Texas Environmental Update

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Texas Developments

EPA Issues Letter to TCEQ Outlining Resolutions to Title V Permit Objections

In an effort to begin moving towards resolution of its stock objections to scores of Texas Title V permits, by letter to TCEQ on March 18, 2011, EPA outlined some of the methods it views as possible resolutions. A longstanding criticism by industry and TCEQ during the two-year Title V standoff has been that EPA has failed to identify concrete resolutions to its objections -- even the most straightforward among them. In the letter, EPA points to specific permit language the Agency has developed to address its objections. While the letter acknowledges that there may be other ways to address the objections, it is unclear to what extent EPA will accept them. The letter is available at www.bdlaw.com/assets/attachments/3-18-11%20EPA%20Ltr%20to%20TCEQ%20re%20Addressing%20Title%20V%20Objections.pdf.

TCEQ Sunset Bill Filed

The long-awaited TCEQ Sunset Bill was filed earlier this month. In the Senate, Senator Joan Huffman co-filed the bill (Senate Bill 657) with Senator Glenn Hegar. Representative Wayne Smith filed the companion bill (House Bill 2694) in the House of Representatives.

Among other things, the Sunset Bill would require TCEQ to adopt rules establishing: (i) a general enforcement policy that describes the agency's approach to enforcement and (ii) a method for evaluating compliance history that ensures consistency in evaluation but that accounts for differences among regulated entities. The Sunset Bill would also expressly provide that the primary duty of the Office of Public Interest Counsel (OPIC) would be to represent the public interest as a party to matters before the commission. Rulemaking to establish the factors that OPIC would need to consider before deciding to participate as a party to a commission proceeding would be required.

As currently drafted, the Sunset Bill also addresses a number of other issues including negotiated rulemaking, alternative dispute resolution, supplemental environmental projects, the petroleum storage tank remediation fund, water rights emergency orders and low-level radioactive waste compact waste disposal fees. Additional information about the Sunset Bill is available at http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=SB657 and http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB2694.

TCEQ Re-issuance of TPDES Multi-Sector General Permit Underway

TCEQ's renewal process for the Texas Pollutant Discharge Elimination System (TPDES) Multi-Sector General Permit (MSGP) for the discharge of storm water from industrial activity, issued on August 14, 2006 and which will expire on August 14, 2011, is underway. TCEQ is proposing to re-issue the new general permit in July with an effective date of August 14, 2011. The draft permit and fact sheet are available for public comment until April 12, 2011. TCEQ will hold a public meeting to consider comments on the MSGP on April 12, 2011 at its headquarter offices in Austin. Additional information about the MSGP, the renewal

process and opportunities for public involvement is available at http://www.tceq.texas.gov/permitting/water_quality/stormwater/TXR15whattodo.html.

Texas Appeals Court Finds Insurer Must Defend Petrochemical Company in MTBE Lawsuits

On March 10, 2011, the Court of Appeals for the First District of Texas held that an insurer must defend a petrochemical company regarding underlying litigation over water contamination from the gasoline additive methyl tertiary butyl ether ("MTBE") because the plaintiffs alleged negligent as well as intentional acts. (*Dallas National Insurance Co. v. Sabic Americas Inc.*, Tex. Ct. App., 1st Dist., No. 01-08-00758, 3/10/11). Allegations of intentional conduct (not covered by the insurance policy) were not sufficient to preclude a duty to defend when coupled with allegations of negligence (which may be covered), because an insurer must defend the entire suit if coverage exists for any portion of the case. According to the court, all doubts regarding the duty to defend will be resolved in favor of the duty, and pleadings are construed "liberally." To that end, the opinion states that "[w]hen an alleged contract ambiguity involves an exclusionary provision of an insurance policy, then we must adopt the construction urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent."

In the context of complex consolidated/multidistrict environmental litigation, this ruling confirms the importance and breadth of an insurer's duty to defend, and underscores its value as "litigation insurance" under general liability policies. The opinion is available on the court's website at http://www.1stcoa.courts.state.tx.us/opinions/PDFOpinion.asp?OpinionId=88856.

Texas Supreme Court Affirms Railroad Commission Interpretation of "Public Interest" In Injection Well Permitting

On March 11, 2011, the Texas Supreme Court reversed the Court of Appeals for the Third District of Texas and affirmed the Texas Railroad Commission's interpretation of "public interest" in the context of injection well permitting. *See Railroad Comm'n of Texas and Pioneer Exploration, Ltd v. Texas Citizens for a Safe Future and Clean Water et. al* (No. 08-0497). At issue was the statutory meaning of the term "public interest," a finding that must be made for issuing injection well permits. The Commission took a narrow view of the term, arguing that its jurisdiction and purpose is to conserve oil and gas resources in Texas, and therefore, any public interest finding must be tailored to those objectives. Citizens groups objecting to the wells argued that "public interest" should be broadly construed to include other issues, such as traffic safety. In reversing the Court of Appeals, the Supreme Court noted that deference should be given to the longstanding and reasonable agency interpretation of an ambiguous term in a statute, even if such interpretation is not the only reasonable one. The case is available at http://www.supreme.courts.state.tx.us/historical/031111.asp.

Texas Railroad Commission Adopts New Pipeline Safety Rule

The Texas Railroad Commission (Commission) has adopted a new pipeline safety rule requiring operators of natural gas distribution systems to develop and implement a risk-based program for the removal or replacement of distribution facilities, including steel service lines. The new rule provides that in developing risk rankings for pipeline segments or facilities operators should consider: (i) pipe location; (ii) composition and nature of the piping system; (iii) corrosion history of the pipeline; (iv) environmental factors that affect gas migration; and (v) any other condition known to the operator that has significant potential to initiate a leak or to permit leaking gas to migrate to an area where it could result in a hazard. Operators are required to establish and submit to the Pipeline Safety Division of the Commission written procedures for implementing the requirements of the rule no later than August 1, 2011. The rule, which became effective on March 14, 2011, is

available at http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=16&pt=1&ch=8&rl=209.

Upcoming TCEQ Meetings and Events

- TCEQ will host a ***Drinking Water Advisory Work Group Meeting*** in Austin on April 26, 2011. The meeting will be available by webcast at http://www.texasadmin.com/cgi-bin/tnrcc.cgi. Information about the meeting is available at http://www.tceq.state.tx.us/permitting/water_supply/ud/awgroup.html.
- TCEQ will host its annual ***Environmental Trade Fair and Conference*** on May 3-4, 2011 in Austin, Texas at the Austin Convention Center. The Trade Fair is often dubbed Texas' premier environmental educational forum and considered by many to be one of the best in the country. The Fair and Conference features eleven concurrent tracks with 100 educational sessions and 400 exhibitors. For additional information, see http://www.tceq.texas.gov/p2/events/etfc/etf.html.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in March can be found on the TCEQ website at http://www.tceq.texas.gov/news/releases/030911commissionersagenda.

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

EPA Issues Rule to Extend Reporting Deadline for 2010 Greenhouse Gas Emissions

The Environmental Protection Agency ("EPA") has issued a final rule, effective March 18, 2011, that extends the deadline for submitting the first annual greenhouse gas ("GHG") emissions reports due under the Greenhouse Gas Reporting Program, 40 CFR Part 98. The new deadline for reporting 2010 GHG emissions data to EPA is September 30, 2011.

EPA anticipates that this additional time will provide an opportunity for the agency to fully roll out an electronic reporting system, test the system, and obtain industry feedback and for industry to become familiar with the new system prior to the first reporting deadline.

This delay follows a last minute scramble by regulated entities to register for reporting by a mandatory January 30th deadline. This rush to register was caused by the failure of EPA to timely bring on-line the registration elements of the electronic reporting system that it had spent months designing for use by the thousands of entities that will need to report GHG emissions. The scramble to register was particularly difficult for those who import or export, as EPA somewhat inexplicably decided that those entities must use an entirely different electronic reporting system, and then posted no information to guide reporters on the registration process until one week prior to the registration deadline. Consequently, EPA's decision to delay all GHG inventory reporting until the regulated community has an opportunity to test and comment on the reporting system is likely a recognition that the initial steps to roll out the reporting system have been rocky, and that more thought and dialogue is necessary to ensure the system will, in fact, work.

The extension does not affect ongoing GHG emissions monitoring requirements for facilities subject to the Greenhouse Gas Reporting Program; these requirements remain

in full force. Nor does the final rule extend the reporting deadline for future years. GHG emissions for calendar year 2011 must still be reported by March 2012. The extension does effectively extend the deadline for reporters to register with EPA's online reporting system until August 1, 2011. Reporters will need to report any changes in their existing designated representatives, those individuals responsible for certifying, signing and submitting the annual GHG reports, by August 1, 2011. The final rule is available at http://edocket.access.gpo.gov/2011/pdf/2011-6417.pdf.

For further information on the GHG reporting rule or on this recent agency action, please contact Stephen Richmond at srichmond@bdlaw.com, Amy Lincoln at alincoln@bdlaw.com, or Aladdine Joroff at ajoroff@bdlaw.com.

EPA Promulgates New Air Toxics Rules For Boilers, And Waste And Sewage Sludge Incinerators

On February 21, 2011, the U.S. Environmental Protection Agency released several new rules related to emissions of toxic air pollutants that will affect thousands of industrial facilities across the nation. Among those rules are the Final Air Toxics Standards for Industrial, Commercial, and Institutional Boilers and Process Heaters at area and major sources, also known as the "Boiler MACT" rules. EPA estimates there are 200,840 existing boilers and process heaters, with another 2,400 coming on line in the next three years, that will have to comply with the new Boiler MACT requirements. The Boiler MACT targets emissions of mercury, dioxin, particulate matter, hydrogen chloride, and carbon monoxide with a combination of new numerical emissions limits and new work practice standards, i.e. a biennial "tune-up," for certain boilers.

EPA also promulgated final rules to limit toxic air emissions from Commercial and Industrial Solid Waste Incinerators ("CISWI rule"), Sewage Sludge Incinerators ("SSI rule"), and a final rule for Identification of Non-Hazardous Secondary Materials That Are Solid Wastes ("Solid Waste rule").

While these rules are final, EPA is voluntarily reconsidering portions of the Boiler MACT rules and the CISWI rule. EPA is in the process of developing a proposed reconsideration notice that will identify the specific elements of the rules EPA will reconsider.

For further information, please contact David Friedland (dfriedland@bdlaw.com), Laura LaValle (llavalle@bdlaw.com), or Graham Zorn (gzorn@bdlaw.com).

BLM Announces Extension of Public Comment Period for Draft Solar Programmatic EIS

In furtherance of efforts to promote solar development on nearly 700,000 acres of government land, on March 7, 2011, the U.S. Department of the Interior, Bureau of Land Management (BLM), announced a 30-day extension of the public comment period for the Draft Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States (Draft Solar Programmatic EIS).

BLM and the U.S. Department of Energy (DOE) are each considering taking actions to facilitate solar energy development. BLM has proposed the establishment of a Solar Energy Program applicable to utility-scale solar energy development on BLM-administered lands in Arizona, California, Colorado, Nevada, New Mexico, and Utah. DOE has proposed the development of programmatic guidance to further integrate environmental considerations into its analysis and selection of DOE-supported solar projects. Pursuant to the National Environmental Policy Act and other applicable authorities, the two agencies have jointly prepared the Draft Solar Programmatic EIS to evaluate the environmental, social, and economic effects of the agencies' proposed actions and alternatives.

In recent years, BLM has begun to receive a substantial number of applications for right-of-way authorizations for solar facilities proposed to be located on BLM-administered lands. In pursuing the Draft Programmatic EIS, BLM seeks - among other things - to standardize and streamline the authorization process. In connection with that effort, the program would

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identify locations best suited for utility-scale production of solar energy, called "solar energy zones" (SEZs), in which development would be prioritized. The Draft Solar Programmatic EIS identifies approximately 677,400 acres of proposed SEZs, out of a total of 22 million acres of public lands, that would be available for potential development under the program.

Other elements of the Solar Energy Program would include: (1) identification of lands excluded from utility-scale solar energy development in the six states covered by the program; (2) establishment of mitigation requirements for solar energy development on public lands (including SEZ-specific requirements); and (3) amendment of BLM land use plans in the six-state area to adopt those elements of the program that pertain to planning.

As a result of the extension, interested parties may now submit comments on the Draft Solar Programmatic EIS until April 16, 2011.

For further information, please contact Stephen Richmond at srichmond@bdlaw.com or Edward Grauman at egrauman@bdlaw.com.

APHIS Accepting Comments on U.S. Lacey Act Import Declaration Requirements

On Monday, February 28, 2011, the U.S. Department of Agriculture's Animal and Plant Health Inspection Service ("APHIS") announced that it will accept public comments on implementation of the Lacey Act's import declaration requirements.[1] The Lacey Act, as amended in 2008, prohibits commerce in illegally sourced timber and wild plant materials and products thereof. The amended Lacey Act also requires that importers submit a declaration at the time of importation for certain timber and wild plant derived products identified by APHIS.[2]

The current Lacey Act import declaration requirements mandate disclosure of: (1) the scientific names of all tree and wild plant species contained in listed products; (2) the country of harvest; (3) the quantity; (4) the value of imported timber/plant materials or products; and [if the product is paper or paperboard] (5) the percent composed of recycled material. As part of its review and report to Congress, APHIS is required to evaluate the effectiveness of each category of required declaration information in enforcement of the Lacey Act's illegal logging provisions, the potential to harmonize the declaration requirements with other applicable import requirements, and the effect of the import declaration requirements on the cost of legal timber/plant product imports as well as the effect of these requirements on illegal logging and trafficking.

The comment period on the import declaration requirements will remain open until April 14, 2011.

If you have questions regarding the Lacey Act amendments or how its requirements apply to your business, please contact Laura Duncan at (415) 262-4003, lduncan@bdlaw.com or Paul Hagen at (202) 789-6022, phagen@bdlaw.com.

This Client Alert was prepared with the assistance of Zachary Norris.

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[1] To view a copy of the February 28, 2011 Federal Register notice, see http://www.gpo.gov/fdsys/pkg/FR-2011-02-28/pdf/2011-4357.pdf

[2] For a current list of products that require an import declaration (listed by Harmonized Tariff Schedule code), see http://www.aphis.usda.gov/plant_health/lacey_act/downloads/2009-09ImplementationScheduleLaceyAct.pdf

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FIRM NEWS & EVENTS

Lily Chinn Named a “Rising Star” by Law360

Beveridge & Diamond, P.C. is pleased to announce that Lily N. Chinn, a Principal in the Firm’s San Francisco office has been named a “Rising Star” in environmental law by Law360. Ms. Chinn is one of five environmental lawyers under 40 named to Law360’s 2011 Rising Stars series. More than 600 submissions were reviewed for the series, with five nominees selected for each of 14 practice areas.

To read Ms. Chinn’s profile on Environmental Law360, please go to: http://www.law360.com/environmental/articles/233559/rising-star-beveridge-diamond-s-lily-chinn.

For more information, please contact Ms. Chinn at lchinn@bdlaw.com.

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