BEVERIDGE & DIAMOND PC

bdlaw.com

Massachusetts Environmental & Land Use Alert

Marc J. Goldstein
Principal
(781) 416-5715
mgoldstein@bdlaw.com

Jeanine L.G. Grachuk
Principal
(781) 416-5713
jgrachuk@bdlaw.com

Heidi P. Knight
Principal
(781) 416-5765
hknight@bdlaw.com

Brian C. Levey
Principal
(781) 416-5733
blevey@bdlaw.com

Stephen M. Richmond
Principal
(781) 416-5710
srichmond@bdlaw.com

Brook J. Detterman
Associate
(781) 416-5745
bdetterman@bdlaw.com

Virginie K. Roveillo
Associate
(781) 416-5726
vroveillo@bdlaw.com

Dylan J. King
Law Clerk
(781) 416-5755
dking@bdlaw.com

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IN THIS ISSUE

MASSACHUSETTS ENVIRONMENTAL DEVELOPMENTS

Massachusetts Permitting Goes Online

Author: Jeanine L.G. Grachuk

Finally catching up with many states that have made it possible to apply for and review permits online, Massachusetts' Energy and Environmental Information Public Access System (EIPAS) went online last month, promising to usher in a new era of improved accessibility to the permitting process, while still exhibiting growing pains and limitations.

Information Data Portal

The Massachusetts Executive Office of Energy and Environmental Affairs (EEA) has created an online platform called the Information Data Portal which allows the public to view information on: (a) permitting, inspection and enforcement at specific facilities located throughout the Commonwealth, (b) dashboards that provide comparative data relating to different permitting programs or different cities and towns, and (c) limited analytical data relating to public water suppliers of drinking water.

Permitting, Inspection and Enforcement Information

The Information Data Portal includes permitting, inspection, and enforcement information from a broad array of programs implemented by the agencies within EEA. The data provided is a tremendous step forward in transparency and in providing the public access to the regulatory status of facilities in their community. However, the data is limited. In the searches we performed, actual permits were not available; instead, the database states that a particular permit was applied for, indicates whether it was issued, and provides the related dates. The database also provides inspection information, including the dates of inspections and where applicable the program the inspection focused on. However, information on the results of the inspection are not included. The database provides enforcement information, but it is limited to the type of enforcement document issued, the program it was issued under, and the penalty assessed. The information in the database begins with January 1, 1996.

The Information Data Portal provides information on the following programs, based on the FAQ page. While EEA plans to expand the information over time, the current limitations on the information provided are discussed below:

- *Air Quality Program.*
- *Hazardous Waste Control.*
- *Industrial Waste water.* According to EEA, this includes industrial NPDES permits; however, because the NPDES program is implemented by US EPA, individual NPDES permits are included not all authorizations issued under a general permit are included.
- *Solid Waste Management.* Not included: third-party inspection certification applications received prior to May 15, 2017.
- *Toxic Use Reduction.* Note, this relates to certifications of individuals to be Toxic Use Reduction Planners.
- *Waste Site Cleanup.* This includes a limited amount of Waste Site Cleanup information, such as: Tier 1 permit actions, special project designations and Grants of Environmental Restriction. No other waste site cleanup documentation is included, and no inspection or enforcement information is included. Additional information on the Waste Site Cleanup program is available on MassDEP's website.
- *Water Pollution Control.* Not included: inspection and enforcement information.
- *Water Supply / Drinking Water.* The FAQ notes that all WS10 permits are included, but applications received prior to May 15, 2017 are not included. WS10 refers to certification of cross connection testers. In addition, inspection and enforcement information is limited to public water supply systems.
- *Watershed Management.* Not included: permitting information on WM04 herbicide applications, and inspection and enforcement information. According to EEA, this category does include Municipal NPDES permits; however,

because the NPDES program is implemented by US EPA, individual NPDES permits are included not all authorizations issued under a general permit are included.

- *Wetlands and Waterways*. The following are not included: inspection and enforcement information. The only permitting information that is included is:
    - WW10 – Major Fill and Excavation Projects;
    - WW11, - Minor Fill and Excavation Projects;
    - 401WQCmajor;
    - 401QCminor; and
    - WW13 – Wetlands Renovation of Abandoned Cranberry Bogs).
- *UST & Environmental Results Program*. No permitting information is available; however, inspection and enforcement information is available.

Program Data

The public can search for drinking water data relating to public water suppliers in the Information Data Portal under the search button "program data." You can search by town, the name of the public water supplier, the contaminant group or the chemical name. The results of the search include the actual data for the identified chemical including the date of the test and the method used. The database indicates whether the data relates to a sample from a raw (prior to treatment) or finished (after treatment) water source.

At this time, data is limited to the data in MassDEP's state-wide drinking water database. EEA plans to expand the available data over time.

Dashboards

On the main page of the Information Data Portal, EEA has provided three dashboards that show statistical information in several visual formats relating to the permitting done by EEA and its agencies. The portal contains the following dashboards:

- *Statewide MassDEP Permit Approvals by Town and Type* graphically shows the types of permits issued state-wide or for the selected town(s).
- *Statewide MassDEP Count of Permits, Inspections, & Enforcements Time Model* graphically shows the number of permit determinations, inspections, and enforcements in a particular timeframe.
- *Statewide MassDEP Total Permit Approvals by Program/Permit Type, Town and Date Range* shows the number of permit approvals by type of permit and by date either statewide or within the town or towns that you select.

EEA ePLACE: Online permitting

Applications for Permits

The online permitting portal is known as ePLACE and is located here. In order to apply for a permit using the portal, users need to register online and create a username and password. According to the EEA announcement, this online permitting portal can be used for permits in the following programs:

MassDEP:

- Air Quality program;
- Drinking Water program;
- Hazardous Waste program;
- Solid Waste program; and

- Toxics Use Reduction program.

Massachusetts Department of Agricultural Resources (MDAR):

- Pesticide Applicator License program.

Massachusetts Department of Conservation and Recreation (MDCR):

- Special Use permitting program for the 2018 season.

Public Access to Permits

The EEA ePLACE Public Access Portal allows the public to search and view all authorizations that were issued electronically. The database of electronic permits is limited because EEA began accepting electronic permits in May 2017. Permits that are eligible for electronic filing at this time are identified above under "Application for Permits.

In addition, this portal allows the public to search, view and comment on applications that are open for public comment. At this time, public comments can only be submitted online for Air Quality Permits.

For questions on environmental permitting in Massachusetts, please contact Jeanine Grachuk.

Beveridge & Diamond counsels clients on a wide-range of environmental permitting issues in Massachusetts and nationally. Our work includes evaluating permitting requirements, compliance strategies, and enforcement response.

EPA Region 1 Increasingly Targeting Ammonia Refrigeration Processes for RMP and General Duty Clause Enforcement

Authors: Stephen M. Richmond, Virginie K. Roveillo

Over the course of 2017, U.S. EPA Region 1 has settled several significant enforcement matters arising under the risk management provisions of the Clean Air Act, Section 112(r). The risk management requirements are intended to minimize accidental releases of hazardous substances to the air and to reduce the severity of releases that do occur.

Much of EPA Region 1's recent enforcement activity has been focused on ammonia refrigeration processes, and most of the cases arise from compliance inspections. EPA Region 1 inspections consider both the Risk Management Plan (RMP) program rules at 40 CFR Part 68 and the General Duty Clause (GDC) statutory language at 42 USC 7412(r)(1). Several settlements this year have adopted a set of "Minimum Safety Measures" as required injunctive relief. These measures were developed by a cross regional team led by EPA Region 1 prior to the change in administrations at the beginning of this year. This article focuses on a few of the significant enforcement matters that EPA Region 1 has recently settled.

RMP Administrative Penalty Settlement

In May 2017, Pawtucket Power Associates, LP entered into a Consent Agreement and Final Order with EPA Region 1, resolving alleged RMP violations involving the company's ammonia refrigeration system at its facility in Rhode Island. *See In re Pawtucket Power Associates, LP*, CAA-01-2017-0004 (May 2017). Among other issues, EPA alleged that the facility's ammonia refrigeration system did not meet industry standards for signage, labeling, emergency switches, and warning alarms, and that Pawtucket failed to inspect ammonia piping for damage to insulation and corrosion in accordance with standard industry practice and the mechanical integrity requirements of the RMP program rules. EPA further alleged that the company had failed to document incident investigations of at least two ammonia release incidents that had occurred in 2010 that had caused injuries, and failed to have an adequate emergency response program.

The parties agreed to a $109,375 civil administrative penalty to settle the matter. The settlement agreement also included a requirement that Pawtucket certify that it had decommissioned the facility's refrigeration system or achieved certain "minimum safety measures." These minimum requirements are a collection of process safety program components that EPA has determined should be present at every facility with an ammonia refrigeration system, whether or not the facility is subject to the process safety management standard that is enforced by the Occupational Safety and Health Administration and by EPA for RMP Program 3 facilities.

- The safety measures focus on the following hazards:
- Releases or safety deficiencies that stem from a failure to identify hazards in design/operation of system
- High risks of release from operating or maintenance activity
- Leaks/releases from maintenance neglect
- Inability to isolate and properly vent releases
- Releases from backpressure and overpressure
- Inability to regain control and reduce release impacts

In another settlement, EPA Region 1 explained that the list of minimum safety measures "is not intended to be a complete list of important safety measures but rather a subset of easily verifiable items that EPA and the International Institute of Ammonia Refrigeration believe could help facilities prevent ammonia releases and prepare for any releases that do occur." *In re Carla's Pasta Inc*., CAA-01-2016-0073 (January 2017). In an informal discussion we had with the EPA Region 1 counsel who led the effort to develop the list of minimum safety measures, we understand the intent in developing these standards was that all EPA regions would use them in settlements of RMP Program 1 and 2 enforcement cases, but to date we have not seen any other regions adopt them.

General Duty Clause Administrative Penalty Settlement

In August 2017, Demakes Enterprises, Inc., the owner and operator of a meat processing, cooking, packaging, and storage facility in Lynn, Massachusetts, entered into a Consent Agreement and Final Order with EPA Region 1, resolving alleged GDC violations involving the company's anhydrous ammonia refrigeration system. *See In re Demakes Enterprises*, CAA-01-2017-0011 (August 2017).

Based on a compliance inspection in July 2014 and subsequent information received, EPA Region 1 alleged that Demakes failed to design and maintain a safe facility. Among other issues, the company allegedly failed to adequately label refrigeration piping, protect refrigeration piping located near the ground from physical damage, post ammonia warning signs near locations containing significant quantities of ammonia, provide emergency shutdown controls or ventilation switches immediately outside refrigeration system machinery room entrances, maintain and calibrate in accordance with industry standards the facility's ammonia detection systems, test or replace within 5 years vessel pressure relief valves, and require hot work permits for contractors performing hot work. EPA Region 1 also alleged that Demakes did not minimize the consequences of accidental releases that do occur by, among other reasons, failing to provide eye and body shower units near machinery rooms, equip machinery rooms with self-closing and tight-fitting doors equipped with panic-type hardware, provide adequate air circulation and ventilation in machinery rooms, and include emergency response contact information and chemical inventory information in the facility's emergency action plan.

General Duty Clause cases typically address situations where there is no RMP plan required, or where EPA believes that there is a recognized hazard that the RMP rules do not address at a specific facility. As illustrated by the alleged violations in the Demakes case, EPA has increasingly viewed as enforceable requirements those applicable industry practices and standards that can act to reduce the likelihood or severity of release events.

According to EPA Region 1's press release announcing the settlement, Demakes reportedly addressed the conditions alleged by EPA at a cost of $300,000. The parties ultimately agreed to a $132,183 civil administrative penalty to settle the matter, with $117,094 of this amount attributable to the CAA violations and $15,089 to EPCRA violations. The settlement also required Demakes to certify compliance with EPA's list of minimum safety measures.

RMP and GDC Administrative Penalty Settlement

EPA Region 1 settled with Performance Food Group, Inc. earlier this year for alleged violations of both the GDC and the RMP program rules at the company's Springfield, Massachusetts facility. The company allegedly violated the GDC by failing to identify hazards associated with the facility's refrigeration system using industry-recognized hazard assessment techniques; design and maintain a safe facility by failing to post signs warning of the presence of ammonia and restricting entry, label piping systems, prevent corrosion on ammonia piping, insulate piping to prevent condensation, implement basic safety practices such as audible and visual alarms; and minimize the consequences of accidental releases of anhydrous ammonia by failing to have adequate emergency design mechanisms, signs and labels, and basic safety practices. The company allegedly violated the RMP program by failing to submit an RMP for the facility's refrigeration system.

EPA issued a $184,717 administrative penalty, with $172,055 of that penalty attributable to the CAA violations and the rest attributable to EPCRA violations. In addition, Performance Food Group certified that it had analyzed ammonia inventories at its other facilities nationwide and filed RMPs for those facilities meeting the 10,000-pound RMP threshold for ammonia, and would review its other facilities nationwide to determine whether "bare minimum safety measures" were in place. If not, the company would develop a schedule to put them in place within 12 months.

Multi-Regional Settlement

Lastly, there has also been a significant RMP/GDC settlement proposed by the U.S. Department of Justice and several EPA regions, including Region 1, against Harcros Chemicals Inc. *United States v. Harcros Chemicals Inc.*, No. 2:17-cv-2432 (proposed July 31, 2017). The proposed settlement arises from a voluntary disclosure that Harcros made to EPA concerning RMP violations at three chemical blending, packaging and distribution facilities. The follow up investigation eventually implicated 29 facilities, including a number of warehouses, in Regions 1, 4, 5, 6, 7 and 8.

In the proposed Consent Decree, Harcros agrees to pay a $950,000 civil penalty, complete a Supplemental Environmental Project at a cost of $2,500,000, and engage in a substantial audit process across all of the facilities, using a third party auditor and including review of both RMP and GDC requirements. The proposed audit procedures require significant EPA oversight for audit findings and corrective action planning, and contains a two-page list of industry standards that must be audited against as part of the GDC review. The audit requirements in the proposed Consent Decree are significant, particularly given that EPA has recently announced a delay by several years of the implementation of a pending amendment to the RMP rule which contains enhanced auditing provisions. One explanation for the severity of the enforcement response might be that the type of facilities involved may appear to EPA to be similar to the chemical warehouse that was involved in the catastrophic 2013 warehouse explosion in West, Texas. Another possibility might be the large number of facilities that the company was operating outside of the RMP framework that are potentially subject to RMP requirements.

Beveridge & Diamond counsels clients on a wide range of matters relating to the Clean Air Act's Risk Management Plan requirements and General Duty Clause. Our work includes compliance strategies, assistance with program development and implementation, and enforcement response.

For more information RMP and GDC enforcement trends, please contact Steve Richmond or Virginie Roveillo.

The Science and Controversy of Offshore Wind: BOEM Embarks on New Research Efforts While Fishing Groups Take Aim at An Offshore Wind Lease In New York

Authors: Brook J. Detterman

The U.S. Bureau of Ocean Energy Management (BOEM) is embarking on several studies to better understand offshore resources and species. At the same time, fishing interests have sued BOEM to block an offshore wind lease, challenging not only the lease itself but the process that BOEM uses to award leases and conduct its environmental analysis under the National Environmental Policy Act (NEPA).

Fighting Over Fish

On September 12, 2017, the Fisheries Survival Fund and other fishing interests asked a federal judge to block a $42.5 million lease awarded by BOEM to Statoil Wind off the coast of New York. The case, filed in late 2016, was brought by a coalition of fishing groups and municipalities who argue that the project poses a serious threat to fishing interests, navigation, and the environment. The case represents the first real test of BOEM's offshore leasing program for wind energy development and comes against the backdrop of numerous studies underway on the impact of offshore wind on fish populations and other marine life.

In their September 12 motion for summary judgment, the Fisheries Survival Fund and other plaintiffs allege that BOEM violated NEPA and the Outer Continental Shelf Lands Act by considering only those environmental impacts associated with the lease itself (which are minimal and related to exploration/evaluation activities), as opposed to *all* of the impacts associated with the ultimate development of a 100+ turbine offshore wind farm. They also took aim at BOEM's regulatory process, alleging that it lacked transparency and failed to meaningfully consider the full impact of an eventual wind farm on both the environment and the seafood industry. BOEM finalized its regulations long ago, and a challenge to those regulations at this stage may come too late. But the plaintiffs' argument that BOEM "segmented" its environmental analysis may hinge on how the court views the issuance of a wind energy lease: as the first in a series of events that may ultimately lead to development of a wind farm (as BOEM sees it), or as a single event with a foregone conclusion (as the plaintiffs see it). BOEM's response is due on October 24, 2017, and a decision is likely in early 2018.

Conserving Birds & Bats

In partnership with Deepwater Wind, the U.S. Fish and Wildlife Service, the University of Rhode Island and the University of Massachusetts Amherst, BOEM is funding a study that will aid conservation efforts for key bird and bat species. Since 2013, the U.S. Fish and Wildlife's Division of Migratory Birds, in collaboration with URI and UMass Amherst, has deployed advanced VHF telemetry to track the movement of high-priority bird and bat species, including common terns, American oystercatchers, and certain species protected under the Endangered Species Act (ESA), such as roseate terns and piping plovers.

Deepwater Wind recently installed a new tracking station on the easternmost platform at the Block Island Wind Farm (the nation's first offshore wind farm), which will provide data on any tagged species that fly within a 20-mile radius of the wind farm. This station is among more than 40 tracking stations along the U.S. East Coast that, with funding provided by BOEM, researchers are using to study movements of birds and bats between nesting sites and foraging areas, as well as movements when departing for fall migration. This information will help BOEM to determine to what extent these species fly over federal waters where potential exists for future energy development projects, including wind farms. Ultimately, this cooperative effort will enable BOEM and project developers to better evaluate the potential impacts to marine and migratory birds from offshore wind projects and to design appropriate mitigation and conservation strategies for future projects.

Understanding Coral, Canyons, and Seeps in the Atlantic

BOEM, the United States Geological Survey (USGS), and the National Oceanic and Atmospheric Administration (NOAA) have launched a 4.5 year study to better understand little-known natural resources of the deep ocean. The study, known as the Deep Sea Exploration and Research of Coral/Canyon/Seep Habitats (or DEEP SEARCH), will explore geological and biological aspects in deep water locations between 30 and 130 miles off the mid-Atlantic and Southeast Coasts (from

Virginia to Georgia). Many of these features—such as corals and naturally occurring gas seeps, and the organisms that inhabit them—are poorly understood.

The Woods Hole Oceanographic Institution has provided an autonomous underwater vehicle (AUV) to aid the research, which will occur in three deep-sea expeditions over the next three years. The AUV, *Sentry*, is equipped with highly advanced electronics, including instruments to map seafloor bathymetry, measure water chemistry, and collect images of benthic habitats and organisms. Scientists will use this data to create high-resolution maps of the seafloor and document deep-sea communities. BOEM will then use this information to inform environmental reviews under NEPA and offshore energy decision-making, such as lease locations and specific permitting actions.

What's Next?

In addition to the above, BOEM is conducting environmental mapping and studies on marine mammals and other aspects of the offshore environment. By taking a science-based approach, BOEM and others hope to foster offshore wind energy development in an environmentally responsible manner. At the same time, challenges persist: some aspects of the ocean are not well understood, while the fishing industry and other groups perceive certain offshore wind projects as a threat to their business. Like all large infrastructure—especially new infrastructure—offshore wind can expect environmental and legal challenges as it grows in the U.S. How those challenges play out remains to be seen.

Beveridge & Diamond's Natural Resources & Project Development practice counsels clients on renewable energy and outer continental shelf project development, regulatory enforcement, and litigation. For more information on how these developments may impact your business, please contact Brook Detterman or your usual Beveridge & Diamond contact.

Will Massachusetts Enact a Carbon Tax?

Authors: Brook J. Detterman

Massachusetts could be the first state in the U.S. to enact an economy-wide carbon tax. In January 2017, two bills were proposed in the Massachusetts legislature that would establish a tax on fossil fuels in Massachusetts with the goal of reducing greenhouse gas (GHG) emissions while returning most or all of the proceeds to consumers and businesses. These bills have picked up some momentum, and with more than 80 legislators co-sponsoring the bills (about 40% of the Massachusetts legislature), there's a real chance that a carbon tax could become law in Massachusetts.

Both bills would impose an initial tax on each ton of CO2 emissions ($10 or $20 per ton), rising to $40 per ton over time. And both bills contain provisions to refund some or all of the tax proceeds to households and businesses. Key provisions of each bill include:

H 1726, *An Act to Promote Green Infrastructure, Reduce Greenhouse Gas Emissions, and Create Jobs*:

- House bill sponsored by Representative Jennifer Benson
- Tax CO2 emissions at $20 per ton, rising $5 a year until it hits $40 per ton.
- Refund 80% of carbon tax revenue to households and businesses, with the aim of offsetting most of the cost increase attributable to the tax. Rebates to consumers and businesses are based on the number of household members or employees. Business that face strong out-of-state competitive pressures would receive higher rebates. Rebates to consumers and businesses are based on the number of household members or employees.
- Establishes a new Green Infrastructure Fund, and raises $200-$300 million each year for that fund, which would be used to help municipalities invest in transportation, climate resiliency, and clean energy projects.

S. 1821, *An Act Combating Climate Change*

- Senate bill sponsored by Senator Mike Barrett
- Tax CO2 emissions at $10 per ton, rising $5 a year until it hits $40 per ton.
- Refund 100% of carbon tax revenue to households and businesses, with additional rebates provided to households in rural areas and to energy-intensive businesses that face strong out-of-state competition. Rebates to other consumers and businesses are based on the number of household members or employees.

The bills would raise the price of fossil fuels in Massachusetts, such as gasoline and heating fuel: for example, the price of gasoline would increase by about 35 cents per gallon. At the same time, the bills aim to offset some—but not necessarily all—of that cost increase through rebate schemes designed to incentivize energy efficiency. These rebate or dividend programs would base the amount of the rebate on household members or employees, and not energy consumption, meaning that very efficient households or businesses could receive a rebate that is higher than the tax they pay, while low-efficiency households or businesses may end up in the red.

These legislative carbon tax proposals are intended to address gaps in current GHG regulations in Massachusetts, which primarily target the electric generating sector. In August, Massachusetts regulators finalized regulations that impose new GHG requirements on the electric energy sector, gas distribution systems, and certain aspects of the transportation sector. The regulations, which were proposed in late 2016, were adopted to help Massachusetts meets its GHG emissions targets under the 2008 Global Warming Solutions Act. But while the new regulations will drive further GHG emissions reductions from the electric generation sector, they will have little impact on emissions related to transportation or residential, commercial, and industrial fuel combustion. With electric generation comprising just 28.2% of GHG emissions in Massachusetts—and transportation accounting for over 30%—regulators and legislators alike are looking towards new mechanisms to drive additional reductions in GHG emissions.

Massachusetts currently imports about $20 billion worth of fossil fuels each year for heating and transportation. Under President Obama, U.S. EPA estimated that the "social cost" of emitting one ton of GHG emissions in 2020 is around $42,

although the Trump Administration has ordered the EPA to revisit that somewhat controversial conclusion. It appears that there is growing legislative support for a carbon tax as a mechanism to reduce fossil fuel use—and corresponding GHG emissions—in Massachusetts, with a tax roughly equivalent to the Obama EPA's Social Cost of Carbon. Notably, both Rhode Island and Connecticut also have pending carbon tax proposals that could be "triggered" by action in Massachusetts, effectively creating a "carbon tax block" in the northeast.

But the bills are not without controversy. Certain business sectors concerned about competitiveness and advocates for low-income residents concerned about disproportionate impacts. Nonetheless, the current bills seem to have gained traction in both chambers, and legislators are considering additional mechanisms to protect low-income consumers: for example, Representative Benson is considering a provision that would pay a rebate to low-income families in advance (known as a "pre-fund"), to help provide funds for efficiency upgrades and heating fuel purchases.

Will the legislature adopt a carbon tax in the 2017-2018 session? At this stage, the answer is "maybe." While the legislature is looking for ways to lower GHG emissions, it may be inclined to act with caution on a proposal with far-reaching impacts across the Commonwealth. But these two bills bear watching, especially as Massachusetts and other states seek to reduce GHG emissions and have vowed to uphold the Paris Climate Accord, regardless of what occurs at the federal level.

Beveridge & Diamond's Natural Resources & Project Development practice counsels clients on renewable energy project development, regulatory enforcement, and litigation. For more information on how these developments may impact your business, please contact Brook Detterman or your usual Beveridge & Diamond contact.

MASSACHUSETTS LAND USE DEVELOPMENTS

Superior Court Decision Raises the Bar For Municipalities Seeking to Challenge Special Permits And Other Zoning Actions Taken By Neighboring Municipalities

Author: Marc J. Goldstein, Brook J. Detterman

The Massachusetts Superior Court has ruled that a municipality lacks standing to challenge a special permit issued by a neighboring town when the alleged harm is "too speculative and remote to qualify them as 'aggrieved parties' with standing to pursue an appeal under M.G.L. c. 40A, § 17." The case, *Town of Chelmsford et al. v. Newport Materials, LLC, et al.* (Case No. 1681CV03455) was brought by Chelmsford to challenge a special permit issued by the Westford Planning Board to construct an asphalt manufacturing plant in Westford on the border of the two towns. Chelmsford argued that because the towns had entered a "mutual aid agreement" under which Chelmsford firefighters could be called to fight a fire at the asphalt plant in Westford, it had standing to challenge the permit as a "person aggrieved" under M.G.L. c. 40A, §17. In an opinion issued in early September, the Superior Court disagreed, ruling that Chelmsford lacked standing to pursue its claims.

Standing is a prerequisite to jurisdiction in all courts: when a party lacks standing, the court lacks jurisdiction to hear the case and will dismiss it. Put simply, the legal doctrine of standing dictates who can—and who cannot—bring a particular lawsuit. In federal courts, standing derives from the "case and controversy" clause contained in Article III of the U.S. Constitution. But in Massachusetts state courts, standing has its origins in judicial economy and prudential considerations, and is arguably more restrictive. In the context of zoning and related permitting decisions, Massachusetts law provides that "[a]ny person aggrieved by a decision" has standing to challenge that decision. M.G.L. c. 40A, § 17. But courts have often struggled to cogently define who, exactly, constitutes a "person aggrieved," with some legal analysts arguing that courts often reach "inconsistent results" on the issue.

In 1996, the Supreme Judicial Court held, in *Marashlian v. Zoning Bd. of Appeals of Newburyport*, that a party "is a 'person aggrieved' if he suffers some infringement of his legal rights" but that the alleged "injury must be more than speculative." Applying this standard in 2011, the Supreme Judicial Court further held in *Kenner v. Zoning Bd. of Appeals of Chatham* that "[a]ggrievement requires a showing of more than minimal or slightly appreciable harm." The court went on to explain that "[t]he adverse effect on a plaintiff must be substantial enough to constitute actual aggrievement such that there can be no question that the plaintiff should be afforded the opportunity to seek a remedy. To conclude otherwise would choke the courts with litigation over myriad zoning board decisions where individual plaintiffs have not been, objectively speaking, truly and measurably harmed."

While recognizing that it did not automatically have standing to challenge the Westford Planning Board's decision, Chelmsford argued that it was "aggrieved" within the meaning of the law because the two towns are part of a "mutual aid agreement" under which multiple municipalities have agreed to provide emergency aid to other towns in the agreement. Chelmsford argued that because the asphalt plant posed a special hazard and fire risk, and because Chelmsford firefighters could be called to the plant for a fire or other emergency, it was a "person aggrieved" with standing to challenge the permitting decision.

In rejecting Chelmsford's argument, Superior Court Judge Tuttman reasoned "the myriad of conditions imposed" by the special permit made the project "as safe as any 'light manufacturing' permitted by the Bylaw." But even if the plant did create a special hazard, the Judge Tuttman reasoned that Chelmsford would still lack standing because the alleged harm—a fire on the Chelmsford border to which Chelmsford firefighters could be called to respond— was "too speculative and remote to qualify [the plaintiffs] as "aggrieved parties." In part, Judge Tuttman ruled against Chelmsford on this issue because while the permit holder submitted evidence demonstrating that the asphalt plant presented no special or unique danger of fire or explosion, Chelmsford failed to present evidence to the contrary. The court also held that Chelmsford lacked standing as a "municipal officer or board" because the Chelmsford officers and boards did not "have duties to perform in relation to the building code or zoning" in Westford, where the project is located.

Notably, the court was concerned that allowing the case to proceed would undermine the "person aggrieved" standard by

allowing "any community that is a party to a mutual aid agreement the right to challenge another signatory community's decision to allow any number of potential uses within its borders." Applying both *Marashlian* and *Kenner*, the court concluded that it was required to construe the statute narrowly and in a way that "avoid[s] choking the courts with litigation over myriad zoning board decisions where individual plaintiffs have not been, objectively speaking, truly and measurably harmed."

Chelmsford is determining whether to appeal. In the meantime, the decision confirms that municipalities seeking to challenge projects in neighboring towns must demonstrate real, measurable, and non-speculative injuries to demonstrate standing as a "person aggrieved." Unless they do so with compelling and admissible evidence, they risk having their claims dismissed.

Beveridge & Diamond's Wellesley Office represents developers and owners of residential, commercial and industrial projects in land use and environmental permitting and litigation throughout Massachusetts. For more information, please contact Marc Goldstein or Brook Detterman.

Zoning-Immune Government Building Retains Its Protected Status Upon Transfer to Private Party

*Author: Brian C. Levey, Dylan King**

The Massachusetts Appeals Court recently clarified whether formerly zoning-immune government buildings continue to considered lawfully noncompliant with local zoning when that immunity is terminated. In *Gund v. Planning Bd. of Cambridge*, 91 Mass. App. Ct. 813 (2017), the Court held that a structure that loses its governmental immunity remains a preexisting nonconforming structure under M.G L. c. 40A, § 6 (or a mirrored municipal zoning ordinance) at the time it is conveyed to a private party. The Court rejected the contention that it must distinguish between a structure that is nonconforming because of subsequent stricter zoning ordinances and a structure that is nonconforming after loss of governmental immunity.

The subject of *Gund* is the Edward J. Sullivan Court House, which was built in 1974 by Middlesex County and is now owned by the Commonwealth. A private entity, LMP GP Holdings, LLC (LMP), signed a purchase and sale agreement with the Commonwealth intending to redevelop the building. Subsequently, LMP received four special permits from the Cambridge Planning Board to improve and expand the existing structure into a twenty story, multi-use complex.

One of the special permits allowed the alteration of a pre-existing nonconforming structure under the Cambridge Zoning Ordinance, Article 8, § 8.22.2(a), which mimics M.G L. c. 40A, § 6. To qualify as a nonconforming structure, the building must not conform to a dimensional, parking, or loading requirement of the ordinance, "provided that such structure was in existence and lawful at the time the applicable provisions of this or prior zoning ordinances became effective." The Cambridge Planning Board granted LMP the special permit effectively acknowledging that the court house fit this definition of a preexisting nonconforming structure.

A group of neighborhood property owners appealed, contending that the court house failed to meet the definition of a preexisting nonconforming structure. On appeal, the Massachusetts Land Court agreed with the Cambridge Planning Board's issuance of the special permit and the plaintiffs further appealed to the Appeals Court.

Before the Appeals Court, the plaintiffs highlighted the fact that the court house did not comply with the zoning ordinance when constructed in 1974 as it violated the then-required floor-to-area ratio. Since the court house was not compliant with zoning when built, the plaintiffs argued that it was not lawfully existing at the time it was constructed and could not qualify as nonconforming under the governing definition. Therefore, the plaintiffs argued, it followed that when the immunity was lifted (upon conveyance to LMP), the court house could not be considered a protected, preexisting nonconforming structure.

Finding this interpretation of Section 6 of Chapter 40A and the local zoning ordinance too narrow, the Court ruled: "[T]o the extent the court house here, strictly speaking, never fully satisfied zoning ordinance requirements, it has always been nonconforming. However, it has always been lawful because the zoning ordinance requirements simply did not apply to it." Further, the Court stated that it "discern[ed] no meaningful distinction in terms of the protections afforded nonconforming structures in the zoning ordinance between a structure that becomes nonconforming because of a subsequently enacted stricter ordinance and one that becomes nonconforming because of a loss of statutory immunity."

The Court's ruling is a helpful one for private parties considering the development of government buildings protected from local zoning by governmental immunity. However, on August 8, 2017, the plaintiffs filed for further appellate review with the Massachusetts Supreme Judicial Court.

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Conservation Commission Retains Authority to Regulate under Stricter Local Law Despite MassDEP Superseding Order of Conditions

Author: Virginie K. Roveillo

The Massachusetts Appeals Court recently held that a Superseding Order of Conditions issued by the MassDEP under the Wetlands Protection Act (WPA) does not divest a municipal Conservation Commission from all authority to regulate activity on the land subject to the Superseding Order of Conditions. *Cave Corporation v. Conservation Commission of Attleboro*, 91 Mass. App. Ct. 767 (2017). Specifically, where a local Conservation Commission issues an Order of Conditions under the authority of a by-law or ordinance that is more stringent than the WPA, the terms of the Conservation Commission's Order of Conditions remain enforceable even if the MassDEP subsequently issues, in relation to a different Notice of Intent, a Superseding Order of Conditions regulating work on the same land.

In *Cave Corporation*, Cave filed a Notice of Intent with the Conservation Commission of Attleboro in connection to the proposed construction of a subdivision development. The Notice of Intent proposed the construction of a new roadway and water main connections to serve certain lots but did not propose any work on the individual lots within the subdivision. In November 2014, the Commission approved the roadway project and issued an Order of Conditions which, among other conditions, prohibited any disturbance within 125 feet of two vernal pools located to the south of the proposed roadway.

While the Notice of Intent for the roadway construction was under review by the Commission, but before the Commission's approval, Cave filed additional Notices of Intent proposing construction work on specific lots within the subdivision. One of these included construction of a driveway that cut through a section of the 125-foot "no-touch" area near a vernal pool. The Commission failed to take action on this Notice of Intent within the 21-day period allowed by M.G.L. c. 131, § 40; therefore, Cave sought a Superseding Order of Conditions from the MassDEP, which MassDEP ultimately issued. However, because the Commission's original Order effectively precluded the driveway's construction, Cave filed suit seeking a declaration that MassDEP's Superseding Order, and not the Commission's Order, applied to the proposed driveway construction.

The Superior Court held that while MassDEP's Superseding Order governed the performance of the work described in the Notice of Intent for the driveway construction, the Commission's Order remained enforceable. Cave appealed, arguing that (1) the Commission's ordinance was no more stringent than the WPA; (2) the Commission lost authority to impose conditions on the driveway construction when it failed to timely take action on the Notice of Intent; and (3) the evidence in the record did not support the Commission's imposition of the condition relating to the 125-ft. vernal pool protection area.

The Massachusetts Appeals Court rejected each of Cave's arguments. First, the Appeals Court affirmed the Superior Court's conclusion that Attleboro's ordinance imposes more stringent controls than those required under the WPA, and, therefore, the Commission's Order was not preempted by the MassDEP's Superseding Order. Second, the Appeals Court determined that it would be "anomalous" for the MassDEP's Superseding Order to preempt the conditions of a previously and validly issued Order of Conditions regulating the same land. Third, the Appeals Court held that Attleboro's ordinance required the Commission to consider the cumulative effects of the proposed subdivision and that there was evidence in the record that any disturbance of the 125-foot area near the vernal pools would be detrimental to the interests protected by the ordinance.

In summary, the Massachusetts Appeals Court reasoned that project developers may seek relief from the MassDEP when a local Conservation Commission fails to timely act on a Notice of Intent, and the MassDEP's Superseding Order of Conditions for the project would control the performance of the work on the subject land. However, if the same land is also the subject of a previously issued Order of Conditions, that Order remains enforceable.

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Playground Permanently Dedicated and Used As a Public Park Earns Massachusetts Constitutional Protections of Article 97

Author: Jeanine L.G. Grachuk, Stephen M. Richmond, Dylan King

The Massachusetts Supreme Judicial Court has reinterpreted the test for determining whether municipal parklands are protected by article 97 of the Amendments to the Massachusetts Constitution. This decision means that more properties will now be restricted from development under the state constitution. Article 97 has historically been interpreted to restrict development only where the property had been taken or acquired for conservation purposes, or specifically designated for article 97 purposes by deed or other recorded restriction. In *Smith v. City of Westfield*, SJC–12243, 2017 WL 4358679 (Mass. October 2, 2017), the Court expands article 97 protection beyond those circumstances to apply whenever there is a "clear and unequivocal intent to dedicate the land permanently as a public park and where the public accepts such use by actually using the land as a public park.

The holding in this case determined the fate of a playground. The Cross Street Playground (the Playground) sits on a 5.3 acre parcel owned by the City of Westfield (the city). The city received the parcel through a foreclosure action in 1939. The planning board recommended the parcel become a new playground in 1946, and the property management was transferred to the city's playground commission in 1949. From 1949 through 2010, it appears that the city treated the Playground as set aside for public recreational use. A few decades later, the city used federal funding to rehabilitate the Playground. The funding came from the federal Land and Water Conservation Fund Act of 1965 (LWCF Act), which required that the property be maintained for "public outdoor recreation uses" absent the approval of the United States Secretary of the Interior. The Court noted that the LWCF Act funding requirements remain in effect over the Playground). Further, a 2006 Massachusetts Statewide Comprehensive Outdoor Recreation Plan stated that properties developed with LWCF Act funding are protected under article 97, a 2009 state open space survey identified the playground as a "permanently protected space," and a 2010 plan endorsed by the city's mayor recognized the Playground to have a "full" degree of protection.

In 2011, the city proposed to build an elementary school at the location of the Playground. The plaintiffs, twenty-four citizens from Westfield and Holyoke, initiated an action against the city, the city council, and the mayor. The plaintiffs sought (i) a restraining order to prevent construction on the Playground and (ii) mandamus, asking the court to step in and force the city's compliance with article 97 before moving forward with the project. The Superior Court granted the plaintiffs a preliminary injunction, temporarily preventing the city from beginning construction without complying with article 97, pending the conclusion of the case.

The parties proceed to trial before the Superior Court. They agreed that the only issue to resolve was whether the Playground was protected by article 97. Article 97 states in part that property "taken or acquired" for conservation purposes "shall not be used for other purposes" without approval by a two-thirds roll call vote of each branch of the legislature. The Superior Court found that the Playground was not protected by article 97 and vacated the injunction. The plaintiffs appealed but again lost. However, an Appeals Court concurrence from Justice Milkey invited the Supreme Judicial Court to revisit the precedent that he believed required this outcome, stating that these cases "rob art. 97 of its intended force" and defeat the law's purpose. The Supreme Judicial Court agreed to appellate review.

The Court invoked its recent decision in *Mahajan v. Department of Envtl. Protection*, 464 Mass. 604, 615 (2013), in which the Court held that land neither taken by eminent domain nor acquired for any of the enumerated article 97 purposes could still receive protected status if the land "was designated for those purposes in a manner sufficient to invoke the protection of art. 97." The Court then considered what would be required to so designate land, determining that there must be (i) a clear and unequivocal intent to dedicate the land permanently as a public park and (ii) the public must accept such use by actually using the land as a public park.

Using this standard, the Court held that the facts in this case demonstrated first that there was sufficient intent to permanently create a public park. The Court ruled that the determining factor was that the city accepted federal LWCF Act funding, where the LWCF Act contained a requirement that acquired land be used for public outdoor recreation unless otherwise approved by the Secretary of the Interior. The Court then found that the second part of the standard was met

because the Playground was plainly used as a public park far into history. Having determined that the Playground was subject to article 97 protection, the Court remanded a decision on the permanent injunction to the Superior Court.

The Court's decision in *Smith* likely expands the number of properties that are protected from development by article 97. This decision will be viewed as an important victory by the land conservation community and as a less welcome restriction by land developers and some municipalities wishing to preserve flexibility over potential uses of their land in the future.

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NATIONAL DEVELOPMENTS

New Presidential and Interior Orders Target Environmental Permitting, NEPA Reviews, and Flood Risk Standards for Infrastructure and Energy Projects

Authors: James M. Auslander, Gus B. Bauman, David H. McCray, W. Parker Moore, Peter J. Schaumberg

The current Administration, like its predecessors, has pursued means to expedite project permitting decisions largely by focusing on perceived time, cost, and paperwork inefficiencies associated with environmental reviews under the National Environmental Policy Act (NEPA). Read the full article.

The TSCA Inventory Reset Begins

Author: Mark N. Duvall, Timothy M. Serie, Ryan J. Carra

Virtually all manufacturers and importers of chemicals for the past 11 years are now subject to a new TSCA reporting requirement known informally as the TSCA Inventory Reset. Reports are due by February 7, 2018. All processors of chemicals have an opportunity and an incentive to report as well, and may do so by October 5, 2018. Read the full article.

CERCLA Task Force Issues Recommendations

Authors: K. Russell LaMotte, Paul E. Hagen

EPA Administrator Scott Pruitt has announced a set of Task Force recommendations that are aimed at improving the Superfund program. The Agency's adoption of these recommendations is another indication that demonstrable change to CERCLA implementation is of interest to the Trump administration. It follows the EPA Administrator's May 9 retraction of certain remedy selection authority from regional offices. Read the full article.

TCFD Report Will Shape Future Expectations for Climate-Related Financial Disclosures

Authors: Kristin H. Gladd, Leah A. Dundon, Paul E. Hagan, Lauren A. Hopkins, K. Russell LaMotte

The Task Force on Climate-Related Financial Disclosures released its Final Report providing recommendations on voluntary climate-related financial disclosures. The recommendations, developed by an industry-led task force of both users and preparers of disclosures, are intended to support the production of more consistent and clear financial disclosure of climate-related risks across sectors for use by investors, lenders, and insurers. Read the full article.

D.C. Circuit Invalidates Part of the RCRA Definition of "Solid Waste," Altering the Regulatory Framework for Recycling of Hazardous Secondary Materials

Authors: Steven M. Jawetz and Zachary M. Norris

The U.S. Court of Appeals for the District of Columbia Circuit issued a decision invalidating two key elements of the regulatory definition of solid waste under the Resource Conservation and Recovery Act, as amended by the U.S. Environmental Protection Agency in 2015, and rejecting efforts to impose additional conditions on existing exclusions in the hazardous waste program. The definition is a cornerstone of the RCRA hazardous waste regulatory program, inasmuch as it specifies when recyclable materials may be classified as solid wastes and thus potentially hazardous wastes subject to the hazardous waste regulatory program promulgated by EPA under RCRA Subtitle C. Read the full article.

FIRM NEWS & EVENTS

Beveridge & Diamond Expands to Seattle

Beveridge & Diamond, P.C., announced the opening in Seattle, WA, of its eighth office, formed by the addition of five lawyers formerly of the Riddell Williams, P.S. firm (now Fox Rothschild).

The lawyers joining Beveridge & Diamond as principals are former Riddell Williams environmental practice group chair David C. Weber and Loren R. Dunn (one of Seattle Business Monthly's "75 Top Business Lawyers" in the Seattle region). Marshall R. Morales and Augustus (Gus) E. Winkes join Beveridge & Diamond as associates. With the Seattle additions, Beveridge & Diamond now has 105 lawyers in eight U.S. offices, all of whom focus on assisting clients with environmental, health, safety, and natural resources regulatory, transactional, and litigation matters. Read the full article.

Beveridge & Diamond Achieves LFSN Sustainability Recognition

Beveridge & Diamond has received the American Legal Industry Sustainability Standards Silver certification from the Law Firm Sustainability Network in recognition of the measures the firm has taken to promote the environmental sustainability of its operations. The Firm is a founding member of LFSN and serves on its Leadership Council. Read the full article.

***National Law Journal* Names Benjamin F. Wilson a Lifetime Achiever**

Beveridge & Diamond is pleased to announce that the National Law Journal has recognized firm Chairman Benjamin F. Wilson as a Lifetime Achiever in its 2017 Professional Excellence Awards. This honor recognizes attorneys who have made significant lasting achievements in both their professional and personal lives. Read the full article.

Beveridge & Diamond Files Amicus Brief in Support of Maryland's Purple Line Transit Project

Beveridge & Diamond Principal Jamie Auslander and Of Counsel Gus Bauman filed, on behalf of the American Road & Transportation Builders Association, an amicus brief in support of Maryland's proposed light-rail Purple Line. The brief was filed in the U.S. Court of Appeals for the D.C. Circuit. It seeks reversal of the lower court's finding of a National Environmental Policy Act violation based on non-environmental grounds. Read the full article.

Nineteen Beveridge & Diamond Attorneys Named to *The Best Lawyers in America* for 2018

Beveridge & Diamond, P.C. is proud to announce that 19 of its attorneys have been named to the 2018 edition of *The Best Lawyers in America*, the "oldest and most respected peer-review publication in the legal profession." Read the full article.

Beveridge & Diamond Expands International Environmental Law Practice with Arrival of Of Counsel Weiwei Luo

Weiwei Luo joined the Beveridge & Diamond, P.C. Washington, D.C. office as Of Counsel on July 17, 2017. Her practice focuses on sustainability, environment, health, safety, data privacy, energy, and government regulatory issues in China, the U.S, and other countries. She brings experience with business transactions, regulatory, and trade matters across a broad range of industries in China, the U.S., and Europe. Read the full article.