Texas Environmental Update

BEVERIDGE & DIAMOND PC

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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

Texas Developments

Ruling in Endangered Species Act Whooping Crane Lawsuit Stayed by Fifth Circuit

On March 11, 2013, the U.S. District Court for the Southern District of Texas issued a decision in *The Aransas Project v. Shaw*, an action relating to Texas Commission of Environmental Quality ("TCEQ") water management policies with respect to the endangered Whooping Crane's winter habitat, the Aransas National Wildlife Refuge (the "Refuge"). The court found that TCEQ violated Section 9 of the Endangered Species Act ("ESA") in failing to allow for sufficient freshwater flows from the San Antonio and Guadalupe Rivers into the Refuge during the 2008-2009 winter.

The *Shaw* case was initiated by environmentalists, local business owners, bird enthusiasts and others who formed The Aransas Project ("TAP") to protect the interests of the Whooping Crane and the environmental conditions of the Refuge. The action was prompted by a severe drought during the 2008-2009 winter, which caused at least 23 cranes, or 8.5% of the Refuge's flock, to die and 34 cranes to leave Texas in the spring without returning to the Refuge the following fall.

Prior to filing the lawsuit, TAP petitioned the TCEQ for a water permit to require a certain amount of freshwater to remain instream in the Guadalupe and San Antonio river systems so that it may reach the Refuge. After TCEQ denied TAP's permit request, on March 10, 2010, TAP filed suit, alleging that TCEQ's failure to properly manage freshwater inflows into the San Antonio and Guadalupe bays caused the Refuge to become hypersaline, reducing the availability of the cranes' drinking water and primary food resources, effectively causing the death of the 23 cranes, which constituted an unlawful "take" of the cranes under Section 9 of the ESA.

The court rejected TCEQ's contention that it had no power to protect the Whooping Cranes because its hands were tied by Texas' "first in time, first in right" priority water system, finding that TCEQ had emergency authority to take the necessary acts to protect bays and wildlife and also the power and duty to abide by federal law and mandates. The court thus enjoined TCEQ from approving new water permits affecting the Guadalupe or San Antonio Rivers until the State of Texas provided reasonable assurances to the Court that such permits would not take Whooping Cranes in violation of the ESA. The court also required TCEQ to seek an Incidental Take Permit that would lead to development of a habitat conservation plan.

On March 26, 2013, pursuant to a motion by TCEQ and the Guadalupe-Blanco River Authority as an intervenor, the U.S. Court of Appeals for the Fifth Circuit stayed the District Court's judgment pending appeal and granted TAP's motion to expedite the appeal.

The opinion of the U.S. District Court for the Southern District of Texas is available on the Aransas Project's website. The opinion of the U.S. Court of Appeals for the Fifth Circuit is available on the TCEQ website.

Eagle Ford Shale Task Force Report Released by Texas Railroad Commission

On March 12, 2013, the Eagle Ford Shale Task Force (the "Task Force"), chaired by Texas Railroad Commissioner David Porter, issued the Eagle Ford Shale Task Force Report (the "Report"). The Task Force was formed in 2011 to ensure that the development of the oil and gas play in the Eagle Ford Shale was not hindered by a lack of communication among local communities and other key stakeholders. Thus, the 24-member Task Force was composed of persons with various interests and areas of expertise, including judges, representatives of industry, and environmental groups. The Task Force met ten times from July 2011 to November 2012 to study a broad range of issues that include the following, along with other topics: flaring and air emissions; water quality and quantity; Railroad Commission issues; and land owner, mineral owner, and royalty owner issues. Each of these subjects is covered in a separate chapter of the Report, which is available online at the Railroad Commission's website.

EPA Argues Lack of Authority to Promulgate Texas FIP for Ozone and Fine Particulate Matter

On March 27, 2013, the U.S. Environmental Protection Agency ("EPA") moved to dismiss a lawsuit by the Sierra Club seeking to require it to promulgate a Federal Implementation Plan ("FIP") for Texas that complies with the Clean Air Act's ("CAA") "good-neighbor" provision in Section 110(a)(2)(D)(i)(I) with respect to ozone and fine particulate matter emissions. According to EPA, the D.C. Circuit's recent rejection of its Cross-State Air Pollution Rule ("CSAPR") in *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), left it without authority to promulgate such a FIP for Texas.

The "good-neighbor" provision at issue requires each state to adopt State Implementation Plan ("SIP") provisions that prohibit air pollution from a state that will "contribute significantly to nonattainment in, or interfere with maintenance by," any other state with respect to National Ambient Air Quality Standards ("NAAQS"). If EPA disapproves a state's SIP submission, EPA must promulgate a FIP for that state to address the CAA requirements at issue.

In September 2010, Sierra Club brought suit against EPA, alleging that the agency had failed to either approve a SIP or promulgate a FIP to satisfy the good-neighbor provision with respect to the ozone and fine particulate matter NAAQS for Texas. Subsequently, in connection with its issuance of the CSAPR, EPA promulgated a FIP covering Texas that was intended to achieve this end. In *EME Homer City*, however, the D.C. Circuit vacated that FIP (as well as FIPs that EPA had issued for other states), holding that EPA must first define states' good-neighbor obligations and give them an opportunity to make a SIP submission addressing those obligations.

EPA has not yet promulgated a rule to quantify Texas's good-neighbor obligations with respect to ozone and fine particulate matter. Thus, in its recent court filing, EPA argued that absent reversal of *EME Homer City* by the U.S. Supreme Court, it is without authority to promulgate a good-neighbor FIP at this time. The case is *Sierra Club v. U.S. Environmental Protection Agency*, No. 1:10-cv-01541-CKK (D.D.C.), and EPA's Memorandum in Support of Defendants' Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6) is available here.

Texas Landowners Seek U.S. Supreme Court Review of Texas Supreme Court Takings Claim Decision

On February 13, 2013, Hearts Bluff Game Ranch (the "Ranch") filed a petition with the U.S. Supreme Court for review of a Texas Supreme Court decision that denied a takings claim brought by the Ranch against the State of Texas and the Texas Water Development Board. In its petition, the Ranch argues that the Texas Supreme Court failed to perform the fact-specific analysis the U.S. Supreme Court has found to be necessary in government takings cases. The petition is filed in the Supreme Court of the United States as *Hearts Bluff Game Ranch Inc. v. The State of Texas and the Texas Water Development Board*, Case No. 12-1015. Our September 2012 article on the Texas Supreme Court decision in this case is available here.

TCEQ Proposes Partially Delisting Texas City from Air Pollutant Watch List

The TCEQ Toxicology Division has requested public comment regarding its proposal to partially delist Texas City from its Air Pollutant Watch List ("APWL") for benzene and hydrogen sulfide. If the proposal is adopted, Texas City would still be an APWL area for propionaldehyde.

The APWL is a list of geographic areas in Texas where the TCEQ has determined that specific air pollutant levels have been measured at levels of concern. The APWL serves a number of purposes, including to heighten awareness of such areas for interested persons (including TCEQ personnel, industry representatives and private citizens), and to encourage efforts and focus resources to reduce emissions in these areas. TCEQ has determined that validated monitoring data show that levels of hydrogen sulfide and benzene in the Texas City area have decreased below levels of potential concern.

TCEQ will host a public meeting regarding this proposal in Texas City on April 11, 2013, and the agency will accept public comment on the proposal through April 26, 2013. Information about the proposal, including the full analyses of the proposed benzene and hydrogen sulfide delistings, is available at TCEQ's website.

Upcoming TCEQ Meetings and Events

TCEQ will conduct ***Texas Emissions Reduction Plan ("TERP") Program Rebate Grants Application Workshops*** during April in Arlington, Austin, Corpus Christi, Houston, and San Antonio. The workshops are free and no registration is required. Additional information about these workshops is available at TCEQ's website.

A meeting of the ***TCEQ Drinking Water Advisory Work Group*** will be held at TCEQ headquarters in Austin on April 24, 2013. Information about this event is available at TCEQ's website.

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 1 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 March can be found on TCEQ's website.

Recent Texas Rules Updates

For information on recent TCEQ rule developments, please see the TCEQ website.

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National Developments

U.S. Supreme Court Upholds CWA Logging Roads Exemption, Endorses Citizen Suit Enforcement of Ambiguous Agency Rules

In an opinion issued on March 20, 2013, the U.S. Supreme Court upheld the U.S. Environmental Protection Agency's (EPA) regulatory interpretation that logging road runoff is not subject to industrial stormwater permitting requirements under the Clean Water Act (CWA). *Decker v. Northwest Environmental Defense Center*, No. 11-338 (U.S. Mar. 20, 2013). The Court also found that plaintiffs had properly brought their suit under the CWA's citizen suit provision, 33 U.S.C. § 1365, because they did not make a direct facial challenge to EPA's regulations but instead sought to impose their interpretation of the CWA on a commercial operator where EPA's rule on the issue was ambiguous. The Court's decision originated from a pair of cases from the U.S. Court of Appeals for the Ninth Circuit addressing the proper application of EPA's Silvicultural Rule (40 C.F.R. § 122.27), one of the agency's industrial stormwater regulations, which establishes a permitting exclusion for stormwater discharges from logging roads.

On the merits of the case, the Supreme Court rejected plaintiffs' arguments that the CWA generally requires National Pollutant Discharge Elimination System (NPDES) permits for stormwater discharges from all industrial operations, and overturned the Ninth Circuit's findings on that point. The Court pointed to repeated references in EPA's stormwater regulations to "facilities, establishments, and manufacturing, processing and industrial plants" to conclude that the agency's application of the Silvicultural Rule to "traditional industrial buildings such as factories and associated sites, as well as other relatively fixed facilities," was rational. The Court therefore found that the text of the rule supported EPA's decision to exclude temporary logging operations from permitting requirements and concluded that the commercial defendant had not violated the CWA by discharging stormwater from its logging roads without a NPDES permit. The Court also found the case was not mooted by EPA's December 2012 amendment of its industrial stormwater regulations to limit permitting requirements only to logging operations involving rock crushing, gravel washing, log sorting, and log storage facilities, since the plaintiffs still could seek to enforce the defendant's alleged violations of the earlier rule.

While the narrow substantive finding of the case has garnered most of the attention, the Court's jurisdictional ruling may pose far greater implications. Petitioners argued that CWA Section 509(b)(1) provides the exclusive mechanism for challenging EPA's CWA regulations, and therefore the suit should have been filed in the federal Courts of Appeals within 120 days of the Silvicultural Rule being promulgated. See 33 U.S.C. § 1369(b)(1). The Supreme Court disagreed. The Court explained that Section 509(b)(1) must be used when directly challenging EPA's actions, such as rules and permits. On the other hand, the Section 505 citizen suit provision should be used when a plaintiff seeks to enforce "a permissible reading" of a CWA requirement against an alleged violator in the face of an ambiguous regulation on the topic. On this point, the Court concluded that the Silvicultural Rule was ambiguous and that plaintiffs had properly brought their claim in a citizen suit against an alleged violator to enforce their interpretation of the CWA's requirements.

The Court attempted to limit the impact of its jurisdictional ruling by stating that direct challenges to EPA regulations still must be brought under Section 509(b)(1) of the CWA. But the Court simultaneously held that environmental groups may use the CWA citizen suit provision to question EPA's regulatory interpretations. Thus, citizen groups may try to effect regulatory change by suing private companies for violating the CWA – even when those companies are operating in compliance with EPA's regulations or with NPDES permits issued under them.

For more information, please contact Karen Hansen, khansen@bdlaw.com, 512-391-8040; Parker Moore, pmoore@bdlaw.com, 202-789-6028; Richard Davis, rdavis@bdlaw.com, 202-789-6025; Tim Sullivan, tsullivan@bdlaw.com, 410-230-1355; or Mackenzie Schoonmaker, mschoonmaker@bdlaw.com, 212-702-5415.

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Federal Government Releases Guidance to Streamline NEPA and NHPA Reviews

On March 5, 2013, the White House Council on Environmental Quality ("CEQ") and the Advisory Council on Historic Preservation ("ACHP") jointly published final guidance entitled "NEPA and NHPA: A Handbook for Integrating NEPA and Section 106 Reviews." The guidance is intended to provide practical advice on streamlining environmental reviews mandated by the 1966 National Historic Preservation Act ("NHPA") and the 1970 National Environmental Policy Act ("NEPA") to avoid unnecessary duplication and delay. Overall, the new guidance builds upon recent efforts to remedy problematic aspects of the NEPA process and reinforces several best practices to facilitate concurrent analysis of potential environmental and cultural impacts of projects with a federal nexus.

Both NHPA and NEPA are procedural statutes that require agencies to examine how a proposal may affect historic and cultural resources and to consider alternatives that would minimize such impacts. The implementing regulations of both statutes aim to foster coordination with other federal laws. See 40 CFR Parts 1500-1508; 36 CFR Part 800. Integration of NHPA and NEPA reviews not only saves project proponents and federal agencies valuable time and money, but also supports sound decision-making by encouraging a broad discussion of proposed actions' effects on the human environment. This unified review reduces litigation risk by ensuring all legal requirements are met, enhancing comprehensive public engagement early in the process, avoiding inconsistent results, resolving any federal interagency or federal-state-tribal disputes, and promoting transparency and accountability in federal decision-making.

This new guidance document provides practical instructions on how to integrate the environmental review processes of the two statutes, focusing specifically on provisions added to Section 106 of the NHPA in 1999 that address "coordination" of NHPA Section 106 and NEPA reviews and alternately the "substitution" of NEPA reviews for the Section 106 process. Coordination encourages agencies to harmonize Section 106 activities with any steps taken pursuant to a NEPA review. Substitution authorizes agencies to use NEPA procedures and documentation (an Environmental Assessment and Finding of No Significant Impact, or an Environmental Impact Statement and Record of Decision) to simultaneously comply with Section 106, instead of the procedures outlined in the Section 106 regulations. The guidance details the standards agencies must meet for coordination and substitution, as well as timing and documentation considerations.

- Specifically, the guidance identifies key principles for integrating NEPA and Section 106:
- Early integration of the two processes;
- Education of stakeholders about the benefits of integration;
- Development of a comprehensive planning schedule and tracking mechanism to keep the NEPA and Section 106 processes synchronized;
- Development of comprehensive communication plans that satisfy agency outreach and consultation requirements, maximize the opportunities for public involvement, minimize duplication of efforts, and identify whether coordination or substitution will be used;
- Use of NEPA documents to facilitate Section 106 consultation, and use of Section 106 to inform development and selection of alternatives in NEPA documents;
- Development of an integrated strategy to accomplish specialized studies to provide information and analysis required by both statutes; and
- Completion of Section 106 and the appropriate level of NEPA review before issuance of a final decision.

Many of the strategies identified in the guidance have been successfully employed by experienced counsel and agency staff in projects across the country. While not rising to the level of a formal regulation or announcing wholly new interpretations, strategies, or procedures for integrating NEPA and NHPA reviews, the guidance helpfully lends the endorsement of CEQ

and ACHP to these best practices. Moreover, it broadly disseminates concrete tips, checklists, and other tools to agencies and interested parties to implement in ongoing and future individual projects.

A copy of the final guidance can be found here.

For more information on this guidance or its implications for a specific project, please contact Parker Moore at (202) 789-6028, pmoore@bdlaw.com; James Auslander at (202) 789-6009, jauslander@bdlaw.com; or Sara Vink at (202) 789-6044, svink@bdlaw.com.

Firm News & Events

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

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

Mr. Fulton provides counseling and strategic advice on domestic regulatory matters, international environmental regulation, and sustainability.

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.

"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 can 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 is 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.