Hansen](#)

khansen@bdlaw.com

[Maddie Kadas](#)

mkadas@bdlaw.com

[Laura LaValle](#)

llavalle@bdlaw.com

[Bryan Moore](#)

bmoore@bdlaw.com

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 Proposes Streamlining Approval of Oil and Gas Maintenance, Startup, and Shutdown Activities

On February 27, TCEQ initiated a rulemaking to create a permit by rule (“PBR”) to authorize emissions from planned maintenance, startup, and shutdown (“MSS”) activities at oil and gas handling and production facilities. The new PBR § 106.359 would provide applicants with a streamlined process for obtaining authorization for planned MSS activities. Under Senate Bill 1134, passed in 2011, certain oil and gas facilities have until January 5, 2014, to claim the authorization. Without authorization, owners and operators will lose the ability to claim an affirmative defense for unauthorized emissions during MSS activities.

The proposed PBR would require permit holders to implement a maintenance program and use best management practices (“BMPs”) to minimize emissions. According to the proposal, “the proposed PBR will not prescribe all of the specific BMPs that must be followed at each [oil and gas site]; rather a permit holder will be responsible for determining the appropriate BMPs to minimize emissions, according to industry-wide standards.” (PBR Proposal at 18-19.) Compliance with the PBR would be demonstrated through recordkeeping, and there would be no requirement that the permit holder notify, register with, or provide a certification of emissions to TCEQ.

The proposed PBR is slated for publication in the *Texas Register* on March 15, 2013. A public hearing will be held on April 4, 2013. Public comments will be accepted from March 15 to April 15, 2013, and the anticipated adoption date is July 24, 2013.

[Click here for a .pdf of the proposed rule.](#)

EPA Proposes Disapproval of Texas Emergency Order SIP Revisions

On February 5, the *Federal Register* published the Environmental Protection Agency’s (“EPA’s”) proposed disapproval (the “Proposed Disapproval”) of revisions to the Texas State Implementation Plan (“SIP”). The Proposed Disapproval applies to portions of the Texas SIP revisions relating to Emergency Orders that were submitted by Texas on August 31, 1993; December 10, 1998; February 1, 2006; and July 17, 2006. According to EPA, the Texas SIP revisions do not meet the requirements of the Clean Air Act (“CAA”), EPA regulations, or applicable policy and guidelines. EPA is reviewing only those portions of the SIP revisions that are applicable to the issuance of air Emergency Orders. The non-air portions of the SIP submittals will be returned by EPA to the State on the grounds that they cannot be included in the SIP because “under the CAA, SIPs can only include provisions addressing criteria pollutants and their precursors.”

Comments on the Proposed Disapproval must be received by EPA by March 7, 2013. The notice of the Proposed Disapproval may be found in [Federal Register Vol. 78, No. 24](#).

TCEQ Issues Updated Effects Screening Level & Air Monitoring Comparison Values Lists

During February 2013, TCEQ issued an updated effects screening level (“ESL”) list and a revised air monitoring comparison value (“ACMV”) list. 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. “AMCVs” is a collective term referring to all odor-, vegetative-, and health-based values that TCEQ uses to review air monitoring data. Similar to ESLs, ACMVs are chemical-specific air concentrations set to protect human health and welfare. The revised lists are available at [TCEQ’s website](#).

Texas Senate Confirms Commissioner Toby Baker

On February 27, 2013, the Texas Senate unanimously confirmed the appointment of Toby Baker to serve as a Commissioner of the Texas Commission on Environmental Quality. Commissioner Baker has been serving in that capacity since his appointment by Governor Rick Perry on April 16, 2012. His term will expire on Aug. 31, 2017.

Upcoming TCEQ Meetings and Events

TCEQ will host its annual *Environmental Trade Fair and Conference* at the Austin Convention Center from April 30 to May 1, 2013. A banquet will be held on the evening of May 2 during which the 2013 Texas Excellence Awards will be accepted. Additional information about this event is available on [TCEQ's website](#).

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in January can be found on [TCEQ's website](#).

Recent Texas Rules Updates

For information on recent TCEQ rule developments, please see the [TCEQ website](#).

NATIONAL DEVELOPMENTS

EPA Proposes to Require 36 States to Revise Startup, Shutdown, and Malfunction Air Emission Provisions in State Implementation Plans

On February 22, 2013, the U.S. Environmental Protection Agency (EPA) published a proposed rule that requires 36 states to revise startup, shutdown, and malfunction (SSM) provisions in their State Implementation Plans (SIPs). The proposed rule responds to a rulemaking petition filed by the Sierra Club. The petition claims that previously approved SIP provisions are inconsistent with the Clean Air Act because they include emission limit exemptions during periods of SSM. If this proposal becomes final, the SSM protections that may facilities are relying on for excess emissions during times of startup, shutdown and malfunction may no longer be available.

In response to the petition, EPA proposes to grant in part the Petitioner's claim and find that 36 states have approved SIPs that include SSM provisions that do not meet the requirements of the Clean Air Act. EPA must make this "inadequacy" finding before requiring a state to revise and resubmit its SIP. EPA proposes to issue a SIP Call that would require the 36 states to correct and submit revised SSM SIP provisions no later than 18 months after EPA makes its final findings of inadequacy. A SIP Call would be issued for the District of Columbia and the following states: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, Washington, West Virginia and Wyoming. Some local jurisdictions within Arizona, Kentucky, Nebraska, North Carolina and Tennessee are also impacted.

In addition, EPA is denying several parts of the petition. EPA proposes to deny the petitioner's request to prohibit affirmative defenses to SSM violations in SIPs. EPA proposes to revise its previous policy to continue to allow affirmative defenses in SIPs for excess emissions that occur when a facility is experiencing a malfunction but not for excess emissions that occur during a planned startup or shutdown. EPA also proposes to deny the request in the petition that EPA discontinue reliance on interpretive letters from states to clarify any potential ambiguity regarding a state's SSM provision. EPA proposed that it may rely on adequate

explanations from the state to determine that the SSM provision is sufficiently clear and complies with applicable Clean Air Act and regulatory requirements.

EPA will accept comments on this proposed rule until March 25, 2013.

If you would like to discuss EPA's proposed rule or if you have any questions about the regulation of SSM emissions, please contact David M. Friedland at dfriedland@bdlaw.com or (202) 789-6047, Steve Richmond at srichmond@bdlaw.com or (781) 416-5710, or Linda Tsang at lsang@bdlaw.com or (202) 789-6073.

States Propose to Regulate Chemicals While Congress Debates TSCA

In the absence of legislation overhauling the federal Toxic Substances Control Act, 19 states have introduced bills in 2013 to regulate chemical exposures, primarily in consumer products. It is unclear which, if any, will become law. Nevertheless, these 41 bills show that states consider themselves full partners with Congress in addressing chemicals management issues.

Details on the bills appear in the [attached chart](#). Among the bills are ones:

- Authorizing state authorities to identify chemicals of high concern and mandating the use of alternatives to chemicals of high concern when available;
- Requiring manufacturers to identify and disclose chemicals used in consumer and children's products;
- Banning chlorinated Tris from children's products;
- Phasing out and labeling the use of bisphenol A in children's products, receipt paper, and food packaging;
- Banning heavy metals such as cadmium, lead, and mercury in children's products;
- Requiring removal of specified flame retardants from children's products and home furniture;
- Banning formaldehyde from cosmetics and children's products;
- Promoting green cleaning products in schools; and
- Banning asthma-causing or triggering cleaning products.

For more information, please contact Mark Duvall at Beveridge & Diamond PC, mduvall@bdlaw.com, (202) 789-6090. This alert was prepared with the assistance of Linda Tsang.

TSCA Modernization Proposals in Congress: Recent History and Prospects

The core provisions of the Toxic Substances Control Act (TSCA) have not been substantially changed since the law's passage in 1976, but efforts to modernize the law have seen a marked increase in intensity in recent years. Democratic bills have been introduced in the last three sessions of Congress. The legislation has been refined each time, but no bill has yet passed either House. The leaders behind the previous bills are looking to try again in 2013. This time, Republicans are planning to introduce TSCA modernization legislation as well, which is sure to significantly change the discussion. This report discusses the political setting for these TSCA modernization efforts, the likely shape of the anticipated Democratic and Republican bills, and the prospects of passage.

Read the full text of this article [here](#).

For more information about these and other TSCA developments in Congress and at EPA, please contact Mark Duvall, mduvall@bdlaw.com, or Alexandra Wyatt, awyatt@bdlaw.com.

TSCA Developments at EPA: Looking Back at 2012

When Administrator Lisa Jackson's term concluded on February 14, 2013, the Environmental

Protection Agency had largely lived up to her incoming promise to make “managing chemical risks” a top priority. EPA’s efforts to enhance its chemicals management program expanded and refocused in February 2012, with the release of a new Existing Chemicals Program Strategy. This report summarizes a pivotal year for chemicals management in the United States and takes stock of EPA’s chemicals programs under the Toxic Substances Control Act (TSCA) at the conclusion of Lisa Jackson’s tenure as EPA Administrator.

Read the full text of this article [here](#).

For more information about TSCA developments in Congress and at EPA, please contact Mark Duvall, mduvall@bdlaw.com, or Alexandra Wyatt, awyatt@bdlaw.com.

TSCA Implementation at EPA: Looking Ahead

Following the reelection of President Obama and the departure of Administrator Lisa Jackson, the Environmental Protection Agency will continue to aggressively implement its Enhanced Chemicals Management Program under the Toxic Substances Control Act (TSCA). While EPA will be able to continue and build on its recent policies, there will also certainly be opportunities to rethink and refine certain policy elements going forward. EPA’s plans under existing TSCA authority are important even in light of the ongoing discussions in Congress regarding legislation to modernize TSCA. Such legislation is not likely to pass in calendar year 2013, but its shape and prospects will be strongly influenced by EPA’s contemporaneous actions and strategies, and by how successful those actions and strategies are perceived to be by various stakeholders. This report assesses EPA’s announced plans as well as unofficial predictions and general trends to paint a picture of some of the top issues and actions that are likely to affect U.S. chemicals management in the upcoming year.

Read the full text of this article [here](#).

For more information about TSCA developments in Congress and at EPA, please contact Mark Duvall, mduvall@bdlaw.com, or Alexandra Wyatt, awyatt@bdlaw.com.

Increased Federal Criminal Enforcement Against Oil and Gas Fracking Companies

While President Obama renewed his support for the “natural gas boom” in his State of the Union address last week, his administration continues to carefully scrutinize the environmental impacts of hydraulic fracturing (or fracking) as a method to access these natural gas reserves. The federal government has been stepping up criminal enforcement actions against oil and gas drilling companies under existing environmental statutes like the Clean Water Act while state and federal governments are in the process of developing policies and regulations specifically targeted at fracking.

Read the full text of this article [here](#).

This alert was prepared with the assistance of [Jennifer Abdella](#). For more information about Beveridge & Diamond’s experience with fracking issues contact [Karen Hansen](#), who leads the firm’s fracking regulatory practice, at (512) 391-8040. For more information about these criminal enforcement cases, please contact leaders of the firm’s White Collar and Environmental Crimes Group, [Lily Chinn](#) at (415) 262-4012, [Nadira Clarke](#) at (202) 789-6069, or [Pete Anderson](#) (704) 372-7370.

First-Ever Criminal CPSIA Charges Brought for the Importation and Sale of Hazardous Toys

On February 4, 2013, a 24-count federal indictment was issued charging multiple individuals and companies with importing and trafficking hazardous toys from China into the United States. The Consumer Product Safety Improvement Act of 2008 (CPSIA) added stringent limits on the amount of lead and phthalates in children’s products, including toys. This case, brought by the United States Attorney’s Office for the Eastern District of New York and jointly investigated by a number of federal, state and local agencies, including the Consumer Product Safety Commission (CPSC), is the first criminal case alleging violations of these requirements.

Read the full text of this article [here](#).

This alert was prepared with the assistance of Daniel Berner. For more information, please contact Mark Duvall at mduvall@bdlaw.com or Nadira Clarke at nclarke@bdlaw.com.

EPA Releases State Enforcement Dashboards and Comparative Maps

On February 7, 2013, EPA released new interactive tools which are intended to provide enforcement performance data and comparative maps through its Enforcement and Compliance History Online (ECHO) service. These tools, available at <http://www.epa-echo.gov/echo/stateperformance/>, chart and map environmental compliance and enforcement trends on a state and national level in the topic areas of air, water, and hazardous waste.

EPA's new state dashboards show detailed data from the current and four previous fiscal years, although datasets are also available for previous years. The dashboards' charts and graphs allow easy visualization of compliance and enforcement trends, showing both activity levels and performance compared to goals or averages. Each chart and graph may be printed or exported in various formats.

The comparative maps allow the user to sort data by agency (EPA and/or state), facility size/type, and various endpoints such as facility counts, inspections, violations, enforcement actions, and penalties. Users may also choose to compare based on total counts or percentages. States and territories are shaded according to the numerical range in which they fall for each selected combination to enable a visual comparison of compliance and enforcement indicators across the country and over time.

EPA hosted a public webinar on Tuesday, February 12, demonstrating how to use the new state dashboards and comparative maps. EPA is also seeking ideas from users on how to improve the dashboards and map and has provided a link on each website to send comments and suggestions.

For more information, contact Steve Herman, sherman@bdlaw.com, 202-789-6060, or Andie Wyatt, awyatt@bdlaw.com, 202-789-6086.

FIRM NEWS & EVENTS

Former EPA General Counsel Scott Fulton to Join Beveridge & Diamond, P.C.

Washington, DC – Scott Fulton, the former General Counsel of the U.S. Environmental Protection Agency (EPA), will join Beveridge & Diamond, P.C. as a Principal in the Firm's Washington, DC office, effective March 25, 2013.

Mr. Fulton was designated by the President in January 2009 to serve as Acting Deputy EPA Administrator and Chief Operating Officer, and was subsequently nominated by the President and confirmed by the U.S. Senate as EPA General Counsel in August 2009. He left EPA in January 2013, after 22 years of distinguished service to the Agency.

Mr. Fulton will join the Firm's comprehensive environmental and natural resource practice, with an emphasis on providing counseling and strategic advice on domestic regulatory matters, international environmental regulation, and sustainability.

"Scott embodies our Firm's unique approach to assisting clients with complex global environmental and natural resource regulatory challenges and high-stakes disputes," said Benjamin F. Wilson, Beveridge & Diamond's Managing Principal. "Many of us have known and worked with Scott for years. His reputation and intellect are impressive. We are delighted to have him at our firm where we and our clients will benefit from his wisdom and good judgment."

"Scott is highly respected within EPA, throughout the government, and in the legal community as a whole," said Steve Herman, a Principal with Beveridge & Diamond and former head of EPA enforcement as the Assistant Administrator for Enforcement and Compliance Assurance from 1993-2001. "He brings tremendous legal talent and insight into the current activities and priorities of EPA on a wide range of environmental issues."

Mr. Fulton remarked, “I’m looking forward to using the rich experience I have had in government to help solve environmental problems for clients, and I can think of no better place to do that than with the nation’s premier environmental law firm.”

As EPA’s chief legal counselor and the United States’ lead environmental lawyer, Mr. Fulton counseled EPA on the Agency’s most pressing domestic and international legal issues, played a major role in its advocacy efforts, and led one of the world’s largest environmental law offices.

Highlights of Mr. Fulton’s EPA career include:

Engaging in and supervising numerous regulatory and policy initiatives related to the Clean Air Act, Clean Water Act, TSCA reform, chemicals of concern, Superfund, FIFRA/pesticides, and RCRA/hazardous waste.

Spearheading EPA’s Export Promotion Initiative to stimulate economic development and job growth by promoting for export the \$4 billion U.S. environmental goods and services sector.

Playing a leading role in multilateral international negotiations on regulatory coherence, pollution control, and other critical topics impacting numerous industry sectors.

Managing U.S. engagement on environmental governance issues with the United Nations and other international stakeholders at the 2012 Rio+20 proceedings.

Leading the creation of the legal framework for, and the successful defense of, the United States’ program for regulating greenhouse gas emissions (GHGs).

Developing “Environmental Justice Legal Tools” in 2012, setting EPA on a course to enhance environmental quality for hundreds of thousands of low-income Americans.

A dedicated public servant, Mr. Fulton has devoted his career to various roles within EPA, including as the head of the Office of International Affairs and as a Judge on the Environmental Appeals Board. He also served as Assistant Chief of the Environmental Enforcement Section of the U.S. Department of Justice Environment and Natural Resources Division.

Mr. Fulton will be the second former EPA General Counsel to actively practice at Beveridge & Diamond. Jonathan Cannon, EPA General Counsel from 1995 to 1998, is a Senior Counsel with the Firm.

For more information, please contact Nathan Darling at ndarling@bdlaw.com, (202) 789-6142.

Beveridge & Diamond Secures Key Appellate Victory for City of Los Angeles Protecting Land Application of Biosolids

Litigators from the Beveridge & Diamond, P.C. Washington, DC and San Francisco offices convinced the California Court of Appeal to affirm a preliminary injunction that blocks implementation of a county voter initiative that sought to halt biosolids recycling at a 4,700 acre farm in Kern County, California, owned by the City of Los Angeles. In a unanimous decision, the Fifth District Court of Appeal ruled that Defendant Kern County’s ban on land application of biosolids likely exceeded the County’s police powers because of the impacts of the ban on public utilities outside of Kern County that must manage biosolids through recycling. The three judge panel also ruled that the ban conflicted with and was preempted by the California Integrated Waste Management Act, which requires that localities encourage recycling practices like land application of biosolids. The court wrote that Kern County could not prohibit “a major, widely accepted, comprehensively regulated form of recycling. . . . Kern County asks us to adopt a position that would authorize all local governments to say ‘not here.’”

National stakeholders have applauded the ruling. The National Association of Clean Water Agencies (NACWA) stated that “this ruling marks an important win for municipal plaintiffs in the case, as well as for the clean water community nationally.” The *California Daily Journal*, the state’s leading legal publication, featured the case in its February 15 edition and quoted Jimmy Slaughter, a Principal at Beveridge & Diamond and lead counsel for the Plaintiffs, that “this strong opinion will be a deterrent to any locality around the country that may be considering banning or overregulating the application of biosolids.”



Mr. Slaughter was also quoted in a BNA Daily Environment Report article about the decision, [*California Appeals Court Upholds Stay on Kern County Ban on Sludge Application*](#).

The case opinion is reported at *City of Los Angeles et al. v. Kern County*, 2013 Cal. App. Unpub. LEXIS 1115 (Feb. 13, 2013) and is [available here](#).

For more information, contact Jimmy Slaughter at jslaughter@bdlaw.com, Gary Smith at gsmith@bdlaw.com, or Jamie Auslander at jauslander@bdlaw.com.

Office Locations:

Washington, DC

Maryland

New York

Massachusetts

New Jersey

Texas

California