TEXAS ENVIRONMENTAL UPDATE

February 2012

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TEXAS DEVELOPMENTS

Texas Supreme Court Rules that Landowners Own Groundwater In Place

On February 24, 2012, the Texas Supreme Court ruled that landowners hold ownership interests in the groundwater in place beneath their properties and may be entitled to compensation if that groundwater is taken for public use or if their access to the water is restricted by permitting authorities. In its opinion, the State's highest court held that its determination of the ownership of groundwater in place in the subsurface should not depart from its longstanding holding in the oil and gas context: "Whether groundwater can be owned in place is an issue we have never decided. But we held long ago that oil and gas are owned in place, and we find no reason to treat groundwater differently." The court remanded the case to the trial court to allow the landowners to proceed with their takings claim – that the Edwards Aquifer Authority ("EAA"), the groundwater permitting authority, had taken their property without compensation because the EAA significantly restricted the quantity of groundwater that the landowners were permitted to withdraw.

The court's decision may spur a bevy of lawsuits alleging similar takings claims. In its arguments to the court, the EAA claimed that if its regulation of groundwater could provide grounds for a compensable taking, "the consequences will be nothing short of disastrous" because "the potential number of takings claims is enormous." The high court was not swayed by the Authority's concerns, finding them speculative and avoidable, and no reason to excuse a compensable taking: "[G]roundwater regulation need not result in takings liability. The Legislature's general approach to such regulation has been to require that all relevant facts be taken into account. The Legislature can discharge its responsibility . . . without triggering the Takings Clause. But the Takings Clause ensures that the problems of a limited public resource – the water supply – are shared by the public, not foisted onto a few. We cannot know, of course, the extent to which the Authority's fears will yet materialize, but the burden of the Takings Clause on government is no reason to excuse its applicability."

The case is *Edwards Aquifer Authority v. Day,* No. 08-0964 (Tex. Feb. 24, 2012). The court's opinion is available at http://www.supreme.courts.state.tx.us/historical/2012/feb/080964.pdf.

TCEQ Executive Director Announces Retirement

On February 23, 2012, the Texas Commission on Environmental Quality ("TCEQ") Commissioners announced that the agency's Executive Director, Mark Vickery, will retire effective May 2012. Mr. Vickery started his 25-year career in government service at the Texas Water Commission, and over time worked in virtually every area of the agency before being named Executive Director in mid-2008. Announcement of his retirement has fueled speculation about who will next be named to the position. Zak Covar, currently the agency's Deputy Executive Director, is considered by many to be the most likely successor.

Additional information about Mr. Vickery's retirement, including comments from the TCEQ Commissioners, is available on TCEQ's website at http://www.tceq.texas.gov/news/releases/2-11Vickery2-23.

BEVERIDGE & DIAMOND PC

Barry Smitherman Elected Chairman of the Texas Railroad Commission

On February 28, 2012, Barry Smitherman was elected to be Chairman of the Railroad Commission of Texas. He was appointed to the Commission in July 2011. His career in government service began in 2002 as a criminal prosecutor in the Harris County District Attorney's office. He was appointed in 2004 to the Public Utility Commission, where he became Chairman in 2007. Chairman Smitherman received a BBA from Texas A&M University, a J.D. from The University of Texas School of Law, and an M.P.A. from Harvard University.

Elizabeth Ames Jones resigned as Chairman on February 13, 2012 in the wake of a challenge to her eligibility to serve on the Railroad Commission after moving her official place of residence from Austin in November to run for the Texas Senate. The challenge was based on a provision in the Texas Constitution that requires statewide officeholders to live in the state capital.

Additional information about Chairman Smitherman is available at http://www.rrc.state.tx.us/commissioners/smitherman/index.php and http://www.rrc.state.tx.us/commissioners/smitherman/press/022812.php

Railroad Commission Responds to EPA Draft Report Linking Groundwater Contamination to Hydraulic Fracturing in Wyoming

On February 7, 2012, the Railroad Commission of Texas sent a letter (available at http://www.rrc.state.tx.us/forms/letters/Jackson_EPA_020712.pdf) to the U.S. Environmental Protection Agency ("EPA") in response to a December 8, 2011, draft EPA report purporting to find a "likely association" between groundwater contamination and hydraulic fracturing in Pavillion, Wyoming. In its letter, the Railroad Commission urged a request made by several members of Congress – that EPA classify the draft report under Office of Management and Budget guidelines as a "highly influential scientific assessment" that must be subject to stringent peer review requirements, because the report is both novel and controversial, as it marks "the first time a governmental body has put forth an assessment that attempts to link groundwater contamination to hydraulic fracturing." The Railroad Commission also questioned the bases for EPA's conclusions, taking the position that EPA reached its conclusions "based on limited and questionable data." The Commission likened EPA's approach to a recent case in Texas in which EPA made similar claims of groundwater contamination allegedly caused by hydraulic fracturing: "Unfortunately, this seems to be a repeat of the template EPA followed in the Range Resources case: first, make a 'preliminary,' unproven assertion that will be perceived by the media and the public as a condemnation of hydraulic fracturing, then quietly back away once the science has proved the assertions to be false."

The Railroad Commission's press release for its February 7th letter to EPA is available on the Commission's website at http://www.rrc.state.tx.us/pressreleases/2012/020912b.php.

Federal District Court Grants Preliminary Injunction in Challenge to City of Dallas Flow Control Ordinance

The U.S. District Court for the Northern District of Texas has issued a preliminary injunction enjoining the City of Dallas from implementing the City's flow control ordinance (available at http://www.bdlaw.com/assets/attachments/SolidWasteFeeOrdinance1.pdf), which the City enacted in September 2011. The ordinance requires all solid waste generated, found, or collected inside the City to be disposed of at a City-owned or -operated facility. A violation of the ordinance is a criminal offense, and the a defense to criminal prosecution is available only if (1) no City-owned or -operated facility is permitted to accept the waste or (2) the waste is composed solely of recyclable material.

The National Solid Wastes Management Association and various solid waste companies and haulers filed suit challenging the ordinance on multiple federal and state law grounds. The plaintiffs moved quickly for a preliminary injunction, which was supported by amici

curiae the American Forest & Paper Association (represented by Beveridge & Diamond, P.C.) and the North Texas Association of Public Employees. Judge O'Connor of the Northern District of Texas held a one-day preliminary injunction hearing and following the hearing, on January 31, issued an order granting a preliminary injunction (available at http://www.bdlaw.com/assets/attachments/Order.PDF).

Because the court found that a preliminary injunction was appropriate on the basis of the plaintiffs' federal Contract Clause claim, the court's order does not address the plaintiffs' other claims (e.g., standardless delegation of power, Texas constitutional claims, and lack of notice and hearing in violation of the City's charter). The court will take up these issues at an expedited trial on the merits of the plaintiffs' claims, if the case proceeds to trial.

Addressing the plaintiffs' Contract Clause claim, the court found that the express terms of the solid waste franchise agreements that the City had previously entered into with certain of the plaintiffs and other hauling companies gave the franchisees an ongoing contractual right to dispose of solid waste collected within the City at any location legally authorized, or permitted, to operate as a disposal, collection, or processing facility, not just at facilities that the City may authorize by ordinance. Impairment of this contractual relationship was found because the flow control ordinance impairs the franchisees' rights under the franchise agreements -- namely, the right to dispose of solid waste collected within the City at legally facilities other than those owned or operated by the City. The court also found that the City's express reservation of police powers in the franchise agreements did not lessen the substantial impairment. While the terms of the franchise agreements may have put the franchisees on notice that their contractual rights were subject to potential future City regulations, the City's own reservation of police powers made clear that the franchisees assumed only the risk of lawful, necessary exercises of the City's police powers. The court found that the Dallas flow control ordinance was not such a lawful, necessary exercise of the City's police powers.

Turning to the issue of whether the flow control ordinance is justified by a significant and legitimate public purpose, the court found, based on the evidence currently before it, that the ordinance was enacted for purposes of raising revenue. For this finding, the court relied heavily on statements made by the City Mayor and City Council when passing the ordinance. The court determined that the City's desire to raise revenue through the flow control ordinance was not a significant and legitimate public purpose because the ordinance was not adopted to address a fiscal problem but, rather, was adopted for the financial benefit of the City. The plaintiffs demonstrated to the court's satisfaction that the ordinance was not necessary to remedy a broad and general social or economic problem or other similar situation. Additionally, the court found that the flow control ordinance is not reasonably necessary to achieve its purported non-financial goals.

While an expedited trial on the merits may be to come in the case, the City may seek an interlocutory appeal, and it is possible that the Fifth Circuit may be less inclined to invoke the seldom-used Contracts Clause to strike down a local law that that claims a public safety and environmental purpose. However, as it stands currently, the district court's opinion is well supported and reasoned and likely to discourage flow control efforts nationwide, particularly those that disrupt existing franchise agreements and have no compelling public service or environmental need for flow control.

Jimmy Slaughter and Bryan Moore from Beveridge & Diamond's Washington and Texas offices represent amicus curiae American Forest & Paper Association.

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Texas Files Brief Challenging EPA's Imposition of Greenhouse Gas Permitting in Texas

On February 8, 2012, the states of Texas and Wyoming filed their opening brief with the U. S. Court of Appeals for the District of Columbia Circuit in the lawsuit challenging EPA's imposition of a New Source Review prevention of significant deterioration ("PSD")

permitting program for greenhouse gas ("GHG") emissions in Texas and Wyoming. Utility Air Regulatory Group v. EPA, No. 11-1037 (and consolidated cases). In the brief, Texas and Wyoming provide detailed arguments to support their position that EPA's SIP Call "is an unlawful attempt to rush into effect EPA's greenhouse gas regulatory scheme, notwithstanding Texas' and Wyoming's rights under the Clean Air Act and the United States Constitution." The brief is available on the Texas Attorney General's website at https://www.oag.state.tx.us/oagNews/release.php?id=3971.

LCRA Approves New Water Management Plan for Lake Buchanan and Lake Travis

On February 22, 2012, the Lower Colorado River Authority ("LCRA") approved a new Water Management Plan (available at http://www.lcra.org/newsstory/2012/newwatermanagementplan.html) for Lake Buchanan and Lake Travis. The plan determines how water is allocated from the lakes, which serve as the region's water supply reservoirs, and provides LCRA more flexibility to respond to severe droughts. The plan will now be sent to the Texas Commission on Environmental Quality for final approval.

EPA Proposes Determination that Houston Area Failed to Attain Ozone Standard

On February 1, 2012, EPA published a proposal to determine that the Houston-Galveston-Brazoria ("HGB") severe nonattainment area did not attain the one-hour Ozone National Ambient Air Quality Standard by its applicable attainment date of November 15, 2007 (77 Fed. Reg. 4937). EPA based this proposal on three years of ambient air quality monitoring data for the period preceding the attainment deadline. A determination of failure to achieve the standard would trigger contingency measures [Clean Air Act Section 172(c)(9)] and a major source fee program [Clean Air Act Sections 182(d)(3) and 185)]. Clean Air Act Section 185 imposes a fee in ozone nonattainment areas designated as "severe" or "extreme" that fail to meet their applicable attainment deadline. The fee applies to specified volatile organic compound ("VOC") and nitrogen oxides ("NOx") emissions from stationary sources in the nonattainment area. Comments on EPA's proposal must be submitted by March 2, 2012. The proposal is available at http://www.gpo.gov/fdsys/pkg/FR-2012-02-01/pdf/2012-2199.pdf.

TCEQ Oil & Gas Air Authorization Guidance Update

TCEQ has published updated guidance to facilitate the use of New Source Review air authorizations for oil and gas industry facilities. The updates coincide with the agency's implementation of revisions to the permit by rule in 30 TAC Section 106.352 for Oil and Gas Handling and Production Facilities, and the non-rule air quality standard permit for Oil and Gas Handling and Production Facilities. The revised authorization mechanisms and updated guidance are available at http://www.tceq.state.tx.us/permitting/air/nav/nsr_news.html.

TERP Guidance Comment Opportunity

TCEQ is offering an opportunity to provide written and oral public comment on proposed revisions on the Texas Emissions Reduction Plan ("TERP") Guidelines for Emissions Reduction Incentive Grants (TCEQ Publication RG-388). The proposal includes revisions to implement statutory changes to the TERP Diesel Emissions Reduction Incentive Program pursuant to House Bill 3399, 82nd Texas Legislature, 2011, Regular Session. TCEQ is also proposing further revisions intended to provide greater flexibility in how evaluation criteria are implemented in a grant round. Comments must be submitted by March 19, 2012. The proposed revisions and information about submitting comments are available at http://www.tceq.texas.gov/airquality/terp.

Air Pollutant Watch List Annual Report & Updated Protocol Released

The TCEQ Chief Engineer's office has issued its 2012 Report on Air Pollutant Watch List Areas in Texas, as well as an updated Air Pollutant Watch List ("APWL") protocol document that outlines the framework the agency will use in implementing the APWL program, including the listing and delisting of APWL areas.

The APWL is a list of geographic areas in Texas for which 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. The annual report discusses the eleven active APWL areas currently designated throughout the state. TCEQ has not observed persistent, elevated monitored concentrations of air toxics in any potential new APWL area.

The annual report and updated protocol, along with other information about the AWPL program, are available at http://www.tceq.texas.gov/toxicology/AirPollutantMain.

Upcoming TCEQ Meetings and Events

- TCEQ will host its annual ***Environmental Trade Fair & Conference*** at the Austin Convention Center on May 1-2, 2012. A banquet will be held on the evening of May 2 during which the 2012 Texas Excellence Awards will be accepted. Information regarding this event is available at http://www.tceq.texas.gov/p2/events/etfc/etf.html.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in February can be found on the TCEQ website at http://www.tceq.texas.gov/news/releases/2-11Agenda2-22 and http://www.tceq.texas.gov/news/releases/2-12Agenda2-8.

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

Congress Limits DOT Authority over the Transport of Lithium Batteries

On February 6, 2012, Congress passed legislation, which is expected to be signed soon by President Obama, to prohibit the United States Department of Transportation ("DOT") from issuing or enforcing any regulation regarding the transport of lithium batteries by aircraft that is more stringent than the requirements of the Technical Instructions for the Safe Transport of Dangerous Goods by Air issued by the International Civil Aviation Organization ("ICAO"). See H.R. 658, Section 828(a), available in House Conference Report 112-381 (112th Cong., 2d Sess.) (http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt381/pdf/CRPT-112hrpt381.pdf) at 125.

The main effect of this legislation is to block DOT from unilaterally issuing more stringent requirements for transport of lithium batteries and products containing such batteries by aircraft, such as the Department proposed to do in 2010. See 75 Fed. Reg. 1302 (January 11, 2010). However, the legislation includes an exception that allows DOT to continue enforcing the existing prohibition on transport of lithium metal batteries aboard passenger aircraft (set forth in Special Provision A100 of 49 CFR 172.102). See H.R. 658, Section 828(b)(1). In addition, if DOT obtains credible reports that lithium batteries meeting ICAO requirements have substantially contributed to the initiation or propagation of a fire on board

an aircraft, it can issue narrowly crafted regulations to address such risk. See H.R. 658, Section 828(b)(2). Moreover, DOT may soon finalize some regulatory amendments to bring the existing U.S. rules more in line with current international standards.

It is important to note that the ICAO Working Group of the Whole on Lithium Batteries is meeting the week of February 6, 2012, in Montreal to consider various industry and governmental proposals for changes to the current ICAO requirements, including: (1) eliminating certain exceptions that currently exist for regulation of the transport of small lithium ion and lithium metal batteries; (2) subjecting certain categories of lithium cells and batteries to additional requirements for the securing of dangerous goods and protection of packages during loading; (3) amending pilot notification requirements for lithium ion and metal batteries; (4) establishing alternatives to the current process for securing approvals for transporting large lithium ion batteries; (5) developing an ICAO lithium batteries training program for shippers; and (6) various other industry alternatives to fully regulating lithium batteries as dangerous goods. The Working Group is also expected to review flammability test data compiled by the Rechargeable Battery Association ("PRBA") and a recent Federal Aviation Administration ("FAA") study regarding the potential fire threat posed by the bulk shipment of lithium batteries. See generally http://www.icao.int/safety/DangerousGoods/Pages/Working-Group-of-the-Whole-on-Lithium-Batteries.aspx.

In a related development, the U.S. Postal Service, which had published a final rule last summer that would have restricted the conditions under which lithium batteries could be mailed internationally from the United States, decided to withdraw that rule in advance of its effective date. The withdrawal was necessitated by an ICAO request for a delay in implementation of the proposed changes until ICAO had an opportunity to review the changes and incorporate them into the Technical Instructions for the Safe Transport of Dangerous Goods by Air. See 76 Fed. Reg. 55799 (September 9, 2011)

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Court Victory for Genetically Engineered Crop

The U.S. Department of Agriculture's (USDA's) Animal and Plant Health Inspection Service (APHIS) and the agriculture-biotechnology industry received welcome news on January 5, 2012. The U.S. District Court for the Northern District of California upheld APHIS's decision to grant non-regulated status to Monsanto's Roundup-Ready Alfalfa (RR Alfalfa), in a case commonly referred to as "Alfalfa II." *See Center for Food Safety v. Vilsack*, No. 11-1310 (N.D. Cal. Jan. 5, 2012). The Court's opinion is available at http://www.bdlaw.com/assets/attachments/Center%20for%20Food%20Safety%20v%20Vilsack%20Roundup%20Ready%20Alf.pdf.

Courts had previously struck down APHIS deregulation decisions that were based on environmental assessments (EAs), including APHIS's prior deregulation of RR Alfalfa, finding that the APHIS EAs were inadequate under the National Environmental Policy Act (NEPA). Relying on their earlier successful NEPA challenges, the plaintiffs argued that APHIS's more detailed environmental impact statement (EIS) for RR Alfalfa was similarly flawed. However, in this case, Judge Samuel Conti rejected each of the plaintiffs' substantive arguments, finding that APHIS had provided the requisite analysis under NEPA. Beyond a favorable outcome for RR Alfalfa, the decision provides APHIS and industry favorable reasoning and guidance on which to rely in approaching other deregulation decisions and defending such decisions if (or more likely when) plaintiffs challenge them.

This decision is not the end of the RR Alfalfa story, as the plaintiffs appealed to the U.S. Court of Appeals for the 9th Circuit the day after the district court decision was issued. *See Center for Food Safety v. Vilsack*, No. 12-15052 (9th Cir. appeal docketed Jan. 10, 2012). The notice of appeal is available at http://www.bdlaw.com/assets/attachments/Center%20for%20Food%20Safety%20v%20Vilsack%20-%20Notice%20of%20Appeal.pdf. The Ninth Circuit's briefing schedule requires the appellants' opening brief by April 16, 2012, the appellees' response by May 16, 2012, and the appellants' reply brief by May 30, 2012, and provides for subsequent oral argument. Even though the litigation over RR Alfalfa continues,

APHIS and the agriculture-biotechnology industry can draw confidence from this significant district court victory.

For more information on developments in this case and other agriculture-biotechnology litigation, please contact Kathy Szmuszkovicz at kes@bdlaw.com or (202) 789-6037, Jamie Auslander at jauslander@bdlaw.com or (202) 789-6009, or Sean Roberts at sroberts@bdlaw.com or (202) 789-6017.

Firm News & Events

Beveridge & Diamond Leads Successful Defense of Power Plant Permit in Case of First Impression in Texas

Beveridge & Diamond's Texas office secured a ruling from a Texas state district court denying novel claims that a wastewater permit for a Texas power plant was issued by the Texas Commission on Environmental Quality in violation of the plaintiffs' due process rights. The district court's ruling signals that the principles of associational standing and adequate representation, as recognized by the U.S. Supreme Court and the Texas Supreme Court, are applicable to administrative hearings in Texas.

In the district court case, the plaintiffs claimed that they were improperly denied party status in a state administrative hearing to contest the merits of the wastewater permit, although the plaintiffs in the district court case were members of an association that participated fully as a party to the administrative hearing. From the preliminary phase to issuance of the permit, the administrative hearing spanned over 14 months and included a four-day merits hearing during which the parties presented and examined numerous expert witnesses.

Although their association was named and participated as a party to the administrative hearing, the district court plaintiffs also sought standing in the administrative proceeding in their individual capacities. Claiming that their standing bid was unlawfully rejected, the plaintiffs filed suit in state district court after the close of the administrative proceedings and asked the district court to set aside the permit and remand the case to the agency for a re-trial of the entire administrative hearing.

The district court case presented associational representation issues of first impression in Texas – i.e., whether the plaintiffs were adequately represented in the administrative hearing by their association such that any due process concerns were satisfied. The parties briefed the issues to the district court and, immediately following oral argument, the district judge ruled from the bench denying the plaintiffs' claims.

Two additional lawsuits remain pending before the district court challenging issuance of the same wastewater permit on other grounds. The disposition of those cases could have additional implications for contested administrative hearings in Texas.

Bryan Moore, a Principal in the Firm's Texas office, serves as lead counsel for the permittee and argued the case before the district court. The district court's final order is available at http://www.bdlaw.com/assets/attachments/Final%20Judgement%20Rolkes%20v%20TCEQ.pdf. To read the district court brief filed by Beveridge & Diamond, please see http://www.bdlaw.com/assets/attachments/Oak%20Grove%20-%20Rolke%20Appeal%20-%20Response%20Brief%20-%20Travis%20County%20District%20Court%20-%20FINAL%20Date%20Stamped.pdf.

For more information, please contact Bryan Moore at bmoore@bdlaw.com

Beveridge & Diamond, P.C. Elects New Principals

Beveridge & Diamond, P.C., the Environmental, Land Use, and Litigation Law Firm is pleased to announce that W. Parker Moore in our Washington, D.C. office and Evynn M. Overton in our Baltimore office have been elected as Principals and Shareholders of the Firm.

Parker Moore maintains a litigation and regulatory practice focusing on land use issues involving the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Migratory Bird Treaty Act, and wetlands regulation under the Clean Water Act. Mr. Moore co-chairs the Firm's Environmental Practice Group and the Firm's NEPA, Wetlands, and ESA Section. Mr. Moore can be reached at pmoore@bdllaw.com.

Evynn Overton's practice is focused primarily on complex environmental litigation, white collar criminal defense, and internal investigations. Ms. Overton's practice also includes significant work with the Clean Water Act (CWA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Ms. Overton can be reached at eoverton@bdlaw.com.

Beveridge & Diamond Ranked One of Largest Environmental Practices by Law360

On February 13, 2012, Law360 released its ranking of the nation's largest environmental practices, listing Beveridge & Diamond, P.C. as the fifth-largest environmental practice, and noting that the Firm had the highest percentage of lawyers dedicated to the practice of environmental law of any law firm.

To read the articles, please visit the Law360 website (http://www.law360.com/articles/307214/law360-ranks-largest-environmental-practice-groups, subscription required).

For more information, please contact Paul Hagen at phagen@bdlaw.com or Ben Wilson at bwilson@bdlaw.com.

Mark Duvall Co-Authors and Edits Book on FDA Regulation of Nanotechnology

Nanotechnology holds a great deal of promise, but also raises many regulatory issues. In a book edited and co-authored by Mark Duvall of Beveridge & Diamond, the complex issues raised by nanotechnology in FDA-regulated applications are explored in detail. Separate chapters address regulation of nanomaterials in cosmetics, color additives, food additives, dietary supplements, food, drugs, medical devices, biologics, and combination products. A copy of the book is available for free download at http://www.bdlaw.com/assets/attachments/FDA%20REGULATION%20OF%20NANOTECHNOLOGY.pdf.

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