Texas Environmental Update

BEVERIDGE & DIAMOND PC

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Texas Developments

EPA Responds to City of Houston's Request for Correction

By letter dated April 7, 2009, the Acting Assistant Administrator of EPA responded to the City of Houston's July 9, 2008 Data Quality Act ("DQA") request to EPA for the correction of emissions factors used to estimate emissions of volatile organic compounds ("VOCs") and hazardous air pollutants ("HAPs"). In his letter, Houston Mayor Bill White had asked EPA to address data quality errors in these emissions factors that "significantly undercount emissions from petroleum refineries and chemical manufacturing plants." Mayor White requested that EPA take the following three actions: (1) immediately establish deadlines for the analysis and correction of the emission factors at issue; (2) require that large refineries and chemical manufacturing plants conduct annual monitoring with remote sensing technologies and fence-line monitoring systems; and (3) require that refineries and chemical plants show actual emission reductions through the use of direct measurement for NSR permitting purposes.

In its response, EPA notes the importance it places on obtaining accurate estimates of emissions from petroleum refineries and chemical plants, and outlines a number of initiatives that EPA had already began implementing to more accurately characterize emissions from such facilities. These initiatives include promoting the use of remote sensing technologies. EPA notes that, in direct response to the City of Houston's request, in January 2009 that agency began developing a comprehensive protocol for estimating volatile organic compound and air toxics emissions from refineries and chemical plants. The protocol will address all emissions sources at these facilities, and will include startup, shutdown, and malfunction events. Development of that protocol will include review of existing emissions factors for tanks, flares, cooling towers, and other sources. EPA will make a draft of the protocol available for public review and comment.

The City of Houston's DQA request and EPA's response to that request are available on EPA's website at http://www.epa.gov/QUALITY/informationguidelines/iqg-list.html.

Fifth Circuit Denies Aspen Power LLC's Motion to Stay EPA Stop-Work Order

On April 14th, the Fifth Circuit Court of Appeals denied a motion by Aspen Power LLC ("Aspen") to overturn a stop-work order issued by EPA regarding Aspen's construction of an $85 million biomass-fueled power plant in Lufkin, Texas. The stop-work order prohibits Aspen from conducting permanent construction activities before the issuance of a Prevention of Significant Deterioration ("PSD") air permit from TCEQ. EPA issued the stop-work order despite a TCEQ compliance agreement allowing Aspen to continue at-risk construction of the plant pending an administrative hearing on the permit.

Aspen Power initally submitted its PSD permit application to the TCEQ in March 2008. TCEQ issued the permit on July 25, 2008. However, in October 2008, the TCEQ Commissioners granted a protestant's motion to overturn the issuance of the permit, and directed the State Office of Administrative Hearings ("SOAH") to conduct an expedited hearing on the matter. In its order, the Commissioners also instructed the Executive Director of the TCEQ to work with Aspen to "evaluate potential enforcement findings that would

facilitate Aspen Power LLC's continued construction of the site at Aspen Power LLC's own risk" pending the hearing. Aspen entered into a compliance agreement with the TCEQ on November 20, 2008 authorizing Aspen to continue construction of the plant at the company's own risk pending completion of the hearing process. Despite that compliance agreement, on March 4, 2009, EPA Region 6 issued an order directing Aspen Power to cease all permanent construction activities at the plant until Aspen obtained the PSD permit. After EPA denied Aspen's request to stay the stop-work order, Aspen filed the Petition for Review in the Fifth Circuit.

In support of its Petition, Aspen outlined the immediate and irreparable harm, including environmental harm, that would result from a sudden stoppage "seven months into a major complex construction project that is critically dependent on coordinated scheduling and overall construction progress," and it noted the absence of any negative environmental impact that would be caused by allowing construction to continue. The company argued that EPA's issuance of the unilateral order violated due process rights, was inconsistent with the federal principles established under the Clean Air Act ("EPA had no compelling reason to trump the TCEQ by "overfiling" on the Compliance Agreement"), and was otherwise contrary to Congressional intent on how the PSD program should be implemented and enforced. Finally, Aspen argued that public interest supported continuation of construction, citing the jobs and economic well-being of a number of businesses at stake, the renewable energy aspect of the plant, and the lack of harm to the underlying environmental program (noting the construction was begun with a PSD permit having been issued (i.e. before the motion to overturn was issued)).

The Fifth Circuit denied Aspen's Petition on April 14th. The court granted the company's subsequent motion for expedited appeal, placing oral argument on the court's calendar for the week of August 3, 2009. Meanwhile, the hearing before SOAH on the PSD permit application began earlier this week.

Legislative Spotlight

With the clock ticking and the last day of the 81st Legislature a little over a month away, environmental bills will need to keep moving to achieve passage. For this report, we summarize legislative action on certain selected measures that have shown signs of traction. The report can be found at www.bdlaw.com/assets/attachments/April_2009_Legislative_Chart.pdf.

EPA Region 6 Superfund Stimulus Funding

On April 15th, EPA Administrator Lisa P. Jackson announced $582 million in new funding through the American Recovery and Reinvestment Act of 2009 (the "ARRA") for the cleanup of fifty Superfund sites across the country. The funding is designed to accelerate ongoing cleanup activities or initiate new construction projects at those fifty sites, increasing the speed at which they are returned to productive use. A list of the fifty sites being funded can be found on EPA's website at http://www.epa.gov/superfund/eparecovery/sites.html.

Three Superfund sites in EPA Region 6 will receive funding under the program: Garland Creosoting in Conroe, Texas; Tar Creek in Ottowa County, Oklahoma; and Grants Chlorinated in Grants, New Mexico. The 12-acre Garland Creosoting site in Texas is an abandoned wood treating facility that used creosote to preserve wood products from 1960 to 1997. It was placed on the National Priorities List in 1999. EPA will use the $5-10 million in Recovery Act funds allocated to the Garland Creosoting site to expedite achievement of site-wide construction completion, which EPA projects will occur by September 2010.

TCEQ Flare Task Force Stakeholder Group Accepting Public Comment

TCEQ is accepting public comment on the information presented during recent Flare Task Force Stakeholder meetings. On March 30 and April 2, 2009, TCEQ held meetings in

Houston and Austin to seek stakeholder input on issues related to all aspects of flares. Flare issues under review include flare performance, flare monitoring, and alternatives to flaring routine emissions. TCEQ staff anticipate submitting a final report that includes options and recommendations to the Executive Director for consideration in the Fall of 2009.

In the meantime, TCEQ is accepting informal public comment in response to the information presented by agency staff until May 8, 2009. Additional information about the agency staff presentation and comment procedures is available at http://www.tceq.state.tx.us/implementation/air/rules/flare_stakeholder.html.

TCEQ Toxicology Accepting DSD & Interim Guidelines Proposal Comments

TCEQ's Toxicology Division is now accepting comments on Development Support Documents ("DSDs") for the following constituents: chromium III, hydrogen chloride, hydrogen fluoride, and methacrolein. The purpose of the DSD is to provide a summary of information considered in the process of developing effects screening levels ("ESLs"). TCEQ is also accepting comments on Interim Guidelines for Setting Odor-Based ESLs. 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.

Comments on the proposed DSDs and the Interim Guidelines must be submitted to TCEQ by July 9, 2009. The proposed documents and information on how to submit comments is available on TCEQ's website at http://www.tceq.state.tx.us/implementation/tox/dsd/dsds_about.html#when.

TCEQ Air Permits Division Taking Questions for Trade Fair Q&A

The Air Permits Division is taking questions early for the two Question and Answer sessions, which will be held at the 2009 TCEQ Environmental Trade Fair. If you would like to send in any questions early for the New Source Review ("NSR") and Title V Question and Answer Sessions, you may submit them on-line to airperm@tceq.state.tx.us. Please use "Trade Fair Question" as your subject. On-line questions will accepted until COB on May 6, 2009. The NSR session will be held on May 12, 2009 from 4 p.m. to 5 p.m., and the Title V session will be held on May 14, 2009 from 10:30 a.m. to 11:30 a.m.

Texas Rules Updates

For new TCEQ rule developments, including the proposed rules increasing water fees, please see the TCEQ website at http://www.tceq.state.tx.us/rules/whatsnew.html.

National Developments

California Adopts First Low-Carbon Fuel Standard

The California Air Resources Board ("CARB") adopted the world's first low-carbon fuel standard ("LCFS") on April 23, expressly taking into account any indirect land use changes associated with a fuel in assessing its lifecycle greenhouse gas ("GHG") emissions. Using CARB's analysis, in what may influence both the U.S. Environmental Protection Agency's ("EPA's") long-delayed regulations under the federal Renewable Fuel Standard program and a growing number of other renewable fuel initiatives around the world, the "carbon intensity" of most corn ethanol is considered comparable to, if not greater than, that of conventional gasoline.

The LCFS, including the full CARB staff report, is available at: http://www.arb.ca.gov/fuels/lcfs/030409lcfs_isor_vol1.pdf. For more information about the California LCFS, the federal Renewable Fuel Standard or other new fuels initiatives, please contact Russ LaMotte

(rlamotte@bdlaw.com) or Alan Sachs (asachs@bdlaw.com).

A. Considering Indirect Land Use Changes as a Component of Carbon Intensity

The California LCFS aims to cut vehicle GHG emissions across the state by 10 percent over the next 10 years and achieve 16 million tons of GHG emission reductions by 2020. To reach these goals, the LCFS uses a credit-trading system effectively requiring that all motor vehicle transportation fuel provided in the California market meet an average declining standard of carbon intensity. Fuel providers must demonstrate that the mix of fuels they supply meet the LCFS intensity standards for each annual compliance period.

The LCFS's carbon intensity standards were determined using a lifecycle emissions analysis that takes into account both the direct effects of producing and using fuels (such as farming practices, harvesting and transportation of the crop, fuel used in the production process, and transport, distribution, and combustion of the fuel), as well as indirect effects – including land use changes abroad – that may be associated with a particular fuel.

Reflecting EPA's own difficulty developing a methodology to quantify lifecycle GHG emissions from renewable fuels (see Beveridge & Diamond, P.C. "Renewable Fuel Standard Program Update: EPA Misses December 2008 Deadline, While EU Approves New Renewable Fuel Mandates With GHG Requirements," available at: http://bdlaw.com/news-458.html), CARB has acknowledged both the lack of scientific consensus concerning the magnitude of land use change emissions associated with renewable fuels, and the continuing development of methodologies to estimate these emissions.

While promising to continue its own investigation of these issues through discussion with stakeholders and analysis of new data, CARB still identified land use changes as a "significant source of additional GHG emissions" that "must be included in LCFS fuel carbon intensities." An expert panel has now been tasked with compiling and analyzing data over the next 18 months that could be used to modify the LCFS's indirect land use methodology.

In light of the relatively high carbon intensity of corn ethanol when indirect land use changes are considered under its current analysis, CARB anticipates that the new generation of LCFS-qualifying fuels will come from the development of technology that uses algae, wood, agricultural waste such as straw, common invasive weeds such as switchgrass, and municipal solid waste. The LCFS carbon intensity requirements are intended to become effective in 2011, although regulated parties must begin meeting the standard's reporting requirements in 2010.

B. Other Developing Low Carbon Fuel Initiatives

The analysis used by CARB in the LCFS is likely to inform EPA policy as it continues to develop its federal Renewable Fuel Standard ("RFS") regulations, which remain unproposed more than four months after the December 19, 2008 statutory deadline for their finalization. The White House Office of Management and Budget reportedly completed its review of EPA's draft RFS regulations on April 29, clearing the way for EPA's publication of its proposal for public comment. There are also efforts in Congress to include a federal Low Carbon Fuel Standard as part of wider energy or climate change legislation.

Among additional low carbon fuel standards now under development that may be influenced by California's LCFS:

- The eleven Northeast and Mid-Atlantic states making up the Regional Greenhouse Gas Initiative ("RGGI") have committed to developing their own regional low carbon fuel standard;
- Two Canadian provinces, British Columbia and Ontario, have pledged to match California's LCFS; and
- The European Union recently adopted a requirement that transportation fuels achieve a lifecycle GHG reduction of at least six percent below 2010 levels by 2020. The European Commission is developing its own methodology to measure GHG emissions associated with indirect land use changes related to biofuels production.

Bush Administration Endangered Species Act Consultation Rule Revoked

On April 28, 2009, the Departments of Commerce and the Interior revoked a rule put in place by the Bush administration in December 2008 that altered long-standing procedures on interagency consultation under ESA section 7. As a result of this revocation, federal agencies must once again consult with the U.S. Fish and Wildlife Service and National Oceanic Atmospheric Administration before taking any action that may affect threatened or endangered species.

A copy of the Department of the Interior press release announcing this decision is available at http://www.doi.gov/news/09_News_Releases/042809c.html.

For additional information about this regulatory change, please contact Fred Wagner at fwagner@bdlaw.com, Parker Moore at pmoore@bdlaw.com, or Tim Sullivan at tsullivan@bdlaw.com.

EPA Issues Proposed Endangerment Finding for GHGs

On April 24, 2009, the U.S. Environmental Protection Agency ("EPA") published in the Federal Register its proposed Endangerment Finding for greenhouse gases ("GHGs"). Although the proposed findings are keyed to section 202(a) of the Clean Air Act, which addresses emissions from motor vehicles, the proposal lays the initial groundwork for potentially widespread climate change-related regulatory initiatives under EPA's existing Clean Air Act authorities.

At the same time, the proposal suggests that EPA intends to follow a careful -- and potentially lengthy -- process for developing regulatory standards under these authorities, particularly with respect to the extension of such authority to source categories beyond motor vehicles. The proposal also makes it clear that EPA intends to reserve significant discretion to itself both for prioritizing additional source categories and for crafting regulatory standards. As such, it appears that the Administration intends to use the Endangerment Finding and its regulatory progeny as flexible tools for mitigating climate change emissions in the United States, while at the same time serving as an adjustable source of leverage to influence the Congress' consideration of dedicated new climate change legislation.

Proposed Findings

The proposal contains two major elements:

1. A broad "Endangerment Finding": EPA proposes to find that the mix of six key greenhouse gases (CO2, CH4, N2O, HFCs, PFCs, and SF6) in the atmosphere "may reasonably be anticipated to endanger public health and welfare."

Although EPA is careful to position its proposal under section 202(a) of the Clean Air Act ("CAA"), its conclusions about the risks of these gases and their impacts are broadly formulated to serve as a platform for regulatory action for other source categories regulated under the Act. EPA gives considerable attention to its assertion that the statute gives the Administrator broad discretion to adopt a precautionary approach in the face of uncertainties and imperfect information, based on her judgment and future projections.

2. A targeted "Cause or Contribute Finding": EPA proposes to find that the combined emissions of a subset of these GHGs (CO2, CH4, N2O, and HFCs) from new motor vehicles and new motor vehicle engines contribute to the air pollution that is endangering the public health and welfare, thus triggering EPA's regulatory authority to address those sources.

EPA asserts that the statutory threshold in section 202(a) leaves considerable discretion to the Agency to determine the point at which a source category "contributes to" the "dangerous" air pollution. There is no bright line that triggers the cause or contribute finding or its implications. Indeed, EPA asserts that it:

> "may determine that emissions at a certain level or percentage contribute to air pollution in one set of circumstances, while also judging that the same level or

percentage of another air pollutant in different circumstances and involving different air pollution does not contribute. When exercising her judgment, the Administrator not only considers the cumulative impact, but also looks at the totality of the circumstances (e.g., the air pollutant, the air pollution, the nature of the endangerment, the type of source category, the number of sources in the source category, and the number and type of other source categories that may emit the air pollutant) when determining whether the emissions 'justify regulation' under the CAA."

Although linked in this case to the "cause or contribute" finding for motor vehicle emissions, the general approach EPA adopts here will likely prove useful to the agency as it applies its Endangerment Finding to other source categories addressed under the Clean Air Act as well.

Next Steps

EPA did not issue proposed standards to address emissions from motor vehicles under Section 202(a) today. Instead it chose to issue its proposed findings under a notice and comment procedure, and to conduct separate notice and comment procedures for the adoption of regulatory standards for motor vehicles in the future. EPA left itself flexibility regarding next steps, indicating that it expects to release a proposed rule on regulatory standards in "several months." These choices, which entail additional procedures that will unfold at a pace largely to be set by EPA, provide the first indication that the Administration intends to move deliberately and over time to impose GHG regulations under the CAA.

EPA released a pre-publication version of the proposed finding on April 17, 2009. Today's publication in the Federal Register opens the proposal for public comment. Comments are due on or before June 23, 2009. Public hearings are scheduled for May 18, 2009 in Arlington, Virginia, and May 21, 2009 in Seattle, Washington. After reviewing the comments, EPA will finalize its findings.

Additional Resources

Background documents relating to the finding are available through the EPA website at: http://epa.gov/climatechange/endangerment.html.

For more information, please contact David Friedland (dfriedland@bdlaw.com), Russ LaMotte (rlamotte@bdlaw.com) or Tom Richichi (trichichi@bdlaw.com).

Rules Finalized for Offshore Renewable Energy Projects

The Department of the Interior's Minerals Management Service ("MMS") has issued final regulations for the development of wind, wave and other renewable energy projects on the U.S. Outer Continental Shelf ("OCS") beyond state waters. These long-awaited rules establish a process for granting leases, easements, and rights-of-way for renewable energy development on the OCS and also establish a method for sharing revenues generated from these projects with adjacent coastal States.

MMS made a number of changes to the final rules based on hundreds of comments submitted in response to the proposed rule, which was published last July. MMS also plans to publish a guidance document that will support the regulations and describe the type of information the agency will look for in a plan submittal.

Congress provided the MMS with the authority to develop a renewable energy OCS program in the Energy Policy Act of 2005. The finalization of regulations was delayed, in part, due to a jurisdictional dispute between MMS and the Federal Energy Regulatory Commission ("FERC") over which agency had authority to regulate hydrokinetic (e.g., wave and current) projects on the OCS. This jurisdictional uncertainty was resolved on April 9, 2009 in a Memorandum of Understanding ("MOU") signed by the agencies. Under the MOU, MMS has exclusive jurisdiction over offshore wind and solar projects and has exclusive jurisdiction to issue leases for hydrokinetic projects on the OCS. FERC has exclusive jurisdiction to grant licenses for OCS hydrokinetic projects once they have first obtained a lease from MMS.

The new rules are a critical step forward for the development of offshore renewable energy projects in federal waters and were published in the Federal Register on April 29, 2009 and will be effective 60 days after publication.

For more information, please contact Peter Schaumberg (pschaumberg@bdlaw.com), Fred Wagner (fwagner@bdlaw.com), or Anne Finken (afinken@bdlaw.com).

D.C. Circuit Vacates 2007-2012 Outer Continental Shelf Leasing Program, But Rejects Climate Change Claims

The U.S. Court of Appeals for the District of Columbia Circuit vacated the U.S. Department of the Interior ("Interior") Minerals Management Service ("MMS") 2007-2012 Five-Year Leasing Program for oil and gas development on the Outer Continental Shelf ("OCS"). *Center for Biological Diversity v. U.S. DOI*, No. 07-1247 (D.C. Cir. April 17, 2009). The Five-Year Leasing Program covers 21 lease sales scheduled between July 1, 2007 and June 30, 2012, in eight OCS areas, including Alaska and the Gulf of Mexico. This decision not only has important consequences for holders of OCS leases issued in lease sales conducted since July 1, 2007, but also will likely influence Interior's next Five-Year Leasing Program (2010-2015), currently under development. Equally important, this ruling may have lasting impacts on any entity engaged in or facing the growing incidence of climate change litigation brought under a variety of federal natural resources statutes.

Three national environmental organizations and an Alaska village challenged the Five-Year Leasing Program under the Outer Continental Shelf Lands Act ("OCSLA"), National Environmental Policy Act ("NEPA"), and the Endangered Species Act ("ESA"). Plaintiffs prevailed on only one of their claims, i.e., failure under OCSLA to adequately assess the environmental sensitivity of OCS areas. Focusing on Alaska, the Court found that Interior's analysis was limited to shoreline areas and did not extend to the OCS area (beginning three miles offshore) as required by statute. As a result, Interior could not conduct a "proper balance" of potential environmental harm and oil and gas discovery. The Court vacated and remanded the Five-Year Leasing Program, but created a glaring omission. Namely, the Court ignored that Gulf of Mexico OCS lease sales have already occurred under the 2007-2012 Five Year Leasing Program, and offered no guidance regarding the current status of those leases. MMS has issued hundreds of leases and received billions of dollars in bonus bids since July 2007. Those leases are in various stages of development.

From a procedural and constitutional standpoint, however, the ruling offers some positive signs for natural resource developers. The Court dismissed Plaintiffs' separate NEPA and ESA claims on standing and ripeness grounds. Rejecting Plaintiffs' "substantive theory of standing" for their climate change claims, the Court limited the Supreme Court's finding of standing in *Massachusetts v. EPA*, 549 U.S. 497 (2007) to claims by a "sovereign," asserting injury beyond general harms to its citizens. Here, even the Alaska village Plaintiff asserted no individualized harm, especially since the OCS is federally-owned. Moreover, the alleged climate change impacts from additional oil and gas use were not sufficiently concrete or imminent and implicated too tenuous a causal link to the Five-Year Leasing Program. The Court did find standing for the NEPA climate change claim under a theory of "procedural" injury based on inadequate assessment of the risk to animals affected by offshore drilling, but did not cite any specific evidence. Nevertheless, the Court found this claim unripe because approval of the Five-Year Leasing Program is only the first of several stages for OCS development. The Court similarly held that Interior may defer ESA consultation until the actual leasing stage.

Finally, the Court limited the sorts of claims that could be brought under OCSLA. Regarding climate change, the Court held that Interior is not required to consider the global or local environmental impact of oil and gas consumption before approval of a Leasing Program. Rather, OCSLA does not authorize Interior to consider consumption once oil and gas have been extracted from the OCS; any such consideration would contravene Congress' determination in OCSLA that oil and gas production should proceed on the OCS. Separately, Interior need not conduct all baseline biological research by the time of Leasing Program approval, but rather it may wait until actual leasing.

For more information about this case's impacts on OCS leasing and development, please contact Peter Schaumberg (pschaumberg@bdlaw.com, (202) 789-6043), Fred Wagner (fwagner@bdlaw.com, (202) 789-6041), or James Auslander (jauslander@bdlaw.com, (202) 789-6009).

For more information regarding the decision's effects on climate change issues and litigation, please contact Russ LaMotte (rlamotte@bdlaw.com, (202) 789-6080) or David Friedland (dfriedland@bdlaw.com, (202) 789-6047).

EPA To Review Climate Change Impacts on Ocean Acidification under Clean Water Act

On April 15, 2009, EPA published a notice of data availability ("NODA"), initiating a process for evaluating information on ocean acidification and reconsidering the current marine water quality criterion for pH, which was first established in the 1970s. 74 Fed. Reg. 17,484 (April 15, 2009) (to view the NODA, please visit http://edocket.access.gpo.gov/2009/pdf/E9-8638.pdf). The move comes in response to a 2007 petition by the Center for Biological Diversity ("CBD") that asked EPA to consider the effects of ocean acidification, understood generally as a decrease in the pH of ocean waters attributed by CBD and others to the impacts of increasing greenhouse gas emissions, on marine aquatic life. The petition represented a novel legal theory that EPA, under the Clean Water Act ("CWA"), could address climate change based on water quality impacts. CBD filed similar water quality-based petitions in each coastal state, seeking complementary actions under the CWA. EPA's decision to evaluate information on ocean acidification for possible regulatory measures under the water quality authorities of the CWA represents a new chapter in the climate change debate.

Legal Background

Section 304(a) of the Clean Water Act requires EPA to publish and, from time to time, revise, water quality criteria ("criteria") that accurately reflect the "latest scientific knowledge" on the kind and extent of "all identifiable effects" on aquatic life and human health that might be expected from the presence of pollutants in any body of water. 33 U.S.C. § 1314(a). The criteria are most often expressed as numeric limits on the amount of a pollutant that can be present without causing harm to aquatic life or human health. Criteria are to be based on available data and scientific determinations of the relationship between pollutant concentrations and its effects on human health and the environment. When developing criteria, EPA does not consider social and economic impacts, or the technological feasibility of meeting the pollutant concentration values. 74 Fed. Reg. at 17,486.

Section 304 criteria set by EPA are non-regulatory, scientific assessments of ecological effects. As such, criteria serve only as recommended guidance to assist States and Tribes in fulfilling their responsibilities under the CWA to establish water quality standards ("standards") for the protection of designated uses (i.e. drinking water, fishing, swimming, navigation, etc.). See 33 U.S.C. § 1313. EPA's national criteria are recommended limits that, if met, should protect aquatic life or human health. In promulgating standards, States and Tribes may 1) adopt EPA criteria, 2) modify EPA criteria to suit site-specific conditions, or 3) base standards on "other scientifically defensible methods." 40 C.F.R. § 131.11(b). If approved by EPA, the standards set by States and Tribes become enforceable maximum acceptable pollutant concentrations in ambient waters.

CBD's petition to EPA to revise the pH criteria attempts to set in motion, longer-term, the water quality standard-setting process by States and Tribes that will ultimately result in Total Maximum Daily Loads for pH in affected ocean waters, which, in turn, could drive CWA-based controls of greenhouse gases emissions causing ocean acidification.

Ocean Acidification and the pH Criterion for Marine Aquatic Life

Oceans absorb an estimated one third of the anthropogenic CO2 emitted into the atmosphere. As CO2 dissolves into ocean waters, the water becomes more acidic, causing a reduction in pH. The primary threat to marine life posed by decreases in the pH of ocean waters is the inhibited ability of marine animals to build and maintain necessary skeletons

and shells. Various marine species, including coral, are seen as at risk from the changes in ocean pH attributed in recent years to rising CO2 emissions world-wide.

EPA's current criterion for marine pH, which applies to open-ocean waters within three miles from state coastlines, was established in 1976 at a recommended range of 6.5 to 8.5 for the protection of marine aquatic life. In December 2007, the Center for Biological Diversity petitioned EPA to revise its recommended national marine pH water quality criterion for the protection of aquatic life to account for risks posed by acidification. As noted, CBD also petitioned every coastal state to list their ocean waters as impaired under the CWA for pH, an action that, if taken, would lead to a TMDL process for pH in every such listed water. EPA's April 15 NODA asserts the Agency's intent to respond to CBD's federal petition by gathering and evaluating information necessary to consider revisions to the criterion.

Under the April 15 notice, EPA is currently soliciting information that will help it determine whether a revision is necessary to protect the marine uses designated by States and Tribes. Comments must be submitted to EPA by June 15, 2009. EPA expects to make a final decision regarding whether to revise the criterion within one year. If revisions are deemed necessary, a new round of public comment will ensue.

Analysis

States and EPA were active in the development of water quality standards for conventional pollutants, including pH, during the 1970s when the CWA's water quality requirements were new. Attention quickly turned to the CWA's technology based controls for point sources, with less focus on the water quality-based programs. Lawsuits over the status of the TMDL program during the 1990s drove EPA, States and Tribes to reinvigorate their approaches to water quality based improvements under the CWA. As a result, in recent years, EPA has recognized a general need to revisit water quality criteria for certain pollutants. While EPA's reconsideration of the pH criterion for protecting marine aquatic life is consistent with the renewed attention to the water quality authorities, the notion that water quality criteria might be used to address a phenomenon associated with greenhouse gas emissions, typically seen as the province of the Clean Air Act, represents a novel application of EPA's CWA authority.

Climate change advocacy in recent years has invoked several other environmental laws such as the Clean Air Act, the Endangered Species Act, and the National Environmental Policy Act to address issues associated with climate change. Until EPA's April 15 NODA, federal agencies have generally opposed such efforts by environmental advocates to employ the Clean Water Act as a new mechanism to address climate change. For example, the Army Corps of Engineers is currently defending in court its decision not to consider the climate impacts of a coal-to-liquids fuel plant during the "public interest review" process of issuing a wetlands permit. *See Natural Resources Defense Council v. Army Corps of Engineers*, No. 09-00588 (N.D. Ohio filed Jan. 14, 2009); 33 U.S.C. § 1344; 33 C.F.R. § 320.4(a)(1). Furthermore, EPA is currently in settlement negotiations over a lawsuit brought by environmental advocates that sought to force EPA to consider climate change impacts during the approval process for certain Total Maximum Daily Loads. *See Conservation Law Foundation v. EPA*, No. 08-238 (D. Vt. filed Oct. 28, 2008); 33 U.S.C. § 1303.

EPA's response to CBD's ocean acidification petition, on the other hand, signals that the Obama administration may be willing to consider non-traditional uses of existing legal authorities to address climate change. This shift in direction raises new questions about the inherent limitations of the Clean Water Act to address a problem caused primarily by air emissions. Although EPA, the States and Tribes have used TMDLs to address certain pollutants located in water bodies due to air deposition (e.g., mercury, nutrients), the effectiveness of this approach to reduce air-emitted pollutants to water bodies has not been demonstrated.

Whether or not possible revisions to the marine pH criterion could effectively impact the sources releasing CO2 into the atmosphere, EPA's call for scientific information and data looks to advance the Agency's learning about ocean acidification and its potential negative effects on marine ecosystems. Furthermore, stakeholders should expect mounting attention to climate change considerations under traditional environmental authorities, even where the

relationships between the laws and the causes and effects of climate change are not readily apparent.

For further information about the EPA's action and possible implications, please contact Karen Hansen (khansen@bdlaw.com, (202) 789-6056), Richard Davis (rdavis@bdlaw.com, (202) 789-6025), or Russ LaMotte (rlamotte@bdlaw.com, (202) 789-6080). This alert was prepared with the assistance of Graham St. Michel.

EPA Releases Proposed GHG Reporting Rule for Public Comment

On April 10, 2009, the U.S. Environmental Protection Agency published in the Federal Register its proposal to establish the first mandatory national system for reporting emissions of carbon dioxide and other greenhouse gases ("GHGs") produced by major emission sources in the United States. If adopted as proposed, the rule would require annual GHG emission reports from an EPA-estimated 13,000 facilities that cut across a wide variety of industry sectors, including electricity generation, petroleum refining, food processing, landfills, and wastewater treatment. The Agency made available a pre-publication version of the proposed rule on March 10, 2009. This publication in the Federal Register opens the proposed rule for public comment. Comments are due June 9, 2009.

A complete copy of the proposed rule is available here. For more information on the proposal, please go to http://www.bdlaw.com/news-news-518.html, or contact David Friedland at (202) 789-6047 or dfriedland@bdlaw.com or Amy Lincoln at (202) 789-6016 or alincoln@bdlaw.com.

EPA Seeks Two-Year Stay of Sixth Circuit's Invalidation of NPDES Permit Exemption for Pesticide Applications; Will Not Pursue Further Appeals

On April 8, 2009, the Environmental Protection Agency ("EPA") announced that it would not petition for rehearing of a federal court's decision that vacated the Agency's final rule exempting many pesticide applications from the need to obtain a Clean Water Act permit. *See National Cotton Council v. EPA*, Slip Op. No. 06-4630 (6th Cir. Jan. 7, 2009). However, the EPA has asked the Court to stay its mandate for a two-year period to allow EPA and state permitting authorities sufficient time to develop an appropriate permitting program to address pesticide applications to, over, or near waters of the United States. If the request is granted, water permits would not be required until expiration of the stay.

In 2007, EPA issued a final rule which gave legal effect to the Agency's long-standing policy of not requiring permits under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") for many applications of pesticides to, over, or near waters of the United States. Under the EPA's interpretation of the Clean Water Act's definitions of "pollutant" and "point source," pesticide applications made in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), did not require NPDES permits even if the pesticide entered waters of the United States. In a lawsuit challenging the legal validity of the final rule, the United States Court of Appeals for the Sixth Circuit on January 7, 2009, struck down the rule as contrary to the plain meaning of the Clean Water Act. *National Cotton Council*, Slip Op. at 19.

Many stakeholder representatives urged EPA to petition the Court for a rehearing of its decision. On March 6, USDA Secretary Vilsack wrote a letter to EPA Administrator Lisa Jackson asking EPA to consider the "significant adverse effect" of the Court's decision on farmers and USDA's own pest control activities. EPA received similar requests from the Association of State and Interstate Water Pollution Control Administrators, ranking members of both House and Senate Agriculture Committees, and industry associations. Nevertheless, EPA declined to seek rehearing, opting instead to seek a two-year stay of the mandate.

EPA's decision not to pursue rehearing left private stakeholders on their own to appeal the Sixth Circuit's decision, which they have done. On the other hand, EPA's request for a two-year stay does recognize the significant steps that must be taken before the Court's decision can be properly implemented. In its motion to the Court, EPA argues that the

stay is necessary to "avoid significant disruption" to EPA, state permitting authorities, and the hundreds of thousands of persons and business who apply pesticides to, over, or near waters of the United States. If the rule were vacated immediately, neither EPA nor state authorities would have the capability under existing regulatory programs to address the many pesticide applications suddenly requiring NPDES permits. Rather than issue thousands of individual permits to each discharger, EPA has announced a preference for authorizing pesticide discharges through a general permit which can broadly address a large number of similarly situated dischargers. EPA estimates that a period of two years is necessary to craft a general permit, a process which entails environmental analyses, public notice and comment, and state certifications. Additionally, EPA argues that it needs that time to assist state permitting authorities in developing their own general permits.

If the Court refuses to issue the stay, the mandate takes effect on April 16. With no currently applicable general permits, and because EPA and state permit authorities lack the resources to handle thousands of new individual permit applications, denial of the stay would present many pesticide applicators with the difficult choice of either not applying needed pesticides or risking citizen suits and enforcement actions for discharging without a permit. However, if the Court grants the stay, the Court's mandate will not take effect until April 9, 2011, or another date set by the Court, at which time EPA and states could have general permits in place to regulate pesticide applications to, over, or near waters of the United States.

For further information about the Sixth Circuit's opinion and its implications, please contact Richard Davis (rdavis@bdlaw.com, (202) 789-6025), Kathy Szmuszkovicz (kszmuszkovicz@bdlaw.com, (202) 789-6037), Karen Hansen (khansen@bdlaw.com, (202) 789-6056), or Mike Neilson (mneilson@bdlaw.com, (202) 789-6061). This alert was prepared with the assistance of Graham St. Michel.

Cost-Benefit Analysis in Regulations for Cooling Water Intake Structures Upheld

On April 1, 2009, the U.S. Supreme Court held in *Entergy Corp., et al. v. Riverkeeper, Inc. et al*., that the U.S. Environmental Protection Agency's ("EPA") use of cost-benefit analysis to weigh the costs of installing new technology on cooling water intake structures at large, existing power plants to protect fish and other aquatic life with the benefit to the aquatic environment was reasonable, and therefore permissible, under the Section 316 of the Clean Water Act ("CWA"). 2009 U.S. LEXIS 2498, Slip Op. No. 07-588 (U.S. April 1, 2009). The Court's decision that the Agency may use cost-benefit analysis in absence of an express prohibition on the use of such analysis is a substantial victory for the utility company petitioners and could have broad implications for other environmental regulations. Others believe that the Obama EPA may reevaluate or rewrite the cooling water intake regulations, and perhaps other environmental regulations, to remove or change the cost-benefit analyses.

The case arose from a decision in the U.S. Court of Appeals for the Second Circuit in which Entergy Corp., other utilities, environmental groups including Riverkeeper Inc., and six states challenged an EPA rule governing cooling water intake structures at large, existing power plants. The challenge was to Phase II of a three phase EPA rulemaking schedule to address the environmental impacts of large, existing power plant cooling water intake structures, which can trap or destroy millions of fish and other aquatic organisms each year when the structures draw in water to cool power plants and other industrial facilities. *Riverkeeper, et al. v. U.S. Envt'l Prot. Agency*, 475 F.3d 83 (2d Cir. 2007). The Phase II rules applied to existing facilities whose primary activity is the generation and transmission of electricity and whose water-intake flow is more than 50 million gallons of water per day, of which at least 25% is used for cooling purposes. 40 C.F.R. § 125.91 (now suspended). "National performance standards" were set requiring most covered facilities to reduce impingement mortality of fish by 80% to 95% through the use of a mix of remedial technologies that EPA determined were "commercially available and economically practicable." 69 Fed. Reg. 41,559 at 41,602. Site-specific variances from national performance standards were also allowed for facilities with extraordinary cost concerns. 40 C.F.R. § 125.91(a)(5)(i).

Based on its comparison of the cooling water intake provisions of the CWA, Section 316(b), with other CWA provisions under which EPA was not permitted to use cost-benefit analyses in the selection of best available technologies for new and existing facilities, the Second Circuit held that EPA impermissibly used cost-benefit analysis in selecting the best technology available for protecting aquatic life from withdrawals from cooling water intake structures at large, existing power plants (Phase II). *Id*. at 101-02, 114-15. Also finding EPA's record of decision unclear as to how and when EPA applied cost-benefit analyses in its Phase II Rule, the Second Circuit remanded the rule for clarification and re-promulgation in accord with the court's interpretation of Section 316(b). *Id*. at 105.

The narrow question upon which the Supreme Court granted review of the Second Circuit decision was whether the cooling water intake provisions at 33 U.S.C. § 1326(b) authorize EPA to compare costs with benefits in determining the best technology available for minimizing adverse environmental impacts at cooling water intake structures. Slip Op. at 2. PSEG Fossil LLC and Utility Water Act group (a non-profit interest group) had also petitioned the Supreme Court for review of the same Phase II Rule; the Court consolidated the three cases. Writing for the majority, Justice Scalia grounded the majority opinion in deference to the Agency and a comparison of Section 316(b) with other text of the statute which, by its nature, does not allow for the use of cost-benefit analysis because it requires the elimination of pollution, as opposed to the "best technology available" standard for cooling water intake structures. 33 U.S.C. § 1326(b).

The majority held that EPA's decision to weigh the costs of the various technologies it could require for Phase II cooling water intake structures with the benefits to the environment was permissible because it was a reasonable interpretation of the CWA. Slip Op. at 2. The Court found that EPA's position that the "best technology available for minimizing adverse environmental impact" statutory requirement permits consideration of a technology's costs versus its environmental benefits was a reasonable interpretation of the 33 U.S.C. § 1326(b), although not the only possible interpretation of this provision. Slip Op. at 7. The majority held that a reasonable interpretation of the "best technology available" could be either the technology that provides the greatest environmental benefit, or the technology that "most efficiently" provides environmental benefits at the lowest per-unit cost. Slip Op. at 8. To bolster its argument that costs can be considered when deciding what constitutes "best technology available," the majority compared the cooling water intake provisions with other provisions in the CWA that require EPA to set effluent limits to eliminate discharges of all pollutants, such as the requirements regarding toxic pollutants. *Id.* at 8-9. Justice Scalia added that the less ambitious goal of "minimizing adverse environmental impacts" suggests that "the agency retains some discretion to determine the extent of reduction that is warranted under the circumstances." *Id*. at 9. In sum, the Court held that EPA permissibly relied on cost-benefit analysis in setting both the national performance standards and the cost-benefit variances from such standards under the Phase II program, reversing the Second Circuit and remanding the cases for further proceedings. *Id.* at 16.

Justice Stevens was joined in his dissenting opinion by Justices Souter and Ginsburg. Justice Stevens found that the relevant statutory provision does not expressly allow for, nor does it prohibit, the use of cost-benefit analysis. Slip Op. at 4-5. Nevertheless, Justice Stevens wrote, that the Court has recognized that when "Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." *Id*. at 3 (citing to prior Court opinions). He continued, that Congress' silence on the issue in this case is not implicit approval of a cost-benefit approach because Congress does not "hide elephants in mouseholes" by changing the basic details of a statutory scheme in vague terms. *Id.* at 3-4 (citing to prior Court opinions).

Justice Breyer issued a separate opinion, concurring with the majority that EPA can compare costs and benefits under 33 U.S.C. § 1326(b), but also going one step further than the majority by writing that he would also remand the cases to EPA so that the Agency can clarify the cost-benefit approach used in the Phase II regulations.

The respondents are confident that the Obama Administration will reevaluate, and possibly rewrite, the Phase II regulations, especially because the Court stated that EPA was free to include or not include cost-benefit in these regulations. Although it remains to be seen how the current Administration will treat cost-benefit analyses in the context of environmental

regulation, advocates of environmental regulation based on cost-benefit analysis are certainly satisfied with the Court's April 1 decision.

For further information, please contact Richard Davis at (202) 789-6025, rdavis@bdlaw.com, Karen Hansen at (202) 789-6056, khansen@bdlaw.com, or Ami Grace-Tardy at (202) 789-6076, agrace@bdlaw.com.

To read the full court opinion, click here.

Firm News & Events

Environmental Torts Roundtable

Beveridge & Diamond, P.C. will host an Environmental Torts Roundtable, "Environmental Torts 2009 -- Defense, Insurance, Winning," which will be held in our Washington, D.C. offices on Thursday, May 21, 2009 from 10:00 a.m. to 2:45 p.m

Our goal is to provide you with a timely briefing on important developments and trends in environmental torts. This type of litigation can ensnarl those doing business in many diverse areas including chemicals, agricultural chemicals, pharmaceuticals, consumer products, mining, metals processing, petroleum refining and real estate development.

We will focus on several types of topics, including (1) responses to evolving strategies being used by the sophisticated plaintiffs' bar to reach the deepest pocket defendants and to expand theories of damages, and (2) developments in key issue areas such as preemption, insurance and punitive damages. We will offer approaches to address these issues and anticipate an interactive dialogue between experienced panelists and members of the audience that we hope will include you or others from your organization.

For more information, for a copy of the agenda, or to RSVP, please e-mail jmilitano@bdlaw.com.

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