Texas Environmental Update

October 2010

Texas Office
98 San Jacinto Boulevard
Suite 1420
Austin, TX 78701
(512) 391-8000

Peter Gregg
pgregg@bdlaw.com

Lydia G. Gromatzky
lgromatzky@bdlaw.com

Maddie Kadas
mkadas@bdlaw.com

Laura LaValle
llavalle@bdlaw.com

For more information about our firm, please visit www.bdlaw.com

If you do not wish to receive future issues of Texas Environmental Update, please send an e-mail to: jmilitano@bdlaw.com

Texas Developments

EPA Meeting with Texas Flexible Permit Holders

Under threat of enforcement, companies operating pursuant to Texas flexible New Source Review ("NSR") permits are scheduling meetings with the U.S. Environmental Protection Agency ("EPA") Region 6 officials over the next few months. As widely reported, EPA has disapproved the Texas flexible permit program for inclusion in the Texas State Implementation Plan ("SIP"). In September, EPA issued "offer to confer" letters to company executives whose facilities operate pursuant to flexible permits, demanding that permittees meet with EPA to determine a process for converting those permits into traditional "non-flexible" NSR permits.

As is increasingly apparent from the "offer to confer" letters, EPA's Voluntary Audit Process, public statements and those few agreements for de-flexing that have been issued, the de-flexing process is expected to include a significant public participation process and a robust technical "look-back" at plant operational changes during the time the flexible permit was held to determine whether federal NSR requirements had been circumvented. A link to EPA press releases on flexible permits is available at http://www.epa.gov/region06/. EPA official statements subsequent to the issuance of these letters make it clear that those companies that do not meet with EPA within the 90-day timeline allowed in the letters will face enforcement and will likely receive objections to their Title V permit amendment or renewal applications, if objections have not been issued already. Presumably, even those companies that de-flex pursuant to agreed de-flexing procedures may also face enforcement for federal NSR circumvention identified in connection with a look-back.

Texas State Implementation Plan Developments

On October 20, 2010 EPA published notice of approval of Texas' request that the Beaumont/Port Arthur ("BPA") ozone national ambient air quality standard ("NAAQS") nonattainment area be redesignated to attainment status for the 1997 8-hour ozone NAAQS and the 1-hour ozone NAAQS. The approval is based upon 2006-2008 ambient air quality monitoring data and preliminary monitoring data for 2009 and 2010. With this action EPA issued a number of associated approvals, including a revision to the BPA state implementation plan that includes a 2021 motor vehicle emissions budget. The redesignation will be effective on November 19, 2010. The Federal Register notice (75 Fed. Reg. 64675) is available at http://www.federalregister.gov/articles/2010/10/20/2010-26261/approval-and-promulgation-of-implementation-plans-and-designation-of-areas-for-air-quality-planning.

On October 19, 2010, EPA published a proposal to approve Texas air quality regulations applicable to "grandfathered" power plants, which are plants that had been in operation prior to Texas' implementation of its New Source Review ("NSR") permitting program in 1971 (75 Fed. Reg. 64,235). The proposal relates to a program implemented after the Texas Legislature passed laws in 1999 and 2001 requiring major facilities to obtain NSR permits with controls on sulfur dioxide and nitrogen oxides emissions. The rules were among the Texas SIP submissions that EPA agreed to review pursuant to settlement of a lawsuit by a Texas business association that established deadlines for EPA action. The publication also includes EPA's proposal to disapprove one provision that would allow use of a "pollution control project standard permit" for certain carbon monoxide emissions. EPA's proposal is

BEVERIDGE & DIAMOND PC

available at http://www.federalregister.gov/articles/2010/10/19/2010-26259/approval-and-promulgation-of-air-quality-implementation-plans-texas-revisions-to-rules-and#p-3.

On October 13, 2010, Texas Governor Rick Perry submitted to EPA a revised nonattainment area boundary recommendation for the 2008 NAAQS for lead for an area in Collin County, Texas. The new recommendation is for a smaller nonattainment area than Texas proposed in the original recommendation submitted to EPA on October 14, 2009. Additional information is available on the Texas Commission on Environmental Quality's ("TCEQ's") website at http://www.tceq.state.tx.us/implementation/air/sip/texas-sip/criteria-pollutants/sip-lead.

TCEQ has rescheduled consideration of a 2010 nitrogen dioxide ("NO_2") NAAQS designation recommendation from the November 12, 2010 Commissioners' agenda meeting to the November 18, 2010 meeting. Information about the 2010 NO2 NAAQS is available at http://www.tceq.state.tx.us/implementation/air/sip/texas-sip/criteria-pollutants/sip-no2.

In another schedule change, TCEQ has extended the deadline for submittal of ozone area attainment designation comments until November 8, 2010 based upon EPA's announcement of a delay in finalizing a revision to the ozone NAAQS. Additional information is available on TCEQ's website at http://www.tceq.state.tx.us/implementation/air/aqps/eighthour.html.

Waste Company Files U.S. Supreme Court Petition Regarding Texas RCRA Program

On October 5, 2010, Texas Disposal Systems Landfill, Inc. ("TDS") filed a petition with the U.S. Supreme Court seeking review of a Fifth Circuit Court of Appeals opinion upholding a decision that the federal courts lacked subject matter jurisdiction to order EPA to withdraw its authorization of the Texas Resource Conservation and Recovery Act ("RCRA") program.

The matter arises from a 1997 accident involving a truckload of color televisions. The debris from that accident, including cathode ray tubes ("CRT"), was disposed at a Type 1 municipal solid waste landfill owned by TDS. TDS subsequently excavated the CRT material, contained in a mixture of clay cover soils and municipal solid waste, and placed it in roll-off containers. After additional removal of CRT parts from the mixture, the Texas Commission on Environmental Quality ("TCEQ") determined that the material remaining in the roll-off containers required no further treatment before disposal. TDS disagreed, asserting that the "mixture rule" in 40 CFR §261.3(a)(2) required that the material undergo further treatment before disposal.

In response to TCEQ's regulatory interpretation regarding the disposition of the material, TDS petitioned EPA to withdraw its authorization of the Texas RCRA program. TDS argued in its petition that while the language of the Texas and federal programs is substantially the same, the TCEQ "has interpreted its rules in a fashion that not only conflicts with the clear language of its rules, but also EPA's application of federal rules." EPA denied the TDS withdrawal request in May 2006, finding that no cause existed to initiate withdrawal proceedings. TDS filed a lawsuit in the U.S. District Court for the Western District of Texas later that year challenging EPA's determination under the Administrative Procedure Act. In January 2009, the district court judge granted EPA's motion to dismiss for lack of jurisdiction, holding that EPA's determination was a nonreviewable discretionary agency action. The Fifth Circuit issued its opinion upholding the district court decision in May 2010.

If the Supreme Court accepts the petition, the Court will likely focus on whether EPA's otherwise discretionary action is circumscribed by RCRA or EPA regulations. The Fifth Circuit found that neither the statute nor the regulations presented standards by which the court could review EPA's decision not to initiate withdrawal proceedings. If the Supreme Court disagrees, it could fundamentally alter the landscape for challenges to state-delegated programs.

Sunset Commission Staff Issues Texas Water Development Board Report

The Texas Water Development Board ("TWDB") is currently under review by the Texas Sunset Commission pursuant to the Texas Sunset Act. The "Sunset" review process includes evaluation and recommendation to the Texas Legislature regarding whether a state agency is still needed, and what improvements to the operation of an agency are needed to ensure that state funds are well spent. Pursuant to that process, during October 2010 the Sunset Commission staff issued its report and recommendations for the TWDB. The Sunset Commission will hold a meeting on November 16, 2010 to take public testimony on TWDB and the Sunset Commission staff's recommendations. The Sunset Commission will meet on December 15-16, 2010 to adopt recommendations regarding TWDB for the Legislature to consider when it convenes in January 2011. The Sunset Commission staff report is available at http://www.twdb.state.tx.us/home/index.asp.

Upcoming TCEQ Meetings and Events

- On November 1, 2010 TCEQ will host a ***New Technology Implementation Grant ("NTIG") Program Workshop*** in Austin. The workshop will provide information regarding grant categories of Advanced Clean Energy and New Technology projects. Information about this workshop is available at http://www.tceq.state.tx.us/implementation/air/terp/terp_mtgs.html.
- TCEQ will conduct ***Petroleum Storage Tank Compliance Workshops*** on November 3, 2010 (in Edinburg) and on November 4, 2010 (in El Paso). Attendees will receive TCEQ's new PST Super Guide and instructions on how to use it in order to stay in compliance. Additional information about these workshops is available at http://www.tceq.state.tx.us/assistance/sblga/industry/pst/pst_wkshp.html.
- On November 16, 2010 the Mickey Leland National Urban Air Toxics Research Center will host a ***symposium entitled, "Credible Science to Address Texans' Health: Exposure to Air Toxics"*** in Dallas. Information about this event is available at http://www.sph.uth.tmc.edu/mleland/.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in October can be found on the TCEQ website at http://www.tceq.state.tx.us/comm_exec/communication/media/10-10Agenda10-15.

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

Strike Two - District Court Invalidates Offshore Drilling NTL 2010-N05

On October 19, 2010, the United States District Court for the Eastern District of Louisiana struck down Notice to Lessees No. 2010-N05 ("NTL-05"). *Ensco Offshore Co. v. Salazar*, No. 10-01941, 2010 U.S. Dist. LEXIS 111226 (E.D. La. Oct. 19, 2010). This order was issued by the same Court that recently invalidated the first deepwater drilling moratorium imposed following the Deepwater Horizon incident. *Hornbeck Offshore Servs., LLC v. Salazar*, No. 10-01663, 2010 U.S. Dist. LEXIS 61303 (E.D. La. June 22, 2010).

The Bureau of Ocean Management, Regulation, and Enforcement ("BOEM") issued NTL-05 on June 8, 2010, imposing several new requirements on all Outer Continental Shelf ("OCS")

drilling operations. BOEM relied upon its general authority to immediately issue NTLs as "guidance documents." 30 C.F.R. § 250.103. The Court disagreed that NTL-05 was simply interpretative guidance. Instead, the Court found that NTL-05 constituted a substantive rule because it imposed new requirements and went beyond existing regulations. Since it was a substantive rule, BOEM could not issue NTL-05 without public notice and comment required under the Administrative Procedure Act. Accordingly, the Court granted summary judgment to the plaintiffs, holding that NTL-05 was procedurally defective and could not stand.

Even though NTL-05 is no longer effective following the Court's decision, the practical impact of the ruling may be muted by intervening regulatory developments. On October 14, 2010, BOEM published an interim final rule known as the "Drilling Safety Rule." *See* 75 Fed. Reg. 63346 (Oct. 14, 2010). This rule expressly incorporates most of the requirements under NTL-05. As an interim final rule, the Drilling Safety Rule is effective immediately. However, BOEM will be accepting public comments on the rule through December 13, 2010. At the conclusion of this 60-day comment period, BOEM will publish a notice either confirming the interim final rule or issuing a modified final rule.

In the interim, most of the requirements of NTL-05 still apply to OCS operators as codified in the Drilling Safety Rule. However, reinstatement of other NTL-05 requirements not included or repeated in the Drilling Safety Rule, such as mandated one-time operator certifications of compliance with every BOEM regulatory requirement, may be more suspect to the extent they lack notice and comment rulemaking.

For more information on this ruling or other developments in offshore energy regulations and litigation, please contact Peter Schaumberg at pschaumberg@bdlaw.com (202-789-6043), Fred Wagner at fwagner@bdlaw.com (202-789-6041), or James Auslander at jauslander@bdlaw.com (202-789-6009).

FTC Proposes Updates to "Green Guides" for Environmental Marketing

The Federal Trade Commission ("FTC") released its much anticipated proposed revisions to the Guides for the Use of Environmental Marketing Claims ("Green Guides" or "Guides") on October 6, 2010. The Green Guides were last updated in 1998 and establish general principles, guidance, and examples to help companies avoid misleading and deceptive statements in environmental marketing materials. Most notably, the revisions would: (1) enhance the FTC's existing guidance on general environmental benefit claims, the use of environmental certifications and seals, and other specific claims such as "compostable," "recyclable," and substance "free"; and (2) expand the guidance to include new sections on claims regarding the use of renewable materials, renewable energy, and carbon offsets. The release marks the FTC's most significant step toward clarification of the legal boundaries for environmental claims since the Commission began its review of the Guides in 2007.

The FTC is currently seeking comment on the proposed revisions and specific issues raised in the notice. Comments are due December 10, 2010. A copy of the Federal Register notice containing the proposed revisions and issues for comment is available at http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf.

Background

The FTC first issued the Green Guides (16 C.F.R. Part 260) in 1992, with subsequent revisions in 1996 and 1998, outlining general principles to help companies avoid misleading and deceptive statements in environmental marketing materials. Although the Guides do not have the force of law, they indicate how the FTC will apply Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive acts, to environmental marketing claims. The FTC considers actions that are inconsistent with the Green Guides to be potential Section 5 violations, and has exercised its enforcement authority to address false and unsubstantiated environmental claims. In addition, the National Advertising Division of the Better Business Bureau actively considers such claims and refers cases to the FTC when necessary. Additional information on prior FTC environmental enforcement actions is available here.

The FTC initiated review of the existing Green Guides in 2007. Recognizing that consumers are increasingly concerned about the environmental impacts of products and services they use, and that companies increasingly seek to promote the environmental attributes of their products and services, the FTC concluded that claims contemplated and addressed in the 1990's were no longer the claims most prevalent in today's marketplace. As a result, the FTC sought public comment on the guides, hosted a series of public workshops, and conducted a consumer perception study. Stakeholder input from this process has been incorporated into the proposed Green Guides revisions.

Summary of Proposed Revisions

The FTC's proposal includes two categories of substantive revisions to the Green Guides: revisions to strengthen, add specificity to, and clarify issues that are currently addressed in the Guides; and new guidance on emerging claims not currently addressed in the Guides. The lengthy preamble also provides critical insight into how the FTC will interpret and enforce the Guides and contains numerous examples of appropriate qualification and substantiation for particular environmental claims.

I. Enhanced Guidance on Issues Currently Addressed in the Guides

A. General Environmental Benefit Claims

The proposed revisions would strengthen the FTC's guidance regarding general environmental benefit claims such as "green," "environmentally friendly," and "eco-friendly." Unqualified general environmental claims are discouraged in the current Guides, since very few products are likely to have all of the attributes that consumers may perceive from such claims. The proposed revisions emphasize that marketers should not make unqualified general environmental benefit claims, and provide additional guidance on how to qualify and substantiate such claims. For example, the proposed revisions direct marketers to:

- Use clear and prominent qualifying language to convey to consumers that a general environmental claim refers only to a specific and limited environmental benefit.
- Substantiate any additional claims conveyed by the qualification itself.
- Ensure that the context of a general environmental claim does not imply other deceptive claims.

The proposed revisions also note the FTC's concern that a general environmental benefit claim, in combination with a claim about a particular environmental attribute (e.g., "green - made with recycled materials"), may imply that the particular attribute provides the product with a net environmental benefit. The FTC specifically requests comment on this issue.

B. Environmental Certifications, Labels, and Seals of Approval

The proposed revisions add further detail on the use of environmental certifications and seals of approval. While the current Guides include one example noting that environmental certifications and seals of approval may imply that a product is environmentally superior to other products, the proposed revisions add a new section devoted to the subject. This section includes the following additional guidance on environmental certifications and seals of approval:

- Use of the name, logo, or seal of approval of a third-party certifier is an "endorsement" and must meet the criteria set out in the FTC's Endorsement Guides (16 C.F.R. Part 255).
- Where certifications or seals convey an unqualified general environmental benefit, clear and prominent language should accompany the certification or seal limiting the claim to the particular attribute(s) for which substantiation is available.
- Marketers should disclose any "material connections" between the endorser and the retailer or manufacturer of the product (e.g., membership in the endorsing

association).

The FTC's proposed revisions do not identify environmentally preferable industry practices or provide guidance on the development of third-party certification programs, nor do they require public disclosure of standards or criteria used to support certifications.

C. Enhanced Guidance on Specific Claims

The proposed revisions enhance the guidance for a number of specific claims that are addressed, to some extent, in the current Guides. Several examples are highlighted below.

Degradable. The current Guides state that degradable claims should be qualified unless a marketer can substantiate that the entire product or package will breakdown within a "reasonably short period of time." The proposed revisions clarify that a "reasonably short period of time" is no more than one year after customary disposal. Marketers are advised not make unqualified "degradable" claims for products destined for landfills, incinerators, or recycling facilities, since products disposed through these channels are not likely to decompose within one year. This guidance would appear to significantly limit the circumstances in which this claim would be acceptable under the revised Guides.

Compostable. The current Guides advise that all materials in a product or package must break down into usable compost in a safe and "timely manner" in order to claim that a product is "compostable." The proposed revisions clarify that the product must break down within the same approximate timeframe as other materials with which it is composted.

Recyclable. The proposed revisions highlight and emphasize the key provisions in the current Guides on disclosing the limited availability of recycling programs. If a "substantial majority" of consumers have access to recycling facilities, unqualified recyclable claims are permitted. Recyclable claims should be qualified if a "significant percentage" or less than a significant percentage of consumers have access to recycling facilities. This guidance raises questions about claims that are targeted at national or large regional markets.

Substance Free. The proposed revisions advise that substance-free claims may be deceptive if a product contains substances that pose the same or similar risk as the substance that is not present, or if the substance has never been associated with the product category. However, the revisions would allow the use of substance-free claims where the product contains a "de minimis" amount of the substance. This proposed guidance thus intersects with growing attention to regulatory and voluntary pressures relating to the presence of substances of concern in manufactured articles.

II. New Guidance on Emerging "Hot Topic" Claims

The FTC's proposed revisions include new guidance on several categories of "hot topic" claims that have emerged since the 1998 revisions. Although the FTC review process for the Guides identified five categories of environmental claims that may warrant further guidance, the proposed revisions address only three — claims that a product was made with "renewable materials," claims that a product was made with "renewable energy," and claims relating to carbon "offsets."

Renewable Materials. The proposed revisions advise that claims relating to "renewable materials" should be qualified with specific information about the material and the quantity of renewable materials for products containing less than 100 percent renewable materials (excluding minor, incidental components).

Renewable Energy. The proposed revisions advise that marketers should not make an unqualified "made with renewable energy" claim if an item was manufactured with energy produced using fossil fuels. In addition, the FTC proposes that marketers disclose the type or source of the renewable energy (e.g., solar, wind) and qualify claims unless all, or virtually all, of the significant

manufacturing processes used to make the product are powered by renewable energy or by conventional energy offset with renewable energy certificates (“RECs”). The proposed revisions also advise that marketers should not represent that they use renewable energy if they have sold RECs for all renewable energy generated.

Carbon Offsets. The FTC’s proposed revisions provide limited guidance on carbon offset claims but emphasize that substantiation in the form of competent and reliable scientific evidence is required to support such claims. In addition, marketers should not advertise carbon offsets if the activity that forms the basis of the offset is already required by law. The proposed revisions further advise disclosure where offset purchases would fund emissions reductions that will not occur for at least two years.

The FTC declined to provide general guidance on the remaining two categories — “sustainable” claims and “organic” or “natural” claims — but noted that the general principles set forth in the Guides would nonetheless apply to such claims. In addition, to the extent that reasonable consumers would perceive sustainable, organic, or natural claims to be general environmental benefit claims or comparative claims, the Guides require substantiation for those claims and all other reasonably implied claims.

III. Other Noteworthy Points

Scope. The FTC is proposing to clarify that the Guides apply to business-to-business marketing claims as well as business-to-consumer marketing claims.

- Use of Websites to Qualify Claims. The preamble to the proposed revisions states that websites cannot be used to qualify otherwise misleading claims that appear on labels or in other advertisements because consumers would likely not see that information before their purchase. Accordingly, the FTC advises that any disclosures must be clear and prominent and in close proximity to the claim being qualified.

- Harmonization with International Standards. The FTC notes that the proposed Guides do not necessarily align with international standards due to the different purposes of ISO and the Green Guides. For claims that have transboundary reach, it will therefore be important to consider how these guides interact with a variety of international and other national standards (see below).

- Life Cycle Analysis. The proposed revisions do not include guidance on the use life cycle analysis (“LCA”) in marketing or as substantiation for environmental claims. The FTC also declined to recommend that marketers follow any particular LCA methodology. However, the FTC noted that it will continue to analyze claims involving LCA on a case-by-case basis.

International Guidance and Standards for Green Marketing Claims

Outside the United States, several extensive guidelines on green marketing claims are available. Marketers may want to consider these international sources as a supplement to the pending revisions to the Green Guides. Examples include:

- ISO 14021, Environmental labels and declarations — Self-declared environmental claims (Type II environmental labelling).

- Canadian Standards Association, Environmental claims: A guide for industry and advertisers (2008).

- European Commission, Guidelines for Making and Assessing Environmental Claims (2000).

- United Kingdom Green Claims Code for Products (updated 2000) and Green Claims Practical Guidance (2003).

Next Steps

The FTC invites comment on any aspect of the proposed revisions as well as on the specific questions posed in the Federal Register notice. According to the notice, the FTC will take all suggestions into account as it works to finalize the revised Guides. Although the timeframe for final adoption will depend on the volume of comments received, issuance of the final revised Green Guides is not likely in 2010.

Beveridge & Diamond actively counsels clients on environmental marketing. For further information on this topic, please contact Russ LaMotte (rlamotte@bdlaw.com), Mark Duvall (mduvall@bdlaw.com), or Lauren Hopkins (lhopkins@bdlaw.com).

Federal District Court Orders Compliance with EPA Requests for Information Concerning Future Capital Projects Under the Clean Air Act

On September 27, 2010, the U.S. District Court for the District of Minnesota granted a preliminary injunction ordering the owner and operator of a major source regulated under the Clean Air Act ("CAA") to provide to EPA documents relating to capital projects planned to begin within the next two years. *See United States v. Xcel Energy, Inc.*, No. 10-2275 (D. Minn. Sept. 27, 2010). The decision gives some credence to EPA's recent efforts to request information related to planned projects that have not yet been implemented. At the same time, the limited legal basis for the court's opinion may limit the circumstances under which EPA may request such information.

Section 114 of the CAA provides EPA broad authority to request information, as long as the requested information is for one of three approved purposes: (1) to assist the Agency in developing rules or regulations; (2) to determine whether "any person is in violation" of any CAA requirement; or (3) to carry out "any provision of this chapter[.]" CAA § 114(a), 42 U.S.C. § 7411(a). During the summer of 2009, EPA issued information requests to Xcel Energy, Inc (a public utility), ostensibly to assess Xcel's compliance with the CAA's Prevention of Significant Deterioration ("PSD") program, which requires preconstruction permitting for certain large projects. While the bulk of the requests sought information regarding past projects, two requests focused on potential future projects that had not yet been initiated. Slip Op. at 2. Xcel refused to provide any information about future projects. In March, 2010, after Xcel rebuffed multiple EPA offers to narrow the range of documents sought, EPA sued, seeking both injunctive relief and penalties. Id.

In support of its request for a preliminary injunction, EPA argued that § 114(a) allows it to obtain any information that it "may reasonably require" to "determin[e] whether any person is in violation" of a CAA standard. 42 U.S.C. § 7414(a). The court disagreed. While the court recognized EPA's "broad discretion" under § 114, it noted that § 114 is written in the present tense. Therefore, because "Xcel cannot violate [PSD preconstruction permitting requirements] until it 'commences construction,'" the court concluded that EPA's authority under this provision did not extend to future projects. Slip Op. at 9.

Nevertheless, the court found support for EPA's request under the third prong of § 114: EPA's authority to seek information to carry out "any provision of this chapter[.]" The court pointed out that § 167 of the CAA specifically empowers EPA to seek injunctive relief to "prevent the construction or modification of a major emitting facility" in violation of PSD requirements. 42 U.S.C. § 7477. Here, the court noted that the permitting process typically takes up to two years; therefore, EPA could reasonably seek information for projects planned within that period, so that EPA would have the opportunity to analyze the projects' potential emissions and, if necessary, take action under § 167 to prevent a project requiring a permit from proceeding without a permit. *Id.* at 10-11; 13-14.

The Xcel decision attempts to strike a balance between EPA's reasonable need for information to implement the CAA requirements and companies' reasonable desire to, as the court put it, keep EPA from gaining a seat at the "planning and approval table." Id. at 14. While the court ordered compliance with EPA's request for information regarding future projects, the court also suggested that EPA's authority to issue such a request is limited in

BEVERIDGE & DIAMOND PC

several ways:

The court limited the scope of the request to a period that it concluded was reasonably necessary to allow EPA to prevent a pending PSD violation. Here, the court suggested that EPA's initial five-year request was overly broad, as was the Agency's follow-up request for two years of data followed by annual updates. The court accepted the two-year period because both parties agreed that this timeframe reflected the length of the PSD permitting process.

The court rejected EPA's argument that it needed information on future projects to assess Xcel's compliance with the CAA under § 114(a)(ii). Instead, the court upheld the request only because § 167 specifically authorizes EPA to enjoin future violations, and the court concluded that EPA reasonably needed information on future projects to carry out that provision under § 114(a)(iii). Section 167, however, is limited to PSD permitting issues. Accordingly, the opinion suggests that requests for information on future projects will not be allowed unless the information involves potential PSD compliance issues.

As a practical matter, the decision reinforces the old maxim that "bad facts make bad law." The court repeatedly noted two facts: (1) EPA had information that several major unpermitted projects were imminent (if not already under construction); and (2) Xcel nevertheless refused to provide any information on these imminent projects. Given that § 167 specifically orders EPA to take action to prevent future PSD violations, the court simply could not have refused to give the Agency access to the very information it needed to carry out that statutory obligation.

For further information about the District Court's opinion and its implications, including questions regarding how to respond to an agency-issued information request, please contact Laura Mcafee (lmcafee@bdlaw.com, (410) 230-1330), David Friedland (dfriedland@bdlaw.com, (202) 789-6047), or Graham St. Michel (gstmichel@gmail.com, (202) 789-6039).

Office Locations:

Washington, DC

Maryland

New York

Massachusetts

New Jersey

Texas

California

Copyright 2010
Beveridge & Diamond, P.C.
All rights reserved

The purpose of this update is to provide you current information on Texas and federal environmental regulatory developments. It is not intended as, nor is it a substitute for, legal advice. You should consult with legal counsel for advice specific to your circumstances. This communication may be considered advertising under applicable laws regarding electronic communications.