Texas Environmental Update

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Texas Developments

Texas Legislature To Convene for its 81st Session

The Texas Legislature will convene for its 81st Regular Session at noon on Tuesday, January 13, 2009. Key issues expected to receive attention during the Session include: meeting the state's growing energy needs; compliance with federal clean air standards; air quality permitting; greenhouse gas emissions regulation; and water funding. *See*, Topics for the 81st Legislature, House Research Organization Focus Report (November 26, 2008) available at http://www.house.state.tx.us/analyses/hro/research.php. Further, the scope of the City of Houston's jurisdiction to regulate air pollution will likely continue to be the subject of legislative debate. Notably, however, the Senate Committee on Jurisprudence declined to adopt recommendations on its interim charge to study administrative and legal procedures used by municipalities to exert regulatory authority beyond city limits indicating that it "does not wish to interfere with long-standing principles regarding extraterritorial jurisdiction and nuisance law." *See*, Interim Report to the 81st Legislature, Senate Committee on Jurisprudence (December 2008) available at http://www.senate.state.tx.us/75r/Senate/commit/c550/c550.htm.

Prefiling of legislation began on November 10, 2008. To date, prefiled bills of interest include those described in the attached chart. We will continue to monitor and report on legislative developments of interest.

Texas Governor Perry Offers Strong Response to Climate Change ANPR

Governor Perry has responded aggressively to EPA's proposed framework for regulating greenhouse gas emissions through the Federal Clean Air Act ("CAA"), as set forth in EPA's July 30, 2008 Advanced Notice of Proposed Rulemaking ("ANPR"). On November 25, 2008, the Governor sent a letter to the EPA administrator urging EPA to decline to take such action. In prepared remarks surrounding the issuance of the letter, Governor Perry said the proposal would "punish innovation, cost jobs and drive investment out of Texas and overseas" and that "China, India, and other countries will be more than happy to welcome businesses driven away by these costly regulations. They'll happily take the jobs and the emissions with them, meaning the federal government will have accomplished nothing at irreparable cost to our economy." Before establishing any greenhouse gas emissions limits under the CAA, the Governor said, the EPA needs to make "aggressive and concrete" progress in four infrastructure needs: (1) modernization of the nation's electricity transmission grid; (2) removing barriers that prevent substantial new investments in nuclear generation; (3) facilitating rapid investments in the development of carbon capture and sequestration (CCS) technologies; and (4) providing for long-term regulatory and tax certainty for renewable energy and energy efficiency technologies. The Governor's letter can be found at http://governor.state.tx.us/files/press-office/O-JohnsonStephen20081125.pdf.

Governor Perry's letter was based on the recommendations of the Texas Advisory Panel on Federal Environmental Regulations, a group he formed at the beginning of November to review EPA's proposal. That group was comprised of Bryan Shaw, TCEQ Commissioner; Barry Smitherman, Chairman of the Public Utility Commission Chairman; and Michael Williams, Chairman of the Texas Railroad Commission. The Advisory Panel's report to the

Governor can be found at http://governor.state.tx.us/files/press-office/Impacts_to_Texas-Final.pdf.

TCEQ Issues Vacated MACT Standard Guidance

TCEQ recently issued guidance regarding judicially vacated maximum achievable control technology ("MACT") standards, including the MACT for industrial, commercial and institutional boilers and process heaters (40 CFR Part 63, Subpart DDDDD), the MACT for brick and structural clay products manufacturing (40 CFR Part 63, Subpart JJJJJ), and the clay ceramics manufacturing MACT (40 CFR Part 63, Subpart KKKKK). Specifically, the agency has issued two memoranda relating to the requirement to obtain case-by-case MACT determinations for major sources pursuant to Federal Clean Air Act Sections 112(g) and 112(j). In a December 11, 2008 memorandum, TCEQ's Air Permits Division Director recommends that regulated entities review potential applicability under Sections 112(g) and 112(j), and indicates that the Air Permits Division will not provide any notification of applicability or application due dates without guidance from EPA or further court action that clarifies these federal requirements. In a November 10, 2008 memorandum, TCEQ's Deputy Director of the Office of Compliance and Enforcement issued guidance for the purpose of establishing consistent enforcement discretion relating to these vacated MACTs. The referenced documents are available on TCEQ's website at http://www.tceq.state.tx.us/permitting/air/announcements/nsr_tv_announce_12_15_08.html

TCEQ Eight-Hour Ozone NAAQS Decisions

On December 10, 2008, the TCEQ Commissioners voted on three different eight-hour ozone National Ambient Air Quality Standard ("NAAQS") matters. First, the Commissioners approved the Executive Director's recommendation regarding area classification designations under EPA's 2008 eight-hour ozone NAAQS. All counties that are in the 1997 eight-hour ozone NAAQS nonattainment areas are included in the recommended nonattainment areas for the 2008 ozone standard. TCEQ further recommended that the following counties be included in 2008 ozone standard nonattainment areas: Austin Area: Travis County; Dallas-Fort Worth: Hood County; El Paso County; San Antonio Area: Bexar County; and Tyler Area: Gregg, Rusk and Smith Counties. TCEQ forwarded its recommended nonattainment area designations to Texas Governor Rick Perry by letter dated December 11, 2008. This letter and other information about the recommended 2008 ozone standard classification recommendations are available on TCEQ's website at http://www.tceq.state.tx.us/implementation/air/aqps/eighthour.html.

The Commissioners also adopted an Eight-Hour Ozone Redesignation Request and Maintenance Plan State Implementation Plan ("SIP") Revision for the Beaumont-Port Arthur ("BPA") area. Although EPA recently reclassified the BPA area from a marginal to a moderate nonattainment area, the area monitored for the 1997 eight-hour ozone standard based on 2005, 2006, and 2007 data. Accordingly, this SIP revision requests that EPA redesignate the BPA area to attainment for the 1997 eight-hour ozone NAAQS and demonstrates how the area will maintain compliance with that standard through 2021. Information about this adopted redesignation request and maintenance plan is available on TCEQ's website at http://www.tceq.state.tx.us/implementation/air/sip/bpa.html#edr.

Finally, the Commissioners approved the adoption of an Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard for the Dallas-Fort Worth area. This SIP revision addresses the EPA Region 6 requirement that, in order to grant final approval of the DFW Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard, TCEQ would need to adopt an enforceable flow control mechanism to limit the use of DERCs in 2009 and subsequent calendar years in which the total amount of DERCs could impact the attainment and maintenance of the 1997 eight-hour ozone NAAQS. Accordingly, this SIP revision changes TCEQ's Discrete Emission Credit Banking and Trading rules in 30 Texas Administrative Code Chapter 101, Subchapter H, Division 4, to provide the TCEQ Executive Director authority to approve the amount of discrete emissions reduction credits ("DERCs") available for use in any calendar year consistent with attainment and maintenance of the 1997 eight-hour ozone NAAQS. The adopted rules require the Executive Director to perform

an annual review of the DFW DERC program to determine the flow control limit in tons per day and apportion available DERCs for potential use. Information regarding this SIP revision is available on TCEQ's website at http://www.tceq.state.tx.us/implementation/air/sip/dfw.html.

TCEQ Issues Annual Enforcement Report

TCEQ has released its enforcement report for Fiscal Year 2008 as required under the Texas Water Code Section 5.123. According to the Report, the TCEQ issued 1,624 administrative orders, the highest number since 1985. These orders resulted in more than $10 million in penalties, $4.6 million in Supplemental Environmental Projects (SEPS), an estimated reduction of 8.3 million pounds of pollutants and approximately $521 million in expenditures that will be required to achieve compliance.

The largest percentage of the enforcement orders issued by the TCEQ, by media, were for water (45%), followed by waste (25%), air (23%) and multi-media (7%). By sector, the highest approximate percentages of orders issued according to regulated entities for FY 2008 were sewerage systems (17 %), chemical manufacturing (12 %), water supply (8 %), and gasoline service stations (10 %). The Report notes that the number of emission events reported increased during 2008 (9%) although the quantity of emissions decreased significantly from the previous year. The 2008 Report is the twelfth of its kind.

New TCEQ Agenda Format

On December 10th, the TCEQ announced a change to its twice-monthly agenda format, effective January 14th. The change is designed to facilitate citizen participation in the agenda process and allow TCEQ staff to better utilize their time. Proposals for decision and contested case hearings, which generate the most public interest at agendas, will now be the first items considered at each agenda. Enforcement orders and rulemakings, which typically generate less interest, will be considered after those items. Also, the agenda will no longer have a morning and afternoon session. Instead, the items will be considered as one continuous agenda. The agendas, as well as Commissioner work sessions and other TCEQ meetings, will continue to be webcast free to the public at www.texasadmin.com. Information about upcoming and past agendas and work sessions can be found at www.tceq.state.tx.us/nav/main/agenda.html.

TCEQ Accepting TERP Grant Applications & Conducting Workshops

TCEQ has announced that it is now accepting Texas Emission Reduction Program ("TERP") applications. Specifically, TCEQ is accepting applications for the Emissions Reduction Incentive Grant ("ERIG") Program through February 20, 2008, and applications for the Rebate Grants Program until June 30, 2009 or until all funding has been awarded.

ERIG Program grants offset the incremental costs associated with reducing NOx emissions from high-emitting internal combustion engines. The Rebate Grants Program is a simplified application process under the ERIG Program, under which rebate grants are awarded for diesel on-road and non-road replacement and repower projects. A portion of funds dedicated to the Rebate Grants Program are set aside for grants to entities that qualify as small businesses under the TERP Guidelines for Emission Reduction Grants. Funding is only available for eligible applicants in the Houston-Galveston-Brazoria, Dallas-Fort Worth, Beaumont-Port Arthur, Tyler-Longview, San Antonio, and Austin areas. Applications must be submitted on new forms that are available on TCEQ's website at http://www.tceq.state.tx.us/implementation/air/terp/index.html.

TCEQ will conduct TERP grant application workshops in Arlington, Austin, Denton, Houston, Longview, Midlothian and San Antonio during January 2009. Information about these workshops is available on TCEQ's website at http://www.tceq.state.tx.us/implementation/air/terp/terp_mtgs.html.

TCEQ Requests Comment on VOC Flash Emissions Calculation Guidance Document

On December 17, 2008, TCEQ requested comments on a draft guidance document for evaluating volatile organic compound ("VOC") flash emissions from crude oil and condensate tanks at oil and gas production sites. TCEQ developed the draft guidance based upon new information and technology that TCEQ indicates raise questions about the accuracy of existing methodologies for estimating VOC flash emissions. These emissions occur when crude oil or condensate is exposed to temperature increases or pressure drops during their transfer from production separators or similar sources into atmospheric storage tanks. TCEQ requests that comments, suggestions and questions about the draft guidance document be submitted by January 30, 2009. The draft guidance document and information about submitting comments is available on TCEQ's website at http://www.tceq.state.tx.us/permitting/air/announcements/nsr_announce_12_17_08.html.

Texas Rules Updates

See, TCEQ website at http://www.tceq.state.tx.us/rules/whatsnew.html for information on new rule developments.

Previous Issues of Texas Environmental Update

To view all previous issues of the Texas Environmental Update, please go to http://www.bdlaw.com/publications-93.html.

National Developments

EPA Finalizes Clean Air Act Rule to Allow Some Sources to Exclude Fugitive Emissions from New Source Review Applicability Calculations

On December 19, 2008, the Environmental Protection Agency (EPA) published a final rule that will allow some emissions sources to exclude fugitive emissions from Prevention of Significant Deterioration (PSD) and New Source Review (NSR) applicability determinations. 73 Fed. Reg. 77,882 (Dec. 19, 2008).

The fugitive emissions rule will amend the Clean Air Act's ("the Act") existing NSR Rules. Under the current rules, all major sources must include fugitive emissions when calculating whether a physical change or change in operations constitutes a "major modification" subject to NSR requirements. Under the new rule, only sources that fall within designated categories will be required to include fugitive emissions when making such a determination. EPA also clarified its procedure for determining whether emissions are "fugitive."

Background & History of the Fugitive Emissions Rule

The NSR Program requires new major sources of air pollution to install pollution controls at the time of construction. A facility is a "major source" if it emits or has the potential to emit a regulated pollutant in excess of a specified threshold amount. In its original 1978 PSD rules, EPA required sources to include all quantifiable emissions – both stack and fugitive – in determining whether a project would exceed these emissions thresholds. The D.C. Circuit overruled this interpretation, finding that the plain language of the Clean Air Act required consideration of fugitive emissions only for those source categories "determined by rule" by EPA. *Alabama Power Co. v. Costle*, 636 F. 2d 325, 370 (D.C. Cir. 1979); CAA § 302(j), 42 U.S.C. § 7602(j). Accordingly, in its August 7, 1980 PSD rules, EPA determined that (1) sources within 26 listed source categories and (2) sources subject to regulation as of that date under the § 111 New Source Performance Standards or § 112 National Emissions Standards for Hazardous Air Pollutants would be required to include fugitive emissions in their major source determinations (so-called "§ 302(j) sources"). 40 C.F.R. §§ 70.2, 71.2.

The NSR program also applies to "major modifications" to existing major sources – *i.e.*, modifications that result in a "significant net emissions increase." The CAA does not, however, clearly specify whether this determination is limited to stack emissions or whether it must include fugitive emissions as well, and EPA's interpretation has followed a somewhat tortured path. In its post-*Alabama Power* 1980 regulations, EPA initially applied the same rule for "major modifications" as it did for "major sources" – *i.e.*, only § 302(j) sources must include fugitive emissions when calculating the source's potential to emit. 45 Fed. Reg. 52,676, 52,689-91 (August 7, 1980). In 1984, however, EPA changed course, proposing an Interpretive Ruling that would require all sources to include fugitive emissions in their "major modification" calculations. 49 Fed. Reg. 43,202 (Oct. 26, 1984). Noting its departure from the 1980 rule, EPA explained that the 1980 rule was based on the agency's erroneous assumption that § 302(j) applied to both "major source" and "major modification" determinations, but that the Agency had since determined that the language of § 302(j) itself applied only to major sources. 49 Fed. Reg. at 43,213. EPA finalized the Interpretive Ruling in 1989, 54 Fed. Reg. 48,870 (Nov. 28, 1989), and codified it in the 2002 NSR Reform Rule. 67 Fed. Reg. 80,186 (Dec. 31, 2002). Accordingly, since 1984, fugitive emissions have been generally excluded when determining whether a facility is a "major source," but *included* when determining whether a specific project at a major source is a "major modification."

The December 19, 2008 Fugitive Emissions Rule

Shortly after the NSR Reform Rule was finalized, Newmont Mining Company petitioned the agency to reconsider its treatment of fugitive emissions. In 2004, EPA granted Newmont's petition. After several more years of review, EPA has now revised the NSR program to return to the Agency's original interpretation of § 302(j).

Under the new rule, EPA will once again treat "major sources" and "major modifications" consistently: only § 302(j) sources will be required to include fugitive emissions when determining whether a project triggers NSR. The new rule amends the NSR regulations to conform to this revised position, and it also addresses the treatment of fugitive emissions in other areas of the NSR Program:

- The rule revises monitoring and reporting requirements for sources that determine, prior to construction, that a change does not constitute a major modification. Such sources must monitor and report on fugitive emissions only if the emissions unit or source in question falls within a § 302(j) category.

- The rule preserves the existing treatment of fugitive emissions for Plantwide Applicability Limitations (PALs). PALs allow a source to track total emissions rather than the effect of each physical or operational change individually. EPA will continue to require the inclusion of fugitive emissions in setting the PAL and tracking compliance for facilities in all source categories.

- The rule also limits the inclusion of fugitive emissions in a source's netting analysis. Because the NSR applicability turns on the net increase of emissions, sources consider all contemporaneous increases and decreases in emissions to determine whether a change results in a significant increase in emissions. Under the new rule, only § 302(j) emissions units and sources may obtain "credit" for a decrease in quantifiable fugitive emissions. A source that is not required to include fugitive emissions when calculating its emissions increase may not use a contemporaneous decrease in fugitive emissions to "net out" of the NSR program requirements.

- Finally, the rule requires states to specify how fugitive emissions are accounted for in the state's minor NSR program. This requirement will exist as a minimum element of each state implementation plan. EPA stressed that the requirement is intended to facilitate clarity on how states treat fugitive emissions in their minor NSR programs, not to prescribe specific requirements for minor NSR programs.

The Rule will become effective January 20, 2009. States must adopt interpretations that conform with the rules or, if necessary, revise the NSR program within the State Implementation Plan within 3 years to conform to the regulation.

Guidance on Determining whether Emissions are "Fugitive"

In addition to the changes detailed above, EPA also clarified its guidance on determining whether emissions are "fugitive" in the rule finalized on December 10. By regulation, fugitive emissions are "emissions that could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening" (*e.g*. windblown dust from surface mines and volatile organic compounds emitted from leaking pipes and fittings at petroleum refineries). 40 C.F.R. § 52.21(b)(20). The agency interprets the phase "could not reasonably pass" to mean whether emissions can be reasonably collected or captured, for example in an enclosure or hood.

In the preamble to the December 10 rule, EPA clarified the analysis for determining whether emissions qualify as "fugitive."

1. To determine whether emissions can "reasonably pass" through a stack, chimney, vent, or other opening, agencies make a case-by-case decision based on whether the emissions can be reasonably collected or captured.

2. While not dispositive, the fact that a similar facility collects, captures, or controls emissions will be a factor in each consideration
    a. Emissions already captured and discharged, *e.g.* through a stack, chimney, or vent, are non-fugitive at that source;
    b. The establishment of a national emissions standard or regulation requiring some sources in a category to collect or capture and control emissions will weigh heavily towards finding that the emissions are non-fugitive at other sources in the category; and
    c. The more commonly other similar sources collect or capture emissions, the more heavily this factor will weigh toward finding that collection is reasonable.

3. The cost to collect or capture and control emissions is a factor when determining what is reasonable.
    a. The regulatory agency may consider the combined costs to collect or capture and control emissions as an alternative measure to the costs of emissions capture or collection alone;
    b. Surrounding air quality will be considered when deciding if costs are reasonable; and
    c. If it is not technically or economically feasible to control emissions, then collection or capture may not be reasonable.

This guidance is significant because EPA has historically focused on the cost of collection or capture, not the cost of control. Though it may be feasible to capture or collect emissions, there may be no technically or economically feasible method to control emissions once they are captured. In such a case, EPA concluded that "collecting the emissions is nonsensical, and thus, may not be reasonable." 73 Fed. Reg. at 77,892.

Implications of the Final Rule

The change in the fugitive emissions program is intended to restore a uniform approach to threshold NSR applicability determinations as they relate to fugitive emissions. The rule may significantly affect a number of source categories that have not been designated under § 302(j) but that have a potentially significant amount of fugitive emissions – *i.e*., surface mines, landfills, agricultural businesses, loading docks, the crushed stone, sand, and gravel industry, sugar mills, and some industrial boilers.

Note, however, that the rule affects only the threshold applicability determinations for the NSR program – it does not create a blanket regulatory exemption for fugitive emissions from non-section 302(j) sources. States may – and many do – impose permitting and control requirements on fugitive emission sources outside of the NSR program through the application of emissions limits, MACT standards, or state and local permitting programs. In addition, once a source does trigger NSR, then all applicable emissions at the source –

including fugitive emissions – are subject to subsequent NSR requirements, including BACT and LAER pollution controls.

The new rule already faces strong opposition from various environmental groups. Interestingly, the rule also becomes effective on the same day President-Elect Obama takes office. In light of these events, political and/or judicial efforts to challenge, block, or rescind the rule appear likely.

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Updated: Environmental Appeals Board Opens Door to Regulation of CO2, but EPA Puts on the Brakes

On November 13, 2008, the Environmental Appeals Board ("EAB" or the "Board") held that EPA must consider regulating carbon dioxide (CO_2) emissions limits as part of a permit review under its Prevention of Significant Deterioration ("PSD") program. *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (Nov. 13, 2008). EPA Region 8 initially issued a PSD permit without requiring the Best Available Control Technology ("BACT") for CO_2, claiming that EPA's past policy precluded regulation of CO2; Sierra Club challenged the permit, arguing that Region 8 not only could, but must require BACT for CO_2. The EAB disagreed with both parties: while the Board found that the Clean Air Act ("CAA" or the "Act") does not compel the Region to impose CO_2 limits in PSD permits, it also concluded that EPA's past policies did not prohibit it from doing so. *Id.* at 63. Because Region 8 had not evaluated whether it should impose BACT for CO_2, the Board ordered the Region to reconsider the permit. *Id.* at 63-64. This decision will likely invigorate the efforts by the Sierra Club and others to compel regulation of CO_2 under existing law.

A. Statutory and Procedural Background

The Clean Air Act ("CAA" or the "Act") requires preconstruction permits for new major sources or major modifications located in areas that have attained the national standards for specific "criteria" pollutants. 42 U.S.C. §§ 7472, 7475(a)(1). As part of the permitting process, the facility must install "the best available control technology [BACT] for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility." *Id.* at § 7475(a)(5). Historically, BACT determinations have focused on pollutants that are subject to emissions standards under the Act (e.g., SO2, NOx, CO, etc.). Because EPA has never identified CO_2 as a "criteria" pollutant under CAA § 108, it has never developed specific emissions standards for CO2 emissions. As a result, CO2 emissions have never been considered in BACT determinations.

Recent events have changed the playing field. In April 2007, the Supreme Court held that CO2 was an "air pollutant," and that EPA must therefore evaluate whether to regulate it under the Act. *Massachusetts v. EPA,* 549 U.S. 497 (2007) ("Under the clear terms of the [CAA], EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do."). While EPA has made progress toward complying with the Supreme Court's instructions, the pace has been slow; rather than issuing a decision, EPA instead chose to issue an Advanced Notice of Proposed Rulemaking seeking comment on the issue, and has made it clear that further action will not proceed under the current Administration. See, e.g., 73 Fed. Reg. 44,354, 44,354-55 (July 30, 2008). Environmentalists, however, have not been content to sit on the sidelines and await EPA's ultimate determination. Taking heart from the *Massachusetts* holding, they have looked for ways to press for additional regulation of CO_2 under existing law. EPA, meanwhile, continues to insist that no regulation is required unless and until either it completes the review ordered by the Supreme Court, or Congress amends the CAA to compel regulation of CO_2.

The *Deseret Power* decision is at the forefront of this skirmish. On August 30, 2007, EPA Region 8 issued a PSD permit to Deseret Power Electric Cooperative ("Deseret Power" or the "facility") authorizing the construction of a new waste-coal fired electric generating unit in

Uintah County, Utah.[1] *Id.* at 1, 5, n.1. During the permit review, the Sierra Club asked the Agency to require BACT for CO_2 emissions; Region 8 refused, claiming that it was bound by EPA's historical interpretation that CO_2 was not regulated. The Sierra Club then petitioned for review, alleging that Region 8 violated the Act by failing to require BACT for CO_2, in violation of Sections 165(a)(4) and 169(3).[2] *Id.* at 1, 5, 12 (citing 42 U.S.C. §§ 7475(a)(4), 7479(3)). Ultimately, the Board disagreed with both parties.

B. The Board's Decision

The central issue before the Board concerned whether CO_2 is a "pollutant subject to regulation" under the CAA for which the Region must impose BACT limits. *Id.* at 27. Sierra Club argued that the Board was obligated to impose CO_2 BACT limits because CO_2 is a "pollutant subject to regulation" under the Act. *Id.* Even though EPA has never imposed emissions limits on CO_2, Sierra Club pointed out that Section 821 of the 1990 CAA Amendments required CO_2 monitoring, which has been codified in 40 C.F.R. Part 75.[3] Sierra Club further pointed to *Massachusetts v. EPA*, 549 U.S. 497 (2007), which established CO_2 as an "air pollutant" under the CAA. *Id.* at 1, 6, 8, 14, 23-28, 33.

Region 8, in turn, argued that it did not have authority to impose CO_2 BACT limits in PSD permits, because it was constrained by the Agency's historical interpretation of the phrase "subject to regulation" as referring only to pollutants that are subject to actual emissions control standards. *Id.* at 1-2, 9, 28-29. Because the CO_2 monitoring requirements do not require actual control of CO_2 emissions, and because Section 821 of the 1990 Amendments is not technically part of the CAA, Region 8 argued that CO_2 is not a "pollutant subject to regulation under this Act." *Id.* The EAB disagreed with both parties.

1. Region 8's Arguments

Region 8 relied on a variety of past documents to establish EPA's "historical" interpretation, including EPA's original 1978 PSD preamble, the 2002 NSR Rule, and memoranda addressing regulation of CO_2 emissions under the Clean Air Act. *Id.* at 35-63. The Region further argued that Section 821 of the 1990 Amendments was not part of the Act, and that CO_2 therefore could not be "subject to regulation" under the Act. The Board rejected all of these arguments, characterizing them as, "at best, weak authorities upon which to anchor the Region's conclusion . . . that its authority to require a CO_2 BACT limit is constrained by an historical Agency interpretation of CAA sections 165 and 169." *Id.* at 53.

1978 PSD Preamble. First, Region 8 argued that the 1978 Preamble set forth a "final" determination that "pollutants subject to regulation" under the Act include only those pollutants that are subject to actual emissions controls. *Id*. at 34, n.35 (citing 43 Fed. Reg. 26,388, 26,397 (June 19, 1978) (the "1978 Preamble"). The 1978 Preamble states that the phrase "each pollutant subject to regulation under this Act" refers to those regulations in Subchapter C of Title 40 of the Code of Federal Regulations. *Deseret Power* at 14, 38-39 (citing 43 Fed. Reg. at 26,397). EPA's 1978 Preamble then provides the categories of pollutants regulated under Subchapter C, all of which were subject to actual control requirements. *Id.* at 39-40. Accordingly, Region 8 argued that "subject to regulation" refers only to those pollutants that are subject to actual control requirements, and that its historical interpretation of the phrase was consistent with this list. *Id.* at 40.

The Board disagreed, finding that the 1978 PSD Preamble interprets the phrase "subject to regulation under this Act" to include "any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type." *Id.* at 3, 40-42. The CO_2 monitoring provisions were promulgated in Subchapter C, and expressly state that a violation of the monitoring requirements is a violation of the CAA. *Id.* at 41. The Board further noted that nothing in the Preamble indicated that the list of regulated pollutants was meant to be exclusive. *Id*. at 40.

2002 NSR Rule. Second, the Region pointed to a similar list of "regulated NSR pollutant[s]" in EPA's 2002 NSR Rule. As with the 1978 preamble, Region 8 argued that because this list is limited to pollutants that are subject to actual emissions controls, pollutants that are subject only to monitoring requirements are not "regulated NSR pollutant[s]." *Id.* at 3-4, 42-43, 48 (citing 67 Fed. Reg. 80,186 (Dec. 31, 2002)). Again, the Board found that the

2002 rule did not explicitly limit the term "regulated NSR pollutant" to pollutants that are subject to actual emissions controls. *Id.* at 43, 48.

EPA Memoranda. The Region pointed to two prior EPA memoranda that articulated the Agency's historical position that CO_2 is not a regulated pollutant under the Act, and therefore not subject to BACT limits: (1) a memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, EPA, Definition of Regulated Air Pollutant for Purposes of Title V (Apr. 26, 1993) (the "Wegman Memo"); and (2) a memorandum from Jonathan Z. Cannon, General Counsel, EPA, to Carol M. Browner, Administrator, EPA, EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources (Apr. 10, 1998) (the "Cannon Memo"). *Id.* at 4, 49-50.

The Region argued that the Wegman Memo provides EPA's historical interpretation that CO2 is not a regulated "air pollutant" under the Act, and that the addition of CO2 monitoring requirements in 1990 did not require a contrary conclusion. *Id*. at 50-51. The Board found, however, that the fundamental premise of this memo – *i.e*., that CO_2 is not an "air pollutant" – was directly controverted by the later *Massachusetts* decision, which concluded that it is. *Id*. at 50. The Cannon Memo was even more summarily dismissed; while the Board acknowledged that that memo arguably supported the Region's position, the EAB noted that EPA subsequently withdrew the memo. *Id.* at 52. Rather than demonstrating a clear, longstanding, consistent Agency position, the Board concluded that the EPA Memoranda in fact presented a confusing, inconsistent historical record of EPA's position on CO2. *Id.* at 50.

Section 821 of 1990 CAA Amendments. Finally, the Region argued that Section 821's CO_2 monitoring requirements are separate from the Act and do not dictate that CO_2 is a regulated pollutant under the Act. *Id.* at 55-57. Acknowledging that Section 821 was enacted simultaneously with the 1990 CAA Amendments, Region 8 nevertheless argued that Congress unequivocally made it separate from the Act. *Id*. at 9, 56-57. The Board disagreed, concluding that the legislative history of Section 821 was unclear and did not show that Congress intended Section 821 to be separate from the Act. *Id*. at 58-59. The Board also observed that Region 8's argument was inconsistent with EPA's previous statements that violations of Section 821's monitoring requirements are violations of the Act. *Id.* at 9, 56-61.

2. The Sierra Club's Arguments

While the Board rejected Region 8's claims that it could not regulate CO_2, it also rejected Sierra Club's claims that EPA *must* regulate CO_2. Sierra Club based its argument on the *Massachusetts* decision and the Part 75 CO_2 monitoring requirements, which Sierra Club concluded confirm that CO_2 is a "pollutant subject to regulation under [the Act]." *Id*. at 25. Sierra Club noted that the "plain and unambiguous meaning" of the word "regulation" includes both emissions control standards and monitoring requirements. *Id*. at 25-28. Sierra Club further pointed to the D.C. Circuit's *Alabama Power* decision, in which the court rejected industry's efforts to restrict that language to only sulfur dioxides and particulates. *Id*. at 30 (citing *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979)). The Board, however, found that Sierra Club's reliance on *Alabama Power* was inapposite, because the additional pollutants at issue in that case were already clearly subject to regulation under other provisions of the Act. *Deseret Power* at 30.

Sierra Club further argued that Congress removed all doubt that CO2 is a "pollutant subject to regulation" when it imposed CO_2 monitoring requirements in Section 821. *Id.* at 26, 31. Sierra Club pointed out that the language of Section 821 is very similar to that of Sections 165 and 169, and therefore compels EPA to construe what pollutants are "regulated" consistently. *Id*. at 31. The Board, however, insisted that the statutory language must be read in context – a context that included a 13-year period between adoption of the various provisions, different terminology in different sections, and the lack of any express relationship between Section 821 and the PSD provisions. Thus, in the absence of clear Congressional intent to the contrary, the Board concluded that Section 821 did not compel EPA to alter its approach to BACT determinations. *Id.* at 34.

Overall, the Board held that the phrase "'subject to regulation under this Act' is not so clear and unequivocal as [to] foreclose the narrower meaning suggested by the Region," and

therefore did not compel the Region to impose CO_2 BACT limits in a permit. *Id*. at 33, 63.

3. The EAB's Holding

Because the EAB found that Region 8's justification for rejecting CO_2 controls – *i.e*., its alleged inability to regulate in light of EPA's historical interpretation – was invalid, the EAB had no choice but to remand the permit. However, because the Board also found that EPA was not necessarily required to regulate CO_2, it refused to mandate that the Region include a BACT determination for CO_2. Rather, the Board simply ordered the Region to evaluate whether it should require BACT for CO_2. *Id*. at 63. Because the Board also recognized that its decision could have national implications, it further suggested that the Region may wish to seek a national determination from EPA Headquarters. *Id*. at 4-5, 9-10, 63-64.

C. Implications of the Decision

The *Deseret Power* decision is likely to engender significant controversy and result in additional delays in the PSD permitting process. By requiring EPA to consider BACT for CO_2, the EAB has opened the door to similar challenges by Sierra Club and others in a multitude of pending and future PSD permits. Yet by not compelling BACT for CO_2, the EAB has left open the door for industry to argue that CO_2 limits are not warranted. Thus, as a practical matter, this decision may effectively trump the *Massachusetts v. EPA* decision, by allowing direct regulation of CO_2 emissions through permitting – even before EPA decides whether or not such regulation is warranted.

D. EPA Guidance Interpreting PSD Regulations

Following the Board's decision, EPA Administrator Stephen L. Johnson recently issued a national interpretation of the phrases "subject to regulation under the Act" and "regulated NSR pollutant," regarding which pollutants are subject to PSD requirements and addressing the "confusion as to which sources must apply for PSD permits," in the wake of the Board's decision. Memo. from S. Johnson, Administrator, EPA, to Regional Administrators (Dec. 18, 2008), available at http://www.epa.gov/oar/nsr/guidance.html at 2, 5. EPA's memorandum interprets the phrase "'regulated NSR pollutant' to exclude pollutants for which EPA regulations only require monitoring or reporting but to include each pollutant subject to either a provision in the Clean Air Act or regulation adopted by EPA under the Clean Air Act that requires actual control of emissions of that pollutant." *Id*. at 6. Administrator Johnson stated that this guidance is consistent with the language and structure of the Act and its implementing regulations, "the historic practice of the Agency," with prior statements from EPA officials, and with important policy considerations. *Id*. at 2, 6, 9. EPA also issued the decision "to provide the analysis and statement of intent that were lacking in the record of the *Deseret* permit." *Id*. at 8. Therefore, CO_2 is not a "regulated NSR pollutant," because CO_2 is subject to monitoring and reporting requirements only. *Id*. at 1, 15.

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[1] Because the facility is located on an Indian reservation, the EPA regional office (not the state) must review and issue the permit. Id. at 5, n.1.

[2] Sierra Club also argued that Region 8 violated Section 165(a)(2), because it failed to consider alternatives to the new unit, such as the alternatives that Region 9 considered for the White Pine Energy Station Project in Nevada. *Id.* at 1, 12, 21 (citing 42 U.S.C. § 7475(a)(2)). The Board found that Section 165(a)(2) did not require Region 8 to analyze alternatives to a new plant, unless those alternatives were raised during the public comment period. *Id.* at 2, 6, 22. Here, because neither Sierra Club nor any other party raised possible alternatives to the power plant during the comment period, no such review was required. *Id.* at 6, 22.

[3] The relevant provision, Section 821 of the 1990 Amendments, requires monitoring of CO_2 emissions contributing to climate change; it appears as a note to 42 U.S.C. § 7651k. *Id*. at 32, n.29.

EPA, Corps Issue Revised Wetlands Guidance

On December 2, EPA and the U.S. Army Corps of Engineers issued revised joint guidance for making jurisdictional determinations for wetlands and waters under Section 404 of the Clean Water Act. The revision comes just 18 months after the agencies released their original version of the guidance to address the Supreme Court's splintered decision in *Rapanos v. United States*. While the new guidance is intended to correct problems that frequently arose under the original, it likely will not accomplish this goal. *See* CWA Jurisdiction Following *Rapanos* (Dec. 2, 2008).

Rapanos presented the Supreme Court with an opportunity to define the scope of CWA jurisdiction over wetlands and non-navigable waters. Rather than settling on a single standard for determining CWA jurisdiction, however, the sharply-divided Court proposed two vastly different tests. The Scalia test holds that the CWA reaches only "relatively permanent, standing or continuously flowing" waters and wetlands with "a continuous surface connection" to those waters. The Kennedy test grounds jurisdiction on the presence of a "significant nexus" between wetlands and navigable waters. Faced with these competing standards, permittees have wrestled with basic questions over obtaining CWA permits for discharges to remote wetlands and streams.

In hopes of alleviating the growing confusion from *Rapanos*, last year EPA and the Army Corps issued joint guidance for interpreting the opinion when making jurisdictional determinations under the CWA. But the guidance only muddied the water by endorsing both of the *Rapanos* tests as available avenues for establishing CWA jurisdiction. (For a detailed analysis of the 2007 Joint Guidance, please see http://www.bdlaw.com/news-183.html). The time it took the agencies to make JDs slowed dramatically, and permit applications began piling up. Much of this delay stemmed from evaluating remote wetlands and impermanent streams individually to identify a "significant nexus" with traditional navigable waters under the Kennedy test. This complicated the JD process by requiring the agencies to consider a number of hydrological and ecological factors – such as flow characteristics, context (location, watershed size), and function (nutrient transport) – to determine whether a feature affects the chemical, physical, and biological integrity of a traditional navigable water.

Faced with the growing costs and delays of obtaining Section 404 permits, landowners pressured EPA and the Corps to replace the guidance through formal rulemaking to provide uniform, enforceable standards developed with public input. The agencies balked at the idea of new regulations. Instead, they issued revised joint guidance, ostensibly to address the permittees' concerns by incorporating lessons learned from applying the original guidance in the field.

The revised guidance makes three changes to the original version; otherwise the two are virtually identical. First, the agencies clarified their view of the term "traditional navigable waters" ("TNWs") by listing examples of features they consider to qualify as such. According to the guidance, TNWs include waters that are jurisdictional under the Rivers and Harbors Act, currently or historically used for commercial navigation or commercial recreation, or are susceptible to future use for commercial navigation or commercial recreation. The agencies will consider several factors to evaluate a feature's susceptibility for this use such as physical characteristics (size, depth, flow velocity), and evidence supporting this determination must be "clearly documented," not insubstantial or speculative. Although EPA and the Corps have explained that they view TNWs rather broadly, several environmental groups already are criticizing this revision for focusing on commercial navigation, which they say narrows CWA jurisdiction. Conversely, many permittees support the change as a reasonable clarification.

Second, the agencies elaborated on what features the term "adjacent wetlands" includes. The guidance specifies that a wetland is adjacent if it meets one of three criteria: 1) it has an intermittent or perennial "unbroken surface or shallow sub-surface connection to jurisdictional waters"; 2) it is "physically separated from jurisdictional waters by man-made dikes or barriers" or similar natural barriers; or 3) its "proximity to a jurisdictional water is reasonably close, supporting the science-based inference that [it has] an ecological interconnection with jurisdictional waters" that is neither speculative nor insubstantial. For

this final criterion, the agencies explain that species (amphibians or anadramous fish) moving between a wetland and jurisdictional water would support an implied ecological interconnection, while migratory species traveling between the two would not. When making "reasonably close" determinations, however, the agencies say it is unnecessary to demonstrate the claimed ecological interconnection in each case.

Finally, the new guidance refines the concept of the "relevant reach" of relatively permanent waters considered to be jurisdictional. Under the original guidance, the agencies interpreted a tributary to include the entire reach of the stream that is of the same order. They then would determine jurisdiction by examining the flow of each stream reach at the point it entered a higher order stream. Permittees objected to this policy because, by assessing a tributary at its farthest downstream point, the agencies could ignore upstream characteristics of a reach that would otherwise sever CWA jurisdiction. The agencies agreed and revised the policy accordingly. The new guidance specifies that where "data indicates the flow regime at the downstream limit is not representative of the entire tributary," such as when a tributary is "relatively permanent at its downstream limit but not for the majority of its length," the agencies should use the flow regime best characterizing the entire tributary.

More important than the policies the agencies changed, however, are the ones they did not. A significant portion of the 66,000 public comments submitted on the original guidance focused on the complexity and data-intensive evaluation of the Kennedy test's "significant nexus" determination. Yet the agencies chose not to address these concerns in their revisions. They explained that the original guidance contemplated these issues, striking "a careful balance" when interpreting *Rapanos*, and therefore they "decided to maintain the policy choices made." Instead, EPA and the Corps referred the commenters to their June 2008 Regulatory Guidance Letter 08-02, which allows parties to request a preliminary JD based on an "effective presumption of CWA/RHA jurisdiction over all of the wetlands and other water bodies at the site." Nevertheless, this offers little comfort to permittees, who now are in the unenviable position of internalizing the costs of delay for a "significant nexus" determination or surrendering arguably non-jurisdictional land to agency regulation for the sake of expediency.

While few stakeholders are satisfied with the new guidance, their displeasure may have little time to take hold. Environmental groups, Democratic lawmakers, and key players in President-elect Obama's transition team already are pressuring the next administration to withdraw the agencies' guidance upon taking control in January. Should this happen, EPA and the Corps will be back at square one, and permittees will face additional delays when applying for Section 404 permits.

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EPA Increases Civil Monetary Penalty Amounts for 2009

On December 11, 2008, the United States Environmental Protection Agency published a final rule increasing the civil monetary penalty amounts that can be assessed for violations of the various environmental statutes the agency administers. *See* Civil Monetary Penalty Inflation Adjustment Rule, 73 Fed. Reg. 75,340 (Dec. 11, 2008) (to be codified at 40 C.F.R. pts. 19, 27).

The EPA issued the rule pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 (DCIA), which requires each federal agency to publish regulations at least once every four years adjusting for inflation the civil penalties potentially assessed by that agency. The previous inflation adjustment regulations went into effect on March 15, 2004.

The adjustments are fairly uniform across the EPA-administered statutes and represent an approximately 15% increase over the present limits, which have been in effect since 2004. Current penalty limits of $6,500, $11,000, and $32,500 will be increased to $7,500, $16,000, and $37,500, respectively. For example, under the Clean Water Act (CWA), the Safe Drinking Water Act (SDWA), and the Clean Air Act (CAA), the civil judicial penalties that

can be sought for most violations will increase from $32,500 per day per violation to $37,500 per day per violation. Administrative penalties for violations under these statutes will also increase. For example, the $11,000 per day per violation limit (up to a total of $157,500) that can be assessed for certain violations of the CWA and SDWA will increase to $16,000 per day per violation (up to a total of $177,500). The $270,000 limit on total administrative penalties that can be assessed for certain violations of the CAA will increase to $290,000. The inflation-adjusted penalty amounts will be codified in Table 1 of 40 C.F.R. § 19.4.

The new inflation adjusted civil monetary penalties apply to violations of the applicable statutes and regulations that occur after January 12, 2009.

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