Texas Environmental Update

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Texas Developments

TCEQ Adopts Houston & Dallas Area SIP Revisions and Rule Changes

On March 10, 2010, the Texas Commission on Environmental Quality ("TCEQ") Commissioners adopted a number of state implementation plan ("SIP") revisions and associated rule changes for the Houston-Galveston-Brazoria ("HGB") and Dallas-Fort Worth ("DFW") nonattainment areas for the 1997 eight-hour ozone standard. The HGB-specific adoptions include attainment demonstration and reasonable further progress SIP revisions, and changes to the Highly Reactive Volatile Organic Compunds ("HRVOC") Emissions Cap and Trade ("HECT") Program and the Mass Emissions Cap and Trade ("MECT") Program rules. The HECT Program rule revision includes adoption of a new HRVOC allowance allocation methodology intended to address concerns that the prior allocation methodology did not result in an equitable HRVOC allowance distribution. TCEQ adopted the MECT Program rule revision to maintain the integrity of that program's nitrogen oxides ("NOx") cap by requiring an entity that submits a late Level of Activity Certification (ECT-3) form to obtain allowances from the market instead of receiving an allocation of allowances that would potentially increase the NOx cap.

The DFW-specific adoption includes a Reasonably Available Control Technology ("RACT") Update, 30 TAC Chapter 117 Rule Revision Noninterference Demonstration, and Modified Failure-to-Attain Contingency Plan SIP Revision. The adoption relating to the 30 TAC Chapter 115 volatile organic compounds ("VOC") control rules to address EPA's control technique guidelines ("CTG") for offset lithographic printing applies to the HGB and DFW nonattainment areas.

Information regarding each of these adoptions is available on TCEQ's website at http://www.tceq.state.tx.us/implementation/air/sip/Hottop.html.

RRC and TCEQ Propose Revised Memorandum of Understanding

The Railroad Commission of Texas ("RRC") and TCEQ have proposed a revision to the Memorandum of Understanding ("MOU") that specifies the division of jurisdiction between the two agencies. The revised MOU addresses several legislative enactments and administrative reorganizations since the last substantive update to the MOU in 1998. The revisions to the MOU provide further clarification for activities currently covered under the MOU, and also discuss activities not previously covered in the MOU.

The following are some of the proposed substantive revisions to the MOU:

- RRC wastes are considered "special wastes" when the wastes are processed, treated, or disposed of at a solid waste management facility authorized by the TCEQ.
- While water quality standards are established by the TCEQ, the RRC has the responsibility for enforcing any violation of such standards resulting from activities regulated by the RRC. Texas Water Code, Chapter 26, does not require that discharges regulated by the RRC comply with regulations of the TCEQ that are not water quality standards.

- The RRC has jurisdiction over spill response and remediation of releases from pipelines transporting crude oil, natural gas, and condensate that originate from exploration and production facilities to the refinery gate, as well as waste generated by construction and operation of such pipelines. The RRC also has jurisdiction over waste generated by construction and operation of pipelines transporting carbon dioxide.
- TCEQ has jurisdiction over wastes associated with the manufacturing of biofuels and biodiesel.
- The agencies shall coordinate in the review of the information relevant to determining jurisdiction for the regulation of geologic storage of carbon dioxide pursuant to SB 1387 (81st Legislature, Regular Session, 2009). The review and processing of permit applications shall include a review by TCEQ's Executive Director as specified under the new program.
- TCEQ has jurisdiction to regulate and license the disposal of radioactive substances, the processing and storage of low-level radioactive waste or naturally occurring radioactive material waste, except oil and gas naturally occuring radioactive Material ("NORM") waste. The RRC has jurisdiction over the disposal of NORM waste that constitutes, is contained in, or has contaminated oil and gas waste.
- The RRC has jurisdiction over mobile offshore drilling units ("MODUs") when they are being used for exploration, development or production. TCEQ has jurisdiction over discharges when the unit is being serviced at a maintenance facility.
- The agencies are directed (not encouraged, as under the current MOU) to provide information about potential violations relating to the other agency's jurisdiction. The RRC must submit a written notice to the TCEQ of any documented cases of groundwater contamination that may affect a drinking water well.

The revision to the MOU will be adopted as concurrent rulemakings by each agency. The RRC approved the Texas Register publication of the proposed amendment to its implementing rule, 16 TAC §3.30, on March 23, 2010. TCEQ approved the publication of amended 30 TAC §7.117 (incorporating by reference the amendments to 16 TAC §3.30) at its March 30, 2010 Commission Agenda. Those rulemakings propose an effective date of June 1, 2010 for the revised MOU. The RRC will hold a public hearing on the proposal on May 11, 2010 at is offices in Austin, Texas. The TCEQ will not hold a separate hearing.

TCEQ Proposes New Standard Permit and Permit by Rule for Oil and Gas Facilities

TCEQ has developed a new proposed standard permit and permit by rule ("PBR") for oil and gas facilities intended to impose more stringent requirements for oil and gas facilities seeking to qualify for these expedited air quality authorizations. For example, the draft revised PBR would include new notification and registration requirements, use of certain best management practices, minimum property-line and receptor distance limitations and provisions relating to planned maintenance, start-up and shutdown ("MSS") activities. The proposed revised standard permit would also tighten the requirements for facilities that qualify.

TCEQ will be conducting a stakeholder meeting to receive input on these proposed standard permit and PBR changes on April 8, 2010 in Austin, Texas. During the expedited initial comment period ending on April 16, 2010, TCEQ is requesting that interested persons limit their comments to those proposed provisions that would not be achievable. A subsequent formal comment period will follow. Additional information about the proposals and upcoming stakeholder meeting are available at TCEQ's website at http://www.tceq.state.tx.us/permitting/air/announcements/nsr_announce_3_25_10.html. Both proposals will have significant impact on oil and gas facilities in Texas and affected entities may wish to closely monitor their development.

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Texas NSR: Permit Application Analysis Process Changes & New Portable Facility Rules

TCEQ has implemented several changes to the air quality analysis ("AQA") process required for New Source Review ("NSR") permitting for the purpose of minimizing or preventing delay in conducting technical reviews and issuing permits. Additionally, portable facilities in Texas became subject to the first-ever TCEQ rules specific to such facilities on March 8, 2010. Specifically, TCEQ announced the following procedures: The agency requires that permit modeling meetings be held with the air dispersion modeling team, permit reviewer, and other agency staff, as applicable, to develop a modeling checklist or protocol. This meeting is required before modeling is submitted in support of any NSR permit application. For Prevention of Significant Deterioration ("PSD") Modeling Projects, applicants must submit an AQA protocol to TCEQ for approval, and a courtesy copy of the protocol to EPA Region 6. Applicants must conduct PSD ambient air monitoring or request a waiver that demonstrates the monitoring requirement is not applicable or can be met with available, representative monitoring data. Finally, although applicants do not need to conduct ambient air monitoring for minor NSR AQA projects, at the permit modeling meeting applicants should identify background air concentrations for minor NSR modeling projects that involve criteria pollutants.

Portable facilities in Texas became subject to first-ever TCEQ rules specific to such facilities on March 3, 2010. New 30 TAC §116.20(2) defines the term "portable facility," and 30 TAC §116.178 contains NSR permitting requirements applicable to relocations and changes of location of portable facilities. TCEQ adopted the new rules to ensure that its rules are consistent with existing guidance on portable facilities, and to clearly define the agency's public notice requirements for relocating a portable facility.

Information regarding both of these developments is available on TCEQ's website at http://www.tceq.state.tx.us/permitting/air/nav/nsr_news.html.

RRC and TCEQ Propose Carbon Dioxide Geologic Storage Rules

The RRC and TCEQ have proposed rules to implement Senate Bill ("SB") 1387 (81st Legislature, Regular Session, 2009), to provide for the implementation of projects involving the capture, injection, sequestration or geologic storage of carbon dioxide. SB 1387 delegates general jurisdiction over the development and implementation of the program to the RRC. The RRC rules are proposed as new Chapter 5 to its rules. The legislation requires coordination between the RRC and TCEQ in implementation of the program. Particularly, it requires that the applicant for a geologic storage permit obtain and submit to the RRC, as part of the application process, a letter from the TCEQ Executive Director certifying that underground fresh water supplies will not be injured by the permitted activity. The proposed TCEQ rules implementing that requirement are proposed as new Subchapter N to Chapter 331 of the TCEQ rules.

The new program applies to injection of anthropogenic carbon dioxide into productive formations and saline formations directly above and below the productive formations for the purpose of geologic storage. The proposed rules do not apply to injection for the primary purpose of enhanced recovery operations. However, under the rules the operator of an enhanced recovery project may propose simultaneously to permit the enhanced recovery project as a carbon dioxide geologic storage facility. Consistent with the legislation, the rules authorize the RRC to issue a carbon dioxide geologic storage facility permit if the RRC finds:

- injection and geologic storage of anthropogenic carbon dioxide will not endanger or injure any oil, gas, or other mineral formation;
- with proper safeguards, both ground and surface fresh water can be adequately protected from carbon dioxide migration or displaced formation fluids;
- the injection of carbon dioxide will not endanger or injure human health and safety;
- the reservoir into which the carbon dioxide is injected is suitable for or capable of being made suitable for protecting against the escape or migration of carbon dioxide

from the reservoir; and

- the permit applicant meets all of the other statutory and regulatory requirements for the issuance of the permit.

The proposed RRC rules address the permitting, operating, and post-operation requirements associated with the project, including: geologic site characterization; well construction; facility operation; testing and monitoring; plugging; post-injection site care and site closure. The rules provide for the collection and administration of fees and penalties to cover the cost of administering the program. SB 1387 establishes an Anthropogenic Carbon Dioxide Storage Trust Fund for those fees.

The proposed TCEQ rules implement the provisions of SB 1387 relating to the issuance of the letter from the TCEQ Executive Director stating that drilling and operating the injection well will not injure any freshwater strata in the area and that the formation or stratum to be used for the geologic storage facility is not freshwater sand. The rulemaking proposes six new definitions necessary to implement that provision.

The RRC and TCEQ rulemakings coincide with EPA's proposed requirements for underground injection of carbon dioxide for geologic storage, which EPA proposed on July 25, 2008. SB 1387 requires the RRC rules to be consistent with EPA's regulations, and requires the RRC to seek enforcement primacy from the EPA for the program. EPA is expected to finalize its rules in September 2010.

Upcoming TCEQ and RRC Meetings and Events

- The TCEQ ***Drinking Water Advisory Work Group*** will hold a meeting in Austin on April 20, 2010. Additional information is available at http://www.tceq.state.tx.us/permitting/water_supply/ud/awgroup.html.
- The TCEQ ***Water Quality Advisory Work Group*** will hold a meeting in Austin on April 20, 2010. Additional information is available at http://www.tceq.state.tx.us/permitting/water_quality/stakeholders/WQ_advisory_group.html.
- TCEQ will host ***Petroleum Storage Tank Compliance Workshops*** on April 21, April 22 and April 23, 2010 in the Corpus Christi, Laredo and San Antonio areas. These free workshops are hosted by TCEQ's Small Business and Local Government Assistance Section. Online registration is required. Additional information is available at http://www.tceq.state.tx.us/assistance/sblga/pst_wkshp.html.
- TCEQ will host its annual ***Environmental Trade Fair & Conference*** on May 4-5, 2010 at the Austin Convention Center. A banquet will be held on the evening of May 5th during which the 2009 Texas Excellence Awards will be given. Additional information is available at http://www.tceq.state.tx.us/assistance/events/etfc/etf.html.
- The Texas Gas Association ("TGA") will be hosting the ***US Department of Transportation Pipeline and Hazardous Materials Safety ("PHMSA")/Railroad Commission Pipeline Safety Seminar for Texas*** in Corpus Christi on June 16-18, 2010 at the Omni Hotel Bayfront. Natural Gas will be covered on June 16-17, 2010 and Hazardous Liquids will be covered June 17-18, 2010. For more information, please contact Carrie Smith at carrie.smith@rrc.state.tx.us.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in March can be found on the TCEQ website at http://www.tceq.state.tx.us/comm_exec/communication/media/031010CommissionAgenda.

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.

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National Developments

EPA Announces Study on Environmental Impacts of Hydraulic Fracturing

On March 18, 2010, the U.S. Environmental Protection Agency (EPA) announced it will study the potential impact of hydraulic fracturing on water quality and human health (see http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/ba591ee790c58d30852576ea004ee3ad!OpenDocument). The study responds to a Congressional request that EPA follow up on the Agency's recent analysis of hydraulic fracturing.[1]

Hydraulic fracturing refers to the practice that injects a mixture of chemicals, water, and sand into the ground at high pressure to crack rock and release oil and natural gas from coal seams, shale formations, and other geologic formations. The practice, which has been used for decades, has vastly enlarged domestic oil and gas reserves available for exploitation by energy companies. As potentially significant natural gas reserves are discovered in shale deposits in the vicinity of more densely populated areas, certain interest groups have raised concerns over ground and surface water contamination and impacts on public health.

EPA's Office of Research and Development drafted a study approach that will include "(1) defining research questions and identifying data gaps; (2) conducting a robust process for stakeholder input and research prioritization; (3) with this input, developing a detailed study design that will undergo external peer-review, leading to (4) implementing the planned research studies."[2] EPA has allocated $2 million for the study this year; it will seek additional funds for 2011.

EPA has sought review of the proposed study by the Science Advisory Board (SAB), a federal advisory committee that provides independent scientific and technical advice to EPA. According to EPA, both SAB advice and "extensive stakeholder input" will guide the Agency as it finalizes the study design.[3] SAB will hold a public meeting on April 7-8 to evaluate and provide comment on the proposed study (see http://www.gpo.gov/fdsys/pkg/FR-2010-03-18/pdf/2010-5956.pdf). Scoping materials (see http://yosemite.epa.gov/sab/sabproduct.nsf/0/3B745430D624ED3B852576D400514B76/$File/Hydraulic+Frac+Scoping+Doc+for+SAB-3-22-10+Final.pdf) for the study and other information related to the public meeting are available at the SAB website (see http://yosemite.epa.gov/sab/sabproduct.nsf/0/3B745430D624ED3B852576D400514B76?OpenDocument).

The recently announced study follows a 2004 study on hydraulic fracturing in which EPA concluded that the practice posed no threat to drinking water (see http://www.epa.gov/ogwdw000/uic/wells_coalbedmethanestudy.html). Based in part on this 2004 study, Congress included a provision in the 2005 Energy Policy Act that exempts hydraulic fracturing from regulation under the Safe Drinking Water Act (SDWA).[4] Legislation proposed in 2009 (H.R. 2766, available at http://www.govtrack.us/congress/bill.xpd?bill=h111-2766 and S. 1215, available at http://www.govtrack.us/congress/billtext.xpd?bill=s111-1215) would eliminate the SDWA exemption, authorize EPA to regulate hydraulic fracturing under that law, and require disclosure of the chemicals utilized in the fracturing process.

Beveridge & Diamond is monitoring the rapid developments in this area, from proposed legislation, to EPA's renewed study, to possible lawsuits in state and federal courts. For more information on current actions impacting the use of hydraulic fracturing, please contact Fred Wagner at (202) 789-6041, fwagner@bdlaw.com, Mark Duvall at (202) 789-6090, mduvall@bdlaw.com, or Peter Gregg at (512) 391-8030, pgregg@bdlaw.com.

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[1] The request was contained in the House of Representatives' Fiscal Year 2010 Appropriation Conference Committee report, H.R. Rep. No. 111-316 (2009) at 109, and in the House Appropriations Committee report on the same legislation, H.R. Rep. No. 111-180 (2009) at 99-100.

[2] EPA Press Release, EPA Initiates Hydraulic Fracturing Study: Agency seeks input from Science Advisory Board (Mar. 18, 2010).

[3] EPA Press Release.

[4] The Energy Policy Act of 2005, section 322, amended the definition of "underground injection" in section 1421(d) of the SDWA to exclude "the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities."

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United States v. Apex Oil Company: Bankruptcy Does Not Discharge RCRA Injunctive Claims

On August 25, 2009, the United States Court of Appeals for the Seventh Circuit issued a decision that may affect companies facing environmental clean-up responsibilities who file for bankruptcy protection. *United States v. Apex Oil*, 579 F.3d 734 (7th Cir. 2009). In *Apex Oil*, the United States brought a claim under section 7003 of the Resource Conservation and Recovery Act ("RCRA") seeking injunctive relief that would require Apex Oil to, among other things, abate a petroleum plume at an oil refinery formerly owned by Apex's predecessor. *See* 42 U.S.C. § 6973. The question brought before the Seventh Circuit was whether the government's claim had been discharged in bankruptcy and therefore could not serve as the basis of a lawsuit. The Seventh Circuit held that the government's claim to injunctive relief under RCRA section 7003 was not discharged by bankruptcy.

Environmental and bankruptcy law often have competing objectives. The Bankruptcy Code allows liability to be narrowed by enabling the discharge of debtors from liability for "pre-petition" claims that arise before the confirmation of the bankruptcy filing. In contrast, environmental laws tend to disfavor any narrowing of liability, especially those laws that make responsible parties liable for cleaning up contamination. As the *Apex Oil* court observed, courts have reconciled this conflict by allowing monetary claims and equitable claims that can be converted to money damages to be discharged in bankruptcy. The Seventh Circuit shifted the balance in favor of maintaining broad liability by construing RCRA section 7003 injunctive claims as surviving bankruptcy. It determined that RCRA section 7003 claims are unique because they do not authorize any form of monetary relief and are purely injunctive. The Seventh Circuit then concluded that a claim under RCRA section 7003 for injunctive relief is not dischargeable in bankruptcy.

The Seventh Circuit's decision in *Apex Oil* adds to the uncertainty of the level of protection provided by a bankruptcy discharge. In the Seventh Circuit, a debtor may remain liable under RCRA for remediating pre-petition environmental contamination even when the debtor no longer owns or operates the contaminated property. Though the *Apex Oil* decision has not yet been relied upon in another reported environmental case, this decision could encourage the government to structure its causes of action as RCRA injunctive suits when seeking environmental clean-up from bankrupt or formerly bankrupt companies.

For more information about the impact of this decision, please contact Pam Marks (pmarks@bdlaw.com, 410-230-1315) or Sarah Albert (salbert@bdlaw.com, 410-230-1375).

U.S. Fish and Wildlife Service Finds That Protection Is Warranted But Declines to Add Greater Sage-Grouse to ESA List

On March 5, 2010, the United States Fish and Wildlife Service ("Service") determined that the greater sage-grouse, a ground dwelling bird found throughout much of the West, warrants protection under the Endangered Species Act ("ESA"). The Service, however, declined to list the greater sage-grouse under the ESA because it determined that listing is precluded by the need to address higher priority species first. As a result of this decision, the greater sage-grouse will join more than 200 species on a candidate list for future action, and states will remain responsible for managing the bird. Citing uncertainty regarding Congressional appropriations and the complexity of listing decisions regarding candidate species with higher priority than the greater sage-grouse, the Service declined to estimate how long it might be before the Service prepares a final rule protecting the greater sage-grouse under the ESA.

Because of the broad range of the greater sage-grouse's habitat, a decision to list the greater sage-grouse under the ESA could have had significant impacts to resource exploration and development in the West. The Service characterizes the greater sage-grouse as a "landscape scale species, requiring large expanses of sagebrush to meet all seasonal habitat requirements." Consequently, decreasing fragmentation of greater sage-grouse habitat would likely be a primary focus of any regulatory efforts to protect the greater sage-grouse under the ESA. With the Service's decision not to list the greater sage-grouse,

the full extent of a listing's potential impacts to resource exploration and development will remain uncertain for the immediate future. In a move that, if successful, would bring consideration of these impacts to the fore sooner rather than later, on March 8 the Western Watersheds Project filed suit challenging the Service's decision in United States District Court in Boise, Idaho.

For additional information about this regulatory action or other matters involving the Endangered Species Act, please contact Fred Wagner (fwagner@bdlaw.com), Tim Sullivan (tsullivan@bdlaw.com) or Gary Smith (gsmith@bdlaw.com).

Fifth Circuit to Rehear En Banc Comer v. Murphy Oil Climate Change Nuisance Case

The U.S. Court of Appeals for the Fifth Circuit has granted defendant energy companies' petitions for rehearing *en banc* (see http://www.bdlaw.com/assets/attachments/Comer_v_Murphy_Oil_Order_For_Reh_g_En_Banc.pdf) of the landmark panel decision issued last fall in the climate nuisance case *Comer v. Murphy Oil Co.*, 585 F.3d 855 (5th Cir. 2009) (see http://www.ca5.uscourts.gov/opinions/pub/07/07-60756-CV0.wpd.pdf). The Comer panel held that individual property owners on the Gulf Coast had standing and stated a cause of action for state common law nuisance to seek damages against the defendant energy companies for allegedly contributing to climate change that increased the intensity of Hurricane Katrina. We reviewed the sweeping and controversial implications of that decision in an earlier client alert, available at http://www.bdlaw.com/news-711.html. *Comer v. Murphy Oil* followed and expanded on the reasoning of a Second Circuit panel in *Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009) (see http://www.ca2.uscourts.gov/decisions/isysquery/caf8dad7-9c11-4aab-aab9-2997cb501981/2/doc/05-5104-cv_opn.pdf), which held that state governments and advocacy groups could seek injunctive relief against greenhouse gas emitters based on climate change tort theories. Petitions for rehearing en banc are pending in the AEP case.

The *en banc* hearing in *Cormer v. Murphy Oil* will occur the week of May 24, 2010. The briefs of defendants/appellants challenging the panel decision are due March 31, 2010, and briefs of amici curiae supporting the defendants are due April 7, 2010.

For more information, please contact John Hanson at jhanson@bdlaw.com, Jimmy Slaughter at jslaughter@bdlaw.com, or Nicholas Van Aelstyn at nvanaelstyn@bdlaw.com. This alert was prepared with the assistance of Alexandra M. Wyatt.

Firm News & Events

Benjamin F. Wilson Named Outside Counsel of the Year

Late last month at the National Bar Association Corporate Law Section's Annual Conference in San Diego, Benjamin F. Wilson, Managing Principal of Beveridge & Diamond, P.C. received the coveted Outstanding Outside Counsel Award for his excellent work on behalf of his clients, and his work promoting diversity in the profession.

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