Texas Environmental Update

BEVERIDGE & DIAMOND PC

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Texas Developments

Ron Curry Appointed As New EPA Region 6 Administrator

The Obama administration has appointed Ron Curry as the new Administrator of EPA Region 6. Curry fills the post left vacant by the resignation of Al Armendariz, who resigned in April amid controversy over his remarks comparing his enforcement philosophy to the Roman crucifixions.

Curry is from Hobbs, New Mexico, and was Cabinet Secretary of the New Mexico Environment Department from 2003 through 2010 under then-Governor Bill Richardson. Curry's appointment marks the first time a non-Texan has been appointed as Administrator of Region 6, which covers Texas, Oklahoma, Arkansas, Louisiana, and New Mexico.

As a New Mexico regulator, Curry pushed for greenhouse gas regulations and stricter requirements for oil and gas operations. He also challenged an EPA-issued permit for a coal-fired power plant on Navajo land and the proposed reopening of the Asarco smelter in El Paso, Texas. Curry also urged EPA to prohibit the construction of new major sources of air pollution in Texas until the State adopted new permitting rules.

Terry Clawson, a spokesman for the Texas Commission on Environmental Quality, said in a statement: "We are happy to see a new regional administrator has been appointed. We sincerely hope that new leadership will lead to constructive dialogue with a refocus on sound science, the law and historic interpretation of Texas programs at EPA."

Barry Smitherman, Chairman of the Railroad Commission of Texas, was a bit more pointed in his comments on Curry's appointment: "After our recent victories over the EPA, I hope that Mr. Curry understands that in Texas, environmental regulation is grounded in science and based in facts."

EPA announced Curry's appointment on Friday, September 21, and Curry started work at Region 6 the following Monday. His bio is available from the EPA Region 6 website.

TCEQ and EPA Resolve Issues Related to Title V Permit Incorporation By Reference

Resolving one of several programmatic objections to Texas Title V State Operating Permits (SOPSs), TCEQ has announced a new format for incorporating by reference New Source Review (NSR) authorizations. Beginning October 1, 2012, all applications received for new SOPs, renewal of a SOP, and significant revisions to SOPs for a permitted area with major NSR permits must include a Major NSR Summary Table identifying monitoring, recordkeeping, reporting, and testing (MRRT) requirements for each emission point as reflected on the Maximum Allowable Emission Rate Table (MAERT).

The changes will apply to all permits issued after October 1, 2012 and to existing SOP permit applications for which public notice has not been issued. The Major NSR Summary Table will now appear as shown below:

Permit Number: XXX and PSDTXXXX (Issuance Date: mm/dd/yyyy)							
Emission Point No. (1)	Source Name (2)	Air Contaminant Name (3)	Emission Rates *		Monitoring and Testing Requirements	Recordkeeping Requirements	Reporting Requirements
			lb/hr	TPY**	Spec. Cond.	Spec. Cond.	Spec. Cond.

According to TCEQ, the new Major NSR Summary Table is intended to resolve EPA's objection to Incorporation by Reference (IBR) of major NSR in SOPs by providing clarification to the relationship between emission points listed on the MAERT and the maintenance, recordkeeping, and reporting requirements specified in the Special Conditions and/or General Conditions of the major NSR permit.

Texas Supreme Court Dismisses Landowners Takings Claim Against State of Texas and Texas Water Development Board

On August 31st, in *Hearts Bluff Game Ranch, Inc. v. The State of Texas et al.*, Cause No. 10-0491 (Tex. Aug. 31, 2010), the Texas Supreme Court affirmed the denial of a landowner's takings claim (alleging damages of up to $70 million) against the Texas Water Development Board (TWDB) and the State of Texas (together with the TWDB, the "State") that was based on the State's identification of the landowner's property as a potential unique reservoir location and the consequent denial of the landowner's application for a federal mitigation banking permit. The landowner plaintiff, Hearts Bluff Game Ranch, had purchased approximately 4,000 acres of hardwood river swamps with the intention of creating a federal mitigation bank, which allows a person who restores, establishes or preserves an aquatic resource to sell federal "mitigation bank credits" to third parties who negatively impact aquatic resources in other areas. *Hearts Bluff*, Slip Op. at 4. However, when the landowner applied for a permit, the United States Army Corps of Engineers (the "Corps") denied it because the State had identified the land as a potential unique reservoir. *Id*. at 4, 6.

The landowner brought an inverse condemnation claim against the State, asserting a regulatory taking under both the Texas and the United States Constitutions and alleging that the Corps denied the permit application "solely because the mitigation bank was located within the footprint of a reservoir that was a unique reservoir suitable for construction, that was to be and actually was adopted by the State legislature." *Id*. at 7. The trial court hearing the case denied defendants' plea to the jurisdiction but the Court of Appeals for the Tenth District of Texas reversed the trial court and dismissed the claim. *Id*. at 8. The appeals court held that, even if the permit's denial was a restriction on the landowner's property rights, the conduct of the State did not cause the restriction because "neither the Legislature nor the TWDB were empowered to grant or deny the permit." *Id*.

The Texas Supreme Court performed extensive analyses of takings jurisprudence and affirmed the denial of plaintiffs' claim, holding that, absent bad faith, a takings claim against the State cannot be "predicated on the denial of a permit by the federal government when the state had no authority to grant or deny the permit." *Id*. at 4. The Court acknowledged that the State's designation of the landowner's reservoir as unique precluded other governmental units in Texas from acquiring an interest in it, but it held that plaintiff cited no authority "for its assertion that a unique designation legally inhibits or prevents private development of the site." *Id*. at 27. Further, in assessing bad faith, the Court found that the State's lobbying of the Corps for the denial of the permit, "without more, [is] insufficient to state a claim for regulatory taking." Id. at 29. In sum, the Court found that, without bad faith, "[b]ecause [of] the State's lack of regulatory authority – and the attendant lack of causation," there was no taking. *Id*. at 34.

Texas Supreme Court Clarifies Burden of Proof for Consent Element in Trespass Cases

On September 13th, in *FPL Farming Ltd. V. Environmental Processing Systems LC*, Cause No. 09-08-000083-CV (Tex. App. – Beaumont), the Court of Appeals for the Ninth District of Texas ordered a new trial regarding an underground trespass claim because the charge given to the jury in the lower court "improperly placed the burden of proving [defendant's] affirmative defense of consent on [plaintiff]." *FPL*, Slip Op. at 1-2. The appellate court held that the trial court erred in charging the jury with determining whether the plaintiff had proven that it had not consented to the trespass, as opposed to determining whether the defendant had established consent.

The plaintiff, FPL Farming Ltd. (FPL) brought suit against Environmental Processing Systems, L.C. (EPS), alleging that a subterranean waste plume had trespassed from the non-hazardous wastewater disposal facility on EPS' property to the briny water under FPL's property. After finding that FPL had standing to sue EPS for trespass and concluding that Texas law recognizes FPL's interest in the briny water under its property, the appellate court turned to considering the jury charge issue.

The court noted that the Texas Supreme Court has not addressed the burden of proving consent in trespass cases but several courts of appeal have found that the burden of proving consent lies with the party alleged to have trespassed once it has been established that the alleged trespasser's entry was unauthorized. *Id*. at 13. After considering the Restatement (Second) of Torts, which states that in trespass cases "the burden of establishing the possessor's consent is upon the person who relies upon it" and referencing basic principles of burden allocation regarding the difficulty in proving a negative, the court found that "the charge improperly placed the burden of proving lack of consent on FPL, and the trial court should have placed that burden on EPS." *Id*. at 16. The court then held that "[b]ecause the charge required FPL to prove an element on which it did not bear the burden of proof, because that issue was hotly contested, and because EPS used the error to its advantage in final argument, we hold the trial court's error was harmful." *Id*. at 19. After setting aside certain additional charge error claims and allegations regarding evidentiary issues, the appellate court remanded the case for a new trial. *Id*. at 27.

TERP Emissions Reduction Incentive Grant Application Period

The Texas Commission on Environmental Quality's Texas Emissions Reduction Plan (TERP) Program is currently accepting applications for its Emissions Reduction Incentive Grants (ERIG) Program. This program provides funds to upgrade or replace older heavy-duty vehicles, non-road equipment, locomotives, marine vessels, and stationary equipment. Eligible counties for this grant cycle include: Bastrop, Bexar, Brazoria, Caldwell, Chambers, Collin, Comal, Dallas, Denton, Ellis, Fort Bend, Galveston, Gregg, Guadalupe, Hardin, Harris, Harrison, Hays, Hood, Jefferson, Johnson, Kaufman, Liberty, Montgomery, Nueces, Orange, Parker, Rockwall, Rusk, San Patricio, Smith, Tarrant, Travis, Upshur, Victoria, Waller, Williamson, Wilson, and Wise. Applications must be submitted by 5:00 p.m. on November 30, 2012. The required new grant application forms and additional information are available at http://www.terpgrants.org.

TCEQ Meetings and Events

TCEQ has scheduled a series of stakeholder meetings to address ***Authorization of MSS Emissions from Oil & Gas Facilities Outside the Barnet Shale Counties***. The agency will hold these meetings to obtain input from stakeholders regarding its proposed creation of a new permit by rule (PBR) for the oil and gas industry to authorize MSS emissions. The meetings are scheduled for September 17 (Austin), October 1 (San Antonio), October 4 (Arlington), and October 9 (Midland). Additional information regarding these meetings and the proposed rulemaking is available at http://www.tceq.texas.gov/permitting/air/announcements/advisory/Current/sp_oilgas_sg.html#schedule.

TCEQ will host meetings of the ***Chapter 115 Stakeholders Group regarding Stage II Vapor Recovery*** on the following dates: October 1 (Arlington), October 4 (El Paso),

October 8 (Houston), October 9 (Beaumont), and October 11 (Austin). The purpose of the meetings is to discuss the possibility of decommissioning the program in the Beaumont–Port Arthur, Dallas–Fort Worth, El Paso, and Houston-Galveston-Brazoria areas. Additional information is available at http://www.tceq.texas.gov/airquality/stationary-rules/stakeholder/115_stakeholder.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in September can be found on the TCEQ website at http://www.tceq.texas.gov/news/releases/commissionersagenda091912.

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

Unprecedented Pesticides Criminal Penalty and Civil Settlement Announced

On September 7, 2012, the U.S. District Court for the Southern District of Ohio sentenced Scotts Miracle-Gro Company (SMG), the world's largest marketer of residential use pesticides, to pay a $4 million fine for eleven criminal violations of the federal law which governs the manufacture, distribution, and use of pesticides (the Federal Insecticide, Fungicide and Rodenticide Act or FIFRA). In a separate consent agreement to resolve related civil pesticide violations with the Environmental Protection Agency (EPA), SMG will also pay more than $6 million in penalties, spend $2 million on environmental projects, and contribute another $500,000 to organizations that protect bird habitat. (To review a copy of the civil consent agreement, click here). The total criminal penalty and civil settlement payment of $12.5 million is the largest payment in the history of FIFRA, according to Ignacia S. Moreno, Assistant Attorney General for the Environment & Natural Resources Division of the Department of Justice (DOJ). (To review DOJ's press release, click here). The criminal indictment and record-breaking fines could signal a new era in the government's enforcement of the pesticide law.

The criminal case against SMG was investigated by EPA's Criminal Investigation Division and the Environmental Enforcement Unit of the Ohio Attorney General's Office, Bureau of Criminal Identification & Investigation. The civil case was investigated by EPA's Land and Chemicals Division and Office of Regional Counsel, as well as EPA Headquarters' Office of Civil Enforcement and the Office of Pesticide Programs. The investigations were conducted in parallel, and resulted in an 11 count indictment, including 1 count of pesticide misuse, 5 counts of falsification of pesticide registration documents, 2 counts of distribution of a misbranded pesticide, and 3 counts of distribution of unregistered pesticides. SMG pleaded guilty to all 11 counts in February, 2012. The civil violations arose after a third party review of SMG's U.S. pesticide registrations and advertisements. Based on a compliance review agreement between EPA and SMG, SMG hired the third party, which in turn led to identification of potential compliance issues with over 100 of SMG's products.

In a plea agreement, SMG admitted to improperly applying pesticides to its bird food products contrary to the pesticides' labels which warned that the pesticides were toxic to fish, birds, and other wildlife. SMG apparently used the pesticides to protect against insect infestation during storage. It then sold the illegally treated bird food for a total of 2 years, and continued with sales for 6 months after management was alerted to the situation by employees. At the time of a voluntary recall in March 2008, SMG had sold more than 70 million units of the illegally treated bird food.

SMG also pleaded guilty to additional violations of FIFRA, including submission by a SMG federal product manager of false documents to EPA and state regulatory agencies

suggesting that numerous pesticides were registered with EPA, when in fact they were not, as well as the illegal sale of unregistered pesticides, and marketing pesticides with false and misleading labels not approved by EPA. An employee of SMG also pleaded guilty to false statements and falsifying documents, and will be sentenced in October.

Although FIFRA criminal enforcement is rare and FIFRA criminal penalties or civil fines greater than $500,000 are highly unusual, this matter demonstrates the broad scope of FIFRA and the magnitude of the federal enforcement consequences that can attach to actions involving pesticides. Under FIFRA, pesticide registrants, applicants for registration and producers who knowingly violate the statute "shall be fined not more than $50,000 or imprisoned for not more than 1 year, or both." Registrants, commercial applicators, wholesalers, dealers, retailers or other distributors may also be subject to FIFRA civil penalties of up to $7,500 for each offense.

For more information about pesticide compliance, enforcement or litigation, please contact Kathy Szmuszkovicz (kes@bdlaw.com or 202-789-6037) or Kate Wesley (kwesley@bdlaw.com or 202-789-6065). For more information about the government's criminal enforcement of environmental laws, please contact Nadira Clarke (nclarke@bdlaw.com or 202-789-6069) or Lily Chinn (lchinn@bdlaw.com or 415-262-4012).

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