Texas Environmental Update

Beveridge & Diamond PC

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

Daniel Berner
dberner@bdlaw.com

Edward M. Grauman
egrauman@bdlaw.com

Karen Hansen
khansen@bdlaw.com

Maddie Kadas
mkadas@bdlaw.com

Laura LaValle
llavalle@bdlaw.com

Bryan Moore
bmoore@bdlaw.com

January 2013

Texas Developments

Texas Files Complaint with U.S. Supreme Court Against New Mexico Alleging Diversions of Water From Rio Grande River

On January 8, 2013, the State of Texas filed a complaint against the State of New Mexico in the U.S. Supreme Court. Texas's complaint alleges that the Rio Grande Compact, signed in 1938 by Texas, New Mexico, and the State of Colorado, requires New Mexico to deliver specified amounts of Rio Grande water to Elephant Butte Reservoir, located near Engle, New Mexico. The complaint states that, once delivered to the Elephant Butte Reservoir, the water belongs and should be allocated to beneficiaries in southern New Mexico and Texas. According to the complaint, New Mexico is not allowing an adequate amount of water to pass through to Texas.

Texas claims that, while the Rio Grande Compact does not identify quantitative allocations of water between southern New Mexico and Texas, it does allocate water based on the proportion of irrigable lands in the two regions. Texas alleges that, historically, 57% of the water flowing below the Elephant Butte Reservoir has been allocated to New Mexico beneficiaries and 43% has been allocated to Texas beneficiaries. However, the complaint alleges that unlawful surface water diversions and extraction of groundwater in New Mexico have increased over time until, in 2011, they amounted to tens of thousands of acre-feet of water annually. Texas alleges that, by its failure to prevent the proliferation of pumping water that is hydrologically connected to the Rio Grande and the non-permitted diversion of surface water, New Mexico has breached and continues to breach its obligations under the Rio Grande Compact.

In bringing the action, Texas invokes the Supreme Court's original jurisdiction over cases in which a state is a party pursuant to Article 3 of the U.S. Constitution. Among other things, Texas asks that the Supreme Court declare the rights of Texas to the waters of the Rio Grande and command New Mexico to deliver the Rio Grande waters to Texas in accordance with its Rio Grande Compact obligations. In addition to New Mexico, Texas named Colorado as a defendant in the case solely on the basis that it is a signatory of the Rio Grande Compact.

Texas's complaint, and the Texas Commission on Environmental Quality ("TCEQ's") press release regarding the complaint, are available from TCEQ's website.

U.S. Supreme Court Grants Certiorari in Case Affecting Water Rights Between Texas and Oklahoma

On January 4, 2013, the U.S. Supreme Court granted certiorari in *Tarrant Regional Water District v. Hermann*, No. 11-889. The petitioner in the case, the Tarrant Regional Water District, is a Texas state agency; the appellees are officers of the Oklahoma Water Resources Board and the Oklahoma Water Conservation Storage Commission. The crux of the litigation lies in the conflict between certain Oklahoma statutes regarding water

use which, among other things, prevent Oklahoma state entities from selling water for out-of-state use, and the Red River Compact between Oklahoma, Texas, Arkansas, and Louisiana, which allocates the water in the Red River Basin among the States and was ratified by the U.S. Congress in 1980. The petitioners are seeking (1) a judgment declaring that the certain Oklahoma statutes violate the Commerce and Supremacy Clauses of the U.S. Constitution, and (2) an injunction to prevent application of the Oklahoma statutes. Both the trial court and the 10th Circuit dismissed the petitioner's claims. Oral arguments in the case are scheduled for April.

The petition for certiorari is available here.

Texas State Representative Introduces Legislation Aimed at Transferring $2 Billion from Texas' Economic Stabilization Fund to Water-Related Projects

On January 10th, Texas State Rep. Allan Ritter (R-Nederland) filed two bills relating to the funding of water projects in Texas. House Bill 4 provides for an amendment to the Texas Water Code to create the State Water Implementation Fund, which is to be used to provide financing for water-related projects. The bill sets forth a variety of limitations and requirements on the use of the funds, including minimum funding requirements for certain regions and certain types of projects such as water conservation, water reuse, and education projects. House Bill 11, introduced the same day by Ritter, provides for the appropriation of $2 billion from the State's Economic Stabilization Fund to be credited to the State Water Implementation Fund, if created, or another fund administered by the Texas Water Development Board for purposes of water-related projects.

TCEQ Imposes Then Lifts Restrictions on Water Rights in Brazos River Basin

Pursuant to a senior priority call issued by a senior water rights holder (the "Senior Water Rights Holder") on November 19, 2012 (the "Senior Priority Call"), the TCEQ Executive Director signed an order on January 15, 2013 (the "January 15 Order") restricting water rights for idle power generation facilities and certain municipal water-right holders which have junior water rights in the Brazos River Basin. The type of restriction imposed by the January 15 Order was tailored to each junior water rights holder; some holders were suspended from impounding water, others were allowed only restricted diversions, and still others had their water permits suspended. Shortly after the issuance of the January 15 Order, the Senior Water Rights Holder rescinded the Senior Priority Call. Consequently, on January 23, 2013, TCEQ notified junior water rights holders in the Brazos River Basin that they could once again divert water under the terms of their water rights.

TCEQ's press release regarding this matter and the January 15 Order are available from TCEQ's website.

Texas Withdraws D.C. Circuit Petition for Review of EPA's Air Regulations for Hydraulic Fracturing Operations

On January 10, 2013, the State of Texas, the TCEQ, and the Railroad Commission of Texas (collectively, the "Texas Petitioners") filed a motion in the D.C. Circuit to dismiss their petition for review of the Environmental Protection Agency's ("EPA's") air pollution standards for natural gas hydraulic fracturing operations (*American Petroleum Institute v. EPA*, No. 12-1405, D.C. Cir.).

The Texas petition had been consolidated with other lawsuits challenging the same regulations, so despite the withdrawal, the case remains active. The Texas Petitioners provided little explanation for the withdrawal motion, other than to say that the industry petitioners in the consolidated action were the more appropriate parties to take on the challenge:

> Upon reflection, the Texas Petitioners believe that the issues in this case more directly affect the industry petitioners and can be fully and adequately addressed

by them. The Texas Petitioners believe that their resources can be more efficiently used by possibly later seeking leave of Court to participate as amici.

The industry petitioners include the American Petroleum Institute, Gas Processors Association, Domestic Energy Producers Alliance, Independent Petroleum Association of America, Texas Oil and Gas Association, and Western Energy Alliance.

The hydraulic fracturing rules at issue were published by EPA on Aug. 16, 2012 (see 77 Fed. Reg. 49,489).

Deadline to Participate in EPA Region VI Episodic Release Reduction Initiative Quietly Expires

Last month, shortly before the end of the year, EPA Region VI sent out official invitations to seventeen facilities from Louisiana and Texas to participate in its Episodic Release Reduction Initiative ("ERRI"). The invites appear to be to those same facilities selected to participate in the ERRI kick-off meeting held more than a year ago. According to EPA, facilities were originally selected based on two factors: (1) the facility belonged to a group with allegedly the largest number of episodic releases to the National Response Center over the past five years and (2) the facility had allegedly high impacts to environmental justice communities.

The ERRI program, modeled after a similar initiative launched in 1999, purports to have four core goals: (1) reduce the number and quantity of releases; (2) provide guidance for local officials and communities on accessing release information on state/federal websites; and (3) participate in Regional Response Teams to enhance emergency preparedness; and (4) prepare and publish a report. Facilities accepting the invitation would be charged with collecting information and developing best practices that would be then disseminated.

Despite the original success of the first version of the program, it remains unclear whether any facilities will accept the Region's renewed invitation. Most, especially those in Texas, operate under a significantly changed regulatory and permitting landscape than existed a decade ago, including: more stringent emissions event reporting rules; new New Source Review permit provisions covering start-up, shutdowns, and maintenance; comprehensive Title V permitting, monitoring, and deviation reporting standards; and, in some cases, global federal consent decrees. With no incentives to participate from EPA and few new best practices viewed as possible in light of an already saturated regulatory arena, it remains to be seen whether any facilities will accept EPA's invitation.

The ERRI draft work plan is available here.

Texas Joins New Association of State Air Agencies

Texas and sixteen other states have joined the newly-formed Association of Air Pollution Control Agencies ("AAPCA"). The association will provide a technical forum to assist states with the application of various aspects of the Clean Air Act and associated regulations. "There are real technical issues with regulations and guidance coming from EPA that need thoughtful consideration across the United States," said TCEQ Commissioner Carlos Rubinstein. "Issues like potentially unachievable air quality standards that keep being lowered and transport issues left in limbo by legal challenges. States participating in this organization will have the opportunity to discuss, educate and be educated about the latest technical and regulatory actions." AAPCA was founded in the fall of 2012 and expects to be fully operational by April 2013.

AAPCA was created as alternative to the 30-year-old National Association of Clean Air Agencies ("NACAA"; formerly "STAPPA/ALAPCO"), which has taken policy positions with which Texas and other states did not agree. Commission Rubinstein has stated that NACAA's structure "is not one that respects differing opinions." Texas, Florida, Indiana, Louisiana, North Dakota, and Ohio have discontinued their association with NACAA.

TCEQ's announcement of Texas' participation in AAPCA is available at here.

BEVERIDGE & DIAMOND PC

U.S. Fish and Wildlife Service Reopens Public Comment Period on Endangered Species Listing for Four Central Texas Salamanders

On January 25, the U.S. Fish and Wildlife Service ("FWS") announced the reopening of the public comment period on the proposed listing and proposed designation of critical habitat under the Endangered Species Act for four central Texas salamanders: the Austin blind salamander, Georgetown salamander, Jollyville Plateau salamander, and Salado salamander (see 78 Fed. Reg. 5385). The FWS issued a previous draft of the proposal rule on August 22, 2012, which would have designated approximately 5,983 acres in 52 units located in Travis, Williamson, and Bell Counties, Texas, as critical habitat (see 77 Fed. Reg. 50768). As a result of public comments received in response to that proposal, FWS identified additional salamander locations, and its current proposal revises the designated critical habitat units for the Georgetown and Jollyville Plateau salamanders.

In addition to the revised critical habitat designations, FWS released a Draft Economic Analysis estimating that the total present value impacts anticipated to result from the proposed designations are approximately $29 million over 23 years. FWS also published a revised analysis of the impact on the salamanders of "impervious cover" (surface material that prevents water from filtering into the soil) based on additional information obtained since the publication of the August 2012 proposed rule.

FWS ultimately intends to issue two separate rules: one for the final listing determination and one for the final critical habitat determination. The agency will consider comments received or postmarked by March 11, 2013. More information is available on the FWS website.

TCEQ Seeks Input to Develop New Effects Screening Levels

TCEQ's Toxicology Division plans to establish health-based Effects Screening Levels ("ESLs") for 97 chemicals from the following groups: Phenol, Amine, Acid, Siloxane/Silicone, Silane, Ester, Pyridines, Azole. TCEQ will develop the new ESLs using the Tier II (N-L ratio) or III (relative toxicity comparison) methodologies outlined in TCEQ's Guidelines to Develop Toxicity Factors (Publication No. RG-442). For this effort, TCEQ has opened a public comment period for submittal of toxicity information regarding the subject constituents, and is requesting that such information be submitted by April 1, 2013.

Additional information regarding this effort, including a list of the constituents for which TCEQ plans to develop ESLs, is available here.

Upcoming TCEQ Meetings and Events

TCEQ's ***Tax Relief for Pollution Control Property Advisory Committee*** will hold a meeting at noon on February 8, 2013, at TCEQ Headquarters. Additional information regarding this event, including the meeting agenda, is available on TCEQ's website.

TCEQ will host its annual ***Environmental Trade Fair and Conference*** at the Austin Convention Center from April 30 to May 1, 2013. A banquet will be held on the evening of May 2 during which the 2013 Texas Excellence Awards will be accepted. Additional information about this event is available on TCEQ's website.

TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in January can be found on TCEQ's website.

Recent Texas Rules Updates

For information on recent TCEQ rule developments, please see the TCEQ website.

BEVERIDGE & DIAMOND PC

National Developments

EPA Announces Proposed Changes for Minimum Risk Pesticides

On December 31, 2012, the U.S. Environmental Protection Agency announced a proposal to make several important changes to the exemption for "minimum risk" pesticide products under Section 25(b) of the Federal Insecticide, Fungicide, and Rodenticide Act. See EPA, "Pesticides; Revisions to Minimum Risk Exemption," 77 Fed. Reg. 76979 (Dec. 31, 2012). Public comments on the proposed changes are due on or before April 1, 2013.

This would be the first set of revisions to EPA's minimum risk pesticide regulations since the Agency first promulgated them in 1996. As briefly summarized below, the proposed changes would include more detailed EPA listings of the active and inert ingredients that may be used in minimum risk pesticides, as well as new labeling requirements that would become mandatory two years after the effective date of the final rule. Although EPA is not proposing to add or subtract any ingredients from its lists of eligible minimum risk product ingredients, the Agency suggests that as many as half of the minimum risk pesticides now marketed may not comply with its current regulations, and acknowledges that the more detailed listings included in its proposal may in effect require manufacturers who currently distribute pesticides under the minimum risk exemption to reformulate their products to achieve compliance.

The full text of this article is available at http://www.bdlaw.com/news-1430.html.

If you would like to discuss EPA's new proposal or if you have any questions about the regulation of minimum risk pesticides more generally, please contact Kathy Szmuszkovicz at Beveridge & Diamond, P.C. (kes@bdlaw.com or (202) 789-6037) or Alan Sachs, Independent Consultant Attorney to Beveridge & Diamond, P.C. (ajs@bdlaw.com or (410) 230-1345).

Army Corps' New Plant List Expected to Increase Number of Wetlands, Assertions of CWA Jurisdiction

An article authored by Parker Moore analyzing the potential impacts of the 2012 National Wetland Plant List was published in a recent issue of BNA Inc.'s *Daily Environment Report*. To read the article, Army Corps' New Plant List Expected to Increase Number of Wetlands, Assertions of Clean Water Act Jurisdiction, please click here.

Supreme Court Reaffirms CWA Discharge Ruling in L.A. Stormwater Case

On January 8, 2013, the U.S. Supreme Court unanimously upheld its 2004 ruling that the movement of polluted water between separate sections of the same waterbody does not constitute a "discharge" of pollutants requiring a permit under the Clean Water Act ("CWA"). In *Los Angeles County Flood Control District v. NRDC*, No. 11-460 (Jan. 8, 2013), the Justices addressed only the discharge issue on which they had granted review, declining to consider broader questions relating to the interpretation of CWA permit terms and the validity of the Environmental Protection Agency's ("EPA") contentious "water transfer rule." Accordingly, while permittees may take comfort in the Court's reiteration of existing law, they also must be mindful that decisions on these other important issues likely lie just over the horizon.

A more detailed analysis of the Supreme Court's ruling and its implications is available here.

Court Rejects EPA's Efforts to Regulate Stormwater as a Pollutant

In an opinion issued on January 3, 2013, a United States District Court for the Eastern District of Virginia ruled that the United States Environmental Protection Agency exceeded its authority by attempting to regulate stormwater, which is not a pollutant under the Clean Water Act, as a surrogate for sediment, which is a pollutant. *Virginia Dep't of Transp. v. U.S. Envtl. Protection Agency*, No. 1:12-CV-775 (E.D. Va. Jan. 3, 2013).

The case, which was brought by the Virginia Department of Transportation and Fairfax County, addressed a 2011 EPA-established total maximum daily load (TMDL) limiting the amount of stormwater that could flow into the Accotink Creek, a tributary of the Potomac River in Virginia. *Virginia Dep't of Transp.*, slip op. at 2. EPA designed the TMDL to regulate the amount of

sediment in the Accotink, which EPA believed to be the primary cause of the creek's impairment. *Id*. at 2-3. All parties agreed that sediment is a pollutant under the Clean Water Act, and that stormwater is not. *Id*. at 3. Thus, the question before the court was whether the Clean Water Act authorizes the EPA to establish a TMDL for the flow of a nonpollutant into the creek. *Id*.

The full text of this article is available at http://www.bdlaw.com/news-1426.html.

For more information, please contact Richard Davis, rdavis@bdlaw.com, 202-789-6025, Karen Hansen, khansen@bdlaw.com, 512-391-8005, Tim Sullivan, tsullivan@bdlaw.com, 410-230-1355, or Mackenzie Schoonmaker, mschoonmaker@bdlaw.com, 212-702-5415.

US DOT Seeking Comments on Aligning Lithium Battery Rules with 2013-2014 ICAO Technical Instructions

On January 7, 2013, the U.S. Department of Transportation (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) will publish a Notice of Proposed Rulemaking (NPRM) soliciting comments until March 8, 2013 on the impact of changes to the international requirements for the air transport of lithium cells and batteries.

Separately, but also on January 7, 2013, PHMSA will publish a final rule aligning U.S. hazard classification, hazard communication, and packaging requirements with international requirements more broadly. This rule is consistent with DOT's routine practice of mostly harmonizing the Hazardous Materials Regulations (HMR) with international dangerous goods rules.

The full text of this article is available at http://www.bdlaw.com/news-1425.html.

For more information please contact Elizabeth Richardson, erichardson@bdlaw.com, 202-789-6066, Aaron Goldberg, agoldberg@bdlaw.com, 202-789-6052, or Alexandra Wyatt, awyatt@bdlaw.com, 202-789-6086.

Supreme Court Hears L.A. Stormwater Case

On December 4, 2012, the United States Supreme Court considered the potential liability of the Los Angeles County Flood Control District (the "District") for stormwater runoff under a municipal stormwater permit. (*Los Angeles County Flood Control District v. NRDC*, No 11-460, *oral argument* 12/4/2012). The District asked the Supreme Court to reverse a decision by the U.S. Court of Appeals for the Ninth Circuit, which had held that the District violated its permit by channeling stormwater into the Los Angeles and San Gabriel Rivers, and to remand the case to the Ninth Circuit to reconsider its decision to evaluate channelized portions of the rivers as distinct waterbodies. If the substance and tone of the Justices' questions during the argument are any indication, the Court appears likely to side with the District.

The full text of this article is available at http://www.bdlaw.com/news-1423.html.

For more information, please contact Parker Moore, 202-789-6028, pmoore@bdlaw.com, or Sara Vink, 202-789-6044, svink@bdlaw.com.

Firm News & Events

A Family Tradition of Excellence: Beveridge & Diamond's Benjamin F. Wilson and Seattle Seahawks Quarterback Russell Wilson

Beveridge & Diamond's Managing Principal, Benjamin F. Wilson, maintains a special relationship with his nephew, Russell Wilson, quarterback of the Seattle Seahawks. With the NFL playoffs in full swing, several media outlets recently documented this relationship.

View two-minute video from WJLA-ABC7 television, the local ABC affiliate for the greater Washington area.

View feature story "Seahawks vs. Redskins: From start, Russell Wilson was destined to succeed" from the January 7, 2013 Washington Post.

BEVERIDGE & DIAMOND PC

Beveridge & Diamond Scores Major NEPA/Wetlands Victory for Railroad in 10th Circuit

On November 28, 2012, the U.S. Court of Appeals for the Tenth Circuit unanimously upheld environmental studies supporting the Clean Water Act Section 404 permit issued for a proposed $250 million intermodal facility near Gardner, Kansas. *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Engineers*, __ F.3d __, 2012 U.S. App. LEXIS 24531 (10th Cir. 2012). The Court rejected claims from environmental groups that the U.S. Army Corps of Engineers had violated the National Environmental Policy Act by evaluating the project in an environmental assessment and the CWA by permitting project construction that would fill wetlands and other waters. Litigators in Beveridge & Diamond's Washington, D.C. office represented the facility's developer, one of the nation's largest freight railroad companies, which intervened as a defendant in the litigation.

The Tenth Circuit granted summary judgment to the Corps and the railroad company on all counts, finding that the Corps had complied with NEPA and the CWA by issuing a Section 404 permit for the project after evaluating the proposal in an environmental assessment and concluding that the project would not significantly affect the quality of the human environment. In the process, the Court established new precedent that will help developers nationwide defend their projects against NEPA challenges.

A more detailed analysis of the Tenth Circuit's ruling and a link to the opinion are available here.

Office Locations:

Washington, DC

Maryland

New York

Massachusetts

New Jersey

Texas

California