Texas Environmental Update

BEVERIDGE & DIAMOND PC

September 2009

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Texas Developments

EPA Proposes Disapproval of Texas State Implementation Plan Submittals

On September 23, 2009, the U.S. Environmental Protection Agency ("EPA") published three separate proposals 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 has proposed disapproval of the following: (1) the Texas Flexible Permitting Program (74 Fed. Reg. 48480, available at www.bdlaw.com/assets/attachments/74%20Fed.%20Reg.%2048480.pdf); (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" (74 Fed. Reg. 48450, available at www.bdlaw.com/assets/attachments/74%20Fed.%20Reg.%2048450.pdf); 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 (74 Fed. Reg. 48467, available at www.bdlaw.com/assets/attachments/74%20Fed.%20Reg.%2048467.pdf). The 60-day public comment period for each of these proposals ends on November 23, 2009.

These proposals follow on the heels of years of deliberation between Texas and EPA regarding EPA concerns about various aspects of pending Texas SIP submittals, with the Texas Flexible Permitting Program being front and center in the debate. Pursuant to a settlement agreement, EPA recently committed to a schedule that includes issuance of final decisions during 2010 regarding various pending Texas SIP submittals, including the Texas Flexible Permitting Program, the Texas Qualified Facilities State Program, and the Standard Permit for Pollution Control Projects.

TCEQ Issues Flare Task Force Draft Report for Public Comment

TCEQ has issued its much-anticipated Flare Task Force Draft Report. Public comments, originally due on September 28, 2009, are now due on October 12, 2009. The Report, issued by a Task Force formed earlier this year and charged with assessing the adequacy of existing flare standards and operational practices, provides a series of general recommendations and a catalogue of data and supporting material that exceeds 2,000 pages. The Report, along with other information developed by the Task Force, is available at http://www.tceq.state.tx.us/implementation/air/rules/flare_stakeholder.html#minutes.

In brief, the recommendations to the Executive Director are to continue review of flaring practices, emissions reduction efficiencies, and regulations. The recommendations and continuing evaluation by TCEQ could ultimately lead to fairly significant rulemaking efforts by TCEQ. Specifically, the Task Force made the following recommendations:

- **Enhanced Monitoring** -- that additional monitoring requirements be developed for flares located in ozone non-attainment areas, areas that directly impact the air quality of ozone non-attainment areas, Air Pollutant Watch List areas; and, for all flares state-wide, that additional monitoring requirements be added to the New Source Review Permit boilerplate conditions.

- **Flare Minimization Plans** -- that flare minimization plan requirements be added by rulemaking or included as part of agreed orders. Flare minimization plans, the overall objective of which would be to reduce emissions, would be modeled on those in other states, such as California.

- **Agency Process Changes** -- that new process changes to agency permitting programs be implemented that require additional evaluation of emergency flares used for the abatement of routine process waste gas streams.

- **Public Outreach** -- that public awareness and public involvement in agency flare issues continue to be promoted to enhance understanding of flare operations, practices and standards.

- **Research** -- that the Agency conduct a flare research study at a test facility in 2010 to examine the impacts of various operational conditions on flare combustion efficiency and destruction removal efficiency (DRE) in a controlled environment.

Assuming the Report is made final and the Task Force recommendations are implemented as outlined, it is the flare research study that may have the most wide-ranging, and perhaps national, implications, although enhanced monitoring and flare minimization plans could be burdensome in themselves. The Draft Report notes, with some frankness, the difficulty of measuring flare emissions and the numerous factors that could call into question the reliability of the assumed regulatory flare DRE estimates. These factors include meteorological conditions; variable waste gas stream flow rate and composition; flare physical design characteristics and general maintenance; and flare steam or air assist operation. If flare research studies determine that existing assumed flare efficiency standards over-estimate emissions reductions, a broad range of programmatic and permitting consequences could ensue.

The Task Force has had two public meetings on the Draft Report this month. Once the Executive Director receives and responds to public comments, a final report will be issued. It seems unlikely that significant changes to the current draft will be made, particularly in light of the fact that no binding requirements are being imposed by the Report itself.

TCEQ Proposes Houston-Galveston-Brazoria and Dallas-Fort Worth SIP Revisions

On September 23, 2009, the TCEQ Commissioners approved the proposal of various state implementation plan ("SIP") and associated rule revisions for the Houston-Galveston-Brazoria ("HGB") and Dallas-Fort Worth ("DFW") nonattainment areas for the 1997 eight-hour ozone standard. Specifically, for the HGB nonattainment area, the proposed SIP revisions are intended to address the severe ozone nonattainment area requirements and show reasonable further progress toward attainment. Associated rulemakings include changes to the Highly-Reactive Volatile Organic Compound ("HRVOC") Emission Cap and Trade ("HECT") program, the Mass Emissions Cap and Trade ("MECT") program, and Volatile Organic Compounds Control Technique Guidelines. For the DFW nonattainment area, TCEQ has proposed a Reasonably Available Control Technology ("RACT") Update, a 30 TAC Chapter 117 Rule Revision Noninterference Demonstration, and Attainment Demonstration Contingency Plan SIP revisions. Associated rule changes to the VOC Control Technique Guidelines are also proposed.

The comment period for the SIP revisions and associated rulemakings will open on October 9, 2009 and close on November 9, 2009. TCEQ will also hold a series of public hearings on the SIP revisions in Austin, Houston and Fort Worth beginning on October 28, 2009. Additional information about submitting public comment and the scheduled public hearings is available for the HGB SIP revision at http://www.tceq.state.tx.us/implementation/air/sip/hgb.html and for the DFW SIP revision at http://www.tceq.state.tx.us/implementation/air/sip/dfw.html.

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TCEQ Proposes Pollutant and Area Removals from "Air Pollutant Watch List"

The TCEQ Toxicology Division has requested public comment regarding proposed pollutant and area removals from its Air Pollutant Watch List ("APWL"). The APWL is a list of geographic areas in Texas for which TCEQ has determined that specific air pollutant levels have been measured at levels of concern. The APWL serves a number of purposes, including to heighten awareness of such areas for interested persons (including TCEQ personnel, industry representatives and private citizens), and to encourage efforts and focus resources to reduce emissions in these areas.

Specifically, TCEQ is now proposing to remove benzene as a pollutant of interest from APWL Site No. 1002 (Beaumont, Jefferson County) and APWL Site No. 1204 (Lynchburg Ferry area, Harris County). The agency is also proposing removal of acrolein, butyraldehyde, and valeraldehyde as pollutants of interest from APWL Site No. 1202 (Texas City, Galveston County). TCEQ is also proposing pollutant and area removals for the following: hydrogen sulfide and APWL Site No. 1101 (Bastrop, Bastrop County); and benzene and APWL Site No. 1402 (Corpus Christi, Nueces County). Comments on these proposed changes must be submitted to TCEQ by October 5, 2009. Information about submitting comments is available on the TCEQ website at http://www.tceq.state.tx.us/implementation/tox/AirPollutantMain/APWL_index.html#consideration.

TCEQ Lifts Restrictions of Junior Water Rights

On September 18, 2009, TCEQ's Executive Director notified junior water rights holders that they may temporarily resume diversions from the Brazos River Basin since drought conditions have improved. However, water rights holders are required to comply with all permit provisions, including stream flow restrictions. Further, drought contingency plans must continue to be appropriately implemented. TCEQ continues to monitor drought conditions and may re-institute suspensions of junior water rights should conditions worsen.

Recent Enforcement Actions

On September 23, 2009, the TCEQ Commissioners approved administrative penalties totaling $447,988 against 76 regulated entities. Earlier this month, at its September 15, 2009 Agenda, the Commissioners approved $558,642 in penalties against 77 regulated entities. A summary of the Commissioners' September 23 and September 15 action can be found at http://www.tceq.state.tx.us/comm_exec/communication/media/09-09Agenda0923.html and http://www.tceq.state.tx.us/comm_exec/communication/media/tceq-approves-fines-totaling-558-642.

Texas Rules Updates

For information on recent TCEQ rule developments, please see the TCEQ website at http://www.tceq.state.tx.us/rules/whatsnew.html.

National Developments

EPA Issues Mandatory GHG Reporting Rule

On Tuesday, September 22, 2009, the U.S. Environmental Protection Agency ("EPA") announced the issuance of a final rule establishing the first comprehensive national system for reporting emissions of carbon dioxide and other greenhouse gases ("GHG") produced by major emission sources in the United States. In press releases accompanying the announcement, EPA stated that the "new reporting system will provide a better understanding of where GHGs are coming from and will guide development of the best possible policies and programs to reduce emissions" and that "[t]his comprehensive, nationwide emissions data will help in the fight against climate change."

Under the final rule, facilities with production processes that fall into certain industrial source categories such as petroleum refiners and petrochemical companies, suppliers of fossil fuels or industrial greenhouse gases, manufacturers of vehicles and engines outside of the light-duty sector, and facilities that contain boilers and process heaters with an aggregate combustion unit capacity of at least 30 mmBtu/hr and emit 25,000 or more metric tons per year of CO_2e (CO_2 or another GHG equivalent in global warming potential) will be required to submit annual GHG emission reports to EPA.

The rule directs reporting facilities to begin collecting data on January 1, 2010, and to submit their first annual reports for calendar year 2010 by March 31, 2011. The gases covered by the rule are the same as those covered under the United Nations Framework Convention on Climate Change (UNFCCC): carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFC), perfluorocarbons (PFC), and sulfur hexafluoride (SF_6). In addition, the rule requires reporting of certain other fluorinated gases including nitrogen trifluoride (NF_3) and hydrofluorinated ethers (HFE). Vehicle and engine manufacturers will report CO_2 for all mobile source categories outside of the light-duty sector beginning with model year 2011 and other GHGs in subsequent model years.

EPA issued the final rule in response to direction from Congress in the Fiscal Year 2008 Consolidated Appropriations Act (H.R. 2764; Public Law 110-161). The Act tasked EPA with instituting mandatory reporting of GHGs using the Agency's existing authority under the Clean Air Act.

The final rule has not yet been published in the Federal Register, but once published, it will be effective 60 days later. A pre-publication copy of the final rule and supporting information is available at http://www.epa.gov/climatechange/emissions/ghgrulemaking.html.

In the full report, available at http://www.bdlaw.com/news-670.html, we discuss who is affected and what information must be reported, followed by an analysis of changes EPA made from the proposed rule.

For more information, please contact David Friedland (dfriedland@bdlaw.com), Russ LaMotte (rlamotte@bdlaw.com), Tom Richichi (trichichi@bdlaw.com), or Steve Richmond (srichmond@bdlaw.com)

Second Circuit Rules Parties May Bring Climate Change Nuisance Actions

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).

APHIS Revises Enforcement Schedule for Lacey Act Import Declaration Requirement

Update, September 2, 2009: The USDA's Animal and Plant Health Inspection Service (APHIS) gave notice of its intent to delay enforcement of the Lacey Act declaration requirement applicable to the import of specified wood products. Certain products that were scheduled to require an import declaration beginning October 1, 2009 or April 1, 2010 are now not expected to require a declaration until September 1, 2010 or later. For the September 2, 2009 Federal Register notice which contains the revised enforcement schedule, please visit http://www.aphis.usda.gov/plant_health/lacey_act/downloads/2008-0119.pdf

Note that the substantive provisions of the Lacey Act amendments, which prohibit commerce in illegally sourced wood and wood products, remain in effect and are enforceable now.

See http://www.bdlaw.com/news-667.html for a full report on the Lacey Act Amendments. If you have questions regarding how the Lacey Act amendments apply to your business, please contact Laura Duncan at (415) 262-4003 (lduncan@bdlaw.com) or Paul Hagen (202) 789-6022 (phagen@bdlaw.com).

Algae-Based Biofuels Attract Surge of Government Incentives and Corporate Investments

Algae, the lowest point on the food chain, may yet prove to be among the principal "green" alternatives to petroleum-based fuels. This, at least, is a view that appears to be gaining currency among key federal agencies, legislators, and several prominent companies that have recently announced substantial investments in algae-based (or "algal") biofuels.

Algae have long been recognized for their potential as a fuel source, as illustrated by nearly two decades of federally-funded research under the U.S. Department of Energy ("DOE") Aquatic Species Program, which focused largely on the development of algal biodiesel. However, the relatively high cost of large-scale algal fuel production as compared to petroleum diesel costs was found to be a critical obstacle to algae's commercial viability. Now, more than ten years after the DOE program, the forecast appears to be changing.

For the full report on algae-based biofuels please go to www.bdlaw.com/news-665.html. For more information, please contact Mark Duvall at mduvall@bdlaw.com.

Consumer Product Safety Improvement Act: One-Year Update

On August 14, 2008, the Consumer Product Safety Improvement Act of 2008 ("CPSIA") promised to revitalize a sleepy Consumer Product Safety Commission ("CPSC"). Just over one year later, a reawakened CPSC is charging forward to implement its authority, which includes several provisions that just recently took effect. The CPSC has a full complement of Commissioners, a full plate of rulemaking activities, and a full arsenal of enforcement powers. Its new chairman, Inez Tenenbaum, testified about these changes at a recent

Congressional oversight hearing. The regulated community needs to keep up to date on these developments at the CPSC and to prepare for more changes and regulations on the horizon.

To read the full update, including information on the new CPSC Commissioners, the CPSIA rules now in effect, new enforcement powers, reports and recommendations, and agenda, please visit www.bdlaw.com/news-news-661.html. For more information, please contact Mark Duvall (mduvall@bdlaw.com).

Going Green Update: The FTC Brings Additional Green Marketing Enforcement Actions

Those following the Federal Trade Commission (FTC) in its campaign against unsubstantiated "green" marketing claims have been awaiting concrete action. Despite hearings in 2008 on updating its "Green Guides", now over a decade old, the FTC has still not proposed revisions. Until recently, the FTC had not brought an enforcement action based on environmental claims in almost ten years. In June, however, the FTC announced three enforcement actions based on "biodegradable" claims. Then in August, it announced four more enforcement actions, this time against companies claiming to manufacture products in an "environmentally friendly process," with two of them also making biodegradability claims. These latest actions signal that the FTC is serious about greenwashing.

To read the full report, please go to www.bdlaw.com/news-news-656.html. For more information, please contact Mark Duvall (mduvall@bdlaw.com) or Rea Harrison (rharrison@bdlaw.com).

Biobased Product Labeling Program Proposed by USDA

If "green" is good, is "biobased" better? A new federal-government-certified label could soon be available to enhance the marketing of certain biobased products. The proposed USDA labeling program could raise public awareness and demand for biobased products. To be eligible for the label under the proposed program, products would have to meet a statutory definition and contain minimum levels of biobased content. If established, the program would fulfill a Congressional mandate issued under the Farm Security and Rural Investment Act of 2002, and would complement an already significant federal procurement preference for biobased products.

For the full article, please visit http://www.bdlaw.com/news-657.html. For more information, please contact Mark Duvall at mduvall@bdlaw.com.

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