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Massachusetts Environmental & Land Use Alert

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MASSACHUSETTS ENVIRONMENTAL DEVELOPMENTS

EPA Issues NPDES Remediation General Permit Renewal for Massachusetts

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U.S. Environmental Protection Agency (EPA) renewed the NPDES General Permit for Remediation Activity Discharges in Massachusetts effective April 8, 2017. This permit authorizes discharges from contaminated sites as well as a collection of miscellaneous discharges that may be contaminated. A companion permit was issued covering these discharges in New Hampshire. According to the US EPA Fact Sheet, discharges from about 750 remediation projects were authorized under the 2010 permits, mostly in Massachusetts.

Changes in Categories and Associated Sampling Requirements

The 2017 Remediation General Permit authorizes essentially the same discharges as the 2010 Remediation General Permit but in slightly different activity categories and contaminant subcategories. For each activity, the applicant identifies the activity category of the discharge and the applicable subcategories based on what is known about contaminants at the site. The activity categories are:

- Petroleum-related site remediation;
- Non-petroleum-related site remediation;
- Contaminated site dewatering;
- Pipeline ant tank dewatering;
- Aquifer pump testing;
- Well development / rehabilitation;
- Collection structure dewatering / remediation; and
- Dredge-related dewatering.

Based on the applicable contaminant subcategories (for example, inorganics, fuels) and which specific contaminants are present, the applicant determines, based on the directions in the permit, what monitoring is required and what effluent limitations apply. For example, for a remediation of a site with lead and trichloroethylene contamination, the activity category is non-petroleum related site cleanup and the contaminant subcategories are inorganics and halogenated volatile organic compounds. For this discharge, the emission limits and monitoring requirements are: (a) for inorganics, all listed limits and monitoring; and (b) for halogenated volatile organic compound, limits and monitoring for only those compounds present at the site.

New in the 2017 permit is an explicit statement that if a contaminant is present at the site that is not on the list in the general permit, US EPA may authorize the discharge upon specific request; if it does so, it may require additional monitoring or other requirements.

Additional monitoring and effluent limitations were added in the 2017 Remediation General Permit for ammonia, cyanide, acetone, 1,4-dioxane, ethanol, tert-amyl methyl ether, and tert-butyl alcohol. Some effluent limitations were removed, and effluent limitations were revised for many contaminants include total residual chlorine, tetrachloroethylene, and mercury.

Emergency Discharges

The 2017 Remediation General Permit provisionally authorizes "emergency discharge" immediately upon initiation of the discharge. A discharge is considered an emergency discharge when:

1) the discharge is a result of remediation and/or dewatering activities conducted in response to a public emergency (e.g., natural disaster, which includes, but is not limited to tornadoes/hurricanes/tropical storms, earthquakes, mud slides, or extreme flooding conditions; or widespread disruption in essential public services); and

2) the discharge requires immediate authorization to avoid imminent endangerment to human health, public safety, or the environment, or to reestablish essential public services."

US EPA must be notified as soon as possible and within 24 hours after the discharge commences, and a Notice of Intent must be submitted within 14 days. Monitoring and work practice requirements apply during the discharge.

Receiving Water Monitoring

New in the 2017 Remediation General Permit is a requirement to analyze a representative sample of the receiving water and include the results in the Notice of Intent. Additional sampling of the receiving water may be required by US EPA on a case by case basis.

Notice of Final Permit

The 2017 Remediation General Permit was signed by US EPA on March 9, 2017, and became effective on April 8, 2017. An aggrieved person may file a petition for review by September 20, 2017 (no later than within 120 days after the permit was issued on May 23, 2017).

A "Notice of Availability of Final NPDES General Permit for Remediation Activity Discharges in Massachusetts and New Hampshire: The Remediation General Permit" is available here on the US EPA website. This is described on the website as the "Pre-Publication Federal Register Notice." As of June 12, 2017, this notice has not been published in the Federal Register. It has been US EPA's longstanding practice to publish such notices in the Federal Register, publication is not required, see 40 CFR Part 124. It is not clear why US EPA has deviated from this practice at this time.

For questions on site remediation generally or US EPA's Remediation General Permit, please contact Jeanine Grachuk.

Is Offshore Wind Power Riding a Rising Tide?
Recent Offshore Wind Developments in the Northeast

Authors: Brook J. Detterman and John G. Cossa

State action in Massachusetts, Rhode Island, and Maryland may help to advance offshore wind projects in those states, while a new federal proposal would extend the investment tax credit for offshore wind through 2025, improving the outlook for offshore wind projects on the eastern seaboard.

Massachusetts

On June 21, 2017, the Massachusetts Department of Public Utilities (DPU) issued an order that approved a request for proposals (RFP) for the solicitation and execution of long-term contracts for offshore wind. At the same time, the DPU ordered electrical distribution companies to shorten the timetable for the solicitation and RFP process. Massachusetts electric distribution companies filed a response on June 28 that revised the RFP timeline in accordance with the DPU's order. The distribution companies intend to issue this version of the RFP today, on June 29, 2017. These actions pave the way for solicitation, bids, and eventual development of significant offshore wind projects of the coast of New England.

The draft RFP was previously submitted to the DPU for consideration on April 28, 2017. Both the draft and final versions describe the process for soliciting and approving bids for 400-800 MW of offshore wind power. The RFP represents a step in complying with Massachusetts' Green Communities Act and Chapter 188 of the Acts of 2016, "An Act to Promote Energy Diversity," which requires utilities in Massachusetts to enter into long-term contracts for approximately 1,600 megawatts of offshore wind energy by June 30, 2027.

The RFP solicits procurement of 400 MW of offshore wind capacity while indicating that the utilities would consider procuring up to 800 MW if a larger proposal is "both superior to other proposals . . . and is likely to produce significantly more economic net benefits to ratepayers." The revised timetable shortens the process by three months, as follows:

Event	Proposed Deadline	Revised Deadline
Issue RFP	June 30, 2017	June 30, 2017 *(anticipated on June 29)*
Bidders conference	July 19, 2017	July 19, 2017
Submit notice of intent to bid	July 26, 2017	July 26, 2017
Submission of questions	July 26, 2017	July 26, 2017
Submission of proposals	Dec. 20, 2017	Dec. 20, 2017
Selection of projects for negotiation	May 22, 2018	April 23, 2018
Negotiate and execute contracts	October 3, 2018	July 2, 2018
Submit contracts to DU for approval	November 1, 2018	July 31, 2018

Contracts awarded under the RFP will help to secure an income stream for potential offshore wind energy developers and to facilitate the development of offshore wind energy projects, which currently do not exist offshore Massachusetts. The RFP also contemplates a potential coordination by multiple states, noting that the Commonwealth and the electric distribution companies "will consider the participation of other states as a means to achieve the Commonwealth's Offshore Wind Energy Generation goals if such participation has positive or neutral impact on Massachusetts ratepayers." That could pave the way for "multi-state coordination and contract execution, as well as potential wind energy projects offshore Connecticut and/or Rhode Island.

Connecticut

On June 28, 2017, the Second Circuit upheld Connecticut's program for soliciting renewable energy projects. The program, part of a joint effort by Connecticut, Rhode Island, and Massachusetts to jointly procure renewable energy capacity, was put on hold last fall by the court pending the outcome of the case. Allco Finance, which was a losing bidder in an earlier 2013 procurement process, challenged Connecticut's program and asked the court to invalidate Connecticut's 2013 procurement, arguing that Connecticut lacked the authority to engage in direct solicitations and also that its actions violate the dormant commerce clause.

The Second Circuit rejected Allco's challenge, applying the recent Supreme Court decision in Hughes v. Talen Energy Marketing to find that Connecticut's renewable energy RFP does not "compel" utilities to enter into wholesale power purchases (which would violate the Federal Power Act and usurp the Federal Energy Regulatory Commission's exclusive jurisdiction over wholesale power markets). Because the Connecticut law only requires solicitations and not the execution of a contract, the Second Circuit held that federal law did not preempt Connecticut's renewable energy RFP. The Second Circuit also upheld a requirement in Connecticut's renewable portfolio standard (RPS) that requires demonstration of compliance through submission of renewable energy credits (RECs) generated in-state.

Last fall, New England Clean Energy (a three-state coordinating body representing Connecticut, Rhode Island, and Massachusetts) released the names of winning bidders, which collectively represent 460 MW in new renewable energy capacity. Among the winners is Deepwater Wind, an offshore wind developer. The Second Circuit's ruling will allow that procurement process to proceed, representing a step forward for both offshore wind and other wind and solar development in the northeast.

Rhode Island

On March 1, 2017, Rhode Island announced a new "Clean Energy Goal" that seeks to add 900 MW of new clean energy within the state by 2020. Right now, Rhode Island is home to about 100 MW of installed renewable energy capacity. While seeking to add clean energy from "broad portfolio of clean energy resources," the Clean Energy Goal specifically references offshore wind, as well as onshore wind and solar power. Rhode Island is currently home to the nation's first and only offshore wind farm, the Block Island Wind Farm, a 30-MW installation built by Deepwater Wind. Rhode Island's new Clean Energy Goal, which is driven by Governor Gina M. Raimondo, has the potential to expand Rhode Island's offshore wind footprint through supporting new projects and/or projects built in coordination with Massachusetts' ongoing offshore wind procurement process.

Maryland

On May 11, 2017. the Maryland Public Service Commission issued $1.9 billion in Offshore Wind Renewable Energy Credits (ORECs) to two prospective offshore wind developers, U.S. Wind and Skipjack Offshore Energy (a unit of Deepwater Wind), each of which holds offshore wind energy leases from the federal government. The move ensures a revenue stream for any wind projects that are built in these lease areas, which Maryland and the developers hope will exceed 368 MW total, and which would represent a significant expansion of offshore wind power capacity in the United States (for comparison the Block Island Wind farm has a capacity of 30 MW). Although neither developer has yet sought approval from the federal government to develop their leases, the developers are hopeful that such approval will be forthcoming when their projects are ultimately proposed. In accepting the Maryland OREC award, both developers have agreed to various conditions aimed at local economic development and made commitments to invest $115 million in manufacturing and port facilities located in Maryland. While Maryland's OREC award is only one of many regulatory steps necessary to bring offshore wind energy to the state, it nevertheless signals Maryland's ongoing commitment to offshore wind as an energy source.

Federal

Also on May 11, Senator Edward J. Markey (D-MA) and Senator Sheldon Whitehouse (D-RI) introduced the Offshore Wind Incentives for New Development Act (the "Offshore WIND Act"), which would extend the 30 percent investment tax credit (ITC) under Section 48 of the Internal Revenue Code (Code) for offshore wind through 2025. A companion bill was introduced on the same day by Representative Jim Langevin (D-RI) and is pending in the House of Representatives.

Currently, the ITC is available for projects that commence construction before January 1, 2020, but to be eligible for the full credits, the project must have begun construction by January 1, 2017 – which means that any future offshore wind project would miss out on the full ITC unless the ITC deadline is extended. To further incentivize offshore wind energy, the Offshore WIND Act would extend the full 30 percent ITC to "qualified offshore property" that commences construction before January 1, 2026. Qualified offshore property would include any wind energy facility (other than certain small facilities) located in the United States' coastal waters, exclusive economic zone, or outer continental shelf. While the last extension of the ITC passed Congress with bipartisan support, it is less clear what the prospects are for the Offshore WIND Act because it focuses exclusively on offshore wind and not a broader array of renewable energy sources. A similar bill was introduced in 2016 but failed to pass.

Although these are still early steps in the long road towards constructing large-scale wind energy projects offshore the U.S. east coast, they are critical steps essential to the viability of a future offshore wind industry. While large scale deployment is still years away, with more states actively pursuing and incentivizing offshore wind projects, the future of offshore wind is beginning to look a bit brighter.

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, John Cossa, or your usual Beveridge & Diamond contact.

Massachusetts Appeals Court Upholds Applicability of Wetlands Protection Act to Commercial Fishing Techniques Using Hydraulic Dredging Methods

Authors: Jeanine L.G. Grachuk and Virginie K. Roveillo

The Massachusetts Appeals Court upheld the applicability of the state's Wetlands Protection Act (WPA) to commercial fishing activities using hydraulic dredging methods on land under ocean and nearshore areas, clarifying municipal authority to impose additional requirements on activities in wetlands in relation to shell fishing. *Aqua King Fishery, LLC, v. Conservation Com'n of Provincetown*, No. 16-P-1366 (Mass. App. Ct., June 16, 2017). However, in the same opinion, the Court concluded that a town bylaw prohibiting hydraulic dredging in nearshore areas without a permit is preempted by state law as applied to sea clam and quahog harvesting.

In Aqua King Fishery, the Conservation Commission of Provincetown alleged that Aqua King Fishery, LLC violated both Provincetown's Wetlands Bylaw and the WPA when it failed to obtain the Commission's approval for the use of hydraulic dredge fishing gear for commercial sea clam fishing near Provincetown's shore. The town's Wetlands Bylaw prohibits hydraulic dredging within waters under the Commission's jurisdiction without a permit. Similarly, the WPA prohibits the dredging of land under the ocean and areas near the shoreline without obtaining an Order of Conditions from the local conservation commission or the Department of Environmental Protection. M.G.L. c. 131, § 40. The Commission concluded that Aqua King's use of hydraulic clamming gear qualified as dredging within the scope of both the Wetlands Bylaw and the WPA and issued an enforcement order requiring Aqua King to discontinue its dredging activities and file a restoration plan with the Commission. Aqua King challenged the enforcement order in the Superior Court, arguing that the Commission had exceeded its authority. *Aqua King Fishery, LLC v. Conservation Com'n of Provincetown*, No. 2015-00064 (Mass. Sup. Ct., Nov. 22, 2016). The trial court affirmed the Commission's authority to enforce under the WPA but not the Wetlands Bylaw, and both parties appealed.

Town Wetlands Bylaw

On appeal, Aqua King argued that the hydraulic dredging prohibition in Provincetown's Wetlands Bylaw is preempted by M.G.L. c. 130, § 52 as applied to the hydraulic dredging of sea clams. While M.G.L. c. 130, § 52 authorizes local towns to regulate shellfish fishing, the law specifically excludes "sea clams and ocean quahogs" from the definition of "shellfish." Aqua King therefore argued that the commercial harvesting of sea clams falls within the authority of the Massachusetts Division of Marine Fisheries, and not local regulation. The Court agreed with Aqua King and concluded that the Commission's application of the hydraulic dredging prohibition to Aqua King's activities was an attempt to regulate the commercial management of sea clams. The Court reasoned that although M.G.L. 130, § 52 does not explicitly prohibit local regulation of sea clam and quahog harvesting, the exclusion of these two species from the definition of "shellfish" clearly demonstrated the Legislature's intent to withhold authority from towns to regulate the harvesting of these species. While Marine Fisheries may authorize regional management of sea clam and quahog fishing under M.G.L. c. 130, § 52, it may only do so if a regional plan is developed by the applicable cities and towns and the plan is approved by Marine Fisheries. The Court noted that Provincetown's Wetlands Bylaw did not meet these criteria.

Wetlands Protection Act

The Court held that the Commission's application of the WPA to Aqua King's fishing activities was not arbitrary or capricious. Aqua King first argued that because commercial fishing is regulated and controlled by the Marine Fisheries, it cannot also be subject to the WPA, even where hydraulic dredging methods are used. The Court rejected Aqua King's reasoning, concluding that the Marine Fisheries' regulations do not prohibit further regulation by other agencies, including the MassDEP and conservation commissions. In addition, substantial evidence existed in the record that showed Aqua King's dredging technique had caused trenches from one to two feet deep and six to eight feet in the ocean floor. The Court therefore concluded that Aqua King's use of hydraulic fishing gear qualified as "dredging" within the meaning of the WPA, which term the Court explained is broadly defined as including "even a slight temporary deepening of the ocean floor."

Thus, while the use of hydraulic fishing gear for commercial sea clam fishing may not be regulated under a town bylaw, the use of such hydraulic fishing gear may nevertheless be subject to regulation under the WPA as dredging.

MASSACHUSETTS LAND USE DEVELOPMENTS

Court Reaffirms Standard for Injury Sufficient to Maintain Standing to Challenge Zoning Permit Modification

Author: Brian C. Levey

The Massachusetts Appeals Court reaffirmed that the injury sufficient to maintain standing to challenge the modification of a special permit turns on the harm stemming from the original project, not the incremental harm between pre- and post-modification changes. In Aiello v. Planning Board of Braintree, 91 Mass. App. Ct. 354 (2017), the Appeals Court reversed the Land Court's decision that the plaintiff lacked standing because he could not show such incremental harm and remanded the approval of a special permit for an enhanced commercial use to the local planning board for reconsideration.

The Abutting Properties

The plaintiff owns 15 acres of residentially zoned property in Braintree, located directly north of the commercially zoned abutting land. The plaintiff's property, consisting of several parcels, contains a number of uses including single and multifamily residential units, nonconforming catering business and a "semi-agricultural use," a goat pasture. The plaintiff's property is at a higher elevation than the adjacent property and has a clear view of the neighboring land's structure and portions of its parking area.

The abutting property, a nine-acre parcel in a commercial district, is improved with a long commercial building (the "Locus"). Pavement covers most of the northern portions of the Locus. For many years, the northern side of the building has been used for parking with vehicular traffic running behind the row of cars along the building. Seventy-two feet separate the building from the common boundary with the plaintiff's land. Twenty-eight feet of the commercial building fall within the 100-foot buffer zone between commercial and residential zones required by Braintree's zoning by-law. Under the by-law, the 100-foot buffer should only be used for access and passive recreation.

A special permit may be granted modifying the buffer zone and its landscaping requirements based on consideration of "(a) [p]roximity to a residential development, (b) [t]opography of the site and the adjacent property, (c) [n]ature of the use and/or activity on the site, (d) [l]and use of adjacent property, … [and] (f) [p]otential for impact of any nuisance activities such as noise, light, or glare."

The Locus benefits from a 1994 special permit that allowed a building addition subject to several conditions including restricting the use of the addition to storage only, prohibiting permanent outdoor storage and requiring appropriate actions to minimize noise that may disrupt the abutting residential neighborhood. After the 1994 special permit was granted, the northern parking lot accommodated numerous employee vehicles and received deliveries of raw materials. Trucks also entered and exited the northern area of the Locus to reclaim waste and materials used as part of the manufacturing process and gain access to a rear loading area. However, the plaintiff registered no complaints.

Commercial Use Transformed

After a contractor purchased the Locus in 2003, the use of the northern parking area was transformed into a contractor's yard with the storage of vehicles, materials, and equipment. The commercial building was repurposed for use as a nonresidential garage for the repair of vehicles and equipment. Also, a bus company rented space and conducted repairs in and outside the building. The plaintiff saw and heard the various industrial vehicles and materials including backhoes, buckets, bulldozers, excavators, construction equipment and their back-up alarms and the dropping of metal plates from his property. The visual impact, noise, and fumes caused him to complain to authorities on multiple occasions.

In 2008, the contractor sought to modify the buffer zone special permit by removing restrictive conditions and seeking approval of its unlawful uses – improving the parking area to accommodate over-sized vehicles and trailers, allowing exterior permanent storage of equipment and supplies, and use of the building for maintenance and repair of construction vehicles. In a 2009 decision, the planning board allowed the requested modifications in large part relying on the fact that the proposed uses were allowed by right in the commercial district. The board also concluded that the potential for any nuisance was minimal.

Land Court Upholds Board

On appeal, the Land Court ruled that the plaintiff lacked standing. The Judge reasoned that the noise and odors emanating from the Locus were the result of uses allowed by right or specifically allowed under the 1994 special permit. Significantly, the Court concluded that the plaintiff was "unable to credibly distinguish between harm that flows from the changes allowed by the 2009 modification and harm that flows from uses allowed prior to… [the] issuance [of the 1994 special permit]." Despite the conclusion that the plaintiff lacked standing, the Court nonetheless reached the merits and concluded that if the plaintiff had standing, it would have remanded for further consideration of the proposed screening while otherwise affirming the decision on the merits.

Lower Court Applies Erroneous Standard

Restating the well-established law that "the right or interest asserted by a plaintiff claiming aggrievement must be one that the Zoning Act is intended to protect, either explicitly or implicitly, " the Appeals Court found that the regulatory scheme makes it clear that visual impact is an interest protected by the by-law. The Court further reiterated that, "where an abutter has alleged harm to an interest protected by the zoning laws, a defendant can rebut the presumption of standing by coming forward with credible affirmative evidence that refutes the presumption," for example, with expert evidence "establishing that an abutter's allegations of harm are unfounded or de minimis." 81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline, 461 Mass. 692, 702 (2012).

The Appeals Court disagreed with the Land Court's determination that the plaintiff had successfully rebutted the defendant's presumption of standing. The lower court had found that the plaintiff "failed to overcome [the defendant's] challenge to his allegation of harm because the visual impact of the 2009 modification, compared to premodification impact, is de minimis." Overruling that conclusion, the Appeals Court held that the "analysis of whether the board's decision will have only a de minimis impact on [the plaintiff's] property is not limited to harm caused by the modifications that exceeded the over-all harm stemming from the project as originally approved in 1994." The lower court's "focus on the incremental harm between the use after the 1994 special permit and the use after removal of the conditions was misplaced." The Court found such a requirement is inconsistent with the principle that the term '"person aggrieved" should not be construed narrowly.

Citing the Land Court's findings, the Appeals Court noted that the plaintiff would be able to see the equipment stored and oversized vehicles parked outside from many points on his property and that the fence required by the special permit was inadequate to buffer the view. This alone, the Court ruled, satisfied the plaintiff's burden to show that the zoning relief granted adversely affected him directly and that his harm was more than de minimis. The lower court's findings also supported standing on the basis of noise from the Locus. In sum, the finding that the plaintiff lacked standing was in error, the judgment was vacated, and the matter remanded to for the entry of an order requiring the board to reconsider the allowance of 2008 application for a special permit.

Top Massachusetts Court clarifies 9/11-era Public Records Exemption

Author: Marc J. Goldstein

The Massachusetts Supreme Judicial Court ruled that the public records exemption passed after the September 11, 2001 terrorist attacks protecting critical infrastructure documents from disclosure is to be interpreted narrowly, sending a public records case brought by People for the Ethical Treatment of Animals (PETA) back to the trial court for further proceedings.

The case, People for the Ethical Treatment of Animals, Inc. v. Department of Agricultural Resources, 2017 WL 2562868 (SJC-12207 June 14, 2017) centers on requests made by PETA to the Department of Agricultural Resources for public records concerning the "export and/or import of nonhuman primates in Massachusetts during 2013" and "alleged or claimed safety risks posed to animals (including but not limited to nonhuman primates), people and buildings involved with housing and transporting non-human primates." The Department provided responsive interstate health certificates for nonhuman primates, but redacted certain types of information including (1) names and addresses of consignors and consignees (2) license and registration numbers, and (3) names, addresses, telephone numbers, and license numbers for veterinarians whose information appeared on the health certificates. PETA challenged the redactions to the supervisor of public records and ultimately filed an appeal under M.G.L. c. 66, § 10(b) to Superior Court. The Superior Court largely upheld the Department's findings and PETA's appeal to the Massachusetts Appeals Court was transferred to the Supreme Judicial Court by the top court's request.

The Department initially justified its redactions solely on the basis of exemption (n) to the public records law (M.G.L. c. 4, § 7(26)(n)) and later added exemption (c) (M.G.L. c. 4, § 7(26)(c)) as an additional basis during the litigation.

Exemption (n) – relating to records that might compromise the security of buildings and infrastructure

At the time of PETA's request for records, exemption (n) stated:

(n) records, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under subsection (b) of section 10 of chapter 66, is likely to jeopardize public safety.

While exemption (n) was amended effective January 1, 2017, the language has not changed in any material way.

Exemption (n) permits withholding of public records that might compromise the security of buildings and infrastructure and was added in 2002 after the 9/11 attacks and is unique in the public records exemptions in that it contemplates the exercise of "reasonable judgment of the record custodian" in determining whether the disclosure of such records "is likely to jeopardize public safety." Slip Opinion at 17. Recognizing that the scope of exemption (n) was a question of first impression, the Court applied standard tools of statutory construction, including an evaluation of the legislative history, to conclude that exemption (n) should be interpreted narrowly and in accordance with its "animating principle" of "protecting the public from terrorist attacks in a post-September 11, 2001, world…." Slip Opinion at 15.

With this in mind, the SJC announced a construction of the exemption based on two prongs. The first prong "probes whether, and to what degree, the record sought resembles the records listed as examples in the statute," referring to the list that includes blueprints, plans, policies, procedures and schematic drawings. "The touchstone of this inquiry is whether, and to what degree, the record is one a terrorist 'would find useful to maximize damage' and in that sense jeopardize public safety." Id. at 17 (quoting a September 5, 2002 Memorandum from the Executive Office of Public Safety) (internal citation omitted).

The second prong "probes the factual and contextual support for the proposition that disclosure of the record is 'likely to jeopardize public safety.'" Id. "Because the records custodian must exercise 'reasonable judgment' in making that determination, the primary focus on review is whether the custodian has provided sufficient factual heft for the supervisor of public records or the reviewing court to conclude that a reasonable person would agree with the custodian's

determination given the context of the particular case." Id.

The Court noted that the two prongs must be analyzed together because "there is an inverse correlation between them. That is, the more the record sought resembles the records enumerated in exemption (n), the lower the custodian's burden in demonstrating "reasonable judgment" – and vice versa." Id. at 18. The Court also noted that although guidance on how to apply exemption (n) from the Secretary of the Commonwealth appears to indicate that inquiry into the requestor's purpose for seeking a particular record is "uniquely" permitted under exemption (n), the Court wrote that although the issue is not directly before them in this case, "nothing we discovered in our review of the legislative history indicated an intent to depart radically from the typical public records procedure, which would not permit such an inquiry." Id. at 17 fn 12.

Recognizing that the Superior Court judge did not have the benefit of the SJC's interpretation of exemption (n), the high court vacated the decision and remanded to that court for further consideration of PETA's request.

Exemption (c) – relating to personal information

Exemption (c) has been the subject of previously judicial review and permits the withholding of "personnel and medical files or information," as well as "any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy." Id. at 20 (citing G.L. c. 4, § 7, twenty-sixth (c)). The Court noted that exemption (c) requires a balancing test: "where the public interest in obtaining the requested information substantially outweighs the seriousness of any invasion of privacy, the private interest in preventing disclosure must yield." Id. at 20 (citing Champa v. Weston Pub. Sch., 473 Mass. 86, 96 (2015)).

In evaluating the privacy interests, the Court has investigated three factors:

1. Whether disclosure would result in personal embarrassment to an individual of normal sensibilities;
2. Whether the materials sought contain intimate details of a highly personal nature; and
3. Whether the same information is available from other sources.

Declaring that exemption (c) requires a "nuanced analysis," the Court noted that the balancing test in this case "should account for different privacy interests in a home address versus a business address, and held by a public employee versus a private one." Id. at 22, 24. Plus it must take into account whether the information is available from other sources. Id. at 24. Finally, the

Court viewed skeptically, but did not rule out, the Department's suggestion that the risks to the personal safety of individuals from the release of requested information should be factored into the balancing test, stating:

Accordingly, we are unwilling to eliminate wholly the possibility that, in very limited circumstances where the department can identify specific information demonstrating that a significant risk to an individual's personal safety is posed by the disclosure of a home address or telephone number, that non-dispositive factor can add weight to whatever privacy interest exists on that side of the balancing test.

In sending the case back to the Superior Court on this exemption, the SJC directed that court to evaluate:

1. Whether the redacted information pertains to home or business addresses of public or private entities;
2. Whether and to what extent that information is available from other sources; and
3. Whether, and to what extent, the department can identify specific information demonstrating that a significant risk to an individual's personal safety is posed by the disclosure of a home address or telephone number that may be among the redacted information.

The Court vacated the judgment in favor of the Department and remanded the case for proceedings consistent with the SJC's opinion.

NATIONAL DEVELOPMENTS

EPA Delays Effective Date of RMP Rule Amendments Until February 2019 Pending Reconsideration of the Rulemaking

Authors: Stephen M. Richmond, Mark N. Duvall, Jayni A. Lanham

On June 14, 2017, EPA published a final rule in the Federal Register delaying the effective date of its Risk Management Program (RMP) rule amendment package for twenty months, until February 19, 2019.

The final rule amendments were published on January 13, 2017, just one week before the change in presidential administrations. Since that time, EPA has twice extended the effective date of the rule amendments. The new extension follows the filing of three petitions for reconsideration from industry groups and a coalition of eleven states, a decision by EPA Administrator Scott Pruitt to convene a reconsideration proceeding (see EPA Stays RMP Rule Amendments and Grants Petition for Reconsideration), and the filing of a notice of rulemaking in which EPA evaluated different options in response to the petitions and proposed to extend the effective date until February 19, 2019.

EPA's final rule amendment package has generated significant public interest. The proposed rule generated over 61,500 public comments, and the notice of rulemaking on the reconsideration petitions resulted in over 54,000 comments.

The final rule amendments include requirements for larger facilities to conduct root cause analyses following major releases or near misses, conduct third party audits following certain reportable incidents, adopt certain enhanced emergency response activities, and for only a few industrial sectors, conduct safer technology and alternatives analyses as part of ongoing process hazard reviews. For more information on the final rule, see our rule summary (EPA Releases Final RMP Amendments, Awaits Response of New Administration).

EPA indicated in both its proposed and final rulemaking notices that the twenty month delay will provide it the opportunity to evaluate the objections raised by the various petitions, consider other issues that may benefit from additional comment, and take further regulatory action, including developing and publishing notices, evaluating and responding to comments and taking regulatory action, which could include revisions to the RMP amendments.

A number of commenters argued that when it evaluates a petition for reconsideration, EPA does not have the authority to delay implementation of the rule for twenty months, asserting that EPA's delay authority under the Clean Air Act is limited to 90 days. EPA disagreed with this interpretation and indicated that it believes it has the right to delay implementation through a rulemaking notice and comment process, as with any rule amendment, which it has just completed. It is not known as of this writing whether the implementation delay decision will be challenged.

For further information on the RMP amendment package, or on our RMP and OSHA compliance practices, please contact Steve Richmond, Mark Duvall, or Jayni Lanham.

Beveridge & Diamond counsels clients on a wide range of matters relating to the Clean Air Act's Risk Management Plan requirements, OSHA Process Safety Management requirements, and the general duty clauses that exist under both the Clean Air Act and the OSHA statute. Our work includes compliance strategies, assistance with program development and implementation, and enforcement response.

Replacement of the Clean Water Rule to Be a Two-Step Process

Authors: Andrew C. Silton, Richard S. Davis, James M. Auslander, Karen M. Hansen, W. Parker Moore, Timothy M. Sullivan

The Environmental Protection Agency and Army Corps of Engineers announced that the implementation of President Trump's executive order directing EPA and the Corps to replace the Clean Water Rule will be a two-step affair. Read the full article.

The Supreme Court Makes a Mess of Takings Law

Author: Gus B. Bauman

On June 23, the Supreme Court finally addressed directly the frequently posed question: *When considering the claimed taking of a property interest by government regulation, what is the affected property to be considered? All of one's land? Or the regulated parcel? In short, what is the proper denominator?* By a 5-3 vote in *Murr v. Wisconsin*, Justice Kennedy wrote an opinion that will insure a generation of litigation in the lower courts on precisely the same question. Read the full article.

Minamata Convention to Take Effect in August, Restricting the Production and Usage of Mercury Worldwide

Authors: K. Russell LaMotte, Paul E. Hagen

On May 17, the European Union and seven EU member states ratified the Minamata Convention on Mercury, pushing past the 50-state threshold needed for its entry into force. The treaty – the most recent of the global multilateral environmental agreements – will now enter into force (i.e., become legally binding) on August 16, 2017. The United States ratified the Convention (as an executive agreement, without the advice and consent of the Senate) in 2013; in contrast to most of the recent multilateral environmental agreements, therefore, the United States will participate in this agreement as a full party. Read the full article.

Executive Order Charts New Path For Offshore Energy Development

Authors: James Auslander, John Cossa, Peter Schaumberg

On April 28, 2017, the Trump administration issued an Executive Order entitled "Implementing an America-First Offshore Energy Strategy." This EO calls for expanded oil and gas leasing in areas of the U.S. Outer Continental Shelf that were recently placed off-limits to energy development, and instructs several federal agencies to reevaluate and possibly reverse recent regulations imposed on the offshore oil and gas industry. If fully implemented, the EO would clear the way for expanded and expedited development of OCS energy resources. Read the full article.

New Developments and Uncertainties for Conflict Minerals Disclosure

Authors: Steven M. Jawetz and Zachary M. Norris

The Securities and Exchange Commission Division of Corporate Finance issued a new statement adding some uncertainty to company obligations and enforcement exposure under the SEC conflict minerals rule ahead of the May 31, 2017 filing deadline. The statement is one of several moving pieces in an unprecedented wave of activity on conflict minerals in recent weeks. Companies should review these developments and their approach to meeting legal obligations imposed by the SEC's implementation of Section 1502 of Dodd Frank, alongside the broader expectations of customers, activists and investors. 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). Emerson J. Hilton, 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.

Chambers USA Ranks Beveridge & Diamond a Top Tier Environmental Law Firm

We are pleased to announce that Beveridge & Diamond's nationwide environmental practice has earned a top tier ranking in the 2017 edition of Chambers USA Guide to the Legal Profession.

Chambers also named Beveridge & Diamond a leading environmental law practice in California, the District of Columbia, Massachusetts, New York, and Texas. In addition to firm-level rankings, Chambers recognized 14 lawyers as leaders in their fields. Read the full article.

Beveridge & Diamond Again Named a Top Tier Environmental Law Firm by The Legal 500

The Legal 500 again ranked Beveridge & Diamond as a top tier firm in the environment - transactional and regulatory category, and as a leading firm in the environmental litigation category, in its 2017 edition of *The Legal 500 United States*. Read the full article.

Beveridge & Diamond to Assist Larry Thompson as Independent Corporate Compliance Monitor and Auditor in Volkswagen AG Emissions Proceedings

A Beveridge & Diamond team led by firm Chairman Benjamin F. Wilson will assist Larry D. Thompson, Counsel to Finch McCranie, LLP and former Deputy U.S. Attorney General, whom the U.S. government has appointed as the Independent Corporate Compliance Monitor and Auditor for Volkswagen AG (VW). Mr. Thompson's appointment is part of VW's criminal plea agreement stemming from the company's scheme to sell diesel vehicles containing software designed to cheat on U.S. emissions tests. Read the full article.

DRI Names Benjamin F. Wilson Winner of 2017 Sheryl J. Willert Pioneer Diversity Award

Beveridge & Diamond, P.C. is proud to announce that our Chairman, Benjamin F. Wilson, will receive the 2017 Sheryl J. Willert Pioneer Diversity Award from the Defense Research Institute (DRI). The Willert Pioneer Diversity Award is given to an individual who has "demonstrated dedication and commitment to advocating diversity in the legal profession through activity that has a visible, tangible, or measurable impact on the perception of, attitude toward, respect for, and treatment of other persons." The award will be presented at the DRI Diversity for Success Seminar on Thursday, June 15, 2017 at the Swissotel Chicago. Read the full article.