Texas Environmental Update

BEVERIDGE & DIAMOND PC

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Texas Developments

Texas Legislature Adopts TCEQ Sunset Bill

The Texas Legislature has adopted the TCEQ Sunset Bill (HB 2694 or "Bill") reauthorizing the agency until September 1, 2023 and abolishing the On-site Wastewater Treatment Council. Differences between the House and Senate versions of the Bill had led to the appointment of a Conference Committee to resolve outstanding issues that largely focused on compliance history and enforcement provisions and changes to the contested case hearing process. Generally, the enrolled Bill addresses these policy issues as follows:

- Compliance History. Notices of violation shall be included as a component of compliance history, but for a period not to exceed one year from the date of issuance. Any notices of violation administratively determined to be without merit may not be included in compliance history. The agency's set of standards for compliance history classification must take into account both positive and negative factors related to the operation, size and complexity of the site, including whether the site is subject to Title V of the federal Clean Air Act. In classifying a repeat violator, the agency shall give consideration to the size and complexity of the site at which the violations occurred and limit consideration to violations of the same nature and environmental media. Before posting compliance history information about a site on the Internet, the agency must provide an owner or operator an opportunity to review the information. (Bill, Art. 4)

- Penalties. The Bill provides that penalty enhancements attributed to compliance history may no longer exceed 100 percent of the base penalty for an individual violation. TCEQ's administrative penalty caps are also increased to match civil penalty amounts. The agency is also directed to adopt a general enforcement policy by rule and to regularly assess, update and publicly adopt specific enforcement policies, including those regarding the calculation of penalties and deterrence to prevent the economic benefit of noncompliance. (Bill, Art. 4)

- Contested Case Hearings. Provisions that would have shifted the burden of proof to protestants in contested case hearings on permit applications were removed. However, under the Bill, the Executive Director's participation in permit hearings is now mandatory and state agencies, not including river authorities, may not contest the issuance of a TCEQ permit. (Bill, Art. 10)

The Bill was reported enrolled just before midnight on May 29, 2011, signed in the House and Senate the following day and will now be sent to the Governor for action. A copy of the enrolled bill is available at http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=82R&Bill=HB2694.

Draft TCEQ Flare Study Report Posted for Comment

TCEQ is seeking comments on the draft "2010 TCEQ Flare Study Project Final Report" dated May 23, 2011 prepared by the University of Texas Center for Energy and Environmental Resources. The draft report describes the results of the flare research study conducted at the Zink flare test facility in Tulsa, Oklahoma during September 2010 as

anticipated in the Flare Task Force Draft Report that TCEQ issued on September 3, 2009. The project involved field tests conducted to measure flare emissions and collect process and operational data in a semi-controlled environment to determine the relationship between flare design, operation, vent gas lower heating value and flow rate, destruction and removal efficiency ("DRE"), and combustion efficiency ("CE").

Three key objectives of the field tests were to: (1) assess the impact of high turndown (low flow) rate of vent gas on flare DRE and CE; (2) assess if flares operating within 40 CFR §60.18 parameters achieve the assumed hydrocarbon DRE of at least 98% at high turndown, varying assist ratios, and vent gas heat content; and (3) identify and quantify the hydrocarbon species in flare plumes. Along with other preliminary findings, the flare research study determined that existing assumed flare efficiency standards overestimate emissions reductions; including that a flare can be operated pursuant to 40 CFR §60.18 and not achieve 98% DRE. This and other findings could trigger proposed changes to programmatic and permitting requirements for flares.

TCEQ will accept informal written comments on the 126-page draft report until June 20, 2011. The draft report will be discussed at the Flare Task Force Stakeholder Group meeting that TCEQ will host in Houston on June 1, 2011. TCEQ will accept informal written comment on the information discussed at that stakeholder meeting until June 6, 2011.

The draft report, a summary of the flare research study's preliminary findings, and additional information regarding the activities of TCEQ's Flare Task Force are available on TCEQ's website at http://www.tceq.texas.gov/airquality/point-source/stationary-rules/flare_stakeholder.html.

Texas Hydraulic Fracturing Disclosure Bill Awaits Governor's Signature

If Texas Governor Rick Perry signs House Bill ("HB") 3328 into law, Texas will join a growing number of states that have in the past several years imposed requirements relating to the oil and gas well stimulation process known as hydraulic fracturing. HB 3328 would require that the Texas Railroad Commission ("the Commission") by July 1, 2012 adopt rules requiring that the owner or operator of a well on which hydraulic fracturing is performed post on a form on a specified publicly accessible Internet website the total volume of water used and certain chemical ingredients used in the hydraulic fracturing process. The bill also provides that by July 1, 2013 the Commission must adopt rules requiring that well owners and operators provide to the Commission a list, to be made available on a publicly accessible website, of all other chemical ingredients not listed in the above-referenced form that were intentionally used in the hydraulic fracturing process. The rules must include provisions for claiming and challenging trade secret protection for information subject to disclosure.

The text of HB 3328 and other information regarding the bill are available on the Texas Legislature Online website at http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB3328.

TCEQ Restricts Junior Water Rights in Brazos River Basin

In response to widespread drought conditions in the state, TCEQ previously informed water rights holders that there might be a need to administer water rights on a priority basis. Now, TCEQ has notified certain Brazos River Basin junior water right holders that their right to divert water has been suspended. Water rights with municipal uses or for power generation were not suspended. Landowners adjacent to the Brazos River may also continue to divert water for domestic or livestock use. Additional drought information is available at http://www.tceq.texas.gov/response/drought.

Texas Sues EPA Upon Publication of Final Rule Extending EPA Greenhouse Gas Permitting Authority

The State of Texas filed a Petition for Review (available at http://www.bdlaw.com/assets/attachments/2011-05-30%20Texas%20Lawsuit.pdf) in the U.S. Court of Appeals for the District of Columbia Circuit on May 4, 2011, the day after the U.S. Environmental Protection Agency ("EPA") published a final rule extending that agency's takeover of greenhouse gas ("GHG") permitting authority in Texas. 76 Fed. Reg. 25,178 (May 3, 2011). Texas' lawsuit calls the subject Final Rule "arbitrary and capricious, an abuse of discretion, and contrary to the Clean Air Act."

The final rule at issue replaced the December 2010 interim final rule pursuant to which EPA commenced promulgation of a federal implementation plan ("FIP") to issue prevention of significant deterioration ("PSD") new source review permits in Texas for GHG emissions. Per the interim final FIP, EPA acted as permitting authority for GHG-emitting sources in Texas in the absence of an EPA-approved Texas SIP that includes provisions to regulate GHG. EPA indicates that the "rulemaking is intended to assure that large GHG-emitting sources in Texas, which became subject to PSD on January 2, 2011, will continue to be able to obtain preconstruction permits under the CAA New Source Review (NSR) PSD program beyond the April 30, 2011, expiration date of the FIP that EPA put in place for this purpose via an Interim Final Rule." EPA had said that Texas' refusal to issue PSD permits for GHG emissions left the agency "no choice but to resume its role as the permitting authority."

EPA notes that the final rule also corrects its previous full approval of Texas' PSD program into a partial approval and partial disapproval. The correction is based upon EPA's determination that Texas' PSD program was flawed because the state did not address how the program would apply to pollutants that become newly subject to Clean Air Act regulation, including non-National Ambient Air Quality Standard pollutants such as GHGs.

TCEQ Objects to EPA Proposed Disapproval of Texas SIP Addressing $PM_{2.5}$ NAAQS

On May 13, 2011, TCEQ submitted comments objecting to the U.S. EPA proposed rule to disapprove Texas' infrastructure state implementation plan ("SIP") submission addressing the Federal Clean Air Act §110(a)(2)(D)(i)(I) transport requirements for the 2006 fine particulate matter (PM2.5) National Ambient Air Quality Standard. 76 Fed. Reg. 20,602 (April 13, 2011). In brief comments, TCEQ made the following three points:

- The September 25, 2009, EPA "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS)" was published four days after the FCAA-required deadline for submittal of such SIPs and did not adequately describe how to complete the required technical analysis.

- EPA failed to provide adequate notice and information necessary for meaningful comment in the Transport Rule proposal if the finalized Transport Rule serves as the Federal Implementation Plan ("FIP") that the EPA intends to implement for Texas.

- Because the Transport Rule is EPA's intended remedy for certain SIP deficiencies, EPA should provide guidance for states whose participation in the Transport Rule program is fundamentally different from their participation in the CAIR program.

The comments are available at http://www.bdlaw.com/assets/attachments/PM2.5_Transport_Cmts1.pdf

Upcoming TCEQ Meetings and Events

- TCEQ will host a ***Flare Task Force Stakeholder Group Meeting*** in Houston on June 1, 2011. The subject of the meeting with be the 2010 Flare Study Draft Final Report regarding which TCEQ is seeking comment. Additional information about this event

is available at http://www.tceq.texas.gov/airquality/point-source/stationary-rules/flare_stakeholder.html.

- TCEQ will host a ***Dam Safety Workshop in Denton*** on June 9, 2011, and in Tyler on June 15, 2011. Information about these workshops is available at http://www.tceq.texas.gov/p2/events/dam-safety.html.

- The Texas Railroad Commission will hold ***Oil & Gas Seminars*** in Arlington on July 7-8, 2011. Information about this event is available at http://www.rrc.state.tx.us/education/seminars/og/index.php.

- TCEQ will host the ***2011 Public Drinking Water Conference*** entitled "Information and Tools for Public Water Systems and Utilities" in Austin on August 9-10, 2011. Information regarding this event is available at http://www.tceq.texas.gov/drinkingwater/conference.html.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in May can be found on the TCEQ website at http://www.tceq.texas.gov/news/releases/commissionersagenda051111.

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 to Decide Whether to Review Appellate Decision Finding Cell Phone Radiation Claims Preempted

The United States Supreme Court is poised to consider whether to grant a petition for certiorari to review the October 2010 decision by the U.S. Court of Appeals for the Third Circuit holding that federal telecommunications regulations preempted a state law tort action claiming damages based on the radio frequency ("RF") radiation emitted by cell phones. *See Farina v. Nokia*, 625 F. 3d 97 (3d Cir. 2010).

In the underlying action, the petitioner brought suit against various cell phone manufacturers and retailers of wireless handheld devices on behalf of a putative class of all past, current, and future Pennsylvania purchasers and lessees of cell phones. *Id.* at 107. Under several tort theories, the petitioner alleged that the respondent cell phone manufacturers and retailers had improperly warranted and marketed their cell phones as safe to operate, had suppressed information regarding the health risks of RF radiation, and that respondents' phones, absent headsets, were unsafe due to RF radiation emitted during a phone's customary use. *Id.* at 104, 107-109.

The Third Circuit affirmed the lower court's dismissal of the petitioner's lawsuit on conflict preemption grounds, ruling that the FCC regulations regarding the specific absorption rate ("SAR") — the maximum amount of RF radiation a device may emit based on the amount absorbed in the body — represented the FCC's "considered judgment' about how to balance competing objectives of protecting the health and safety of the public and allowing industry to maintain an efficient and uniform nationwide wireless network. *Id.* at 125. The Third Circuit found that allowing juries to perform their own risk-utility analysis to determine whether cell phones in compliance with FCC standards were nevertheless unreasonably dangerous would conflict with and "second guess" FCC regulations. *Id.* The court also expressed concern that if tort claims were not preempted, RF radiation standards could vary from state to state and eradicate the uniformity that was necessary to regulate a national wireless network. *Id.* at 126.

The Third Circuit's decision created an apparent split among Circuit Courts of Appeal regarding the preemptive effect of the FCC regulations. In 2005, the Fourth Circuit found that similar state law claims were not preempted and found no evidence of any congressional objective to ensure uniform national RF radiation standards for cell phones. *See Pinney v. Nokia*, 402 F.3d 430, 458 (4th Cir. 2005).

Seizing upon this conflict, the petitioner, in his appeal of the Third Circuit ruling, asks the Supreme Court to consider whether state law claims premised on cell phone companies' alleged misrepresentations regarding the safety of their products are impliedly preempted because they would frustrate the purpose of the FCC's RF radiation standard. *See Farina v. Nokia*, U.S. No. 10-1064, Petition for a Write of Certiorari, at i (filed Feb. 22, 2011), available at http://www.scotusblog.com/case-files/cases/farina-v-nokia-inc/. On the principal substantive issue, the petitioner contends that the FCC regulations impose no substantive standards on a cell phone's RF radiation emissions but merely define the level of emissions that triggers the FCC's obligation to conduct an environmental analysis under the National Environmental Policy Act. *Id.* at 22-25. Given that the FCC guidelines constitute mere procedural requirements, the petitioner questions the preemptive effect they can have on state health, safety, and consumer-protection laws. *Id.* at 24-25. Additionally, the petitioner points to a "savings clause" in the statutory authority under which the FCC regulations at issue were promulgated which purportedly disclaims any preemptive effect over state laws. *Id.* at 17-22.

In opposition to the petition, the respondent cell phone manufacturers and retailers (including but not limited to Motorola, Inc., Nokia Inc. and Sony Electronics, Inc.) dispute the petitioner's characterization of the RF standards as merely procedural, asserting that the FCC promulgated its rules as substantive ones grounded in the FCC's long-established and broad rulemaking authority to regulate communications. *See Farina v. Nokia*, U.S. No. 10-1064, Brief in Opposition for Respondents, at 18-19 (filed April 29, 2011), available at http://www.scotusblog.com/case-files/cases/farina-v-nokia-inc/. Further, respondents also contest the effect of the savings clause, contending that Congress would have never charged the FCC with adopting rules on RF standards only to render the regulations a nullity in the face of conflicting state law. *Id.* at 20. Respondents also note that the Court has declined to give broad effect to savings clauses where doing so would upset regulatory schemes established by federal law. *Id.* at 19.

This is not the first time the Supreme Court has been asked to review a Circuit Court's decision related to the preemptive effect of federal telecommunications regulations related to FCC's RF standards. In 2005, the Court denied a certiorari petition brought by cell phone manufacturers and retailers, which asked the Court to reverse the Fourth Circuit's decision reinstating five class action lawsuits (including Farina) involving the same claims. *See Pinney v. Nokia*, 402 F. 3d 430 (4th Cir. 2005). That petition was denied. *See Nokia v. Naquin*, 546 U.S. 998 (2005).

Given that the success rate for certiorari petitions before the Supreme Court is approximately 1.1%, it is statistically unlikely that Plaintiff's petition will be granted. Nevertheless, given that two federal circuit courts have come to opposite conclusions on this issue, the possibility that the Court may grant certiorari is at least somewhat higher. Additionally, the Supreme Court on May 31st invited the Acting Solicitor General to file a brief in the case expressing the view of the United States. Given the Court's request for further briefing, the possibility that the Court may grant the petition now appears to be somewhat higher. It is not clear when the Court will next consider the certiorari petition because it has not yet set a new conference date for this matter.

For more information, please contact Daniel Krainin at dkrainin@bdlaw.com, Paul Hagen at phagen@bdlaw.com or Ryan Tacorda at rtacorda@bdlaw.com.

EPA Proposes New General Permit for Stormwater Discharges from Construction Activity

On April 25, 2011, the U.S. Environmental Protection Agency ("EPA") issued for public comment a new draft general permit for stormwater discharges from construction activities

involving more than one acre. *See* 76 Fed. Reg. 22,882, available at http://www.epa.gov/npdes/pubs/cgp_2011frnotice.pdf. EPA is developing this draft construction general permit ("CGP") to implement the Agency's new Effluent Limitations Guidelines and New Source Performance Standards for the Construction and Development Industry. Because the existing permit is set to expire on June 30, 2011, EPA also is proposing to extend that permit until January 31, 2012. When EPA finalizes the new CGP, likely in early-January 2012, operators of construction activities will be subject to significantly more stringent erosion and sediment control, inspection, and monitoring requirements.

Background

Pursuant to Section 402 of the Clean Water Act ("CWA"), EPA prohibits any person from discharging pollutants to navigable waters without a permit. Beginning in 1990, EPA established regulations under the National Pollutant Discharge Elimination System ("NPDES") program for owners and operators to obtain permits for stormwater discharges associated with construction activity. Since that time, EPA has carried out the NPDES program, first by promulgating permit application requirements, and later by creating a series of general permits for construction stormwater discharges. The current CGP took effect in 2008.

When EPA develops a NPDES permit, the CWA requires the Agency to incorporate into it conditions for meeting technology-based effluent limits established under Sections 301 and 306 of the statute. Prior to the promulgation of an effluent limitations guideline ("ELG"), EPA permit writers establish these technology-based limitations using their Best Professional Judgment. It was their exercise of that Best Professional Judgment that supported the effluent limitations (primarily expressed as Best Management Practices) contained in the Agency's 2008 CGP.

On December 1, 2009, EPA issued its Effluent Limitations Guidelines and New Source Performance Standards for the Construction and Development Industry ("C&D Rule"). *See* 74 Fed. Reg. 62,996, available at http://edocket.access.gpo.gov/2009/pdf/E9-28446.pdf. EPA designed the C&D Rule, which took effect February 1, 2010, to control sediment pollution from construction for all sites that disturb one or more acres and, for the first time, to impose nationally-applicable numeric effluent limitations on stormwater discharges from sites that disturb greater than 20 or 10 acres based on a schedule established by the rule. Under the C&D Rule construction sites must implement Best Management Practices ("non-numeric effluent limits") to control stormwater discharges, such as erosion and sediment controls, soil stabilization requirements, dewatering requirements, pollution prevention measures, prohibitions on certain discharges, and use of surface outlet structures.

The C&D Rule was challenged before it took effect on February 1, 2010. During the course of litigation, EPA discovered that the data it had used to calculate the numeric limit for turbidity were misinterpreted. Ultimately, EPA sought a voluntary remand of the numeric turbidity limit so it could recalculate the limit. All other portions of the C&D Rule remained in effect and subject to implementation in any new permit. Since the remand took effect on January 4, 2011 EPA has been working to develop a recalculated limit with the goal of proposing and promulgating that revised limit in time for it to be incorporated into a reissued CGP along with the un-remanded, non-numeric requirements of the C&D Rule.

New Proposed Construction General Permit

On April 25, 2011, EPA published notice of its new draft CGP. As proposed, the draft permit incorporates the C&D Rule's non-numeric effluent limits as prescriptive requirements and design standards, but includes only a placeholder for inclusion of the numeric effluent limit for turbidity, which EPA continues to develop. Even without the numeric limit, however, the proposed CGP's requirements are significantly more stringent than those of the current permit.

The new proposed CGP includes a number of changes to the 2008 CGP, as well as a suite of wholly new requirements. The proposal would require operators to:

- Establish at least a 50-foot undisturbed, natural buffer area around any waters of the U.S., including wetlands, occurring on or adjacent to their sites, or achieve an equivalent

level of protection by implementing alternative measures. The operator must maintain the selected alternative for the duration of permit coverage.

- Before beginning earth-disturbing activities, install and make operational all stormwater controls required under Section 2 of the permit and identified in the site's Stormwater Pollution Prevention Plan ("SWPPP"). This requirement does not apply to earth disturbances related to initial site clearing and establishing entry, exit, and access of the site, for which stormwater controls may be installed immediately after the earth disturbance if necessary. Notably, the draft permit does not differentiate in this requirement between controls scheduled in a SWPPP to be phased in over the course of construction and controls the SWPPP requires to be installed for project commencement.

- Immediately initiate stabilization on exposed portions of the site where earth-disturbing activities have permanently or temporarily ceased, and will not resume for a period exceeding 14 calendar days, or for a period of 7 or more calendar days if (a) earth-disturbing activities occur within 50 feet of a water of the U.S. located on or immediately adjacent to the construction site, (b) the site discharges to sediment- or nutrient-impaired waters, (c) the site discharges to high quality waters (i.e., Tier 2, 2.5, or 3 waters), or (d) the activity disturbs slopes of 15% or greater. A host of new stabilization criteria must be met under all stabilization scenarios.

- Remove sediment deposited on the site, tracked out of the site, or accumulated near sediment controls before it compromises the effectiveness of onsite controls and/or is discharged to surface waters.

- Stabilize all entrance and exit points created on the site for a minimum of 50 feet into the site so that no soil is left exposed and no sediment is discharged during storm events.

- Avoid earth-disturbing activities on steep slopes (i.e., slopes of 15% or greater), unless infeasible or inconsistent with the requirements of the project.

- Install and maintain controls to protect any storm drain inlets to which the site discharges and the operator has access.

- Design, install, implement, and maintain effective pollution prevention measures to minimize the discharge of pollutants. At a minimum, these measures must minimize (a) the discharge of pollutants from equipment and vehicle washing, wheel wash water, and other wash waters (wash waters must be treated in a sediment basin or alternative control with equivalent treatment), (b) the exposure of building materials, wastes, and other materials to precipitation and stormwater, and (c) the discharge of pollutants from spills and leaks (operators also must implement prescribed chemical spill and leak prevention and response procedures).

- Visually assess the quality of site discharge (e.g., color, odor, floating, settled, or suspended solids) if a site inspection occurs during a discharge-generating precipitation event.

- Undertake corrective actions for addressing erosion and sediment control installation, maintenance, and repair issues and for addressing sediment discharges within an allotted timeframe (typically 7 days) and in accordance with specific procedures.

Beyond these non-numeric effluent limits set forth in the proposed CGP, EPA plans to incorporate into the permit the numeric effluent limit for turbidity after it is re-promulgated later this year. Once the numeric limit is recalculated and added to the new CGP, EPA will implement the limit in a phased approach. Construction sites that disturb 20 or more acres at once must monitor discharges from construction areas and comply with the numeric effluent limitation beginning August 1, 2011 (or when EPA incorporates the limit into the final new CGP). Construction sites that disturb between 10 and 20 acres at once must begin monitoring discharges from the site and comply with the numeric effluent limitation on February 2, 2014. Operators on sites subject to the numeric limit will be required to perform sampling during all discharge-generating precipitation events. The first sample will be required to taken within the first hour after the discharge begins, and a minimum of 3

samples will be required to be taken for each event. If any one sample exceeds the turbidity limit, specified corrective actions will be required.

The feasibility and legality of implementing enforceable numeric limits on stormwater discharges from construction sites has repeatedly been questioned by prospective permittees. In fact, its legality already has been challenged in litigation although the Agency sought time to reconsider its limitation before the court had an opportunity to address those challenges on their merits. As a result, once finalized and implemented, the new CGP and its expected incorporation of a numeric effluent limitation for turbidity almost certainly will be the subject of further litigation.

Comments on the new proposed CGP must be submitted to EPA by June 24, 2011.

For more information, please contact Richard Davis at (202) 789-6025 (rdavis@bdlaw.com) or Parker Moore at (202) 789-6028 (pmoore@bdlaw.com).

Firm News & Events

Paul Hagen Joins the Conservation Fund Board of Directors

Paul Hagen, a Principal in the Firm's Washington, D.C. office, has been elected to the Board of Directors of the Conservation Fund, one of the nation's leading land conservation non-profits. Collaborating with partners across the U.S., the Conservation Fund works to conserve land, train leaders and invest in communities. Since its founding in 1985, the Conservation Fund has saved land in all 50 states—nearly 7 million acres of wild havens, working lands, and vibrant communities.

"We are delighted to see Paul join other national conservation leaders on the Board of the Conservation Fund and look forward to his furthering our firm's longstanding collaboration with the Conservation Fund," said Henry Diamond, who has served as an advisor to the Fund.

With a skilled team with real estate, finance, legal, investment and scientists, the Fund has pioneered a conservation approach that blends environmental and economic values, from protecting "working" forests and recreation destinations to helping communities grow thoughtfully. The Fund consistently earns top rankings for efficiency by review groups such as Charity Navigator and the American Institute of Philanthropy. More information on the Conservation Fund can be found at http://www.conservationfund.org/

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