ENVIRONMENTAL BRIEF

Office of Conservation Issues Emergency Order Imposing Affirmative Obligations on Oilfield Sites, Facilities, Structures, Injection Wells and Pipelines Throughout the State

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On April 28, 2011, Governor Bobby Jindal declared a State of Emergency as a result of growing concern over the predicted crest of the Mississippi River well above flood stage in many areas. Consistent with his authority, on May 13, 2011, James Welsh, Commissioner of Conservation, also issued an emergency and administrative order. It is expected that substantial flooding in the state will likely lead to adverse effects on many oilfield sites which could result in serious threats to public safety and the environment. The order specifically applies to following throughout the state:

- Oilfield sites – including injection wells
- Other facilities – including commercial E&P waste disposal and transfer stations
- Structures and Pipelines

Ordered actions are both general calls for alert monitoring of the situation and a more specific list of necessary steps (as appropriate). The Order contains a practical, common sense mandate, to keep track of forthcoming proclamations, orders, warnings, predictions, forecasts, directives or other communications from federal, state and local authorities and to monitor water levels and weather activity. Additionally, the order requires operators to take all necessary steps and perform all necessary actions to avoid damage to the environment or threats to life or safety, including the following, where appropriate:

- Empty petroleum tanks and re-fill with water
- Remove chemicals from sites
- Remove or secure loose items
- Ensure that storm chokes or downhole plugs are installed in wells
- Empty active pits of E&P waste
- Shut in and secure wells where necessary
- Protect sites from stray debris

The above list of actions is discretionary, tasking each operator with the duty to determine which actions are necessary as each operator is in the best position to assess the potential risks and dangers.

The Order also requires notification to the Office of Conservation within 12 hours should an operator shut down one of the covered facilities. The Order will extend for 120 days, unless modified or extended. The order may be found *http://dnr.louisiana.gov/assets/OC/eng_div/Emergency_Order_No_2011-001_20110513.pdf*

EPA Clarifies Solid Waste Materials

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On March 21, 2011, a final rule title "Identification of Non-Hazardous Secondary Material That Are Solid Waste" was published in the Federal Register. See, 76 Fed. Reg. 15456. The final rule does not as much identify that which is a solid waste as it identifies materials that are not solid waste. The effect of the rule is to determine whether combustion units should be regulated under Section 129 or Section 112 of the Clean Air Act (CAA) – solid waste is regulated under Section129 and non-solid waste under Section112. See, 76 Fed. Reg. 15610.

Under current regulations, certain materials (spent, sludges, by-products, specific chemical products and scrap) are solid waste when burned for energy recovery. See, 40 C.F.R. §261.2(c)(2). Materials are not solid waste when recycled through use or reuse as ingredients, as substitute products, or returned to the original process. See, 40 C.F.R. §261(e). The preamble of the final rule expands recycling by indicating that it includes burning for energy recovery. See, 76 Fed. Reg. 15468-69.

The new rule attempts to add clarity by distinguishing "traditional fuels" from non-hazardous secondary materials that are not solid waste when burned. The definition of traditional fuel includes that which has historically been considered a fuel in the past (e.g., fossil fuels) and alternate fuels (e.g., used oils that meet 40 C.F.R §2791.11 standards). Traditional fuels are neither secondary materials nor solid waste. Alternatively, under the rule, a secondary material is "any materials that is not the primary product of a manufacturing or commercial process, and can include post-consumer materials, off-specification commercial chemical products or manufacturing chemical intermediates, post-industrial material, and scrap." See, 76 Fed. Reg. 15550; both definitions will be codified at 40 C.F.R. §241.2 when the rule becomes effective on May 20, 2011. The rule establishes six exceptions to the definition of solid waste for non-hazardous secondary materials when used legitimately as a fuel or ingredient in a combustion unit:

1. Those that remain with the generator and meet the specified legitimacy criteria
2. Scrap tires managed by established collection programs
3. Resinated wood used as fuel
4. Used as ingredient in a combustion unit
5. Secondary materials that have been processed into a legitimate fuel
6. Non-hazardous determinations

The "legitimacy criteria" is a very important test intended to ferret out sham recycling. Legitimate materials are not thrown away. See, 76 Fed. Reg. 15471. Legitimate fuels must: (1) be managed as a valuable commodity, (2) not be stored for an unreasonable time, (3) have a meaningful heating value, (4) be burned for heat recovery, and (5) contain equivalent or less contaminants compared to traditional fuels burned in a given combustion unit design. See, 40 C.F.R. §241.3(d). It should be noted that the EPA implies that the concept of legitimacy is important in hazardous waste determinations. See, 76 Fed. Reg. 15463.

In conclusion, the final rule adds definition to the question of non-hazardous solid waste combustion. The rule adds a definition for traditional fuel, which is neither a solid waste nor a secondary material. Traditional fuels will be subject to CAA §112 as well as certain non-hazardous secondary materials that meet exceptions from the definition of solid waste. Secondary materials that do not meet an exception will be classified as solid waste and be subject to CAA §129.

EPA Extends the Greenhouse Gas Report Program's Reporting Deadline

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In a March 1, 2011 press release, the Environmental Protection Agency ("EPA") announced its intent to extend the reporting deadline for companies to report 2010 greenhouse gas ("GHG") data. Under EPA's GHG Reporting Program, large sources and suppliers of GHG originally had until March 31, 2011 to report their 2010 GHG data. On March 17, 2011, EPA announced that the reporting deadline has been extended until September 30, 2011. In announcing the extension of the reporting deadline, EPA stated that the delay was due to the fact that the online electronic reporting system needed to be further tested by EPA and that industry would need additional time to test the system and to provide feedback prior to reporting.

EPA's GHG reporting rule stemmed from a provision of the 2008 Consolidated Appropriations Act, Pub. L. No. 110-161, 121 Stat. 1844 (2008), which required EPA to impose mandatory reporting of GHG emissions above certain threshold levels in all sectors of the economy. In response, EPA issued the Mandatory Reporting of Greenhouse Gases Rule, 74 Fed. Reg. 56,260 (Oct. 30, 2009). The reporting requirements apply to owners and operators of certain facilities that directly emit GHG as well as to certain fossil fuel suppliers and industrial GHG suppliers. Instead of requiring control of GHGs, the rule requires only that sources above certain threshold levels monitor and report GHG emissions.

The final rule also required the first annual GHG report be due by March 31, 2011. EPA's reporting extension means that this deadline will not be met. EPA has promised to provide more detail on any changes that it makes to its online reporting system.

Information regarding the GHG Reporting Program can be found at the following EPA website: *http://www.epa.gov/climatechange/emissions/ghgrulemaking.html*