Texas Environmental Update

BEVERIDGE & DIAMOND PC

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Texas Developments

EPA and TCEQ Square Off on Texas SIP Gap Issues

In an increasingly strained policy dispute over the conformity and enforceability of the Texas State Implementation Program ("SIP") under the Federal Clean Air Act ("CAA"), EPA and Texas environmental regulators pressed forward this month with a suite of actions on Flexible Permits, Qualified Facilities, and Title V Permits, key issues central to a years-long SIP Gap controversy that seems unlikely to be resolved any time soon.

TCEQ Proposes Flexible Permit Rules. On June 16, 2010, the Texas Commission on Environmental Quality ("TCEQ") adopted proposed rule changes to the Texas flexible permit program designed to respond to EPA's proposed decision to deny SIP approval last fall. In doing so, TCEQ made clear that it intended to defend its existing program, but was proposing changes to demonstrate a "good faith effort" to respond to EPA's central criticisms of the flexible permit program, namely, that the program fails to prevent circumvention of federal prevention of significant deterioration ("PSD") permitting requirements and has insufficient monitoring, recordkeeping, and reporting requirements. The public comment period for the proposed rules ends on August 2, 2010. A public hearing will be held July 29, at TCEQ headquarters, 12100 Park 35 Circle, Austin, Building E, conference room 201-S. http://www.tceq.state.tx.us/comm_exec/communication/media/6-10flexrulesproposal.

EPA Requests Additional Title V Permit Applications. Also in mid-June, EPA requested that two more companies submit applications for Title V permits from EPA -- rather than TCEQ where the permits are pending under its long-standing federally approved Title V Program. EPA, which has now filed objections and "concerns" on nearly 40 Texas Title V permits pending before TCEQ, claims that EPA must now act on the Title V permits because TCEQ has failed to respond to those actions within 90 days. http://yosemite.epa.gov/r6/Apermit.nsf/AirP. EPA's objections have mainly related to the underlying policy issues associated with SIP Gap issues -- flexible permits, qualified facilities, general recordkeeping timeframes, incorporation by reference of New Source Review ("NSR") permit limitations, and federal operating permit certification standards -- although some objections are permit-specific. The move, which represents an unprecedented "federalization" of Texas Title V permits, has been met with incredulity and opposition by Texas environmental regulators and industry alike. TCEQ is pressing to respond to the remaining objections as soon as possible, most likely in the next few weeks.

EPA and TCEQ Develop "De-Flexing" Proposals. In the wake of a massive information request under CAA Section 114 to nearly all Texas flexible permit holders and indications that the Agency intends to follow with at least some enforcement actions, EPA has now proposed a voluntary program for "de-flexing" Texas flexible permits. The proposal, published on June 17, 2010 (75 Fed. Reg. 34445), presents a novel scheme that would entail a third-party audit, extensive public participation in the audit process and report, resolution of any alleged NSR violations, and execution of a consent decree. Comments are due by July 2, 2010. TCEQ is developing its own "two-step" de-flexing process as outlined in meetings with EPA officials and industry representatives in Dallas on June 16, 2010. The process is reported to entail an initial procedural permitting step followed by a mandatory more detailed amendment process. The TCEQ de-flexing process is expected to be outlined in official correspondence from TCEQ to EPA in early July.

TCEQ Challenges EPA Denial of the Qualified Facilities Rule. On June 14, 2010, TCEQ filed a petition for judicial review in the Fifth Circuit of EPA's decision to deny SIP approval of the qualified facilities rule. The qualified facilities rule authorizes changes without a permit at facilities provided that any increase in actual emissions falls below emissions thresholds that require federal NSR and if the control technology at the facilities is no older than 10-year-old BACT. The TCEQ petition has been consolidated with similar industry petitions. http://www.tceq.state.tx.us/comm_exec/communication/media/061410QualifiedFacilities.

EPA Disapproves Flexible Permit Program. On June 30, 2010, EPA announced its final disapproval of the flexible permit program pursuant to a court ordered schedule, ignoring industry's recent petitions to delay a final decision until November 2010 so that EPA could review TCEQ's proposed new rule package. The denial formalizes the Agency's long-standing position that the existing Flexible Permit programs does not conform to the CAA SIP requirements for the NSR program. It is likely that TCEQ (and industry groups) will seek judicial review of the decision, as it did with the EPA's denial of the Qualified Facilities Program.

Houston-Area HRVOC Emissions Cap & Trade Program -- Guidance for Certification Due July 1, 2010

On June 16, 2010, TCEQ posted on its website a guidance document for facilities that are subject to the Houston-area Highly Reactive Volatile Organic Compound ("HRVOC") Emissions Cap and Trade ("HECT") Program. The Agency issued the "Guidance and Clarification for ECT-6H Submittals" document to assist entities with preparation of the TCEQ Form ECT-6H (Baseline Emissions Certification Form) by the July 1, 2010 deadline in 30 Tex. Admin. Code §101.401(f). The document contains information on "HECT Program Applicability" and "Flare Control Efficiency Calculations." This guidance is available at http://www.tceq.state.tx.us/implementation/air/banking/hrvoc_ept_prog.html.

TCEQ Reports on City of Fort Worth Follow-Up VOC Survey Project

In continuation of its increased surveillance and monitoring of oil and gas operations in the Barnett Shale area, TCEQ has recently released the results of additional volatile organic compound (VOC) sampling activities in the Fort Worth area. During the month of April, TCEQ visited a total of 97 sites. Monitoring and field assessments were conducted at multiple natural gas emission sources including tank batteries, compressor stations and natural gas processing facilities. TCEQ has determined that the results do not indicate an immediate health concern and anticipates that a final report from its Toxicology Division will be available in July of this year. Additional information about this survey project are available at TCEQ's website at http://www.tceq.state.tx.us/implementation/barnettshale/fw_sampling.

Upcoming TCEQ Meetings and Events

- TCEQ will host ***Texas Emissions Reduction Plan ("TERP") Grant Application Workshops*** in San Antonio, Houston and Dallas during July. Information about these workshops is available at http://www.terpgrants.org.

- TCEQ's Air Quality Division is hosting a number of ***public meetings regarding EPA's proposed 2010 ozone national ambient air quality standards ("NAAQS")***. The meetings are being held in select locations around the state from June 8 through July 20 to provide an opportunity to obtain information and offer comments on potential ozone nonattainment area boundaries and designations. During July, meetings will be held in El Paso, Alpine, Longview and Harlingen. Information regarding these meetings and submittal of written comments is available at http://www.tceq.state.tx.us/implementation/air/aqps/eighthour.html.

- TCEQ will host a ***Water Quality Advisory Work Group Meeting*** and a ***Drinking***

Water Advisory Work Group Meeting in Austin on August 3, 2010. Information about these meetings, including information to access/view the meetings by webcast, is available at http://www.tceq.state.tx.us/permitting/water_quality/stakeholders/WQ_advisory_group.html and http://www.tceq.state.tx.us/permitting/water_supply/ud/awgroup.html.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in June can be found on the TCEQ website at http://www.tceq.state.tx.us/comm_exec/communication/media/06-10Agenda06-6 and http://www.tceq.state.tx.us/comm_exec/communication/media/6-10Agenda6-2.

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

Supreme Court Leaves Question of Judicial Taking Unanswered

The Supreme Court's 8-0 decision upholding the decision of the Florida Supreme Court that Florida's beach restoration law did not effect a taking without just compensation belies a deep division in the Court about the still unanswered question of whether a judicial decision itself can constitute an unconstitutional taking without just compensation in violation of the Fifth Amendment to the U.S. Constitution.

In *Stop the Beach Renourishment, Inc. v. Florida Depart. of Environmental Protection*, 2010 U.S. LEXIS 4971, Slip Op. No. 08-1151 (U.S. June 17, 2010), the Supreme Court's decision was ultimately governed by specific issues of Florida property law. Under Florida law, beachfront property seaward of the median high-water mark belongs to the state while the owners of beachfront property own the land between the high-water line and their houses. When two Florida cities sought to restore a beach by depositing new sand and extending the state-owned beaches seaward, owners of beachfront properties challenged the effort claiming that it would violate the Takings Clause by eliminating their rights of direct access to the water and to ownership in new lands deposited on the beach through natural processes.

The Supreme Court ruled that the Florida Supreme Court's decision "did not contravene the established property rights" of the petitioners because the land under the water along Florida's beaches belonged to the state and continued to belong to the state even after a state-sponsored program added new sand. As a result, the state did not improperly impact rights of beachfront owners and there was no unconstitutional taking.

The Court split 4-4 (Justice Stevens did not participate) on the larger issue of whether a decision by a court could itself be a taking in violation of the Fifth and Fourteen Amendments to the U.S. Constitution and what standard would be applied under those circumstances. Following the Florida Supreme Court's decision determining that the Florida law was not an unconstitutional taking, owners of beachfront property sought a rehearing, arguing that the Florida Supreme Court's decision was a violation of the Taking Clause. The Supreme Court has never ruled on this issue.

Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, wrote for the plurality that the Takings Clause applies to the government as a whole, not to particular branches, and that if a court "declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."

The remaining four justices that participated in the case, Justices Sotomayor, Kennedy, Breyer, and Ginsberg, all agreed in the judgment of the Court but, in two separate concurrences, stressed that there was no reason in this case to decide the broader constitutional question of judicial takings, leaving the issue unresolved by the Court.

For more information about the Court's decision, please contact Marc J. Goldstein at mgoldstein@bdlaw.com, (781) 416-5715, or Gus Bauman at gbauman@bdlaw.com,

EPA Delays Enforcement of New Lead-Based Paint Certification and Training Requirements

On June 18, 2010, the Environmental Protection Agency ("EPA") announced its decision to delay enforcement of the certification and training requirements in the Lead Renovation Repair and Painting Rule ("RRP Rule"). The RRP Rule required renovation firms and individual renovators to become certified by April 22, 2010, prior to performing work on target housing and child-occupied facilities. EPA responded to complaints from the regulated community and related pressure from Congress regarding the processing time for applications and difficulty obtaining the necessary renovator training. The new deadlines for compliance with the rule's certification and training requirements are as follows:

- Renovation Firms: EPA will not enforce against renovation firms for violations of the certification requirement until October 1, 2010.
- Individual Renovators: EPA will not enforce against individual renovators if the person has applied to enroll in, or has enrolled in, a certified renovator training class by September 30, 2010. Renovators must complete the training by December 31, 2010.

In the interim, EPA will continue to enforce the work practice standards set out in the rule. E.g., 40 C.F.R. § 745.85. The pre-renovation education provisions have been in effect since 1999 and continue to be enforced. Additional background on the RRP Rule and an overview of its key requirements is available at http://www.bdlaw.com/news-846.html.

The announcement was issued in the form of a memorandum from EPA's Office of Enforcement and Compliance Assurance to the Regional Offices. A copy of the memorandum is available at http://www.dealer.org/files/EPA_Delay_Announcement_6_18_10.pdf. A copy of the RRP Rule is available at http://www.epa.gov/fedrgstr/EPA-TOX/2008/April/Day-22/t8141.pdf.

For further information, please contact Christopher McKenzie in Beveridge & Diamond's New York office, cmckenzie@bdlaw.com, (212) 702-5434, or Hal Segall, hsegall@bdlaw.com, (202)789-6038, Edward West, ewest@bdlaw.com, (202) 789-6070, or Lauren Hopkins, lhopkins@bdlaw.com, (202) 789-6081 in the firm's D.C. office.

Congress Enacts "Formaldehyde Standards for Composite Wood Products Act" Amending the Toxic Substances Control Act

On June 14, the Senate passed by unanimous consent S. 1660, the Formaldehyde Standards for Composite Wood Products Act ("Formaldehyde Standards Act" or "FSA").[1] The House passed identical legislation on June 23, 2010. [2] The Formaldehyde Standards Act amends the Toxic Substances Control Act ("TSCA") through the addition of Title VI to TSCA. It regulates formaldehyde emissions from (1) hardwood plywood, medium-density fiberboard, and particle board that is sold, supplied, offered for sale or manufactured in the United States, and (2) finished goods produced from these composite wood products.

The Formaldehyde Standards Act is noteworthy in several respects because it: (1) adopts standards established by the California Air Resources Board ("CARB")[3] as national standards, advancing trends in state action leading the way in chemical product regulation; (2) addresses chemical concerns previously raised in petitions to EPA but not yet addressed by the Agency (reported in a prior B&D alert on April 28, 2009);[4] (3) singles

out a specific chemical, formaldehyde, for TSCA regulation (joining PCBs, asbestos, radon, lead and elemental mercury); and (4) regulates under TSCA manufacturers and sellers of composite wood products and finished goods incorporating these products not previously regulated by TSCA.[5]

Background

Since the 1990's, the safety of formaldehyde emissions has been evaluated pursuant to the Clean Air Act Amendments of 1990 in which formaldehyde was identified as a hazardous air pollutant for which emissions standards were required.[6] More recently, CARB evaluated formaldehyde emissions from composite wood products.[7] Formaldehyde emissions gained greater notoriety due to concerns regarding formaldehyde exposure by persons living in temporary trailers used in Hurricane Katrina recovery efforts. These concerns arose from potential for exposure to "off-gassing" formaldehyde from trailer construction materials. Reflecting this concern, FSA defines manufactured and modular homes and thereby indicates that EPA will address these exposure settings through future rulemaking.[8]

While CARB was adopting composite wood formaldehyde emissions standards, EPA received petitions from several non-profit organizations asking the Agency to use its TSCA section 6(a) authority to adopt the anticipated CARB standards.[9] EPA declined this specific relief sought by the petitions.[10] At that time, EPA indicated that it would undertake a rulemaking to determine the steps necessary to protect against formaldehyde emissions from composite wood products. In addition, on June 2, 2010, EPA announced a 90-day public comment period on a draft human health assessment: "Toxicological Review of Formaldehyde Inhalation Assessment: In Support of Summary Information on the Integrated Risk Information System."[11] With Congressional action taken on formaldehyde emissions standards, now EPA's risk assessment, and the comments that EPA receives on its draft, will influence implemention of the Formaldehyde Standards Act.

On January 1, 2009, CARB regulations became effective in California for controlling formaldehyde emissions from composite wood products, including those products incorporated into finished goods.[12] The Formaldehyde Standards Act will lead to adoption on a nationwide basis of key aspects of the CARB standards, while subjecting to TSCA jurisdiction and enforcement the producers of composite wood products and of finished products containing them.[13]

Formaldehyde Standard Act Requirements

Under the FSA, EPA must establish new regulations, by January 1, 2013, under which CARB standards for formaldehyde emissions will apply to hardwood plywood, medium-density fiberboard, and particle board sold, supplied, offered for sale or manufactured in the U.S.14 The standards apply to these composite wood products in both unfinished panels and when incorporated in finished products.[15] (Finished products exclude a component part of a finished good standing alone and previously sold "finished" goods such as antiques or secondhand furniture.)[16] The FSA also requires that EPA, in coordination with the Department of Homeland Security, revise TSCA Section 13 regulations to apply FSA requirements to imported products.[17]

FSA adopts testing standards for determining whether products (1) meet emissions standards, or (2) fall within defined product classes.[18] FSA also grants EPA some authority to modify testing standards and regulated product definitions in the context of Agency rulemaking.[19]

FSA adopts technology-based emissions standards for hardwood plywood, particleboard, or medium-density fiberboard in reference to technical standards defining each material.[20] FSA exempts from emissions standards a number of lumber types and products, as well as composite wood products used in new vehicles (other than recreational vehicles), railcars, boats, aerospace and aircraft, and certain windows and garage or exterior doors. [21]

EPA Rulemaking to Implement Formaldehyde Standards Act

By January 1, 2013, EPA must promulgate regulations implementing FSA emissions standards. [22] EPA regulations much address, among other things, product labeling,

chain of custody requirements for products, "sell through" provisions enabling the sale of previously manufactured products not subject to emission standards, third-party testing and certification, recordkeeping, preferred resin products which may exempt a product from third-party certification, and exempt products containing composite wood products in de minimis amounts.[23] Notably, EPA must adopt through rulemaking the number and frequency of tests required to demonstrate compliance with admissions standards.[24] With respect to "sell through" provisions for existing composite wood products, FSA prohibits "stockpiling" these products in amounts greater than the rate of manufacture or purchasing prior to FSA enactment, which may restrict manufacturers given economic conditions before FSA enactment.[25]

Conclusion

The Formaldehyde Standards Act imposes on a nation-wide basis recently adopted CARB formaldehyde emissions standards for composite wood products and many products containing them. Many producers and sellers of affected products already may be moving to comply with CARB standards for all products. FSA extends, however, TSCA regulatory jurisdiction and enforcement to classes of manufacturers and importers who may not be aware of CARB developments. Further, these parties may be unlikely to consider their potential regulation under TSCA, need to participate in the FSA rulemaking, or exposure to TSCA enforcement and liability.

For more information, please contact Michael Neilson at mneilson@bdlaw.com or Mark Duvall at mduvall@bdlaw.com.

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[1] 111 Cong. Rec. S4891-92 (daily ed. Jun. 14, 2010), available at http://www.gpoaccess.gov/crecord/digest2010/d14JN101.html.

[2] 111 Cong. Rec. H4701-05 (daily ed. Jun. 23, 2010).

[3] Notice of California Air Resources Board adopting "Airborne Toxic Control Measure to Reduce Formaldehyde Emissions from Composite Wood Products" (to be codified at 17 California Code of Regulations, sections 93120-93120.12), No. 18-Z Cal. Regulatory Notice Reg. 677 (May 2, 2008).

[4] http://www.bdlaw.com/news-557.html.

[5] S. 1660 111th Cong. § 2 (as passed by Senate, June 14, 2010, and House, June 23, 2010), adding TSCA § 601(b)(1)(4).

[6] S. Rep. No. 111-169, at 2 (2010).

[7] *Id*. at 3.

[8] S. 1660 111th Cong. § 2 (as passed by Senate, June 14, 2010, and House, June 23, 2010), adding TSCA §§ 601(a)(4), (6).

[9] Formaldehyde Emissions form Composite Wood Products; TSCA Section 21 Petition; Notice of Receipt, 73 Fed. Reg. 22,369 (Apr. 25, 2008).

[10] Formaldehyde Emissions from Composite Wood Products; Disposition of TSCA Section 21 Petition, 73 Fed. Reg. 36,504 (June 27, 2008).

[11] Draft Toxicological Review of Formaldehyde in Support of Summary Information on the Integrated Risk Information System, 75 Fed. Reg. 30,825 (June, 2, 2010).

[12] No. 18-Z Cal. Regulatory Notice Reg. 677 (May 2, 2008).

[13] S. 1660 111th Cong. § 2 (as passed by Senate, June 14, 2010, and House, June 23, 2010), adding TSCA §§ 601(b), (e).

[14] *Id*., adding TSCA § 601(d).

[15] *Id*., adding TSCA § 601(b)(4).

[16] *Id*., adding TSCA § 601(a)(1)(B)(ii).

[17] *Id*., adding TSCA § 601(d)(4).

[18] *Id*., adding TSCA §§ 601(a)(7), (10), 601(b)(3).

[19] *Id*., adding TSCA §§ 601(a)(3)(C)(ii), 601(a)(10), 601(b)(3).

[20] *Id*., adding TSCA § 601(b).

[21] *Id*., adding TSCA § 601(c).

[22] *Id*., adding TSCA § 601(d)(1).

[23] *Id*., adding TSCA § 601(d)(2).

[24] *Id*., adding TSCA § 601(b)(3)(C).

[25] *Id*., adding TSCA § 601(d)(3).

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The Supreme Court Strikes Down a Ninth Circuit Permanent Injunction, Again

The Supreme Court surprised many observers when it granted Monsanto's cert. petition in *Geertsen Seed Farms v. Johanns*. *See* 541 F.3d 1130 (9th Cir. 2009). After all, the United States had not appealed the underlying finding that the United States Department of Agriculture ("USDA") should have prepared a full environmental impact statement ("EIS") before it decided to deregulate Monsanto's Roundup Ready alfalfa. Monsanto appealed only the procedure by which the trial court had decided the scope of the injunction, subsequently upheld by the Ninth Circuit. The United States did not support the cert. petition. Moreover, the Court had issued a ruling on the proper standards for injunctive relief just the year earlier in *Winter v. Natural Resources Defense Council*, 129 S.Ct. 365 (2008). For all these reasons, Monsanto's petition attracted relatively little attention and only five amicus briefs were filed in support of the petition.

Once the Court took the appeal, however, few experts doubted the outcome. The Court has frequently taken the opportunity to reverse the Ninth Circuit, especially in environmental and natural resources matters. Of course the Court would once again remind the Ninth Circuit that an injunction does not automatically issue simply because a court finds a procedural violation of the National Environmental Policy Act ("NEPA"). Few questioned that the Court would overturn the broad, nationwide injunction against the planting or use of Monsanto's genetically modified ("GM") alfalfa.

Then things got complicated. First, Justice Breyer recused himself from the case, as his brother, Judge Charles Breyer, was the federal district court judge who imposed the initial injunction. Only eight justices would hear the case, raising the specter of a split decision. Second, reply briefs filed by respondents and certain amici raised for the first time whether Monsanto had standing to challenge the scope of injunctive relief in light of the lower court's decision vacating USDA's deregulation decision. If the administrative action was vacated, they argued, how could a party seek to modify an injunction based on an underlying illegal decision? Third, oral argument revealed confusion on the bench about what the Court needed to decide. Justice Sotomayor questioned Monsanto's counsel about why the parties were even before the Court and asked for clarification about the basis of the challenge. For an oral advocate, that's never an encouraging sign.

This week, after all these twists and turns, matters reverted to form, original predictions came to fruition, and the Supreme Court issued a 7-1 ruling reversing the injunction imposed by the lower court. *Monsanto Co. v. Geertson Seed Farms*, 2010 U.S. LEXIS 4980, Slip Op. No. 09-475 (U.S. June 21, 2010), available at www.bdlaw.com/assets/attachments/Monsanto%20v%20Geertson%20Seed%20Farms%20Slip%20Op%2009-475%20U%20S%20June%2021%202010.pdf. Writing for the majority, Justice Alito relatively quickly disposed of the eleventh hour standing arguments and turned to the merits of the scope of injunctive relief. He wrote that in order to determine the proper scope of injunctive relief, a court must faithfully apply all four prongs of the traditional test specified in *eBay Inc. v. MercExchange L.L.C.*, 547 U.S. 388, 391 (2006), and reinforced in the *Winter* ruling of 2008. The Court accepted Monsanto's position that the trial court had recited improper Ninth Circuit standards and appeared to presume that once a NEPA violation had been found, there was little choice but to impose an injunction until the agency properly considered all potential environmental factors on remand.

The lower courts' primary errors appeared to be the failure to adequately consider the agency's proposal to limit the extent of planting and impose restrictions on the use of GM alfalfa to avoid the sorts of injuries alleged by the organic farmers who originally challenged the USDA action. The Court sympathized with Judge Breyer's "unenviable position" of sifting through expert evidence that "disagreed over virtually every factual issue" to determine whether this partial deregulation was justified, but concluded that simply imposing a complete ban on deregulation was not the appropriate answer. He may have properly concluded that USDA could not completely deregulate the alfalfa without an EIS, but he went too far in using that conclusion to justify a prohibition on even limited deregulation.

Stressing USDA's separate regulatory authority to completely or only partially deregulate GM alfalfa and the agency's expertise to make those decisions, the Court concluded that the agency should be able to consider partial deregulation on the basis of a new

environmental assessment. Until USDA decided to partially deregulate, however, enjoining partial deregulation did not meet the four-factor test for granting a permanent injunction. In particular, the plaintiffs could not show that they would suffer irreparable injury, because a partial deregulation, if sufficiently limited, would not necessarily harm them, and if they believed it would harm them, they could challenge the partial deregulation when it is granted.

After determining that the complete injunction on deregulation was improper, the Court had little trouble determining that the lower courts' almost complete nationwide ban on planting GM alfalfa went too far, although not for the reasons Monsanto argued. The nationwide ban was too broad because, if USDA determines that partial deregulation is appropriate, the ban would prevent farmers from legally planting GM alfalfa in accordance with the partial deregulation. More fundamentally, the nationwide ban was unnecessary because it did not have any practical effect once the complete deregulation was overturned and GM alfalfa was regulated again.

The decision might not have immediate impacts on GM alfalfa, as USDA already has published the draft EIS for complete deregulation. Judge Breyer and USDA will have to decide whether they want to take any additional actions toward partial deregulation of GM alfalfa. However, the decision could impact the deregulation of other GM crops, most notably Roundup Ready sugar beets, which currently are being challenged in the U.S. District Court for the Northern District of California.

While the ultimate outcome of this case conformed to expectations, the potential repercussions of the ruling are wide-ranging. Among other impacts, the decision reinforces USDA's authority and options for making partial deregulation decisions for GM plants; it appears to more firmly place the burden on a prevailing party to show that a broad injunction is necessary; and it could limit the breadth of relief available to plaintiffs, not just for GM plant deregulation, but for other programmatic NEPA decisions in which agencies choose from a range of regulatory options. The ruling also once again reinforces that a broad injunction is not the default remedy for a NEPA violation; a court must actually apply the appropriate test before granting an injunction. Perhaps the Ninth Circuit will finally get this message.

For more information on the impact of the decision, please contact Fred Wagner, at fwagner@bdlaw.com or (202) 789-6041, or Kathy Szmuszkovicz, at kes@bdlaw.com or (202) 789-6037. This alert was prepared with the assistance of Sean Roberts.

Fifth Circuit Declines En Banc Review and Dismisses Climate Change Nuisance Case

Following the recusal of the eighth of its 16 judges on April 30, 2010, the *en banc* U.S. Court of Appeals for the Fifth Circuit determined that it had lost the requisite quorum to decide the climate change public nuisance case *Comer v. Murphy Oil*, and, on that basis, dismissed the appeal. *Comer v. Murphy Oil*, No. 07-60756 (5th Cir. May 28, 2010). A majority of the remaining judges also found they could not reinstate the prior ruling of its three-judge panel, and instead restored the district court's dismissal of the case. The plaintiffs' only recourse at this point is to petition the U.S. Supreme Court for certiorari. The district court's dismissal stands in contrast to the Second Circuit's decision in *Connecticut v. AEP*, 582 F.3d 309 (2d Cir. 2009), a similar climate change nuisance action, on the political question doctrine and federal justiciability issues. *See* http://www.bdlaw.com/news-711.html. Moreover, the unusual basis for the Fifth Circuit's dismissal of the appeal muddies the issues such that, if the Supreme Court does grant certiorari, it may spend as much time addressing procedural points as it does the more substantive issues pertaining to the justiciability of climate-nuisance actions.

In the fall of 2009, the *Comer* appellate panel reversed the district court and held a class of Gulf Coast private plaintiffs could sue oil companies, utilities, and chemical companies for their greenhouse gas releases' alleged contribution to the severity of Hurricane Katrina. (Go to http://www.bdlaw.com/news-711.html for our more complete discussion of the panel opinion.) On February 26, 2010, six of the nine non-disqualified judges of the full Fifth Circuit voted to grant defendants' request to rehear the case *en banc*. On April 30, 2010, less than a month before oral argument was scheduled to be heard on May 24, an eighth

judge recused herself due to new circumstances. In its May 28 Order, the *en banc* Court held that it lacked a quorum and therefore could no longer handle the case. Further, based on its reading of the Court's Local Rules, the majority held that the original panel's decision was vacated upon the grant of rehearing *en banc* in February and could not subsequently be reinstated or "*dis-enbanced*." As a result, the Court held that the effect of its dismissal was to reinstate the district court decision, adding that "[t]he parties, of course, now have the right to petition the Supreme Court of the United States."

The three judges that sat on the 2009 *Comer* panel filed two vigorous dissents from the May 28 order, highlighting the procedural issues that could predominate the sure-to-be-filed certiorari petition to the U.S. Supreme Court. These judges objected to the Court's determining the merits of the case based on a vote to grant *en banc* review. That is, if the eighth recusal had pre-dated the decision to grant rehearing *en banc*, the panel's ruling for the plaintiffs rather than the district court's dismissal would now control. The dissenting judges also disagreed with the majority's refusal to pursue other options to preserve the appeal, including (1) inviting a judge from another Circuit; (2) invoking the "Rule of Necessity" to set aside recusals; (3) reinterpreting applicable court rules to find a quorum; and (4) holding the case in abeyance until the Court's vacant 17th judge position is filled or a quorum is otherwise established. According to the dissents, refusal to either proceed *en banc* or reinstate the panel decision is a deprivation of plaintiffs' appeal rights. The dissents provide a preview of the arguments that plaintiffs are likely to make in their certiorari petition.

The Fifth Circuit's decision presents several implications for potential Supreme Court review. The unusual posture and procedural issues presented in *Comer* may allow the Supreme Court to avoid the more difficult merits questions. Moreover, Supreme Court review of the district court's decision may be foreclosed if a sufficient number of Justices similarly recuse themselves (typically due to ownership of stock in one of the corporate parties to the action — and there are very many named as defendants in Comer). In any event, the district court's decision in *Comer* is inconsistent with the Second Circuit's decision in *Connecticut v. AEP*, 582 F.3d 309 (2d Cir. 2009), which found no standing or political question impediment to climate change nuisance claims. (Go to http://www.bdlaw.com/news-669.html for our more complete discussion of AEP.) A third major climate-nuisance decision, *Kivalina v. ExxonMobil Corporation*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), in which the district court dismissed plaintiffs' suit for climate change damages, is pending on appeal before the Ninth Circuit. (The appellants' opening brief was filed in March; the appellees' briefs have not been filed yet.)

The plaintiffs in *Comer* have 90 days from the date of the order to file a petition for certiorari with the Supreme Court.

Go to www.bdlaw.com/assets/attachments/Fifth%20Circuit%20Opinion%2005-28-10.pdf for a copy of the Fifth Circuit's May 28th opinion. For more information on the impact of this decision, please contact David Friedland (dfriedland@bdlaw.com, 202-789-6047), Dan Krainin (dkrainin@bdlaw.com, 212-702-5417), Nico van Aelstyn (nvanaelstyn@bdlaw.com, 415-262-4008), or James Auslander (jauslander@bdlaw.com, 202-789-6009).

Proposed TSCA Amendments Would Target Nanomaterials

Recent legislative proposals to overhaul the Toxic Substances Control Act ("TSCA") aim to greatly increase the level of regulatory scrutiny of nanomaterials. The legislation would authorize EPA to regard all nanomaterials as new chemicals or as having new uses, subject to requirements for notification and review by EPA in advance of manufacture or use. This change is targeted particularly at nanoscale versions of bulk materials already on the TSCA inventory, such as nanoscale titanium dioxide. Further, manufacturers and processors would have to report to EPA about the "special substance characteristics" of chemicals that may affect risk, another provision specifically targeting nanomaterials.

As discussed in a prior alert, the "Safe Chemicals Act of 2010" ("SCA") bill in the Senate, S. 3209, and the discussion draft for the "Toxic Chemicals Safety Act of 2010" ("TCSA") in the House of Representatives, both released on April 15, 2010, would make extensive changes to the industrial chemicals management framework in the United States. Part of the impetus for these proposals was the idea, presented at several earlier Congressional hearings, that

the current TSCA framework should be modified specifically to better address emerging technologies, particularly nanotechnology. The legislation therefore proposes to allow EPA to deem all nanomaterials to be new chemicals or as having new uses, requiring submission of information before manufacture, import, or processing. Ironically, EPA already plans to require similar information from manufacturers, importers, and processors of nanomaterials whose bulk counterparts are on the TSCA Inventory through a significant new use rule, scheduled to be proposed later in 2010.

This alert highlights and provides background on some of the changes these legislative and agency proposals would present for manufacturers and processors of nanomaterials.

To read the full article, go to http://www.bdlaw.com/news-891.html.

For more information, please contact Mark Duvall at mduvall@bdlaw.com or Alexandra Wyatt at awyatt@bdlaw.com.

Firm News & Events

Henry Diamond Featured in NYDEC's 40-Year Look Back

This year marks the 40th anniversary of the creation of the New York State Department of Environmental Conservation (DEC). The DEC was created on July 1, 1970, combining all resource management and antipollution programs into the nation's first environmental department. Henry Diamond became New York State's first Commissioner of Environmental Conservation in 1970, when the new agency was created. As the agency's first Commissioner, Mr. Diamond joined the state's land conservation, fishing and hunting programs together with programs to address solid waste, water and air pollution. The combination was the first of its kind in the nation, and proved to be a model for many other states.

Mr. Diamond was also instrumental in developing the Environmental Quality Bond Act of 1972 and securing its passage by the state legislature and approval by the voters. To promote passage of the Bond Act, he undertook a 533-mile bike ride across the state. The Act ultimately passed by a margin of 2 to 1 and provided needed funds for land acquisition, solid waste management aid, sewage treatment, air pollution control and resource recovery.

In celebration of its 40th year, DEC's publication, the Conservationist, is taking a look back at the achievements of the environmental movement over the past four decades. In the June 2010 issue, Henry Diamond is pictured on the cover of the publication, and inside are excerpts from a 1970 interview with then-Commissioner Diamond, when the Conservationist sat down with him to get his thoughts on the future of the department, and the environmental challenges ahead.

To read the interview (and to see pictures of a young Commissioner Diamond), please go to www.bdlaw.com/assets/attachments/Conservationist%20June%202010%20WEB.pdf. For more information about DEC, please visit their website at http://www.dec.ny.gov/.

Beveridge & Diamond Participates as Founding Member of Landmark Sustainable Ocean Summit

Beveridge & Diamond, a founding member of the World Ocean Council, participated this week in the Council's inaugural Sustainable Ocean Summit (SOS) in Belfast, Northern Ireland. The World Ocean Council is the international, cross-sectoral industry alliance for private sector leadership and collaboration in ocean stewardship.

With the theme of "Reducing Risk, Increasing Sustainability: Solutions through Collaboration", the SOS covered a range of ocean stewardship issues including marine spatial planning, the Arctic, biodiversity, marine debris, and sound in the marine environment.

Over 150 members of the ocean business community met in nearly 20 international marine

related business groups to consider areas of common concern. The SOS also included the first international industry seminar on marine spatial planning. Participants from around the world learned about the growing efforts to address multiple uses of the ocean through this approach, and encouraged the World Ocean Council to work with ocean industries to better understand and engage in marine spatial planning.

Karen Hansen, a B&D Principal, chaired a panel on managing risk and uncertainty in ocean environmental issues. “The Sustainable Ocean Summit represents an important catalyst for industry participation in the growing global commitment to ocean sustainability,” said Hansen. “The businesses involved in the event had an unprecedented opportunity to share ideas and aspirations on business involvement in the processes and decisions on balancing society’s interests and needs for use of ocean resources, globally and locally.”

For more information about the summit, visit http://go.madmimi.com/redirects/70c8d693893d3f971666cf8e5a30c716?pa=1314977086. For more information about B&D’s oceans and coastal law practice, please see http://www.bdlaw.com/practices-115.html, or contact Karen Hansen at khansen@bdlaw.com, (202) 789-6056 or Russ LaMotte at rlamotte@bdlaw.com, (202) 789-6080.

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