Texas Environmental Update

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November 2009

Texas Developments

Environmental Crimes Prosecutor Position Created

On November 20, 2009, Travis County District Attorney Rosemary Lehmberg, in cooperation with the Texas Commission on Environmental Quality ("TCEQ"), announced the creation of an environmental crimes prosecutor position. The assistant district attorney serving in this position will be based in Travis County, but will prosecute cases throughout Texas (since the Travis County District Attorney's Office has statewide authority regarding environmental crimes under the Texas Water Code and Texas Health and Safety Code). The person named to the position is Patty Robertson, an experienced white collar prosecutor.

As explained in the press release issued by District Attorney Lehmberg's office, "[t]he specialized prosecutor will seek to provide consistency in charges filed and case resolutions as well as a shorter time frame in the indictment and disposition of environmental cases across the state." TCEQ Executive Director Mark Vickery voiced his support: "Establishing a full-time presence at the Travis County District Attorney's Office, solely for the prosecution of environmental crimes, will ensure that criminal offenses against our natural resources will be dealt with swiftly and effectively." The new position is funded by a grant from the TCEQ.

New EPA Region 6 Administrator Appointed

On November 5, 2009, U.S. Environmental Protection Agency ("EPA") Administrator Lisa Jackson announced the selection of Dr. Alfredo "Al" Armendariz as Regional Administrator for EPA Region 6. Dr. Armendariz is a Research Associate Professor at Southern Methodist University in Dallas, where he has taught environmental and civil engineering since 2002. He received his S.B. in chemical engineering from the Massachusetts Institute of Technology in 1993; his M.E. in environmental engineering from the University of Florida in 1995; and his Ph.D. in environmental engineering from the University of North Carolina at Chapel Hill in 2002. From 1995 to 1998, as a Chemical Engineer at Radian Corporation (now URS Corporation) he assisted natural gas utilities, pulp and paper mills and wood products companies with permitting and air quality compliance. During 2002 he served as an Environmental Scientist in the Multimedia Planning and Permitting Division of EPA Region 6.

Armendariz has served as a member of the advisory board of the Environmental Defense Fund's Texas office, and as technical advisor to the Downwinders at Risk Dallas area citizen group, the Denver-based Rocky Mountain Clean Air Action, and the Santa Fe-based WildEarth Guardians. Dr. Armendariz has been a vocal critic of various aspects of TCEQ's air program. For example, he has asserted that the emissions inventories for the Dallas/Fort Worth and Houston areas significantly underestimate actual emissions. In advance of his appointment he indicated that EPA should ensure vigorous enforcement of permits and environmental regulations, and -- to that end -- the new Region 6 Administrator should seek to add 20 to 30 additional inspection and enforcement personnel to EPA's Houston office. TCEQ Chairman Brian Shaw issued the following statement about Dr. Armendariz's appointment on the date of the announcement: "I congratulate Dr. Armendariz on his appointment as Regional Administrator for Region 6. I look forward to working with him on our common goals of protecting the health and environment of the people of Texas," Shaw said. "While he has a long history as an environmental activist, I hope Dr. Armendariz

recognizes that this position is too important to be used as a podium for environmental activism. I urge Dr. Armendariz to use sound science in his decisions."

EPA's news release of Dr. Armendariz's selection is available at http://yosemite.epa.gov/opa/admpress.nsf/e8f4ff7f7970934e8525735900400c2e/e5a2e935be9bc4bb852576650071b61f!OpenDocument.

TCEQ Responds to EPA Proposed SIP Disapprovals

On November 23, 2009, the Texas Commission on Environmental Quality ("TCEQ") submitted comments on the three proposals that the U.S. Environmental Protection Agency ("EPA") published on September 23, 2009 to disapprove various Texas State Implementation Plan ("SIP") revision submittals based upon EPA's position that they fail to meet federal Clean Air Act requirements. Specifically, EPA proposed disapproval of the following: (1) the Texas Flexible Permitting Program; (2) revisions relating to the Texas Qualified Facilities State Program, and changes to the definitions of "best available control technology" and "modification of existing facility"; and (3) the Standard Permit for Pollution Control Projects, and revisions to Texas Major and Minor New Source Review ("NSR") SIP and the Texas Major Prevention of Significant Deterioration ("PSD") SIP.

Each of the November 23, 2009 comment documents outlines various EPA concerns that the TCEQ Executive Director will propose be addressed by rulemaking. For instance, for the Flexible Permit Program TCEQ will consider rulemaking to ensure federal NSR applicability requirements are included in Flexible Permit reviews; to apply the federal NSR applicability concepts of modification, project and contemporaneous netting during the technical review of a Flexible Permit; to ensure that the terms and conditions of previously issued permits or more stringent terms and conditions are added to a Flexible Permit; and to ensure that rules contain legally enforceable and replicable procedures for establishing emission caps. The TCEQ Executive Director is planning to present to the TCEQ Commissioners proposed rulemaking relating to EPA's proposed SIP disapprovals according to the following schedule: Public Participation (December 2009); definition of PSD Best Available Control Technology (January 2010); Qualified Facilities (March 2010); Flexible Permits (May 2010); and NSR Reform (August 2010).

EPA's proposals and TCEQ's comments on the proposals are available at http://www.tceq.state.tx.us/permitting/air/announcements/20091109. Also available on that webpage is a November 12, 2009 letter to TCEQ from EPA's Gina McCarthy, Assistant Administrator for the Office of Air and Radiation, following up on the October 23, 2009 TCEQ letter in which the agency outlined its plan to address EPA's concerns with the Texas SIP.

TCEQ Creates New Office of Water and Names New Rio Grande Valley Watermaster

Citing the current and future demand on water resources and the need to enhance its focus on water issues, TCEQ has created a new Office of Water that will consist of three major divisions: Water Planning, Water Supply and Water Quality. The new Office of Water will be headed by long-time agency employee L'Oreal Stepney. Ms. Stepney has previously served as Assistant Deputy Director of the Office of Permitting and Registration and Director of the Water Quality Division. The creation of the new Office of Water is effective December 1, 2009.

TCEQ has also announced the appointment of Erasmo Yarrito, Jr. as the new watermaster for the Rio Grande Valley. Mr. Yarrito, previously the deputy Rio Grande watermaster, assumed his new role on November 1, 2009. The watermaster manages the allocation of water assigned to the U.S. in the Rio Grande Basin below the Amistad Reservoir. Additional information regarding this appointment is available on TCEQ's website at http://www.tceq.state.tx.us/comm_exec/communication/media/10-29Yarritorelease.

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Administrator Jackson Announces Environmental Justice Initiative

On November 17, 2009, EPA Administrator Lisa Jackson announced the national "Environmental Justice Showcase Communities" initiative to address environmental justice challenges in ten U.S. urban areas. Port Arthur, Texas is one of the ten cities selected to participate in the initiative.

Under the program, EPA has committed to fund $1 million—$100,000 per city—over the next two years. As explained in EPA's announcement, the money will be used to "test and share information on different approaches to increase EPA's ability to achieve environmental results in communities." Jackson said the showcase communities will give a voice to vulnerable communities and "will provide lessons for how we can make every community a better place for people to live, for business to invest and bring jobs." In Port Arthur, EPA proposes a comprehensive, cross-media pilot project addressing the severe impact that city suffered as a result of hurricanes Katrina, Rita and Ike. Through the Environmental Justice Showcase Project, EPA will work with partners to strategically target additional tasks to be performed and supplement ongoing efforts in Port Arthur.

A copy of EPA's news release regarding this initiative is located at: http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/b3d235503bc70b3a852576710060f044!OpenDocument.

TCEQ Meeting to Discuss Emissions from Barnett Shale Operations

On November 13, 2009, the Texas Commission on Environmental Quality ("TCEQ") met with representatives of natural gas production companies with operations in the Barnett Shale natural gas formation to discuss ongoing developments regarding air contaminant emissions from those operations. Recent private and TCEQ studies of air quality in the area have suggested elevated levels of benzene and other constituents near those operations. Following concerns raised by residents of the small town of DISH, Texas, that town hired a consultant earlier this year to conduct an independent study of emission levels resulting from production equipment located in DISH. DISH subsequently published the results, which indicated emissions of several constituents exceeded TCEQ's Effects Screening Levels. Representatives of the companies operating in the Barnett Shale dispute the results of that study, and the DISH study. TCEQ's evaluation of emissions relating to Barnett Shale operations resulted in the issuance of a preliminary report dated October 23, 2009. TCEQ has indicated it will issue a final report by the end of 2009, and that the agency will conduct additional testing in early 2010.

TCEQ's November 13th meeting with the Barnett Shale operators included discussion of the preliminary results in TCEQ's October 23rd preliminary report and discussion of voluntary steps to address emission levels, including voluntary permit revisions that would require increased monitoring to detect leaks from production equipment.

Newly-appointed EPA Region 6 Administrator Dr. Alfredo Armendariz has separately voiced his concern regarding impacts from emissions from the Barnett Shale operations. Prior to his appointment, Dr. Armendariz published a report for the Environmental Defense Fund estimating the impact of such emissions.

TCEQ Completes Sunset Self-Evaluation Report

TCEQ recently submitted its Self-Evaluation Report to the Sunset Advisory Commission ("Sunset Commission"). The Self-Evaluation Report, which is more than 500 pages long, is a key component of the Sunset Commission's review of the agency, and includes the identification of policy issues that TCEQ believes merit consideration by the Sunset Commission and ultimately, the Legislature. The policy issues identified by TCEQ include, among others, those related to potential changes to the state's air permitting process, the current standard for evaluating compliance history, use of monitoring activities in the agency's regulatory processes, enhancement of public participation in regulatory activities and the agency's authority and funding related to water resources.

The Self-Evaluation Report is available at the agency's website at http://www.tceq.state.tx.us/agency/sunset/tceq-evalrpt.html.

TCEQ Presents Data for Maintaining $PM_{2.5}$ Attainment Designation for Harris County

At a stakeholder meeting on November 19, 2009, the TCEQ Air Quality Division Director, David Brymer, presented data that support retention of the existing unclassifiable/attainment designation for Harris County for the federal Clean Air Act annual National Ambient Air Quality Standard ("NAAQS") for fine particulate matter ("$PM_{2.5}$")(annual average of 15.0 $\mu g/m^3$). Currently, the entire of state of Texas is designated unclassifable/attainment, a designation made by EPA in 2005.

The meeting was held in conjunction with TCEQ's response to EPA's $PM_{2.5}$ redesignation request, sent to Governor Rick Perry in early October 2009. In that request, EPA pointed to 2006-2008 data suggesting that Harris County may be out of attainment with the $PM_{2.5}$ standard and gave TCEQ 120 days to respond with a recommendation.

TCEQ's data, however, which legally exclude exceptional event data (*e.g.,* smoke dust from Mexican agricultural burning and Saharan dust storms), show that Houston area met the $PM_{2.5}$ NAAQS and that local industry projects support a sustained reduction trend. Although the redesignation process remains in full swing, with a Commission Workshop to be held December 4, 2009, these data suggest that TCEQ will not change its recommendation regarding the $PM_{2.5}$ standard proposed redesignation in its response to EPA, which is due on February 5, 2010.

A copy of the presentation provided at the stakeholder meeting is available at http://www.tceq.state.tx.us/assets/public/implementation/air/sip/pm25/111909_meeting_PM25.pdf.

TCEQ Forms Advisory Committee on Tax Relief for Pollution Control Property

TCEQ has announced the formation of a permanent advisory committee to provide guidance regarding property tax exemptions for pollution control property. TCEQ is accepting applications for committee membership representing the following groups: industry, appraisal districts, taxing units, environmental groups, and members who are not representatives of any of those groups but have substantial technical expertise in pollution control technology and environmental engineering. The application deadline is December 15, 2009. The Commission expects to appoint committee members in January 2010 and hold an initial committee meeting during February 2010. A link to the advisory committee application and additional information about the group can be found on the Tax Relief for Pollution Control Property Advisory Committee web page at http://www.tceq.state.tx.us/implementation/air/rules/taxadvisory/taxrelief.html.

TCEQ Accepting Public Comment on Proposal to Revise Tank Degassing Rules

TCEQ held two Chapter 115 Stakeholder Group meetings during November. The purpose of these meetings was to provide stakeholders with information about the Chapter 115 Degassing Rule Revision project and to solicit stakeholder input on potential revisions to 30 TAC Chapter 115, Subchapter F, Division 3 (Degassing or Cleaning of Stationary, Marine, and Transport Vessels). Some of the issues that may be addressed during this rulemaking include: rule clarifications (for example, defining degassing and venting); clarifying the testing requirements for control devices used to comply with these rules (including frequency and control efficiency for vapor condensers and open flares); clarifying the sampling protocols necessary to demonstrate compliance with the emission specifications in the rule (for example, location and duration of volatile organic compound measurements); and evaluating the necessity of requiring notification of degassing activities and/or registration of degassing equipment. Comments on the proposed rule revisions are due December 7, 2009.

Additional information about the rule proposal is available at: http://www.tceq.state.tx.us/implementation/air/rules/115/115_stakeholder.

TCEQ Extends Public Comment Period for MSW General Operating Permit

As reported in Beveridge & Diamond's October 2009 Texas Environmental Update, TCEQ is requesting public comments on the Municipal Solid Waste General Operating Permit No. 517. TCEQ has extended the end of the public comment period -- by which comments must be submitted -- from December 11, 2009 to December 22, 2009.

Upcoming TCEQ Meetings and Events

- The TCEQ Commissioners will hold a ***Commissioners' Work Session*** in Austin on December 4, 2009. Among the topics on the agenda for discussion is the 1997 Annual Fine Particulate Matter ($PM_{2.5}$) National Ambient Air Quality Standard (NAAQS) nonattainment area designation recommendation request from the Environmental Protection Agency for $PM_{2.5}$ in Harris County. Additional information is available at http://www.tceq.state.tx.us/comm_exec/agendas/wk_sess/w_session.html.

- TCEQ will hold a ***Standard Permit for Thermoset Resin Stakeholder Group*** meeting regarding the agency's proposal to issue a standard permit for the thermoset resin industry on December 7, 2009. TCEQ has requested that comments on the draft standard permit be submitted by January 7, 2010. Additional information is available at http://www.tceq.state.tx.us/permitting/air/announcements/advisory/Current/sp_thermoresin_sg.html.

- TCEQ will host an ***Underground Storage Tanks (UST) Management and Assistance Seminar*** in Austin on December 15-16, 2009. Additional information is available at http://www.tceq.state.tx.us/assistance/events/ust-management-and-compliance-assistance-seminar.

- TCEQ will hold its ***2010 Emissions Inventory Workshop*** in Austin on January 27, 2010. The Workshop will focus on a new, Web-based emissions inventory reporting system. Additional information is available at http://www.tceq.state.tx.us/assistance/events/emissions_inventory.html.

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

Court Faults NEPA Review, Holds Corps Liable for Katrina Damage

Last week a federal judge found the Army Corps of Engineers responsible for catastrophic flooding experienced in parts of New Orleans after Hurricane Katrina. U.S. District Court Judge Stanwood Duval Jr. held that the Corps' negligent maintenance of a major shipping channel -- the Mississippi River Gulf Outlet ("MRGO") -- led to intensified storm surges, to the deterioration of wetlands protection, and ultimately, to the levee breaches that swamped the city. The decision, the first to hold the federal government liable for Katrina-related flooding, rests on the conclusion that the Corps could not invoke sovereign immunity under the Federal Tort Claims Act because in the course of operating MRGO, it did not satisfy specific environmental review standards under the National Environmental Policy Act ("NEPA"). This novel ruling that NEPA bears on defenses available to the federal government in a suit for monetary damages will likely engender close scrutiny on appeal.

According to Judge Duval, the Corps violated NEPA in three ways. First, the Corps' initial review of the project, set forth in a 1976 environmental impact statement ("EIS"), "was fatally flawed" because, among other problems, it failed to provide a description of the cumulative impacts of MRGO's operations on the environment. Second, despite awareness of substantial changes to environmental impacts caused by MRGO's maintenance and operation, the Corps failed to supplement the 1976 EIS. Third, the Corps improperly segmented its reporting on MRGO's environmental impacts, thus "guaranteeing that the public and other agencies would remain uninformed as to the drastic effects [that MRGO] was causing" on the environment.

Although finding the Corps liable for faulty operation and maintenance of the MRGO appears defensible on the extensive trial record, it is uncertain whether the Court picked the correct vehicle in NEPA through which to do so. Courts analyzing NEPA have not addressed its interplay, if any, with the tort-law concept of negligence. NEPA's "procedural" mandates differ from tort law in many respects. The requirement to act under NEPA is not the same as a duty owed under tort law; the arbitrary and capricious standard of review for NEPA-related actions is vastly different from a negligence standard of review; and federal statutory schemes such as NEPA offer deference to agency decision-making, a notion with no counterpart under a common law tort scheme. Judge Duval's opinion does not attempt to reconcile these inconsistencies, but rather, raises substantial questions without answers for agencies seeking to comply with NEPA, project proponents, and third-party contractors that regularly prepare NEPA documents.

Another troubling aspect of the opinion is the failure to address those few opinions that actually discuss NEPA and tort-related issues, such as causation. For example, the Supreme Court has opined that, to make an agency responsible for a particular effect under NEPA, "a reasonably close causal relationship" akin to proximate cause under tort law must be shown. *DOT v. Public Citizen*, 541 U.S. 752, 767 (2004) (*citing Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). Here, the Court found that an allegedly inadequate EIS prepared in 1976 has a sufficiently close causal relationship to hold the Corps responsible for hurricane-related damage nearly 30 years later. If that relationship suffices for causation purposes, numerous "line drawing" questions arise. For example, can a plaintiff claim that their lung cancer was caused by a highway built near their home 30 years ago and seek to hold the federal government liable on the basis that the original EIS concluded that air impacts would not be significant or that the EIS did not adequately address the highway's potential health impact? What if that EIS had been challenged years ago and held to be adequate? What if it were never challenged? Will an agency's NEPA predictions now be held to a higher level of scrutiny?

A link to the opinion can be found at www.bdlaw.com/assets/attachments/_Katrina.pdf

If you would like further information or to discuss the implications of this noteworthy decision in more detail, please contact Ben Wilson at (202) 789-6023 (bwilson@bdlaw.com), Fred Wagner at (202) 789-6041 (fwagner@bdlaw.com), or Bill Sinclair at (410) 230-1354 (wsinclair@bdlaw.com).

Congressional Hearing Builds Momentum For TSCA Amendments

Even without a bill to discuss, a Congressional subcommittee hearing recently explored how an amended Toxic Substances Control Act ("TSCA") could tackle the thousands of chemicals in commerce through prioritization. On November 17, 2009, the House Energy and Commerce Committee's Subcommittee on Commerce, Trade, and Consumer Protection held a hearing entitled "Prioritizing Chemicals for Safety Determination." Following up on a previous hearing earlier this year and on many significant developments in chemicals management since then, the hearing showcased the high level of agreement among stakeholders on the need for at least some modernization of TSCA. However, it also highlighted areas of continuing disagreement. The hearing shows that momentum for a fundamental overhaul of TSCA continues to build.

To read the full article, please go to http://www.bdlaw.com/news-730.html. For more information, please contact Mark Duvall at mduvall@bdlaw.com.

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House of Representatives Passes Chemical Plant and Water Utility Security Legislation

On November 6, 2009, the House of Representatives passed a bill to permanently reauthorize the Chemical Facility Anti-Terrorism Standards ("CFATS") program. The bill, H.R. 2868, would maintain the core features of the existing program, as administered by the Department of Homeland Security ("DHS") since 2006, but would make significant additions as well. Most significantly, H.R. 2868 would authorize DHS to require chemical facilities deemed to be high-risk to adopt "inherently safer technology" ("IST") under some circumstances. H.R. 2868 also includes provisions for two forms of citizen participation. One would allow citizen suits challenging DHS's implementation of CFATS. The other would require DHS to establish procedures for citizen petitions, by which any person could effectively compel DHS to investigate an alleged violation of CFATS requirements. The version of H.R. 2868 that ultimately passed the House incorporates as separate sections two other bills to establish security programs for drinking water and wastewater treatment facilities. These programs would be administered by the Environmental Protection Agency ("EPA") and state environmental agencies.

This client alert provides additional details on the evolution and current status of chemical plant and water utility security legislation. To read the full alert, go to www.bdlaw.com/assets/attachments/House%20Passes%20Chemical%20Plant%20and%20Water%20Security%20Legislation.pdf. For more information, please contact Mark Duvall at mduvall@bdlaw.com.

Circuits Avoid Conflict in Climate Change Nuisance Cases; District Court Diverges

Update: The Defendants-Appellees in *Connecticut v. American Electric Power* filed a petition for panel rehearing or rehearing en banc on November 5, 2009.

The following article was originally published by Beveridge & Diamond, P.C. on September 22, 2009.

On September 21, the Second Circuit issued its *Connecticut v. Am. Elec. Power Co.* decision reinstating public nuisance tort actions against private emitters of greenhouse gasses ("GHGs"), holding that they did not present non-justiciable political question or Article III standing problems. See the Beveridge & Diamond client alert regarding this game-changing decision, available at http://www.bdlaw.com/news-669.html. We noted there that the case likely would influence several related cases pending in other circuits. Two of those cases, *Native Village of Kivalina v. ExxonMobil Corp.*, No. CV-08-1138, (N.D. Cal. Sept. 30, 2009) and *Comer v. Murphy Oil USA, Inc., et al.*, No. 07-60756 (5th Cir. Oct. 16, 2009), have since been decided. This article evaluates those decisions as they relate to *Conn. v. AEP* and the revival of nuisance law. To read the full article, please go to http://www.bdlaw.com/news-711.html.

For more information, contact Nico van Aelstyn at nvanaelstyn@bdlaw.com or Russ LaMotte at rlamotte@bdlaw.com.

Second Circuit Rules Parties May Bring Climate Change Nuisance Actions

Update: The Defendants-Appellees in *Connecticut v. American Electric Power* filed a petition for panel rehearing or rehearing en banc on November 5, 2009.

The following article was originally published by Beveridge & Diamond, P.C. on September 22, 2009.

On September 21, 2009, the Second Circuit issued a long delayed climate change decision, *Connecticut v. Am. Elec. Power Co.*, holding that public nuisance actions can be brought against private emitters of greenhouse gasses. As discussed below, this is a major decision. The immediate impacts are likely to include:

- A flood of similar nuisance actions against greenhouse gas emitters (and possibly others, as the standing logic may apply equally well in other environmental cases);
- Major proof problems for the plaintiffs in this and similar cases should they reach trial; and
- A boost for the prospects of Congress adopting comprehensive federal climate change legislation which would preempt such claims.

The Second Circuit's decision overturned a 2005 district court decision, *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005), which had dismissed the claims on the ground that they presented a non-justiciable political question. The Court of Appeals took up the case in 2006, but remained silent until yesterday. The Court, consisting of one judge appointed by President George H.W. Bush and one by President George W. Bush, sided with the eight states, one city, and three environmental groups that brought the suit. Relying heavily though not exclusively on the U.S. Supreme Court's 2007 decision in *Massachusetts v. EPA*, 549 U.S. 497 (see our alert about that decision at http:www.bdlaw.com/news-news-151.html), the two-judge panel rejected all of the arguments put forth by the five power company defendants, holding that:

- The claims do not present non-justiciable political questions;
- All of the plaintiffs have standing to bring their claims;
- Current federal statutes do not "displace" the claims; and,
- The claims were rightly brought under the common law doctrine of nuisance.

As a result of the decision, the case was remanded to the district court. A link to the opinion can be accessed at http://www.ca2.uscourts.gov/decisions/isysquery/caf8dad7-9c11-4aab-aab9-2997cb501981/2/doc/05-5104-cv_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/caf8dad7-9c11-4aab-aab9-2997cb501981/2/hilite/.

For our full report on the decision, please visit http://www.bdlaw.com/news-669.html. For more information, please contact Nico van Aelstyn (nvanaesltyn@bdlaw.com) or Russ LaMotte (rlamotte@bdlaw.com).

EPA Begins to Revise Emissions Standards In Response to *Sierra Club*'s Vacatur of Startup, Shutdown, Malfunction Exemption

This week, the U.S. Environmental Protection Agency ("EPA") issued final rules amending the maximum achievable control technology ("MACT") and generally available control technology ("GACT") standards for petroleum refineries and chemical manufacturing facilities, respectively, and providing some insight into the manner in which it intends to regulate hazardous air pollutant emissions occurring during periods of startup, shutdown, and malfunction ("SSM").

As B&D has previously reported, the EPA regulations that generally exempt SSM emissions from compliance with the National Emissions Standards for Hazardous Air Pollutants ("NESHAP") — 40 C.F.R. §§ 63.6(f)(1) and 63.6(h)(1) (the "SSM Exemption") — were invalidated by the D.C. Circuit last year in *Sierra Club v. EPA*, 551 F.3d 1019. Following the court decision, EPA issued guidance interpreting the decision as affecting only those standards that both (i) incorporate the SSM Exemption by reference and (ii) contain no other text that provides SSM protections. At the same time, however, EPA indicated it would reevaluate and possibly revise the similar SSM provisions that appear in many source category-specific NESHAPs in light of the court's decision. Letter from A. Kushner to C. Knauss et al. re Vacatur of Startup, Shutdown, and Malfunction (SSM) Exemption (40 C.F.R. §§ 63.6(f)(1) and 63.6(h)(1)) (Jul. 22, 2009) ("Kushner Letter"). *See* EPA Issues Guidance to Regulated Community on Startup/Shutdown/Malfunction Vacatur (http://www.bdlaw.com/news-631.html)

EPA has now begun this process, promulgating in two NESHAP rulemakings new standards that claim to address SSM emissions without reference to the SSM exemption vacated by the D.C. Circuit.

First, on October 28, 2009, EPA amended the refinery MACT (40 C.F.R. Part 63, Subpart CC) to add new standards for heat exchange systems that will apply on a continuous basis, including during SSM events. *See* 74 Fed. Reg. 55670, 55672 (Oct. 28, 2009). According to the preamble accompanying the amendments, because these standards apply continuously, EPA has concluded that the *Sierra Club* decision does not affect their applicability. *Id.* The Agency did, however, reiterate its position in the Kushner Letter that the effect of the *Sierra Club* decision on other provisions of the refinery MACT "requires further analysis," and that EPA is "currently evaluating how to address SSM events" under those provision "in light of the court decision." *Id.* The Agency did not indicate any schedule or deadline for doing so.

In another NESHAP rulemaking on October 29, EPA chose a slightly different approach to manage the effects of the *Sierra Club* decision. Specifically, EPA promulgated new GACT standards for nine area source categories (*i.e.*, sources whose emissions are lower than the 10 and 25 ton thresholds that trigger MACT standards) in the chemical manufacturing sector (40 C.F.R. Part 63 Subpart VVVVVV). *See* 74 Fed. Reg. 56008, 56013 (Oct. 29, 2009). Like the new heat exchanger standards, the area source standards in the new rule will apply on a continuous basis. In one context, however, EPA established two standards — one that would apply during startup and shutdown and another that would apply at all times. The two standards apply to continuous process vents, and require 85% control of emissions during startup and shutdown, and 95% control at all other times. EPA justified the lower level of control applicable during startup and shutdown on the basis that those periods (which EPA described as involving "the filling, emptying, and inerting of vessels") have "significantly different emissions than normal operations." *Id.*

This area source standard is EPA's first attempt at addressing any kind of SSM emissions through a separate, enforceable limit applicable only during qualified SSM events. Notably, EPA elected not to establish an alternative limit for periods of malfunction, and their rationale for that decision seems to indicate they are not likely to do so in other contexts. Specifically, the agency noted in the preamble accompanying the new area source standards that, unlike startup and shutdown operations, which EPA described as "predictable and routine," malfunctions are not "a distinct operating mode," making it impractical for the Agency to account for them when calculating the emissions standard.

Both of the new standards are eligible for review for a 60-day period following their issuance (*i.e.*, December 27, 2009 for the refinery MACT and December 28, 2009 for the chemical manufacturing sector area source standard). *See* CAA § 307(b). Some of the determinations in the rulemakings may be subject to statutory or constitutional arguments, especially given the rules' overlap with the D.C. Circuit's broad holding in the *Sierra Club* decision. So, those covered by the rules should review them carefully in light of this 60-day limit for challenges. Moreover, the rules are likely to set the precedent for how EPA will address SSM emissions in NESHAPs going forward, so even sources unaffected by these latest rules should be conscious of the outcome and ready to act quickly as EPA moves forward in addressing SSM emissions in other industrial sectors.

For further information on the SSM Exemption, please contact Stephen Richmond at SRichmond@bdlaw.com; Laura McAfee at LMcAfee@bdlaw.com; David Friedland at DFriedland@bdlaw.com; or Madeleine Kadas at MKadas@bdlaw.com.

EPA Publishes Final Mandatory Greenhouse Gas Reporting Rule

The final rule implementing EPA's Mandatory Greenhouse Gas Reporting Program was published in the Federal Register on October 30, 2009. Challenges to the rulemaking must be filed by December 29, 2009. For a copy of the rule and B&D's full analysis, go to http://www.bdlaw.com/news-670.html.

For more information, please contact David Friedland at dfriedland@bdlaw.com, Laura McAfee at lmcafee@bdlaw.com, or Amy Lincoln at alincoln@bdlaw.com.

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New Memorandum of Understanding Promises Streamlined Electric Transmission Permitting on Federal Lands

After decades of relatively low levels of investment, new electric transmission capacity has become a high national priority. In a recent speech, President Obama promoted investment in a "clean energy superhighway" to support renewable energy development. New transmission lines are necessary to bring new renewable energy to users, as well as to address increasingly severe grid congestion and unreliability. Especially in the western United States, these new transmission lines will often cross federal lands and thus require federal approvals. However, the large collection of regulatory agencies with a say in siting decisions has offered limited opportunity for cooperative and efficient planning and permitting, leading to expensive bureaucratic delays.

A new Memorandum of Understanding (MOU), announced on October 28, 2009, among the federal agencies involved in the siting and construction of electric transmission lines and infrastructure aims to streamline authorizations and increase the consistency and transparency of decisionmaking. The participating agencies are the Council on Environmental Quality, the Departments of the Interior, Energy, Agriculture, Commerce, and Defense, the Environmental Protection Agency, the Federal Energy Regulatory Commission, and the Advisory Council on Historic Preservation.

The MOU follows on an earlier order by Interior Secretary Salazar creating an inter-departmental task force to prioritize the permitting of transmission rights of way, and supersedes a prior MOU adopted in 2006. It establishes a protocol regarding the designation of a lead agency and single point of contact by the Department of Energy when multiple agencies are involved in approving a transmission project. It also aims to facilitate coordination and unified environmental documentation among project applicants, agencies, states, and tribes, establishes clear timelines for review, and establishes a single consolidated environmental review and administrative record.

Fred R. Wagner and Peter J. Schaumberg gave a presentation on this topic in September 2009 at the Rocky Mountain Mineral Law Foundation's Special Institute on Energy Development: Access, Siting, Permitting, and Delivery on Public Lands. The Institute was co-sponsored by the DOI Bureau of Land Management. Their paper is available at http://www.bdlaw.com/assets/attachments/Power%20to%20the%20People%20-%20Electric%20Transmission%20Siting%20on%20Public%20Lands%20Schaumberg%20Wagner.pdf. For more information, please contact Fred at fwagner@bdlaw.com or (202) 789-6041, or Peter at pschaumberg@bdlaw.com or (202) 789-6043. This alert was prepared with the assistance of Alexandra Wyatt.

The MOU is available at http://www.doi.gov/documents/MOU-TransmissionSitingonFederalLands_001.pdf, and a multi-agency press release announcing the MOU is available at http://www.doi.gov/news/09_News_Releases/102809a.html. President Obama's October 27, 2009 speech on funding for smart grid technology and the need for a "clean energy superhighway" can be read at http://www.whitehouse.gov/the-press-office/remarks-president-recovery-act-funding-smart-grid-technology.

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