Texas Environmental Update

BEVERIDGE & DIAMOND PC

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Texas Developments

Negotiating How Flexible Permits Will Be "De-Flexed"

During September, the U.S. Environmental Protection Agency ("EPA") and the Texas Commission on Environmental Quality ("TCEQ") moved forward in their efforts to develop agency-sanctioned processes by which Texas flexible permit holders can transition to state implementation plan ("SIP")-approved de-flexed permits. To that end, on September 16 the TCEQ and EPA hosted a meeting in Austin with stakeholders to introduce and discuss a preliminary draft of TCEQ's proposed four-step de-flexing process. That state-run process would involve: (1) submitting a Title V permit minor revision application to add a permit condition committing to a schedule to transition to a SIP-approved permit; (2) determining federally-applicable requirements based on an historical analysis of New Source Review ("NSR") authorizations required for physical or operational changes implemented since issuance of the last SIP-approved authorization; (3) applying for and obtaining an amended SIP-approved NSR permit; and (4) applying for a revised Title V permit within 30 days of the amended NSR permit's effective date. The agencies have requested that comments on the proposed four-step process be submitted by September 30, 2010. The proposal is available on TCEQ's website at http://www.tceq.state.tx.us/agency/flexiblepermit/process.html.

Beyond its coordination on TCEQ's draft four-step process, EPA communicated with the regulated community about other options it is offering for de-flexing permits. EPA announced its "Audit Program for Flexible Permit Holders" on September 20, 2010, and published the program in the September 28, 2010 Federal Register (75 Fed. Reg. 59711). EPA's announcement and the Audit Program are available on EPA's website at http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/5433d124fd51288c852577a400660916!OpenDocument. Additionally, EPA sent "opportunity to confer" letters to most flexible permit holders. In those letters, EPA offers a 90-day period to confer and the following two de-flexing paths available through EPA: (1) its newly-issued Audit Program, and (2) a streamlined enforcement settlement with EPA to negotiate the terms of a SIP-approved permit. Consistent with its work with TCEQ on the draft four-step de-flexing process, EPA notes its expectation that a state-run process will soon be available as another option. Further, EPA indicates that enforcement-related actions will be contemplated if a permittee does not take advantage of the opportunity to confer and communicate its plan for obtaining a SIP-approved permit.

EPA Rejects Proposed Texas State Air Plan Revisions

The September 15, 2010 edition of the Federal Register included final action on EPA's disapproval of Texas SIP submittals regarding several elements of Texas' air program (75 Fed. Reg. 56424). Two of the disapproved program elements are Texas' definition of best available control technology ("BACT") and the standard permit for pollution control projects ("PCPs"). EPA disapproved Texas' definition of BACT in 30 Tex. Admin. Code §116.10(3) based upon EPA's determination that applicability of the definition is not clearly limited to minor sources and minor modifications. EPA also determined that a standard permit is not an appropriate mechanism for authorizing PCPs because Texas' SIP provides that standard permits will only be issued to new or existing similar sources. Given that the PCP standard permit applies to different types of sources, EPA found that it is not possible to develop "standardized, enforceable, replicable permit conditions" that specify how discretion will be

implemented for individual projects.

The September 15, 2010 Federal Register, which includes EPA's discussion of these and the other disapproved SIP submittals, is available at http://www.federalregister.gov/articles/2010/09/15/2010-22670/approval-and-promulgation-of-implementation-plans-texas-revisions-to-the-new-source-review-nsr-state.

Sierra Club Sues EPA Over Implementation of 1997 Fine Particulate Matter and Ozone Standards in Texas

On September 14, 2010, the Sierra Club filed a lawsuit against EPA in the U.S. District Court for the District of Columbia alleging that EPA failed to exercise its nondiscretionary duty to cure deficiencies in Texas' implementation of the 1997 national ambient air quality standards ("NAAQS") for fine particulate matter ("PM") and ozone. The Complaint for Declaratory and Injunctive Relief includes a request that the Court compel EPA to promulgate federal implementation plans ("FIPs") for Texas that satisfy Clean Air Act requirements concerning interstate transport for the fine PM and ozone standards, and the implementation of the revised ozone standards. The Sierra Club also asks the Court to compel EPA to take final action to approve or disapprove the SIP that Texas submitted to implement the fine particulate matter standard. The complaint is available is available at www.bdlaw.com/assets/attachments/Sierra%20Club%20Lawsuit.pdf.

Texas Takes Its Opposition to Greenhouse Gas Regulation To Court

The State of Texas took its strong and continuing opposition to EPA greenhouse gas regulation to the U.S. Court of Appeals for the District of Columbia Circuit in filings during September. On September 7, 2010, Texas filed a Petition for Review (available at http://www.bdlaw.com/assets/attachments/Texas%20Lawsuit%20September%2013.pdf) requesting review of EPA's denial of Texas' petition asking that Agency to reconsider its December 2009 finding that greenhouse gas emissions from cars and light trucks endanger human health and welfare. This filing follows from the Petition for Review and Petition for Reconsideration that Texas filed on February 16, 2010 challenging EPA's endangerment finding. Information about the February petitions is available on the Texas Attorney General's website at http://www.oag.state.tx.us/oagnews/release.php?id=3218. Additionally, on September 16, 2010 Texas filed motions to stay various aspects of EPA's regulation of greenhouse gas, including EPA's endangerment finding, the timing rule, the tailpipe rule, and the tailoring rule. Information about these filings, including copies of Texas' motions, is available on the Texas Attorney General's website at http://www.oag.state.tx.us/oagNews/release.php?id=3484.

Texas Parks & Wildlife Department Revising Exotic Aquatic Plant Program

Various businesses and researchers -- including energy/alternative energy/biofuel companies and chemical manufacturers -- with research and development or manufacturing operations in Texas could soon be subject to a now-in-development permitting program for the possession/use/disposal of nonindigenous plants. The program is being developed and will be implemented by the Texas Parks & Wildlife Department ("TPWD"). TPWD is overhauling its regulation of exotic aquatic plants ("EAPs") under Texas Parks & Wildlife Code Chapter 66 pursuant to revisions that went into effect during 2009 with the enactment of Texas House Bill 3391. Under the program currently in place, TPWD requires a permit only for EAPs on the existing prohibited species list. Pursuant to House Bill 3391, by December 31, 2010 TPWD must publish its initial list of approved EAPs and implement a permitting program for EAPs that are not on the approved list. The deadline to enact a final approved list and rules to regulate the possession of EAPs has been extended such that TPWD now expects final approval of the list and rules at the January 27, 2011 meeting of the Texas Parks and Wildlife Commission.

This program change has sparked considerable controversy based upon various aspects of the program as initially envisioned by TWPD in pre-publication draft rules. Along with other issues of concern to stakeholders, TPWD has proposed a definition of "aquatic plant" that would include a broad spectrum of microorganisms, including microorganisms that are genetically modified irrespective of whether the organisms modified are indigenous to

Texas. Additional information regarding this program, including the draft proposed rule that TPWD staff presented to the Texas Parks and Wildlife Commission at their August 25, 2010 meeting, is available on TPWD's website at http://tpwd.state.tx.us/huntwild/wild/species/exotic/aquatic_plants/.

TCEQ Convenes First Meeting of Pesticide Permitting Stakeholder Group

On September 9, 2010, TCEQ convened the first meeting of the Pesticide Permitting Stakeholder Group ("Stakeholder Group"). The agency is currently developing a new general permit for discharges into waters of the United States. This new general permit is being developed in response to a decision by the Sixth Circuit Court of Appeals (*National Cotton Council, et al. v. EPA*) vacating EPA's aquatic pesticides rule concluding that pesticides applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") were exempt from the Clean Water Act's permitting requirements. *See* 71 Fed. Reg. 68,483 (Nov. 27, 2006). As a result, NPDES permits will be required for discharges to waters of the U.S. of biological pesticides, and of chemical pesticides that leave a residue, no later than April 9, 2011.

TCEQ's proposed general permit for such discharges, as well as additional information about the Stakeholder Group, is available at http://www.tceq.state.tx.us/permitting/water_quality/stakeholders/pesticidegp_stakeholder_group.html#participating.

TCEQ Issues Updated Title V Air Permit Site Definition Guidance Document

TCEQ has issued an updated guidance document for defining a site for Title V federal operating permitting. The term "site" is defined in 30 Tex. Admin. Code §122.10(27) as "[t]he total of all stationary sources located on one or more contiguous or adjacent properties, which are under common control of the same person (or persons under common control)." TCEQ indicates that it removed references to day-to-day control from the "Common Control" section of the document because that was never a singular factor in determining common control. In the "Oil and Gas Owned Properties" section, reference to the January 12, 2007 EPA memorandum entitled "Source Determinations for Oil and Gas Industries" was removed given that it was rescinded by EPA's September 22, 2009 memorandum entitled "Withdrawal of Source Determinations for Oil and Gas Industries." Additionally, TCEQ clarified that its site definition guidance is consistent with the direction in EPA's September 22, 2009 memorandum that all relevant factors must be evaluated in making a site determination for oil and gas properties.

The guidance document is available at http://www.tceq.state.tx.us/permitting/air/announcements/tv_announce_8_23_10.html.

TCEQ Accepting Nominations for Texas Environmental Excellence Awards

TCEQ is accepting nominations for the Texas Environmental Excellence Awards through October 15, 2010. The Texas Environmental Excellence Awards are presented annually to recognize outstanding, innovative environmental programs in nine categories. Nomination forms are available at http://www.tceq.state.tx.us/assistance/events/teea/TEEA.html.

Upcoming TCEQ Meetings and Events

- TCEQ will host its annual ***Advanced Air Permitting Seminar*** and the ***Oil and Gas Facilities Workshop*** in Austin on October 5-6, 2010. The Advanced Air Permitting Seminar on October 5 will include updates on air permitting rules, requirements, and issues for a variety of industries. The Oil and Gas Facilities Workshop on October 6 will focus on air permitting issues as they relate to oil and gas facilities. Information about the event is available at http://www.tceq.state.tx.us/assistance/events/air-permitting.html.
- TCEQ will host a ***Municipal Solid Waste Management and Resource Recovery***

Advisory Council Meeting on October 7, 2010 in Austin. Information about this meeting is available on the MSW Advisory Council webpage at http://www.tceq.state.tx.us/permitting/waste_permits/advgroups/msw_advcouncil.html.

- TCEQ will host a ***Drinking Water Advisory Work Group Meeting*** in Austin on October 19, 2010. The meeting will be available by webcast at http://www.texasadmin.com/tceqs.shtml. Information about the meeting is available at http://www.tceq.state.tx.us/permitting/water_supply/ud/awgroup.html.

- TCEQ is partnering with the University of Texas at Arlington's Zero Waste Network to present ***Pollution Prevention ("P2") Workshops*** in Fort Worth (October 21-22, 2010) and Houston (November 10-11, 2010). The workshops will provide information about creating and implementing pollution prevention plans that comply with the Texas Waste Reduction Policy Act rules. Information about these workshops is available at http://www.tceq.state.tx.us/assistance/events/P2Workshops/p2workshop.html.

- TCEQ will conduct a series of ***Petroleum Storage Tank Compliance Workshops*** on October 5 (Pasadena), 7 (Fort Worth), 12 (Hewitt), 15 (San Antonio), 21 (San Angelo), 22 (Odessa), 26 (Pasadena) and 28 (Dallas). 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.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in September can be found on the TCEQ website at http://www.tceq.state.tx.us/comm_exec/communication/media/CommissionersAgenda091510 and http://www.tceq.state.tx.us/comm_exec/communication/media/092910CommissionersAgenda.

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

Who Rules the Roost? CWA After Maryland Ruling

CAFO Industry Faces Potential Expansion of Clean Water Act Liability in Wake of Maryland Decision

This article was originally published on September 16, 2010 by Portfolio Media, Inc. in Environmental Law 360 and Product Liability Law360.

In a decision that could herald significant change in the allocation of liability for violations of the Clean Water Act at animal feeding facilities, a federal judge in Maryland recently denied Perdue Farms' motion to dismiss claims seeking to hold it jointly responsible for the alleged discharge of animal waste from a concentrated animal feeding operation owned and operated by Hudson Farms in violation of Hudson's National Pollutant Discharge Elimination System permit. *See Assateague Coastkeeper et al. v. Alan & Kristin Hudson Farm et al.*, case number 10-CV-487 (D. Md. July 21, 2010).

Perdue, a so-called "integrator," owns the animals at issue (in this case, approximately 800,000 chickens) and provides their feed and medication but hires independent contractors like Hudson to raise them. As is traditionally the case, the CAFO owner held the NPDES permit.

In its motion to dismiss Perdue argued that, as it neither held the permit nor owned the facility at issue, it could not be liable under the CWA. Judge William Nickerson disagreed,

finding that CWA liability potentially extends to all entities that exercise sufficient control to be responsible for causing the violation, including integrators like Perdue.

While this decision does not establish Perdue's liability — plaintiffs will be permitted to take discovery regarding their claim that Perdue exercised sufficient control to be held liable — it signals a potential shift from the historic protection that integrators have enjoyed from direct liability under the CWA.

Who Needs a Permit, the CAFO or the Integrator?

EPA regulations at 40 C.F.R. § 122.21(b) establish what types of entities are required to obtain an NPDES permit under the CWA ("owners and operators"). The U.S. Environmental Protection Agency has twice developed CAFO-specific rules that designate large animal feeding operations as point sources requiring NPDES permits.

However, neither the EPA nor the Maryland Department of the Environment, which administers the NPDES program in the state, has clarified by rule whether anyone other than an owner or operator of a CAFO requires such a permit. Both have traditionally interpreted the obligation to obtain an NPDES permit to fall on the farm owners that actually own or operate the CAFO, and not integrators that use the farmers' services.

Not Putting All Its Eggs in One Basket?: Ambiguity in the Basis of the Court's Decision

While the court clearly concluded that integrators like Perdue can be liable under the CWA even if they do not hold an NPDES permit, it never fully developed the rationale supporting its conclusion.

On the one hand, a plausible reading of the decision suggests that the court decided that, despite its argument to the contrary, Perdue is an "owner or operator" that must obtain a, NPDES permit. While such a theory runs counter to the EPA and the MDE's interpretation of their applicable rules, precedent for such a theory exists.

In regulatory preambles to proposed CAFO rulemakings, never adopted, the EPA indicated that all entities that exercise substantial operational control over a CAFO may be subject to NPDES permitting requirements as an "operator" of a facility.

Moreover, the EPA has interpreted the CWA to require multiple parties to obtain permits for the same discharge where each exercises control sufficient to satisfy the definition of "operator" in other circumstances, including permitting under the federal construction general stormwater permit.

Assuming this is the rationale employed by the court, the consequence of this decision would be a significant expansion of the NPDES permitting scheme.

If the decision is upheld, or the foregoing rationale adopted by the EPA, any entity that exercised sufficient control over a CAFO such that it could be deemed an "operator" would, going forward, be required to obtain an NPDES permit.

In short, not just poultry integrators, but potentially a wide swath of parent companies, customers of so-called "toll processors" and other outsourcers could face serious questions about whether they, as well, might need to obtain NPDES permits for discharges that are not under their direct control.

The more likely basis for the decision is that the court believes liability attaches to parties even where the control they exert is not sufficient to require that they hold a permit.

For example, the court finds Perdue's contention that it cannot be held liable because integrators need not obtain a permit "overstated ... because having a permit is not the basis of an integrator's potential liability. Rather, an integrator's liability is determined on the basis of its level of control over their contractors' chicken operations." Memorandum Opinion at 22.

Being liable as one who does not need a permit but is still required to comply with the CWA would represent an exponential and likely unprecedented expansion of liability under the

CWA, which has always been predicated on the obligation to have, or to comply with, an NPDES permit.

Unfortunately, there is simply not enough legal analysis in the court's opinion to determine whether, if in fact this is the court's rationale, it committed an egregious error or, recognizing previous limitations in the statutory and regulatory permitting scheme, felt the time had come to close a perceived loophole.

Regardless, should courts continue down this path and explicitly extend CWA liability to non-permittees, that revolutionary line of reasoning will generate predictable, significant opposition.

Don't Count Your Chickens: Industry Challenges May Be on the Horizon

Regardless of the basis for its decision, the court found plaintiffs' allegations that Perdue owned the chickens, provided their feed and dictated their care "sufficient to state a plausible claim against Perdue at the motion-to-dismiss stage," but it remains to be seen whether the plaintiffs can prove their factual allegations and, if so, whether the court finds them sufficient to hold Perdue liable. Memorandum Opinion at 23.

Holding Perdue liable for the foregoing reasons — control over the animals and how they are raised — would suggest that control over the source of pollutants, rather than control over site compliance or the design or operation of pollution control technologies, is sufficient to impose CWA liability.

Should Perdue be found liable on that relatively paltry basis, a vigorous opposition should be expected not only from the livestock processing industry but from other industries that also rely on third-party operators to control site compliance or the design or operation of pollution control technologies.

Moreover, the EPA may decide to take further regulatory action in response to the Assateague decision, either to confirm the court's expansion of potential liability under the CWA or to limit CWA liability to permit holders.

Indeed, parties on both sides of this divide may well be pondering petitions to encourage rulemaking in the direction of their liking. Regardless of its genesis, any potential EPA regulatory action on the issue will almost certainly be challenged, either by industry or environmental groups.

In sum, this decision raises far more questions than it answers. What is the basis for integrator liability? Are permits only one route to legal liability? What constitutes the sufficient exercise of control? One thing, however, is virtually certain: a vigorous opposition either through the appellate process or regulatory rulemaking to this potential expansion of CWA liability.

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Carbon Storage: Texas Stakes Its Claim

Peter Gregg and Lydia González Gromatzky authored an article, *Carbon Storage: Texas Satkes Its Claim*, that appears in the Fall 2010 issue of ABA's Natural Resources & Environment. To read the article, go to http://www.bdlaw.com/assets/attachments/263.pdf.

Firm News and Events

Beveridge & Diamond Ranked as Tier 1 Environmental Law Firm by U.S. News and Best Lawyers

Washington, DC -- Beveridge & Diamond, P.C. has been named to the 2010 Best Law Firms list by U.S. News Media Group and Best Lawyers. The Firm is ranked as a Tier 1 law firm in Environmental Law in Washington, DC, and as a Tier 2 law firm in Land Use & Zoning Law in the Boston metropolitan area.

According to U.S. News and Best Lawyers, "achieving a high ranking is a special distinction that signals a unique combination of excellence and breadth of expertise."

"Our Firm strives to deliver outstanding legal support to our clients and we are very pleased to receive this top ranking for our environmental practice," said Ben Wilson, the Firm's Managing Principal.

U.S. News and Best Lawyers released the 2010 Best Law Firms rankings on September 15, marking the inaugural publication of this highly-anticipated annual analysis. These rankings showcase 8,782 different law firms ranked in one or more of 81 major practice areas. Full data are available online for the law firms that received rankings. To view our rankings on the U.S. News Best Law Firms website, please visit http://bestlawfirms.usnews.com/firmprofile.aspx?firm_id=13605.

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About Beveridge & Diamond, P.C.

Since 1974, Beveridge & Diamond, P.C. (www.bdlaw.com) has defined the practice of environmental law in the U.S. With 100 attorneys nationwide, the Firm has helped clients achieve success in numerous venues and in every substantive area of environmental practice. Firm lawyers partner with our clients, helping them meet local, national and global legal challenges and business opportunities.

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