Massachusetts Environmental and Land Use Alert

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Massachusetts Developments

Massachusetts Environmental Secretary Rejects MEPA Fail-Safe Review Petition Seeking to Delay Construction of Biomass Power Plant

On November 19, 2010, the Secretary of the Massachusetts Executive Office of Energy and Environmental Affairs rejected a fail-safe review petition filed by the Conservation Law Foundation. *(full article)*

Permit Extension Act Guidance Seeks to Clarify Questions of Applicability

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U.S. EPA Seeks Comment on Draft Institutional Control Guidance

On November 30, 2010, the United States Environmental Protection Agency (EPA) announced the availability of an interim final guidance document on "Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites." *(full article)*

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EPA Region 1 set new deadlines for the public comment period and rescheduled the public hearing on its draft General Permits for Small Municipal Separate Storm Sewer Systems (MS4) under the National Pollutant Discharge Elimination System ("NPDES") program for Massachusetts Interstate, Merrimack, and South Coastal Watersheds. *(full article)*

Voters Reject Repeal of Affordable Housing Law; SJC Case Strengthens HAC Review under Law

On November 2, 2010, Massachusetts voters resoundingly rejected the repeal of the so-called Affordable Housing Statute, Massachusetts General Laws chapter 40B, §§ 20-23 ("Chapter 40B") by a vote of 58 percent to 42 percent. *(full article)*

Update on MassDEP's Efforts to Develop Comprehensive Guidance on Addressing Vapor Intrusion at Contaminated Sites

The Massachusetts Department of Environment Protection (MassDEP) has been working toward developing updated, comprehensive guidance for addressing sites with vapor intrusion issues for the past several years. (*full article*)

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Courts Rule Against Brookline Developer Yet Again

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Massachusetts Lieutenant Governor Murray Announces Round II of Brownfields Support Team Initiative

This fall, Lt. Governor Murray announced the selection of six projects across Massachusetts for assistance under Round II of the Brownfield Support Team (BST) initiative. (*full article*)

National Developments

FTC Proposes Updates to "Green Guides" for Environmental Marketing

The Federal Trade Commission ("FTC") released its much anticipated proposed revisions to the Guides for the Use of Environmental Marketing Claims ("Green Guides" or "Guides") on October 6, 2010. *(full article)*

Senate TSCA Hearing Closes Out 111th Congress' Focus on TSCA

On October 26, 2010, Senator Lautenberg (D-NJ), Chairman of the Senate Environment and Public Works Committee's Subcommittee on Superfund, Toxics, and Environmental Health, led a field hearing at the University of Medicine and Dentistry of New Jersey in Newark entitled "Toxic Chemicals and Children's Environmental Health."[1] This hearing likely was the final step in what has been a two-year focus of both the House and Senate on overhaul of the Toxic Substances Control Act (TSCA). The prospects for TSCA legislation in the upcoming 112th Congress are uncertain in light of the November mid-term election results. *(full article)*

Federal District Court Orders Compliance with EPA Requests for Information Concerning Future Capital Projects Under the Clean Air Act

On September 27, 2010, the U.S. District Court for the District of Minnesota granted a preliminary injunction ordering the owner and operator of a major source regulated under the Clean Air Act ("CAA") to provide to EPA documents relating to capital projects planned to begin within the next two years. *(full article)*

Firm News

Jeanine Grachuk co-Chairs Seminar on "Hot Topics in Environmental Due Diligence" for the Environmental Business Council of New England

Environmental due diligence practices are evolving to address emerging issues as well as renewed sensitivity to known concerns. *(full article)*

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National Asian Pacific American Bar Association (NAPABA) Webinar

SEC Climate Change Disclosure Requirements

On Wednesday, October 20, 2010, Beveridge & Diamond's Lily Chinn and Wilson Sonsoni Goodrich & Rosati's Charlotte Kim, members of NAPABA's Sustainability and Climate Change Committee (SCCC), co-moderated a webinar on the U.S. Securities and Exchange Commission's (SEC) Climate Change disclosure requirements. *(full article)*

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

September 17, 2010, Washington, DC -- Beveridge & Diamond, P.C. has been named to the 2010 Best Law Firms list by U.S. News Media Group and Best Lawyers. The Firm is ranked as a Tier 1 law firm in Environmental Law in Washington, DC, and as a Tier 2 law firm in Land Use & Zoning Law in the Boston metropolitan area. *(full article)*

Previous Issues of the Massachusetts Environmental and Land Use Alert

Massachusetts Developments

Massachusetts Environmental Secretary Rejects MEPA Fail-Safe Review Petition Seeking to Delay Construction of Biomass Power Plant

On November 19, 2010, the Secretary of the Massachusetts Executive Office of Energy and Environmental Affairs (Secretary) rejected a fail-safe review petition filed by the Conservation Law Foundation requesting that the Secretary require significant additional study of the potential environmental impacts of a proposed biomass-fueled power plant to be built in Springfield, Massachusetts. The project is known as the Palmer Renewable Energy project.

The developers of the power plant had previously filed an environmental notification form under the Massachusetts Environmental Policy Act (MEPA) in 2008, at a time when the project was expected to be fueled by a variety of biomass materials, including waste wood from construction and demolition (C&D) recycling operations. Beveridge & Diamond assisted the City of Springfield in the negotiation of a host community agreement between the City and the developer during the initial MEPA review and local permitting of the project.

The developer encountered opposition in the state air permitting process for the facility, and revised the project to, among other things, remove the C&D fuel component. Consequently, the project was reconceived as a green wood biomass plant. A Notice of Project Change (NPC) was then filed under MEPA to describe the changes, and the notice included a greenhouse gas impacts analysis, a health risk assessment, and substantial additional commitments to the City of Springfield. Beveridge & Diamond also assisted the City of Springfield in reviewing and commenting on that NPC.

The Conservation Law Foundation filed a petition for fail-safe review with the Secretary on behalf of ten citizens of the Commonwealth, seeking to convince the Secretary to require the filing of an environmental impact report, which would have significantly expanded the scope and duration of the MEPA review. State permits may not be issued until the conclusion of a required environmental impact report.

In a case of first impression, the Secretary determined that the MEPA rules provide an option for fail-safe review only where a project does not meet any MEPA review threshold. Addressing the plain language of the MEPA rules, the Secretary found that MEPA would not allow fail-safe review where, as in this case, a project has previously exceeded MEPA review thresholds and has already been subject to MEPA review. The

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Secretary also found that where greenhouse gas developments were occurring that could have impacts on the analysis of biomass projects, such as the enactment of the Global Warming Solutions Act and the recent release of the Manomet study of biomass greenhouse gas impacts, there were no applicable requirements that the developer had not yet met, and therefore there was no reason to conduct further review under MEPA and the project could proceed to state permitting.

The MEPA decision on the Palmer Renewable Energy Project is consistent with a similar decision on MEPA fail-safe review that Beveridge & Diamond worked on earlier in this year. The previous decision involved the proposed construction of an asphalt manufacturing facility in Westford, Massachusetts. In that case, Beveridge & Diamond represented the project developer. Following the issuance of an air permit for the project by the Massachusetts Department of Environmental Protection, a petition for fail-safe review was filed with the Secretary seeking to convince the Secretary to require the filing of an environmental impact report.

The MEPA office denied the petition on the basis that the petition was filed after the necessary state permitting for the project had been concluded. Unlike in the Palmer Renewable matter, the asphalt project had not triggered any MEPA thresholds and therefore was potentially subject to MEPA fail-safe review, however because the petition for fail-safe review was filed after state permits were issued, the MEPA Assistant Secretary determined in a written opinion that fail-safe review was unavailable and under the MEPA rules could not be invoked.

For further information on these developments, please contact Stephen Richmond at srichmond@bdlaw.com, or Brian Levey at blevey@bdlaw.com.

Permit Extension Act Guidance Seeks to Clarify Questions of Applicability

The Massachusetts Executive Office of Housing and Economic Development posted on its website in November “Frequently Asked Questions” (“FAQ”) for the Permit Extension Act (the “Act”), the new law that automatically extends for two years most local, regional, and state land use and environmental permits that were in effect any time during the period from August 15, 2008 to August 15, 2010. The Act provides relief to owners and developers who have been unable to proceed with residential, commercial, or industrial projects due to the lack of available financing caused by the recent recession and sub-prime mortgage crisis.

With 40 different questions and answers (“Q&As”), the FAQ covers a broad range of topics, all of which explicitly pertain to permits issued by state agencies, but may be used to guide conclusions about non-state issued permits. The FAQ covers three main areas.

First, several Q&As relate to the broad scope of the statute:

- the definition of “Approvals” is expansive;
- the Act encompasses municipal, regional or state permits; and
- the applicable statutes are not limited to those referenced in the Act; and Building Permits and MEPA decisions are included.

Second, many Q&As concern the Act’s self-executing nature:

- the extension is automatic;
- it cannot be conditioned by the agency; and
- it requires no further agency review or notification or other executive, legislative or judicial action.

Third, the Act’s potency is addressed:

- it revives permits that expired during the qualifying period or for which a request for extension during the qualifying period was previously denied;
- it extends a permit in effect during the qualifying period even if it was set to expire

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after that period;
- it further extends permits that were in effect during the qualifying period due to an extension granted by the issuing agency; and
- it extends permits even if the permittee is in violation (subject to enforcement rights under the applicable statute or regulation).

The links to the Act and FAQ are below.

- http://www.mass.gov/?pageID=ehedterminal&L=5&L0=Home&L1=Economic+Analysis&L2=Executive+Office+of+Housing+and+Economic+Development&L3=Massachusetts+Permit+Regulatory+Office&L4=Zoning+and+Permitting+Laws&sid=Ehed&b=terminalcontent&f=permitting_permit_extension_act&csid=Ehed

- http://www.malegislature.gov/Laws/SessionLaws/Acts/2010/Chapter240

For more information, please contact Brian Levey at blevey@bdlaw.com.

U.S. EPA Seeks Comment on Draft Institutional Control Guidance

On November 30, 2010, the United States Environmental Protection Agency (EPA) announced the availability of an interim final guidance document on "Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites." This document is available at http://www.epa.gov/superfund/policy/ic/guide/index.htm, and EPA has requested public comment through January 14, 2011.

According to EPA, this guidance is intended to provide an an overview of EPA policies regarding roles and responsibilities of parties involved in various aspects of the institutional control life cycle, and encourages communities and local authorities to become involved in all phases of this life cycle, including stakeholder discussions on future land use and securing financial commitments to maintain and enforce the controls in the long term. It applies to institutional controls for Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); brownfields, federal facility; underground storage tank; and Resource Conservation and Recovery Act (RCRA) site cleanups.

In the document, EPA notes that effective implementation of institutional controls may be improved by devloping an Institutional Control Implementation and Assurance Plan documenting responsibilities over the life-cycle of the institutional control. Further, EPA will be developing guidance on how to develop such plans.

For further information on institutional controls and contaminated sites, please contact Jeanine Grachuk at jgrachuk@bdlaw.com.

MassDEP Issues Draft Solid Waste Facility Site Assignment Guidance

On November 17, 2010, the Massachusetts Department of Environmental Protection (MassDEP) issued draft guidance intended to assist local Boards of Health in the implementation of their new responsibilities under the state solid waste site assignment statute. MassDEP has requested comments on the guidance by December 31, 2010. MassDEP also issued draft guidance on implementation of the new permitting program for small transfer stations (50 tpd or less), but the focus of this article is on the site assignment guidance.

During the summer of 2010, the state Legislature amended the solid waste site assignment statute in an outside section of the fiscal year 2011 budget to remove MassDEP from much of the site assignment process, thereby leaving local boards of health with the full burden of determining the suitability of specific sites for solid waste activities. While this change was intended as a burden reduction measure, and was in fact offered by MassDEP to the Legislature as a measure to reduce workload at an

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agency that has seen significant budget and staffing cuts (24% budget reduction and 142 fewer staffers since 2008), it seems far more likely that MassDEP will be forced in the short term to spend more time on site assignment issues than it would have if no changes had occurred.

The net effect of the statutory revisions is that boards of health will now have the sole burden of evaluating scientific and technical siting criteria established at G.L. c.111, §150A ½., without the assistance of MassDEP. In the past, boards of health would receive a detailed site suitability evaluation from MassDEP in advance of their site assignment hearings, and could rely on MassDEP's technical expertise on complex siting issues such as modeled ambient air impacts, potential groundwater impacts, endangered species evaluations, facility sizing considerations, cumulative environmental impact analyses, and evaluations of impacts from existing sources of contamination. The review of these issues is now the sole province of local boards of health.

There are several issues that arise from the draft guidance proposed by MassDEP that are worthy of comment.

First, the draft guidance indicates that boards of health should interpret the existing site assignment regulations at 310 CMR 16.00 as if the provisions referring to MassDEP are intended to refer to the local board of health. This is a concept that is fraught with difficulties. The regulations establish specific procedural rights and responsibilities, and differentiate between the technical evaluation of site suitability previously conducted by MassDEP and the much more formal administrative hearing process conducted by the boards of health to issue site assignments. Simply merging the two processes into one through a guidance document is only an invitation to litigation.

Beveridge & Diamond has significant experience with the site assignment process, representing both project developers and municipalities in many such proceedings. On both sides of that equation, the parties need certainty. The procedural rules and the burdens are complex, and cannot be blended simply by issuing guidance that tells the boards of health to do it all. As one example, the current rules provide that the process for determining site suitability allows MassDEP to rely upon any information made available to MassDEP, whereas the consideration of information by the board of health in the site assignment hearing is tightly constrained. Which standard governs under MassDEP's guidance? As another example, the current rules provide that the review of applications may not include information on detailed design or operations except where MassDEP determines that this is necessary. This provision balances the broad nature of a site suitability review with MassDEP's particular expertise with facility evaluation. How should boards of health, which typically have very little solid waste facility expertise, determine whether they may consider detailed design or operations? Are these issues appropriately within their purview? MassDEP should initiate a thoughtful but expedient rule amendment proceeding to amend the current rules and fix these problems.

Second, the statute continues to require that MassDEP provide both guidance and technical assistance to boards of health during their review of site assignment applications. G.L. c.111, §150A says:

> The department shall, upon request by the board of health, provide advice, guidance and technical assistance to said board during its review of a site assignment application. The department and a board of health may enter into such other cooperative agreements in addition to those herein specified for the purpose of achieving an effective and expeditious review of the application.

MassDEP's guidance does not address how this advice, guidance and technical assistance will be provided. The guidance states some interesting options that MassDEP is considering, such as informal consultations, the issuance of standard site suitability letters, providing comment letters, and holding public meetings. However, rather than establish a commitment to provide specific support, the guidance only says that MassDEP intends to have further discussions on this issue.

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In our view, this question of what role MassDEP intends to play in the site assignment process is the critical issue to be resolved through agency guidance. The purpose of the guidance should be to provide clarity about how MassDEP will address the statutory requirement to assist local boards of health.

Site assignment proceedings are compressed, intense, and usually the subject of significant community attention. They are often contested, and this often leads to litigation. The draft guidance creates more uncertainty in the process, and will likely lead to more litigation. MassDEP should move quickly to amend its regulations to reflect the new statutory provisions, and should clarify its ongoing role in these proceedings, consistent with its continuing statutory role.

For further information on this development, please contact Stephen Richmond at srichmond@bdlaw.com or Marc Goldstein at mgoldstein@bdlaw.com.

EPA Region 1 Revises Deadlines for Hearings and Comments on NPDES General Permits for Small Municipal Separate Storm Sewer Systems (MS4)

EPA Region 1 set new deadlines for the public comment period and rescheduled the public hearing on its draft General Permits for Small Municipal Separate Storm Sewer Systems (MS4) under the National Pollutant Discharge Elimination System ("NPDES") program for Massachusetts Interstate, Merrimack, and South Coastal Watersheds. EPA's original notice on November 4, 2010 failed to provide the required time prior to a public hearing scheduled for December 2, 2010; EPA's November 29, 2010 revision of those deadlines extended the public comment period for written submissions to January 21, 2011 and scheduled a public meeting for January 12, 2011 following by a formal public hearing in the same location on the same date.

EPA's issuance of the draft MS4 General Permit for these three watersheds comes on the heels of its issuance of similar draft permits for the Massachusetts North Coastal Watershed and New Hampshire, for which the comment periods are closed and EPA is predicting issuance of final permits in Spring 2011. These permits replace General Permits originally issued on May 1, 2003, which expired on May 1, 2008 and have been administratively extended.

The MS4 General Permits cover small storm water systems operated by municipalities and cities located in urbanized areas. A map showing the areas covered by the three draft permits is located on the EPA Region 1 web site (http://www.epa.gov/region1/npdes/stormwater/ma/MA_PermitType.pdf).

Under the new draft permits, entities operating small MS4 systems will need to submit a new Notice of Intent to EPA and the Massachusetts Department of Environmental Protection ("MassDEP") within 90 days of the effective date of the final permit and include information on the status of the map of all outfalls and bylaws and ordinances governing stormwater connections and discharges, and a summary and assessment of the stormwater management program that each permittee was directed to implement in the 2003 MS4 General Permit.

The new permits impose considerably more stringent requirements on operators of these systems, adding to the various requirements in nearly every category:

- Reduction of discharges to the Maximum Extent Practicable through Best Management Practices (BMPs);
- Augmentation of programs to identify and eliminate illicit discharges (IDDE), including prohibition of sanitary sewer overflows;
- Outfall monitoring including dry- and wet-weather screening, monitoring, and analytic testing where appropriate;
- Enhanced public participation and involvement efforts;
- Development of programs to address stormwater discharges from construction

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sites disturbing more than one acre; and

- Creating a program to minimize post-construction run-off by evaluating the extent of impervious surfaces and imposing new requirements on new development and redevelopment.

EPA has prepared a table comparing the requirements of the 2003 and newly proposed MS4 General Permits on its web site (http://www.epa.gov/region1/npdes/stormwater/ma/MIMSC-SummaryMajorChanges.pdf).

For further information, please contact Marc J. Goldstein at mgoldstein@bdlaw.com.

Voters Reject Repeal of Affordable Housing Law; SJC Case Strengthens HAC Review under Law

On November 2, 2010, Massachusetts voters resoundingly rejected the repeal of the so-called Affordable Housing Statute, Massachusetts General Laws chapter 40B, §§ 20-23 ("Chapter 40B") by a vote of 58 percent to 42 percent. Unofficial results show that more than 1.2 million voters and 80 percent of municipalities in urban, suburban, and rural communities all across the state affirmed their support for the affordable housing law. Question 2 on the State ballot represented the most serious challenge ever posed to Chapter 40B. Repeal efforts were led by John Belskis of the Coalition for the Repeal of 40B. Tripp Jones served as the Chair of the Campaign to Protect the Affordable Housing Law. While Question 2 failed in its primary objective, legislative observers have speculated that the pending ballot challenge effectively caused the Massachusetts Legislature to exclude Chapter 40B from the Permit Extension Act. It is anticipated that the usual bills seeking to limit or abolish Chapter 40B will again be filed, but that Legislators will have little appetite to approve these changes in light of Question 2's clear cut defeat.

With Chapter 40B's survival, the recent case of *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748 (2010) takes on renewed interest and relevance. There, the Massachusetts Supreme Judicial Court ("SJC") recently held that a local zoning board's power to impose conditions is not all encompassing; rather, it is limited to the types of conditions that the various local boards in whose stead the local zoning board is acting. Moreover, the Court held, the Housing Appeals Committee (HAC) is authorized to strike conditions that were not in the board's power to impose even though such conditions may not render the project "uneconomic."

The developer sought to construct a 40-unit condominium development with ten affordable units. The board granted a Comprehensive Permit but attached 94 conditions ranging from typical zoning issues like construction and density to "nonzoning restrictions, such as land acquisition values and allowable profit, regulatory documents, and marketing." On appeal to HAC, the developer provided evidence that the subsidizing entity, Massachusetts Housing Finance Agency ("MassHousing"), would not fund the project if its programmatic requirements were subject to several of these nontraditional local permit conditions. HAC, ruling on a summary decision motion, struck several of the nonzoning conditions ruling that the board lacked authority to impose them and, hence, the developer was under no burden to demonstrate that each such rendered the project uneconomic. On appeal, the Superior Court affirmed the HAC's decision.

Also affirming the HAC, the SJC explained that, "Because the board's authority is tied to that of 'local boards,' the scope of issues that it permissibly may address through conditions is necessarily limited to the types of concerns and powers of these boards. We have interpreted the listing of agencies and officials in the act's definition of 'local board' in [G.L.c. 40B, § 20] as representative rather than exact, and have looked at the functions they perform rather than their title. These functions relate to matters of clear local concern, such as building construction, zoning and subdivision control, land use planning, as well as health and safety of local residents…. Accordingly, insofar as the

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board's ninety-four conditions included requirements that went to matters such as, *inter alia*, project funding, regulatory documents, financial documents, and the timing of sale of affordable units in relation to market rate units, they were subject to challenge as *ultra vires* of the board's authority under § 21."

Turning to the HAC's authority to remedy such conditions, the Court rejected the board's contention that the HAC was locked into first determining whether the developer proved the condition was "uneconomic" and, if so, whether the board had nonetheless shown the condition's "consistency with local needs." The Court found that this "restrictive interpretation of the HAC's authority… would frustrate the purposes of the [40B]…. [since] the developer would be forced to file separate appeals: one with the HAC to challenge conditions on the ground that adherence to them would render the project uneconomic, and another in the Superior Court in the form of a declaratory action to determine whether the board had the authority to set the conditions in the first instance." The Court rejected this "dual system of review" as completely antithetical to the purpose of the statute -- the prompt creation of new affordable housing. Thus, the Court found that the HAC could "consider whether some or all of the challenged conditions are within the power of a local zoning board to impose or whether they otherwise intrude impermissibly into areas of direct programmatic concern to State or Federal funding and regulatory authorities" and "strike or modify conditions that fall outside the range of issues set out in [G.L. c. 40B,]§ 21."

For more information, please contact Brian Levey at blevey@bdlaw.com.

Update on MassDEP's Efforts to Develop Comprehensive Guidance on Addressing Vapor Intrusion at Contaminated Sites

The Massachusetts Department of Environment Protection (MassDEP) has been working toward developing updated, comprehensive guidance for addressing sites with vapor intrusion issues for the past several years. Vapor intrusion refers to the ability of volatile contaminants to move from soil vapor into the indoor air of buildings. This "Alert" provides an update on MassDEP's progress.

Regulations implementing the state cleanup law, chapter 21E, have long required assessment and remediation of sites to address vapor intrusion concerns. In April 2006, MassDEP made the standards addressing vapor intrusion more stringent in light of evolving data. As part of these revisions, the perchloroethylene standard that applies to groundwater underneath a building was lowered by two orders of magnitude (from 3,000 ug/L to 50 ug/L). Subsequently, MassDEP began examining perchloroethylene sites closed under prior standards to determine if they pose an imminent hazard. http://www.mass.gov/dep/cleanup/laws/viaud.htm. Of about 600 sites examined, MassDEP determined that additional assessment or remedial work would be required for about 100 sites.

In 2008, MassDEP convened an Indoor Air Workgroup for the purpose of developing updated, comprehensive guidance for addressing sites with vapor intrusion issues. The workgroup consists of representatives from the licensed-site-professional, risk assessment, and legal communities, along with MassDEP staff. Important issues that have been discussed in workgroup meetings include the appropriate use of modeling, how to achieve site closure, and mechanisms for addressing potential future building construction. In addition, MassDEP has identified deed restrictions (known in Massachusetts as Notices of Activity and Use Limitations) as a potential mechanism for addressing vapor intrusion issues at some sites.

MassDEP has announced that draft comprehensive vapor intrusion guidance will be issued shortly for public comment, and will be finalized in the next several months. In addition, MassDEP has announced that it will seek public comment on revised guidance on deed restrictions in the near future.

While not directly relevant to the work by MassDEP to develop a policy addressing

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remediation of sites with potential vapor intrusion issues, we note that ASTM recently issued a new due diligence standard for Vapor Encroachment Screening on Property involved in Real Estate Transactions, ASTM E2600-10.

For further information on vapor intrusion issues in Massachusetts, please contact Jeanine Grachuk at jgrachuk@bdlaw.com.

Nonconforming Lot Created in ANR Plan "Infects" Conforming Lot, Making it Invalid

Courts Rule Against Brookline Developer Yet Again

Perhaps ending a battle that has raged for more than five (5) years on Spooner Road in Brookline, Massachusetts, and already resulted in one decision from the Supreme Judicial Court of Massachusetts ("SJC"), the Massachusetts Appeals Court ruled that when a developer split a lot into two lots but caused one with an existing home to be nonconforming under local zoning, that zoning violation "infected" the newly created, although otherwise conforming, lot.

The dispute involves a zoning appeal by neighbors under M.G.L. c. 40, § 17 of actions by a developer to divide an existing lot with a home in Brookline in order to create a second lot on which to construct a new home. In the first round of this litigation, the developer challenged the validity of the Brookline zoning bylaw that imposed a maximum floor area ratio after the Brookline Zoning Board of Appeals ("Board") found the existing and proposed homes violated the provision. The developer argued that the bylaw improperly regulated the interior space of a building in violation of M.G.L. c. 40A, § 3. However, the SJC ruled that the Land Court judge did not err in finding that the bylaw was proper. "Although the town's bylaw requires consideration of gross floor area of single-family residences for purposes of calculating floor-to-area ratio, this is not a prohibited direct regulation of interior area. Its effect is only incidental." *81 Spooner Rd. LLC v. Town of Brookline*, 452 Mass. 109, 117 (2008).

Having lost this legal challenge to the bylaw itself, the developer sought to extinguish the abutter's claims by challenging their standing and the timeliness of the appeal and arguing that certain interior spaces did not fit the bylaw's definition of gross floor area. *81 Spooner Road, LLC v. Zoning Board of Appeals of Brookline*, 09-P-1248 (November 9, 2010). The Court brushed aside the procedural arguments and found that the local Board's interpretation of the definitions of its own bylaw were reasonable and entitled to deference.

However, because the developer had already sold the lot with the house to another party, the developer was ultimately concerned about the buildability of the newly created lot. The Appeals Court affirmed the Land Court's finding that because the lot with the original house became nonconforming as a result of the Approval Not Required ("ANR") plan obtained by the developer separating the lot into two, the newly created and otherwise conforming lot was "infected" by the nonconformity of the house lot, rendering it an invalid lot. "[The developer] may not form a new building lot by dividing an existing conforming lot if as a result the latter is rendered nonconforming by such a division."

Post-decision motion practice at the Appeals Court indicates the developer is intending to pursue file a request for further appellate review to the SJC.

For further information, please contact Marc J. Goldstein at mgoldstein@bdlaw.com or Brian C. Levey at blevey@bdlaw.com.

Massachusetts Lieutenant Governor Murray Announces Round II of Brownfields Support Team Initiative

This fall, Lt. Governor Murray announced the selection of six projects across Massachusetts for assistance under Round II of the Brownfield Support Team (BST)

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initiative. As described by the Governor's office, the BST was created in 2008 to bring various state agencies together to work with communities to help clean up and redevelop challenging contaminated sites. Redeveloping these properties will promote job creation and economic recovery. The newly selected sites are:

1. Uniroyal/Facemate in Chicopee. The City has targeted these sites for redevelopment, potentially including a river walk to connect them with the downtown commercial district. PCBs, petroleum and asbestos have been identified at these sites.

2. Mill Street Corridor Redevelopment in South Gardner. The City has prioritized redevelopment of its former manufacturing center including the municipal-owned former Garbose Metal Company property which is contaminated with PCBs, metals and petroleum.

3. Katrina Road in Chelmsford. This former Silicon Transistor Corporation property is now owned by the town which has prioritized the clean up of contaminated soil and groundwater and redevelopment of the property.

4. Downtown Redevelopment Project in Attleboro. As part of redevelopment of the city's downtown commercial district into a revitalized transit-oriented "urban village," the city has identified challenges due to contamination at key locations.

5. Kiley Barrel in Somerville. The city seeks to revitalize the historic Union Square neighborhood, including the Kiley Barrel site, for mixed-use transit-oriented development adjacent to a proposed Green Line station.

6. City-wide brownfields assistance pilot in Brockton. Instead of focusing on a particular site, this project will assist the city in developing an inventory of sites in need of state and federal assistance which demonstrate significant economic development potential.

According to the Governor's office, the BST initiative was expanded due to the success of the original five pilot sites selected in 2008 in Round I. Measurable results were achieved at all five sites, including the commitment of more than $8 million in funding by participating agencies for assessment, cleanup, demolition, and infrastructure improvements. The original five sites were: Chapman Valve/Crane Co. in Springfield, the South Worcester Industrial Park in Worcester, the Fisherville Mill in South Grafton, the City Pier in Fall River, and Ted's for Tires in Haverhill. Beveridge & Diamond lawyers were involved in the Chapman Valve/Crane Co. site as advisors to the City of Springfield on brownfields issues.

For further information on Brownfields in Massachusetts, please contact Jeanine Grachuk at jgrachuk@bdlaw.com.

National Developments

FTC Proposes Updates to "Green Guides" for Environmental Marketing

The Federal Trade Commission ("FTC") released its much anticipated proposed revisions to the Guides for the Use of Environmental Marketing Claims ("Green Guides" or "Guides") on October 6, 2010. The Green Guides were last updated in 1998 and establish general principles, guidance, and examples to help companies avoid misleading and deceptive statements in environmental marketing materials. Most notably, the revisions would: (1) enhance the FTC's existing guidance on general environmental benefit claims, the use of environmental certifications and seals, and other specific claims such as "compostable," "recyclable," and substance "free"; and (2) expand the guidance to include new sections on claims regarding the use of renewable materials, renewable energy, and carbon offsets. The release marks the FTC's most significant step toward clarification of the legal boundaries for environmental claims

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since the Commission began its review of the Guides in 2007.

The FTC is currently seeking comment on the proposed revisions and specific issues raised in the notice. Comments are due December 10, 2010. A copy of the Federal Register notice containing the proposed revisions and issues for comment is available at http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf.

Background

The FTC first issued the Green Guides (16 C.F.R. Part 260) in 1992, with subsequent revisions in 1996 and 1998, outlining general principles to help companies avoid misleading and deceptive statements in environmental marketing materials. Although the Guides do not have the force of law, they indicate how the FTC will apply Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive acts, to environmental marketing claims. The FTC considers actions that are inconsistent with the Green Guides to be potential Section 5 violations, and has exercised its enforcement authority to address false and unsubstantiated environmental claims. In addition, the National Advertising Division of the Better Business Bureau actively considers such claims and refers cases to the FTC when necessary. Additional information on prior FTC environmental enforcement actions is available at http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf.

The FTC initiated review of the existing Green Guides in 2007. Recognizing that consumers are increasingly concerned about the environmental impacts of products and services they use, and that companies increasingly seek to promote the environmental attributes of their products and services, the FTC concluded that claims contemplated and addressed in the 1990's were no longer the claims most prevalent in today's marketplace. As a result, the FTC sought public comment on the guides, hosted a series of public workshops, and conducted a consumer perception study. Stakeholder input from this process has been incorporated into the proposed Green Guides revisions.

Summary of Proposed Revisions

The FTC's proposal includes two categories of substantive revisions to the Green Guides: revisions to strengthen, add specificity to, and clarify issues that are currently addressed in the Guides; and new guidance on emerging claims not currently addressed in the Guides. The lengthy preamble also provides critical insight into how the FTC will interpret and enforce the Guides and contains numerous examples of appropriate qualification and substantiation for particular environmental claims.

I. Enhanced Guidance on Issues Currently Addressed in the Guides

A. General Environmental Benefit Claims

The proposed revisions would strengthen the FTC's guidance regarding general environmental benefit claims such as "green," "environmentally friendly," and "eco-friendly." Unqualified general environmental claims are discouraged in the current Guides, since very few products are likely to have all of the attributes that consumers may perceive from such claims. The proposed revisions emphasize that marketers should not make unqualified general environmental benefit claims, and provide additional guidance on how to qualify and substantiate such claims. For example, the proposed revisions direct marketers to:

- Use clear and prominent qualifying language to convey to consumers that a general environmental claim refers only to a specific and limited environmental benefit.
- Substantiate any additional claims conveyed by the qualification itself.
- Ensure that the context of a general environmental claim does not imply other deceptive claims.

The proposed revisions also note the FTC's concern that a general environmental

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benefit claim, in combination with a claim about a particular environmental attribute (e.g., "green - made with recycled materials"), may imply that the particular attribute provides the product with a net environmental benefit. The FTC specifically requests comment on this issue.

B. Environmental Certifications, Labels, and Seals of Approval

The proposed revisions add further detail on the use of environmental certifications and seals of approval. While the current Guides include one example noting that environmental certifications and seals of approval may imply that a product is environmentally superior to other products, the proposed revisions add a new section devoted to the subject. This section includes the following additional guidance on environmental certifications and seals of approval:

- Use of the name, logo, or seal of approval of a third-party certifier is an "endorsement" and must meet the criteria set out in the FTC's Endorsement Guides (16 C.F.R. Part 255).
- Where certifications or seals convey an unqualified general environmental benefit, clear and prominent language should accompany the certification or seal limiting the claim to the particular attribute(s) for which substantiation is available.
- Marketers should disclose any "material connections" between the endorser and the retailer or manufacturer of the product (e.g., membership in the endorsing association).

The FTC's proposed revisions do not identify environmentally preferable industry practices or provide guidance on the development of third-party certification programs, nor do they require public disclosure of standards or criteria used to support certifications.

C. Enhanced Guidance on Specific Claims

The proposed revisions enhance the guidance for a number of specific claims that are addressed, to some extent, in the current Guides. Several examples are highlighted below.

Degradable. The current Guides state that degradable claims should be qualified unless a marketer can substantiate that the entire product or package will breakdown within a "reasonably short period of time." The proposed revisions clarify that a "reasonably short period of time" is no more than one year after customary disposal. Marketers are advised not make unqualified "degradable" claims for products destined for landfills, incinerators, or recycling facilities, since products disposed through these channels are not likely to decompose within one year. This guidance would appear to significantly limit the circumstances in which this claim would be acceptable under the revised Guides.

Compostable. The current Guides advise that all materials in a product or package must break down into usable compost in a safe and "timely manner" in order to claim that a product is "compostable." The proposed revisions clarify that the product must break down within the same approximate timeframe as other materials with which it is composted.

Recyclable. The proposed revisions highlight and emphasize the key provisions in the current Guides on disclosing the limited availability of recycling programs. If a "substantial majority" of consumers have access to recycling facilities, unqualified recyclable claims are permitted. Recyclable claims should be qualified if a "significant percentage" or less than a significant percentage of consumers have access to recycling facilities. This guidance raises questions about claims that are targeted at national or large regional markets.

Substance Free. The proposed revisions advise that substance-free claims

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may be deceptive if a product contains substances that pose the same or similar risk as the substance that is not present, or if the substance has never been associated with the product category. However, the revisions would allow the use of substance-free claims where the product contains a "de minimis" amount of the substance. This proposed guidance thus intersects with growing attention to regulatory and voluntary pressures relating to the presence of substances of concern in manufactured articles.

II. New Guidance on Emerging "Hot Topic" Claims

The FTC's proposed revisions include new guidance on several categories of "hot topic" claims that have emerged since the 1998 revisions. Although the FTC review process for the Guides identified five categories of environmental claims that may warrant further guidance, the proposed revisions address only three — claims that a product was made with "renewable materials," claims that a product was made with "renewable energy," and claims relating to carbon "offsets."

Renewable Materials. The proposed revisions advise that claims relating to "renewable materials" should be qualified with specific information about the material and the quantity of renewable materials for products containing less than 100 percent renewable materials (excluding minor, incidental components).

Renewable Energy. The proposed revisions advise that marketers should not make an unqualified "made with renewable energy" claim if an item was manufactured with energy produced using fossil fuels. In addition, the FTC proposes that marketers disclose the type or source of the renewable energy (e.g., solar, wind) and qualify claims unless all, or virtually all, of the significant manufacturing processes used to make the product are powered by renewable energy or by conventional energy offset with renewable energy certificates ("RECs"). The proposed revisions also advise that marketers should not represent that they use renewable energy if they have sold RECs for all renewable energy generated.

Carbon Offsets. The FTC's proposed revisions provide limited guidance on carbon offset claims but emphasize that substantiation in the form of competent and reliable scientific evidence is required to support such claims. In addition, marketers should not advertise carbon offsets if the activity that forms the basis of the offset is already required by law. The proposed revisions further advise disclosure where offset purchases would fund emissions reductions that will not occur for at least two years.

The FTC declined to provide general guidance on the remaining two categories — "sustainable" claims and "organic" or "natural" claims — but noted that the general principles set forth in the Guides would nonetheless apply to such claims. In addition, to the extent that reasonable consumers would perceive sustainable, organic, or natural claims to be general environmental benefit claims or comparative claims, the Guides require substantiation for those claims and all other reasonably implied claims.

III. Other Noteworthy Points

Scope. The FTC is proposing to clarify that the Guides apply to business-to-business marketing claims as well as business-to-consumer marketing claims.

- Use of Websites to Qualify Claims. The preamble to the proposed revisions states that websites cannot be used to qualify otherwise misleading claims that appear on labels or in other advertisements because consumers would likely not see that information before their purchase. Accordingly, the FTC advises that any disclosures must be clear and prominent and in close proximity to the claim being qualified.
- Harmonization with International Standards. The FTC notes that the proposed Guides do not necessarily align with international standards due to the different

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purposes of ISO and the Green Guides. For claims that have transboundary reach, it will therefore be important to consider how these guides interact with a variety of international and other national standards (see below).

- Life Cycle Analysis. The proposed revisions do not include guidance on the use life cycle analysis ("LCA") in marketing or as substantiation for environmental claims. The FTC also declined to recommend that marketers follow any particular LCA methodology. However, the FTC noted that it will continue to analyze claims involving LCA on a case-by-case basis.

International Guidance and Standards for Green Marketing Claims

Outside the United States, several extensive guidelines on green marketing claims are available. Marketers may want to consider these international sources as a supplement to the pending revisions to the Green Guides. Examples include:

- ISO 14021, Environmental labels and declarations — Self-declared environmental claims (Type II environmental labelling).
- Canadian Standards Association, Environmental claims: A guide for industry and advertisers (2008).
- European Commission, Guidelines for Making and Assessing Environmental Claims (2000).
- United Kingdom Green Claims Code for Products (updated 2000) and Green Claims Practical Guidance (2003).

Next Steps

The FTC invites comment on any aspect of the proposed revisions as well as on the specific questions posed in the Federal Register notice. According to the notice, the FTC will take all suggestions into account as it works to finalize the revised Guides. Although the timeframe for final adoption will depend on the volume of comments received, issuance of the final revised Green Guides is not likely in 2010.

Beveridge & Diamond actively counsels clients on environmental marketing. For further information on this topic, please contact Russ LaMotte (rlamotte@bdlaw.com), Mark Duvall (mduvall@bdlaw.com), or Lauren Hopkins (lhopkins@bdlaw.com).

Senate TSCA Hearing Closes Out 111th Congress' Focus on TSCA

On October 26, 2010, Senator Lautenberg (D-NJ), Chairman of the Senate Environment and Public Works Committee's Subcommittee on Superfund, Toxics, and Environmental Health, led a field hearing at the University of Medicine and Dentistry of New Jersey in Newark entitled "Toxic Chemicals and Children's Environmental Health."[1] This hearing likely was the final step in what has been a two-year focus of both the House and Senate on overhaul of the Toxic Substances Control Act (TSCA). The prospects for TSCA legislation in the upcoming 112th Congress are uncertain in light of the November mid-term election results.

Earlier Developments

The 111th Congress began its consideration of TSCA early with a hearing on February 26, 2009 held by the House Energy and Commerce Committee's Subcommittee on Commerce, Trade, and Consumer Protection, chaired by Representative Bobby Rush (D-IL).[2] Additional hearings by that Subcommittee followed on November 17, 2009,[3] and March 4, 2010.[4] In the Senate, the Environment and Public Works Committee and Senator Lautenberg's Subcommittee on Superfund, Toxics and Environmental Health held a hearing on December 2, 2009,[5] with the Subcommittee holding additional hearings on February 4, 2010,[6] and on March 9, 2010.[7]

On April 15, 2010, Senator Lautenberg introduced TSCA legislation, the "Safe Chemicals Act of 2010," S. 3209, that would fundamentally overhaul TSCA.[8] His Subcommittee held no hearings on the bill, however, until the field hearing on October

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26, six months later.

Meanwhile, a discussion draft of the House counterpart to Senator Lautenberg's bill, the Toxic Chemicals Safety Act of 2010, was released the same day as his bill, on April 15, 2010. Representative Rush then held a series of stakeholder sessions before introducing the bill, H.R. 5820, on July 22, 2010. A hearing followed on July 29, 2010, at which industry representatives expressed concern about the bill.[9] No further hearings were held.

Senate TSCA Hearing

The October 26, 2010 field hearing reiterated prior arguments for TSCA reform. Its timing late in the legislative year suggests an effort to position the topic for the next Congress.

Senator Lautenberg's introductory statement recited a now-familiar litany of flaws in the current TSCA law, relating to EPA's difficulties in obtaining information and imposing restrictions on chemicals.[10] Senator Lautenberg also stated that substantial fractions of childhood cancers, neurological disorders, and asthma are associated with hazardous chemicals, and cited an earlier Senate hearing on a Centers for Disease Control and Prevention report on biomonitoring.[11] While acknowledging that industry groups have not endorsed the Safe Chemicals Act, he characterized them as having agreed that TSCA reform legislation is "a worthwhile venture" and as "not as hostile" to the idea of TSCA reform as in the past. TSCA reform, he argued, would benefit rather than harm the economy and the important chemicals sector by, among other things, restoring public trust in the industry.

Senator Inhofe (R-OK), the ranking member on the Subcommittee, was not present at the hearing. He submitted a written statement that could be construed as generally supportive of TSCA reform, saying "assessing the environmental impact on children deserves additional, specialized interest." He expressed a commitment "to develop legislative solutions to the extent they are needed and according to what the best available science is telling us."

The field hearing's first panel consisted of EPA Administrator Lisa Jackson, who has made chemicals management a top priority for her agency. Administrator Jackson's testimony reiterated previous statements about limitations of TSCA and about special risks faced by children exposed to chemicals. A large part of the testimony summarized EPA's "Essential Principles for Reform of Chemicals Management Legislation," released in fall 2009.[12] She also highlighted suspected ties between toxic chemicals in the environment and breast cancer.

When asked how long a TSCA reform law might take to implement and to impact environmental health endpoints, Administrator Jackson acknowledged that it would take "a while" to actually review all chemicals in commerce. She added that impacts on chemical safety would be felt more quickly. Administrator Jackson also acknowledged that many of the concerns driving mistrust of chemicals, such as the presence of chemicals such as bisphenol A in food-contact materials, are outside EPA's jurisdiction. (She did not expand on the relevance of these jurisdictional issues to the introduced legislation.) In response to a question from Senator Lautenberg regarding the balance between public disclosure of information and protection of manufacturers' intellectual property interests and competitiveness, Administrator Jackson acknowledged the industry concern but generally supported greater disclosure requirements.

The second panel featured four speakers, all also supportive of TSCA reform. The first was CNN medical correspondent Dr. Sanjay Gupta, who spearheaded an extensive investigative report on "Toxic America" earlier this year.[13] Dr. Gupta used the examples of DDT and lead to illustrate the importance of knowing about the health effects of chemicals. He criticized what he called the "innocent until proven guilty" approach to chemicals management under current law, comparing it unfavorably to the Regulation

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on Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) in the European Union. Dr. Gupta also stated that, according to his investigation, a precautionary principle would promote rather than stifle innovation.

Dr. Lisa Huguenin, an environmental scientist and mother of child with autism and an immune system disorder, offered emotional testimony about her worries about exposure to chemicals.

Dr. Steven Marcus, MD, a professor at the New Jersey Medical School, discussed his experiences with treating lead poisoning and with broader medical toxicology. He argued that we live in "a soup of environmental chemicals" whose cumulative effects should be detrmined, and urged additional support for pediatric toxicology and Poison Control Centers.

Finally, Dr. Frederica Perera, Director of the Columbia University Center for Children's Environmental Health, reported on studies on developmental effects from children's prenatal exposures to phthalates, BPA, and polybrominated diphenyl ethers.

What Next?

As a result of the November 2 mid-term election, in the 112th Congress Republicans will have control of the House of Representatives, by a margin of approximately 242 to 193, and will have increased strength in the Senate, where there will be some 51 Democrats, 2 independents who caucus with them, and 47 Republicans. Chairmanship of the House Energy and Commerce Committee will pass from Representative Henry Waxman (D-CA), a strong supporter of TSCA reform, to a Republican to be selected in the coming days.

TSCA reform will not be among the House Republicans' initial priorities. House Republicans are likely to focus on health care, appropriations, and oversight, rather than enactment of major environmental legislation. The lead environmental issue will once again be climate change, with TSCA waiting its turn.

Still, TSCA reform legislation does have some chance of enactment in the 112th Congress. Republicans may need to point to accomplishments on environmental issues beyond limitations on EPA's greenhouse gas rulemaking activity. The key question is whether industry stakeholders, who advocated for TSCA legislation in 2009, will maintain that position in a very different Congress. Those who felt that the 2010 legislation went too far may push for a more moderate compromise that still results in significant changes to TSCA.

For more information, please contact Mark Duvall at mduvall@bdlaw.com or Alexandra Wyatt at awyatt@bdlaw.com.

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[1] U.S. Senate Committee on Environment and Public Works, Subcommittee on Superfund, Toxics, and Environmental Health, Field Hearing: "Toxic Chemicals and Children's Environmental Health" (Oct. 26, 2010), available at http://www.epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=c9fbef98-ee5d-2a2d-65cd-21bcd5313f8f (including witness testimony and archived webcast).

[2] See Beveridge & Diamond, P.C., First TSCA Reform Congressional Hearing of 2009 Held February 26, Mar. 3, 2009, available at http://www.bdlaw.com/news-506.html.

[3] See Beveridge & Diamond, P.C., Congressional Hearing Builds Momentum for TSCA Amendments, Nov. 20, 2009, available at http://www.bdlaw.com/news-730.html.

[4] U.S. House Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection, Hearing: TSCA and Persistent, Bioaccumulative, and Toxic Chemicals: Examining Domestic and International Actions" (Mar. 2, 2010), available at http://energycommerce.house.gov/index.php?option=com_content&view=article&id=1915:tsca-and-persistent-bioaccumulative-and-toxic-chemicals-examining-domestic-and-international-actions&catid=129:subcommittee-on-commerce-trade-and-consumer-protection&Itemid=70.

[5] See Beveridge & Diamond, P.C., Senate Oversight Hearing on TSCA Highlights Familiar Concerns, New Science, Dec. 4, 2009, available at http://www.bdlaw.com/news-747.html.

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[6] U.S. Senate Committee on Environment and Public Works, Subcommittee on Superfund, Toxics, and Environmental Health, Hearing: "Current Science on Public Exposures to Toxic Chemicals" (Mar. 4, 2010), available at http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=8a722315-802a-23ad-4e9a-b8477139e63f.

[7] U.S. Senate Committee on Environment and Public Works, Subcommittee on Superfund, Toxics, and Environmental Health, Hearing: "Business Perspectives on Reforming U.S. Chemical Safety Laws" (Mar. 4, 2010), available at http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=29c259ec-802a-23ad-4b7b-6087cdaf2ceb.

[8] See Beveridge & Diamond, P.C., "Proposed Legislation Would Overhaul TSCA" (Apr. 23, 2010), available at http://www.bdlaw.com/news-852.html.

[9] See Beveridge & Diamond, P.C., "House Discusses Potential Dramatic Changes to U.S. Chemicals Law" (Aug. 5, 2010), available at http://www.bdlaw.com/news-938.html.

[10] See, e.g., Beveridge & Diamond, P.C., "Senate Oversight Hearing on TSCA Highlights Familiar Concerns, New Science: (Dec. 4, 2009), available at http://www.bdlaw.com/news-747.html.

[11] See Beveridge & Diamond, P.C., "TSCA Reform Efforts Turn to Biomonitoring Studies for Support" (Feb. 12, 2010), available at http://www.bdlaw.com/news-809.html.

[12] EPA, "Essential Principles for Reform of Chemicals Management Legislation" (Sep. 29, 2009), available at http://www.epa.gov/oppt/existingchemicals/pubs/principles.html.

[13] CNN, Specials: Toxic America, available at http://www.cnn.com/SPECIALS/2010/toxic.america/. The special report first aired over two nights: "Toxic Towns" on June 2, 2010, and "Toxic Childhood" on June 3, 2010.

Federal District Court Orders Compliance with EPA Requests for Information Concerning Future Capital Projects Under the Clean Air Act

On September 27, 2010, the U.S. District Court for the District of Minnesota granted a preliminary injunction ordering the owner and operator of a major source regulated under the Clean Air Act ("CAA") to provide to EPA documents relating to capital projects planned to begin within the next two years. *See United States v. Xcel Energy, Inc.*, No. 10-2275 (D. Minn. Sept. 27, 2010). The decision gives some credence to EPA's recent efforts to request information related to planned projects that have not yet been implemented. At the same time, the limited legal basis for the court's opinion may limit the circumstances under which EPA may request such information.

Section 114 of the CAA provides EPA broad authority to request information, as long as the requested information is for one of three approved purposes: (1) to assist the Agency in developing rules or regulations; (2) to determine whether "any person is in violation" of any CAA requirement; or (3) to carry out "any provision of this chapter[.]" CAA § 114(a), 42 U.S.C. § 7411(a). During the summer of 2009, EPA issued information requests to Xcel Energy, Inc (a public utility), ostensibly to assess Xcel's compliance with the CAA's Prevention of Significant Deterioration ("PSD") program, which requires preconstruction permitting for certain large projects. While the bulk of the requests sought information regarding past projects, two requests focused on potential future projects that had not yet been initiated. Slip Op. at 2. Xcel refused to provide any information about future projects. In March, 2010, after Xcel rebuffed multiple EPA offers to narrow the range of documents sought, EPA sued, seeking both injunctive relief and penalties. *Id*.

In support of its request for a preliminary injunction, EPA argued that § 114(a) allows it to obtain any information that it "may reasonably require" to "determin[e] whether any person is in violation" of a CAA standard. 42 U.S.C. § 7414(a). The court disagreed. While the court recognized EPA's "broad discretion" under § 114, it noted that § 114 is written in the present tense. Therefore, because "Xcel cannot violate [PSD preconstruction permitting requirements] until it 'commences construction,'" the court concluded that EPA's authority under this provision did not extend to future projects. Slip Op. at 9.

Nevertheless, the court found support for EPA's request under the third prong of § 114: EPA's authority to seek information to carry out "any provision of this chapter[.]"

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The court pointed out that § 167 of the CAA specifically empowers EPA to seek injunctive relief to "prevent the construction or modification of a major emitting facility" in violation of PSD requirements. 42 U.S.C. § 7477. Here, the court noted that the permitting process typically takes up to two years; therefore, EPA could reasonably seek information for projects planned within that period, so that EPA would have the opportunity to analyze the projects' potential emissions and, if necessary, take action under § 167 to prevent a project requiring a permit from proceeding without a permit. *Id*. at 10-11; 13-14.

The Xcel decision attempts to strike a balance between EPA's reasonable need for information to implement the CAA requirements and companies' reasonable desire to, as the court put it, keep EPA from gaining a seat at the "planning and approval table." Id. at 14. While the court ordered compliance with EPA's request for information regarding future projects, the court also suggested that EPA's authority to issue such a request is limited in several ways:

The court limited the scope of the request to a period that it concluded was reasonably necessary to allow EPA to prevent a pending PSD violation. Here, the court suggested that EPA's initial five-year request was overly broad, as was the Agency's follow-up request for two years of data followed by annual updates. The court accepted the two-year period because both parties agreed that this timeframe reflected the length of the PSD permitting process.

The court rejected EPA's argument that it needed information on future projects to assess Xcel's compliance with the CAA under § 114(a)(ii). Instead, the court upheld the request only because § 167 specifically authorizes EPA to enjoin future violations, and the court concluded that EPA reasonably needed information on future projects to carry out that provision under § 114(a)(iii). Section 167, however, is limited to PSD permitting issues. Accordingly, the opinion suggests that requests for information on future projects will not be allowed unless the information involves potential PSD compliance issues.

As a practical matter, the decision reinforces the old maxim that "bad facts make bad law." The court repeatedly noted two facts: (1) EPA had information that several major unpermitted projects were imminent (if not already under construction); and (2) Xcel nevertheless refused to provide any information on these imminent projects. Given that § 167 specifically orders EPA to take action to prevent future PSD violations, the court simply could not have refused to give the Agency access to the very information it needed to carry out that statutory obligation.

For further information about the District Court's opinion and its implications, including questions regarding how to respond to an agency-issued information request, please contact Laura Mcafee (lmcafee@bdlaw.com, (410) 230-1330), David Friedland (dfriedland@bdlaw.com, (202) 789-6047), or Graham St. Michel (gstmichel@gmail.com, (202) 789-6039).

Firm News

Jeanine Grachuk co-Chairs Seminar on "Hot Topics in Environmental Due Diligence" for the Environmental Business Council of New England

Environmental due diligence practices are evolving to address emerging issues as well as renewed sensitivity to known concerns. These topics were explored at the November 16, 2010, seminar "Hot Topics in Environmental Due Diligence" hosted by the Environmental Business Council of New England, co-chaired by Jeanine Grachuk. Among the issues discussed were due diligence issues relating to the potential for PCBs in components of buildings constructed roughly between 1950 and 1978, which has resulted in significant abatement expenses at many buildings, especially institutions and schools. We also discussed due diligence issues relating to other building components

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that can lead to abatement issues, such as certain drywall from China. Finally, while the potential for vapor intrusion into indoor air has long been known, we discussed how this issue is receiving renewed focus due to increased regulatory concern in many states and a new ASTM standard for Vapor Encroachment Screening on Property involved in Real Estate Transactions.

For further information on due diligence issues, please contact Jeanine Grachuk at jgrachuk@bdlaw.com.

National Asian Pacific American Bar Association (NAPABA) Webinar

SEC Climate Change Disclosure Requirements

On Wednesday, October 20, 2010, Beveridge & Diamond's Lily Chinn and Wilson Sonsoni Goodrich & Rosati's Charlotte Kim, members of NAPABA's Sustainability and Climate Change Committee (SCCC), co-moderated a webinar on the U.S. Securities and Exchange Commission's (SEC) Climate Change disclosure requirements.

The webinar addressed (1) the scope and impact of SEC's reporting requirements related to climate change based on its February 2010 interpretive release, (2) trends in SEC reporting and how industries such as electric power utilities have complied, and (3) how SEC's requirements compare to international standards. The webinar also provided strategies and best practices for publicly-held companies to meet SEC's disclosure requirements.

NAPABA thanks the distinguished panel of speakers for sharing their insights. Click on the links below to download the panelists' presentations and other background information:

- **James Budge, SEC, Senior Special Counsel, Division of Corporation Finance**: SEC's guidance regarding disclosure related to climate change (http://www.bdlaw.com/assets/attachments/Budge%20PDF.pdf), Text of SEC Release No. 33-9106 (http://www.sec.gov/rules/interp/2010/33-9106.pdf).
- **Jim Coburn, CERES, Senior Program Manager**: Ceres Climate Change Disclosure in SEC Filings (http://www.bdlaw.com/assets/attachments/Coburn%20PDF.pdf), 2007 Investor Petition to SEC (http://www.incr.com/Document.Doc?id=187), Ceres' 2009 report on climate disclosure in 10-K filings (http://www.ceres.org/Document.Doc?id=473), and Global Framework for Climate Risk Disclosure (http://216.235.201.250/Document.Doc?id=73).
- **Gayle Koch, The Brattle Group**: Climate Change Financial Disclosures: An Update (http://www.bdlaw.com/assets/attachments/Koch%20101020%20ASTM%20Climate%20disclosure.pdf), Summary of ASTM International Standard (http://www.astm.org/SNEWS/JA_2010/e5005_ja10.html), Text of ASTM International Standard E2718-10 (http://www.astm.org/Standards/E2718.htm)

A summary of the key SEC climate change disclosure requirements prepared by Beveridge & Diamond is also available at (http://www.bdlaw.com/news-807.html).

If you have any additional questions, please contact Lily Chinn at lchinn@bdlaw.com.

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

September 17, 2010, Washington, DC -- Beveridge & Diamond, P.C. has been named to the 2010 Best Law Firms list by U.S. News Media Group and Best Lawyers. The Firm is ranked as a Tier 1 law firm in Environmental Law in Washington, DC, and as a Tier 2 law

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firm in Land Use & Zoning Law in the Boston metropolitan area.

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

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

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

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About Beveridge & Diamond, P.C.

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

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