Texas Environmental Update

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Texas Developments

Fifth Circuit Vacates EPA Disapproval of Texas Flexible Permit Program

On August 13, in a long awaited decision, the U.S. Court of Appeals for the Fifth Circuit vacated the EPA's disapproval of the Texas Flexible Permit Program (the "Program"), holding that the Agency's decision was based "on demands for language and program features of the EPA's choosing, without basis in the Clean Air Act ("CAA") or its implementing regulations." *Texas v. U.S. EPA*, Slip. Op. No. 10-60614 (5th Cir. Aug. 13, 2012). This decision had been closely watched, as it follows two other recent Fifth Circuit decisions on similar Texas State Implementation Plan ("SIP") submissions.

Texas originally submitted the Program for EPA approval in 1994. The Program was designed to provide more permitting flexibility by allowing facilities to make minor modifications without requiring a new permit, so long as the facility's emissions remained within the facility's overall emissions cap. After a sixteen-year delay, including a successful lawsuit seeking to compel EPA action on the submittal, EPA disapproved the Program on July 15, 2010, based on three issues that formed the basis of the Fifth Circuit's decision: "(1) the Program might allow major sources to evade Major NSR; (2) the provisions for monitoring, recordkeeping and reporting [("MRR")] are inadequate; (3) and the methodology for calculating flexible permit emissions caps lacks clarity and is not replicable."

The Court first held that the Program could not be rejected simply because it did not comport with EPA's preferred drafting style. EPA argued that the Program might allow major sources to evade Major NSR because (1) it did not explicitly prohibit sources from using the Program to circumvent Major NSR permitting requirements, and (2) it did not include express language limiting the Program to Minor NSR. The Court, however, concluded that the Program language – which affirmatively required major sources to comply with the Major NSR requirements set forth in other regulations – was sufficient to meet Clean Air Act requirements. The Court next turned to EPA's challenge to the adequacy of the MRR provisions, holding that the State could reasonably rely on "Director discretion," noting that EPA had approved this mechanism in other SIPs only months before, that "replicability" and "clarity" were not legal standards to which the MMR provisions could be held, and that "EPA ha[d] … failed to explain how Texas' case-by-case approach to permitting would interfere with NAAQS or another applicable requirement of the CAA." Finally, the Court rejected EPA's concerns over the Program's emission cap calculation methodology for similar reasons, holding that "[t]he CAA does not make the replicability the EPA desires a standard for disapproving a SIP revision" and, that, even if replicability were a CAA requirement, the Program might satisfy it. The Court accordingly vacated the EPA's disapproval and remanded it for the EPA's further consideration.

The Fifth Circuit's decision is the third and arguably most significant decision addressing EPA's disapproval of numerous longstanding Texas SIP provisions. In March of this year, the same Court vacated EPA's original disapproval of the several Texas minor NSR rules, emphasizing the limited role of EPA in approving a SIP and noting that the CAA "confines

the EPA to the ministerial function of reviewing SIPs for consistency with the Act's requirements." *Luminant Generation Company*, *L.L.C. v. EPA*, Slip. Op. No. 10-60891 (March 26, 2012). A few months later, the Court followed the same principle but reached a different outcome, upholding EPA's disapproval of the Texas Qualified Facilities Program ("QFP") because the program was not explicitly limited to minor sources. *BCCA Appeal Group v. EPA*, Slip. Op. 10-60459 (June 15, 2012). The current decision reaffirms the federalist principles outlined in *Luminant*, emphasizing the limitations on EPA's authority to disallow state action based on standards not clearly found in the CAA or its implementing regulations.

The *Texas v. EPA* decision will have significant repercussions within the State of Texas. As the Fifth Circuit noted, EPA's disapproval had "unraveled approximately 140 permits issued by Texas under the revision's terms" and, as a result of the disapproval, "every facility with a flexible permit could face fines or other enforcement action irrespective of emission levels." Indeed, after issuing its belated disapproval, EPA had compelled many flexible permit holders to enter into a multi-step "de-flexing" process that the Agency argued was necessary to demonstrate that facilities had not violated major source NSR requirements. With the Fifth Circuit's decision, the fate of these permits – and the "de-flex" process – remains in doubt.

A copy of the opinion is available here.

Texas Officials Hail D. C. Circuit Vacation of EPA's Cross-State Air Pollution Rule

With the State of Texas as a leading governmental petitioner in the case, Texas Attorney General Greg Abbott and the Texas Commission on Environmental Quality ("TCEQ") commissioners quickly praised the August 21, 2012 decision of the U.S. Court of Appeals for the District of Columbia Circuit to vacate the U.S. Environmental Protection Agency's Cross-State Air Pollution Rule ("CSAPR") (*EME Homer City Generation LP v. EPA*, D.C. Cir., No. 1101302, 8/21/12). As promulgated, CSAPR required twenty-eight states (including Texas and Louisiana) to significantly reduce power plant emissions that contribute to ozone and/or fine particulate matter levels in other states.

The Court held that CSAPR exceeds EPA's statutory authority, and ordered that EPA continue administering the 2005 Clean Air Interstate Rule ("CAIR") until EPA puts into place a valid replacement program. EPA promulgated CSAPR to replace CAIR after the U.S. Court of Appeals for the District of Columbia vacated CAIR in 2008. EPA adopted CAIR and CSAPR to implement the "good neighbor" provision in federal Clean Air Act Section 110(a)(2)(D)(i). That provision requires that state air plans prevent emissions within a state from adversely affecting, or interfering, with another state's compliance with National Ambient Air Quality Standards ("NAAQS").

The Texas Attorney General issued the following statement regarding the ruling: "Yet another federal court has reined in an overreaching EPA for violating federal law and intruding on Texas sovereignty. Texas challenged the Obama Administration's burdensome and unlawful regulations because they jeopardized electric reliability in the state, threatened job losses for hard-working Texans, and exceeded the limits of the EPA's authority. Vindicating the State's objections to EPA's aggressive and lawless approach, today's decision is an important victory for federalism and a rebuke to a federal bureaucracy run amok." The Attorney General's press release, which includes a link to the opinion, is available at https://www.oag.state.tx.us/oagNews/release.php?id=4126.

TCEQ's press release includes the following statement: "Together with the recent ruling on flexible permits, the courts have made it clear that EPA has again overstepped its bounds, imposing severe regulatory directives that are simply not within its authority."

TCEQ's press release, which includes a link to the opinion, is available at http://www.tceq.texas.gov/news/releases/8-12CSAPRcomment8-22.

EPA Formalizes Rulemaking by Enforcement Approach for Flaring

EPA Office of Enforcement and Compliance Assurance ("OECA") formally announced through an August Enforcement Alert the latest evolution in its longstanding Flaring Enforcement Initiative: flaring efficiency violations. In mid-August, OECA's Office of Air Enforcement Division forwarded the Enforcement Alert to a number of industrial facilities the Agency appears to believe may have improper flare operating practices. The Alert precedes long-awaited rulemaking proposals for flare operating practices -- which have not been significantly modified since their inception in the early 1980's – crystalizing the Agency's rulemaking-by-enforcement approach.

Heralding recent settlements with two separate entities, (Marathon Petroleum Company and BP North America), the Enforcement Alert unabashedly suggests that the Consent Decrees reached with these companies establish new legal baselines for proper flare operating practices. Despite their marked absence in the existing rules, the Agency outlines two extra-regulatory parameters as the key indicators for flare efficiency: steam to vent gas ratio and net heating value of combustion zone gas. To impose these flare efficiency parameters, the Agency points to the "general duty clause" requiring good air pollution control practices for its legal justification.

The Agency concludes by identifying a new and dynamic suite of complex flare operating requirements, in particular:

- monitoring and adjusting heating value of vent gas to meet regulatory standards for heating value of vent gas;
- monitoring vent gas and steam or air flow and applying steam or air and supplemental gas to result in high combusting efficiency; and
- operating in accordance with the manufacturers' recommendations and publicly available documents, including the "long-available literature and generally available documents regarding the current state of scientific knowledge on flare operation and combustion."

The Alert reminds entities that violating federal requirements for flares can result in penalties of $37,500 per day per violation under the Clean Air Act.

Sixth Circuit Rejects EPA Single Source "Adjacency" Analysis

On August 7, 2012, the U.S. Court of Appeals for the Sixth Circuit issued a decision vacating a U.S. Environmental Protection Agency ("EPA") Clean Air Act Title V determination that a natural sweetening plant and sour gas production wells located in a 43 square mile area constitute a single stationary source under EPA's Title V permitting program, remanding the case to EPA for reassessment (Summit Petroleum Corp. v. EPA, Nos. 09-4348; 10-4572 (6th Cir. Aug. 7, 2012). EPA had concluded that the plant and the wells, which are located at varying distances (500 feet to eight miles away), are "adjacent." The Court rejected EPA's longstanding interpretation that what constitutes an "adjacent" property in a single stationary source analysis can be established through functional relatedness rather than proximity. The opinion explains why the Court found EPA's interpretation unreasonable and contrary to the plain meaning of the term "adjacent."

Activities are permitted together as a single stationary source ("aggregated") for purposes of EPA's Title V program if they: (1) are located on contiguous or adjacent property; (2) are under common control; and (3) belong to the same Standard Industrial Classification "Major Group" (i.e., have the same 2-digit SIC Code). The decision could have implications beyond Title V permitting because EPA also applies these same factors, including the same

interpretation of adjacency, to single stationary source determinations for EPA's federal New Source Review permitting programs (Prevention of Significant Deterioration/"PSD" and Nonattainment).

The Sixth Circuit's decision is available at http://www.ca6.uscourts.gov/opinions.pdf/12a0248p-06.pdf.

Fifth Circuit Denies Challenges To EPA's Action on Texas SIP Revision Providing Affirmative Defense For Startup, Shutdown, And Maintenance Emissions

In an opinion handed down on July 30, 2012, the U.S. Court of Appeals for the Fifth Circuit denied petitions for review of the U.S. Environmental Protection Agency's ("EPA's") final rule partially approving and partially disapproving a revision to Texas' State Implementation Plan ("SIP") that created an affirmative defense against civil penalties for excess emissions during both planned and unplanned startup, shutdown, and maintenance ("SSM") events. EPA approved the portion of the SIP revision providing an affirmative defense for unplanned SSM events and disapproved the portion providing an affirmative defense for planned SSM events. Petitions for review of EPA's final rule were filed by power generators and environmental organizations. The power generators challenged EPA's disapproval of the affirmative defense for planned SSM events, whereas the environmental organizations challenged EPA's approval of the affirmative defense for unplanned SSM events. The Fifth Circuit denied both challenges, leaving EPA's final rule in place.

Texas submitted the SIP revision at issue in the case on January 23, 2006. However, EPA did not take final action on the submittal until November 10, 2010. In finalizing its approval of the portion of the SIP revision containing an affirmative defense for unplanned SSM events, EPA found the affirmative defense consistent with the agency's interpretation of the federal Clean Air Act ("CAA" or the "Act"), explaining that EPA has "recognized that sources may, despite good practices, be unable to meet emission limitations during periods of startup and shutdown due to events beyond the control of the owner or operator." 75 Fed. Reg. 68,989, 68,992 (Nov. 10, 2010). Conversely, EPA disapproved the affirmative defense for planned SSM events because the agency believed that – given that such events are planned in advance – sources should be able to comply with applicable emission limits during these activities.

The environmental organizations argued, in part, that EPA's approval of the affirmative defense for unplanned SSM events exceeded the agency's authority and contravened the CAA, which authorizes the assessment of civil penalties against sources found to be in violation of the Act. The Fifth Circuit rejected this argument, reasoning that the CAA "is silent, however, as to whether or not a state may include in its SIP the availability of an affirmative defense against such penalties." The appellate court also recognized that the availability of an affirmative defense does not negate the authority conferred by the CAA to assess and recover civil penalties, "it simply provides a defense, under narrowly defined circumstances, if and when penalties are assessed." The court then went on to hold that EPA permissibly construed the CAA in approving the affirmative defense for unplanned SSM events.

Regarding the partial disapproval, which the power-generating petitioners challenged, the Fifth Circuit reasoned that EPA's authority under the CAA was "limited to determining whether the proposed SIP revision providing an affirmative defense for planned SSM activity, as written, complies with the Act." Here, the court arguably applied – at EPA's urging – a strained and overly-literal reading of a cross-reference in the Texas rule providing an affirmative defense for planned SSM events. Because that rule cross-referenced the criteria for unplanned SSM events, the court held that "a source owner or operator conducting planned SSM activity applying the plain text of [the affirmative defense rule for planned SSM events] would find that the majority of the criteria contained in the section refer to unplanned SSM activity, and consequently, find those criteria not applicable." EPA contended that

this cross-referencing "defect" could be interpreted to broaden the affirmative defense for planned SSM events by "not requiring a source to establish all elements of the affirmative defense." The Fifth Circuit agreed and also concluded that EPA permissibly construed the CAA to find that the affirmative defense for planned SSM events was "not narrowly tailored because it provided a defense for SSM activities during which excess emissions could be avoided."

The case is captioned *Luminant Generation Co. v. EPA*, No. 10-60934 (5th Cir. July 30, 2012), and is available here.

Texas State Implementation Plan Update

Proposed Infrastructure and Transport SIP Revision for the 2008 Ozone NAAQS

On August 22, TCEQ approved proposal of the federal Clean Air Act ("CAA") Infrastructure and Transport State Implementation Plan ("SIP") Revision for the 2008 Ozone National Ambient Air Quality Standards ("NAAQS"). The proposed revision is necessitated by EPA's March 2008 action to strengthen the NAAQS for ground level ozone to 0.075 ppm for both the primary and secondary eight-hour ozone standards.

The proposed SIP revision would purportedly demonstrate Texas's compliance with the infrastructure requirements set forth in section 110(a)(2) of the CAA, 42 U.S.C. § 7410(a)(2), with respect to the 2008 ozone NAAQS. Those requirements "include basic program elements such as enforceable emission limitations and control measures, air quality monitoring and modeling, a permitting program, adequate funding and personnel, authority under state law to carry out the plan, emissions reporting, emergency powers, public participation, and fee collection." (Proposed Infrastructure and Transport SIP at ES-1.)

The proposed SIP revision also includes a technical demonstration to meet the interstate transport requirements of section 110(a)(2)(D)(i)(I) of the CAA, 42 U.S.C. § 7410(a)(2)(D)(i)(I), which "includes an analysis of ozone trends and discussion of existing ozone control strategies to demonstrate that emissions from Texas do not contribute significantly to nonattainment or interfere with maintenance of the 2008 ozone NAAQS in another state." (Proposed Infrastructure and Transport SIP at ES-1.)

The proposed SIP revision will be open for public comment until September 28, 2012. The anticipated adoption date is January 2013.

More information on the proposed Infrastructure and Transport SIP revision is available on the TCEQ website at http://www.tceq.texas.gov/airquality/sip/criteria-pollutants/sip-ozone.

Collin County Attainment Demonstration SIP Revision for the 2008 Lead NAAQS

On August 8, TCEQ adopted the Collin County Attainment Demonstration SIP Revision for the 2008 Lead NAAQS as well as a related Agreed Order with Exide Technologies ("Exide"), which operates a battery recycling plant in Frisco, Texas. In November 2010, EPA designated a portion of Collin County surrounding Exide's plant as nonattainment for the 2008 lead NAAQS effective December 31, 2010.

According to TCEQ, the Collin County SIP revision "demonstrates attainment using air dispersion modeling that includes control strategies already in use at the Exide site as well as additional measures being adopted concurrently" through the Agreed Order. (Collin County SIP Revision at ES-1.) Exide must implement the prescribed control measures as soon as possible but no later than January 16, 2014; alternatively, Exide may close the plant and cease all production activities.

More information on the Collin County SIP revision is available at http://www.tceq.texas.gov/airquality/sip/stakeholders/dfw/dfw-latest-lead.

EPA Publishes Oil & Gas NSPS and NESHAP Final Rules

On August 16, the *Federal Register* published the revised New Source Performance Standards ("NSPS") and National Emissions Standards for Hazardous Air Pollutants ("NESHAP") for onshore gas processing plants and various other stages of oil and gas production that were signed by EPA Administrator Lisa Jackson on April 17, 2012. The rules, which will become effective on October 15, 2012, reduce emissions limits for volatile organic compounds, sulfur dioxide and certain other pollutants emitted at different stages of the oil and gas production process, including hydraulic fracturing operations. Petitions for review of the rules must be filed in the United States Court of Appeals for the District of Columbia Circuit by October 15, 2012. The relevant Federal Register publication, 77 Fed. Reg. 49,490 (Aug. 16, 2012), is available at the Federal Register website at https://www.federalregister.gov/articles/2012/08/16.

Dallas City Council Holds Briefing Regarding Hydraulic Fracturing Rules

On August 1, the Dallas City Council held a briefing regarding hydraulic fracturing and natural gas development in the Barnett Shale, which underlies the city. The briefing, which consisted of presentations by Ed Ireland, Ph.D., Executive Director of the Barnett Shale Energy Education Council, and Terry Welch, an attorney with Brown & Hofmeister LLP, followed an April 20, 2012 briefing on the same topic conducted by the Dallas Gas Drilling Taskforce ("DGDT"), the entity charged with developing gas drilling permit regulations for the Barnett Shale. The Dallas City Council is presently considering the development of ordinances regulating hydraulic fracturing within city limits.

Dr. Ireland's presentation focused largely on the potential economic benefits of hydraulic fracturing and the advantages of certain minimally restrictive regulations, including the avoidance of local air monitoring programs (the presentation states that state programs are adequate), a maximum health protective setback of 600 feet from the wellhead of drilling equipment, and the allowance of drilling on floodplains. Mr. Welch's presentation called for more restrictive regulations than those proposed by Dr. Ireland, including drilling setbacks and variance distances between 1,000 and 1,500 feet, and a prohibition on drilling in floodplains and public parks.

Information on the briefing and Dr. Ireland and Mr. Welch's presentations are available at the Council Briefings archive on the Dallas City Hall website: http://www.dallascityhall.com/council_briefings/archive.html.

Court Approves Consent Decree Requiring EPA Action on Plan for Texas Ozone Nonattainment Areas

As reported in our July 2012 issue, the U.S. Environmental Protection Agency ("EPA") recently entered into a consent decree with the Sierra Club in which it agreed to take actions to approve, disapprove, or partially approve various portions of Texas' State Implementation Plan for the Houston-Galveston-Brazoria and Dallas-Fort Worth eight-hour ozone nonattainment areas.

On August 14, the consent decree was approved and entered by the U.S. District Court for the District of Columbia. The final consent decree is available here, and Sierra Club's first amended complaint (to which the consent decree was addressed) is available here.

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Texas Environmental Excellence Awards Applications

TCEQ is accepting applications for the 2013 Texas Environmental Excellence Awards. Apply online through October 5, 2012 at http://www.teea.org/.

Upcoming TCEQ Meetings and Events

TCEQ will host its annual ***Advanced Air Permitting Seminar*** and an ***Oil and Gas Facilities Workshop*** in Austin on September 10 and 11, 2012. Information regarding these events is available at http://www.tceq.texas.gov/p2/events/advancedairpermittingoilandgasfacilitiesseminar.

TCEQ will host its annual ***Water Quality/Storm Water Seminar*** in Austin on September 13 and 14, 2012. The seminar will provide information on applying for municipal, industrial, storm water, CAFO and sludge permits; and updates on homeland security, reclaimed water, pretreatment, and environmental management systems. Information regarding this event is available at http://www.tceq.texas.gov/p2/stormwater.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in August can be found on the TCEQ website at http://www.tceq.texas.gov/news/releases/8-12agendfa8-8 and http://www.tceq.texas.gov/news/releases/8-12Agenda8-22.

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

SEC Approves Final Conflict Minerals Rule

On August 22, 2012, the Securities and Exchange Commission approved (by a 3-2 vote) the final rule on "conflict minerals."

The rule implements the disclosure requirements mandated by Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The final rule will require certain publicly traded companies to disclose whether they use "conflict minerals" in their products, and what efforts they have undertaken to ensure their use of those minerals does not contribute to the ongoing conflict in the Democratic Republic of Congo ("DRC") and adjoining countries (known here as the "Covered Countries").

For the full text of this article, please visit http://www.bdlaw.com/news-1398.html.

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