Massachusetts Environmental, Land Use and Real Estate Alert

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Massachusetts Developments

Massachusetts DEP Proposes Regulations Implementing Broad Statewide Stormwater Discharge Permitting Program

The Massachusetts Department of Environmental Protection proposed new regulations on November 17, 2008 implementing a new Stormwater Management Program that would significantly expand the scope of stormwater permitting in the state. *(full article)*

I-CUBED: Massachusetts Infrastructure Investment Incentive Program

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SJC Rules on Community Preservation Act Case

On October 24, 2008, the Massachusetts Supreme Judicial Court issued a long awaited ruling in the case of *Seideman & others v. City of Newton*, 452 Mass. 472 (2008). The Seideman case involved a suit brought by ten taxpayers in the City of Newton challenging the expenditure of funds under the Community Preservation Act (CPA). *(full article)*

Massachusetts Appeals Court Invalidates Major Residential Development Special Permit Requirement in Westwood Bylaw as Inconsistent with Subdivision Control Law

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The Massachusetts Department of Environmental Protection has proposed its second set of regulations (the "Phase 2" regulations) implementing the Massachusetts Mercury Management Act (the "Act"). *(full article)*

National Developments

EPA Issues Amendments to SPCC Rule

In November, 2008, the U.S. Environmental Protection Agency (EPA) issued two significant amendments to the Spill Prevention, Control and Countermeasure (SPCC) rule, 40 CFR Part 112. These amendments implement important changes to the scope and applicability of the SPCC rule. *(full article)*

Federal Court Allows Retrospective Environmental Mitigation Penalties - Providing Boon to Enforcement But Also Opening the Door to Creative Compliance Solutions

On October 14, 2008, a federal district court held for the first time that facilities found liable under the Clean Air Act's New Source Review program can be subject not only to prospective injunctive relief and penalties, but also ordered to undertake retrospective mitigation to "to remedy, mitigate, and offset" past harm. *(full article)*

EPA Updates Emergency Planning and Release Notification Requirements

On November 3, 2008, the U.S. Environmental Protection Agency issued a final rule modifying regulations implementing the Emergency Planning and Community Right-to-Know Act (EPCRA), effective December 3. The revisions were originally proposed on June 8, 1998. EPA described these changes as minor and clarifying. *(full article)*

Environmental Appeals Board Opens Door to Regulation of CO2

On November 13, 2008, the Environmental Appeals Board held that EPA must consider regulating carbon dioxide (CO2) emissions limits as part of a permit review under its Prevention of Significant Deterioration ("PSD") program. *(full article)*

EPA'S Final Revisions to the Definition of Solid Waste: Recycling the Rules for Recyclable Materials

On October 30, 2008, the United States Environmental Protection Agency published its long-awaited final rule revising the Resource Conservation and Recovery Act ("RCRA") regulatory definition of solid waste, which will go into effect on December 29, 2008. *(full article)*

Firm News & Events

Mark Duvall Joins Environmental Practice Group of Beveridge & Diamond, P.C.

Washington, D.C. -- Beveridge & Diamond, P.C. is pleased to announce that Mark N. Duvall has joined the Firm as a Principal and member of its Environmental Practice Group. Mr. Duvall joins the Firm from the legal department of The Dow Chemical Company, where he served as lead environmental counsel for the Toxic Substances Control Act (TSCA), the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the Federal Food, Drug, and Cosmetic Act (FFDCA), and their foreign counterparts.

To access this article, go to http://www.bdlaw.com/news-410.html

Previous Issues of the Massachusetts Environmental, Land Use and Real Estate Alert

Massachusetts Developments

Massachusetts DEP Proposes Regulations Implementing Broad Statewide Stormwater Discharge Permitting Program

The Massachusetts Department of Environmental Protection ("DEP") proposed new regulations on November 17, 2008 implementing a new Stormwater Management Program that would significantly expand the scope of stormwater permitting in the state. Under the regulations, owners of property containing five (5) or more acres of impervious surfaces including paved areas and roofs would be required to apply for coverage under either a general or individual DEP permit.

The proposed regulations also are intended to allow DEP to assume delegation from the U.S. Environmental Protection Agency ("EPA") to administer the National Pollution Discharge Elimination System ("NPDES") stormwater permit program. Currently, EPA administers the NPDES stormwater program in Massachusetts, under which certain industrial, municipal, and construction sites must apply for coverage under either an individual or general permit.

The permitting requirements proposed by DEP would impact owners of sites containing "Regulated Impervious Areas" ("RIA"), defined as five or more acres of impervious surfaces located on a single lot or two or more contiguous lots. Lots will be aggregated for the purposes of determining RIA where, for example, stormwater runoff is directed to the same on-site stormwater management system or if there are shared paved parking areas or buildings.

In the proposed regulations, DEP has also reserved the authority to designate for regulation areas of less than five acres of impervious surface if it determines control of discharges from such smaller sites is necessary to achieve or maintain compliance with the Massachusetts Surface Water Quality Standards. Similarly, DEP has reserved the authority to designate additional activities as requiring coverage under either a general or individual permit in cases where stormwater discharge is contaminated, subject to certain effluent limitations, or associated with construction activities not adequately regulated by the NPDES Construction General Permit.

Owners of properties containing RIA would be required to apply for coverage under a general permit, which has not yet been published. Applicants would be required to provide a Stormwater Management Plan, undertake "good housekeeping" practices such as regular parking lot sweeping, and implement standard operating procedures to manage potential pollutants from activities such as snow removal and deicing activities.

In addition to the basic requirements of the general permit, the regulations provide additional performance standards applicable to development, redevelopment, and discharges to impaired waters.

These additional performance standards incorporate certain existing DEP policies and guidelines, including elements of the Stormwater Management Handbook. For example, development of impervious surfaces within an existing site containing RIA will be required to implement Low Impact Development techniques or Best Management Practices capable of meeting Standards 3 through 6 of the Stormwater Management Standards as described in the Massachusetts Stormwater Handbook. Off-site mitigation will be available for redevelopment projects only.

Additional provisions in the extensive proposed regulations provide that municipalities may be authorized by DEP to administer a Qualifying Local RIA Program, detail when individual permits may be required by DEP, and address regulation of small municipal separate sewer systems or "Small MS4s".

The proposed regulations are available at: http://www.mass.gov/dep/service/regulations/proposed/31421new.doc. Public comment on the proposal is not yet open as of the date of this alert.

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I-CUBED: Massachusetts Infrastructure Investment Incentive Program

On June 12, 2008, the so-called I-Cubed legislation, amending St. 2006, c.293, §§ 5-12 (I-Cubed) was signed into law authorizing public infrastructure investment of up to $250 million for an unspecified number of certified economic development projects in Massachusetts. *See* St. 2008, c. 129. Final regulations have recently been issued by the Secretary of Administration and Finance and the Commissioner of Revenue. The purpose of the legislation is to support new job growth and economic development by providing innovative financing for new public infrastructure improvements required to support major new private development.

I-Cubed is a financing arrangement whereby the Commonwealth of Massachusetts, the municipality and the private developer share the cost and risk associated with the construction of public infrastructure needed to support a certified economic development project. In order to be certified, the project must be approved by the municipality, the Secretary of Administration and Finance and MassDevelopment and meet the criteria set forth in the statute and regulations. The public infrastructure improvements for a certified project will be financed by bonds issued by MassDevelopment. During the construction of the project, the debt service on the bonds will be paid by the private developer through municipal assessments that will reimburse the Commonwealth for the debt service cost. Once the commercial component of the project is occupied and generating new state tax revenue, the debt service related to that component will be paid by the Commonwealth. If there is a shortfall in the state tax revenues generated by the project, the municipality will reimburse the Commonwealth for that amount. The developer may agree to cover this shortfall, but is not required to do so.

In order to be eligible for financing under I-Cubed, the Secretary of Administration and Finance must find that the project would not be developed or reach the anticipated level of development but for the I-Cubed financing. The cost of the public infrastructure improvements must be no less than $10 million and no more than $50 million. Furthermore, the anticipated tax revenues must be at least 1.5 times more than the projected annual debt service on the bonds. I-Cubed also limits projects to no more than two projects per municipality and restricts other public financing of the project.

At least $50 million of the I-Cubed funding must be used for projects in economically distressed municipalities which are defined as communities with an unemployment rate at least 1.5% higher than the statewide average or a median income that is 80% or less than the state median income. In general, I-Cubed identifies the following priorities for distribution of the funds: (i) highest priority will be given to municipalities with an unemployment rate at least 1.5% higher than the statewide average and a median income that is 80% or less than the state median income; (ii) second highest priority to municipalities that meet either the unemployment rate or median income criteria; and (iii) otherwise to projects located within growth districts or that commit to obtaining LEED Silver certification.

The intent of the I-Cubed financing program is that the new state tax revenues generated from the project cover the costs of the public infrastructure improvements needed to support the project. To that end, only new state tax revenue or revenue that would be lost to the state if the project were not developed will be included in the evaluation. The following tax revenue will not be included: (i) state tax revenue that replaces lost revenues from businesses that were replaced by the new economic development project; (ii) existing state tax revenues that relocate from another part of the state into the economic development district unless it can be shown that the business would have relocated out of state but for the new project; or (iii)state tax revenues from new or expanded businesses within the economic development district that replace other similar businesses within the state.

The new regulations are extensive and require a thorough examination to determine eligibility and potential benefits for specific development projects.

For more information, please contact Deborah A. Eliason at deliason@bdlaw.com.

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SJC Rules on Community Preservation Act Case

On October 24, 2008, the Massachusetts Supreme Judicial Court issued a long awaited ruling in the case of *Seideman & others v. City of Newton*, 452 Mass. 472 (2008). The *Seideman* case involved a suit brought by ten taxpayers in the City of Newton ("City") challenging the expenditure of funds under the Community Preservation Act (CPA). The taxpayers alleged that the proposed CPA projects did not fall within the purview of the statute and, therefore, were ineligible for funding under the CPA. The case involved funding for improvements to existing parks that had been used by the City for recreation purposes since before the CPA was enacted. The SJC found for the taxpayers.

On May 15, 2006, the City approved an appropriation of $765,825 of CPA funds to cover the first year of project costs associated with improvements to two existing parks. The improvements included, among other things, reorganizing existing park facilities, building new tennis courts, reconfiguring and relocating basketball courts, improving landscaping, adding new fencing, creating new paths, installing water fountains, and preserving ball fields. There was no dispute that the parks had been used by the City for recreation purposes since before the passage of the CPA. Two questions were before the court: (1) whether CPA funds could be used for improvements to parks that were in existence prior to the enactment of the CPA; and (2) whether the proposed improvements constituted "preservation" of recreation land rather than "rehabilitation or restoration."

Under the CPA , funds may be appropriated "for the acquisition, creation and preservation of land for recreational use" and for the "rehabilitation or restoration of … land for recreational use…that is acquired or created as provided in this section." G.L.c. 44B, § 5(b)(2). The taxpayers argued that because the recreation land existed before the enactment of the CPA, it was not being "acquired or created" with CPA funds and, therefore, the appropriation was invalid. The taxpayers also argued that the proposed improvements constituted "rehabilitation or restoration" and therefore CPA funds could not be expended unless the recreation land was originally acquired or created with CPA funds. The City countered that the word "creation" in the CPA statute should be broadly construed to include the "creation of new recreational uses within existing parks that would make the areas open and accessible to new groups of users." *Seideman* at p. 477 In addition, the City characterized the improvements as "preservation" and not "rehabilitation or restoration" arguing that the improvements go well beyond mere maintenance.

The court dismissed the City's argument that the word "creation," which is undefined in the CPA, should include the creation of new recreational uses within existing parks. The court found the fact that the parks were in existence prior to the enactment of the CPA to be significant and relied upon the usual meaning of the word creation, which it did not find applicable to pre-existing recreation land. Likewise, relying upon the statutory definition of the word "preservation," the court found that the extensive improvements and upgrades planned for the parks did not constitute "preservation" of the recreation land. Instead the court held that the improvements were "rehabilitation or restoration" and, therefore, CPA funds could not be used to fund the improvements because the parks had not been acquired or created with CPA funds.

The SJC's ruling clarifies this outstanding issue, but may leave some communities with appropriated funds that can no longer be used for the purposes for which they were appropriated. Legislation has been filed to allow the use of CPA funds for improvements to recreation land that was not acquired or created with CPA funds, but it has not yet passed.

For more information, please contact Deborah A. Eliason at deliason@bdlaw.com.

Massachusetts Appeals Court Invalidates Major Residential Development Special Permit Requirement in Westwood Bylaw as Inconsistent with Subdivision Control Law

The Massachusetts Appeals Court ruled that a local bylaw empowering a Planning

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Board to reject a subdivision plan otherwise acceptable under the Subdivision Control Law is invalid in *Wall Street Development Corporation v. Planning Board of Westwood*, 72 Mass. App. Ct. 844 (2008).

The Westwood Zoning Bylaw included a provision requiring that proponents of a "Major Residential Development"—defined to include most subdivisions of four or more lots—secure a special permit from the Planning Board. Applicants for such a special permit were required to submit both a "conventional plan" showing complete compliance with all applicable zoning and subdivision rules and regulations and an "alternative plan" that "differs substantially" from the conventional plan. The suggested differences for the alternative plan included the number of lots created, road pattern, or open space configuration. The Planning Board was authorized to approve whichever plan it found "best promotes the objectives" of the bylaw.

The Appeals Court concluded that because the bylaw granted the Planning Board the authority to reject so-called conventional subdivision plans in total compliance with the applicable laws and regulations, it presented a facial conflict with the Subdivision Control Law and therefore was invalid. The Subdivision Control Law provides that a subdivision plan conforming to the reasonable rules and regulations of a planning board and the board of health "shall receive the approval" of the planning board. G.L. c. 41, § 81M. The statute does not allow planning boards the authority to reject conforming plans.

Despite this finding, however, the developer did not ultimately prevail because the Appeals Court also found that the Planning Board was not presented with a subdivision plan conforming with all applicable rules and regulations.

For further information, contact Brian C. Levey at blevey@bdlaw.com or Krista L. Hawley at khawley@bdlaw.com.

Massachusetts Court of Appeals Affirms Relocation of Beach Easement under M.P.M. Builders

In *Carlin v. Cohen*, 73 Mass. App. Ct. 106 (2008), the Appeals Court affirmed the Land Court's ruling that a deeded easement for beach access could be relocated pursuant to the principles annunciated by the Supreme Judicial Court in *M.P.M. Builders v. Dwyer*, 442 Mass. 87 (2004) ("M.P.M.").

The dispute in *Carlin* arose between neighbors on Martha's Vineyard after the defendant proposed to replace the small summer cottage on his beachfront property with a larger house. The plaintiff sought to enjoin construction of the house in what she alleged was the location of a deeded easement providing her with access by foot over the property of the defendant to a private beach. Construction of the larger house also would interfere with the plaintiff's unobstructed view of the ocean.

Under *M.P.M.*, which adopted Section 4.8(3) of the Restatement (Third) of Property (Servitudes) (2000), the owner of a servient estate whose property is burdened by an easement may seek to relocate that easement so long as the alternative satisfies certain criteria. Section 4.8(3) provides that, unless the terms of the easement expressly provide otherwise, "the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not (a) significantly lessen the utility of the easement, (b) increase the burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created."

In a bifurcated trial, the Land Court ruled both that the beach access easement was located in part in the footprint of the larger house and that the easement could be relocated to an alternate location under *M.P.M.* The servient estate owner proposed numerous alternative locations for the easement, and the Land Court ruled that one alternative means of access to the beach was suitable because it was shorter than the original easement, protected the parties' privacy, was not subject to greater erosion than the original location, and was relatively flat. Based on these factors, the Court concluded the alternative easement location satisfied the *M.P.M.* criteria.

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The Appeals Court affirmed the lower court's refusal to consider testimony offered by the dominant estate holder as to the potential diminution in her property value because her view would be interfered with by the presence of the larger house on the servient estate. The Court ruled that so long as the three *M.P.M*. criteria are satisfied as to the utility, use and enjoyment, and purpose of the easement itself, effects unrelated to the purpose of the easement which may reduce the value of the dominant estate should not be considered. Where the easement at issue was created for access and not for view, impacts to views should not be considered.

The Appeals Court did disagree with the Land Court's view of what consideration should be given to the potential increase in maintenance associated with the alternate easement location. The Appeals Court emphasized that under M.P.M., whether a dominant estate holder would be required to undertake more frequent maintenance of the easement than the original location is relevant to the inquiry as to whether the relocation would impermissibly "increase the burdens on the owners of the easement in its use and enjoyment." The Appeals Court otherwise affirmed, however, that the relocation of the easement was appropriate under *M.P.M.*

For further information, contact Brian C. Levey at blevey@bdlaw.com or Krista L. Hawley at khawley@bdlaw.com.

Massachusetts DEP Proposes Mercury Management Act Regulations Implementing Sales Ban, Labeling Requirement, and Disposal Prohibition

The Massachusetts Department of Environmental Protection ("MassDEP") has proposed its second set of regulations (the "Phase 2" regulations) implementing the Massachusetts Mercury Management Act (the "Act").

Regulations implementing the Act, which was adopted in 2006, are being promulgated in two phases. Final Phase 1 regulations, which addressed the collection and recycling of end-of-life mercury added products and mercury-added lamps, were published on December 12, 2007. The proposed Phase 2 regulations address mercury-added products and specifically implement a ban on sales of certain mercury containing products, labeling requirements, and a disposal prohibition. The proposed Phase 2 regulations also contain amendments to the existing Phase 1 regulations governing the removal and recycling of mercury-added components from vehicles.

Sales Ban

The Act provides that as of May 1, 2008, retailers, distributors and manufacturers must have stopped selling certain measuring devices, including mercury-containing thermostats. The sales ban will expand to include mercury-containing switches and relays as of May 1, 2009. The proposed regulations implementing the sales ban include a process for requesting an exemption from these provisions.

In considering exemptions to the sales ban, the Act directs MassDEP to consult with other states that have adopted similar bans through the Interstate Mercury Education Clearinghouse or "IMERC" in reviewing applications to ensure regional consistency to the greatest extent possible. Currently thirteen states, including all the northeastern states, have sales bans in place. To facilitate review by IMERC states, MassDEP has designed its proposed rules with an intent to be as consistent with those adopted by other participating states as possible to the extent allowed by statute. Timelines and fees for the exemption application process will be proposed in future amendments of 310 CMR 4.00, MassDEP's regulations governing Timely Action Schedule and Fee Provisions.

Labeling Requirement

The Act also requires the labeling of most mercury-added products. Mercury-added products may not be sold in Massachusetts after May 1, 2008 unless they are labeled in accordance with the Act. The proposed regulations provide for certain exemptions to this requirement and also establish standards for label placement, size and content.

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In establishing these standards, MassDEP considered the labeling requirements of Connecticut, Maine, Minnesota, New York, Rhode Island, Vermont and Washington (all IMERC states), again with an intent to achieve consistency where possible. MassDEP proposed to accept labeling plans that have been and are in the future approved by Vermont or any other IMERC states. Manufacturers will be required to provide to MassDEP upon request a copy of the label as it appears on products and product packaging sold in Massachusetts, a copy of the application or labeling plan approved by another IMERC state; and a copy of the letter from another IMERC state approving the plan.

Disposal Ban

Finally, the Act established a prohibition on the disposal of mercury-added products except by recycling, management as hazardous waste, or a method approved by MassDEP. This disposal ban took effect May 1, 2008. The ban prohibits generators of end-of-life mercury-containing products from knowingly disposing of those products with solid waste, and prohibits solid waste collectors from collecting for disposal as solid waste the contents of a container it knows or reasonably should know contain a mercury-added product.

The proposed disposal ban rules, which will be codified in 310 CMR 76.00, would require mercury-added products currently classified as “hazardous waste” to continue to be managed in accordance with the Hazardous Waste Regulations at 310 CMR 30.000. Mercury-added products classified as “universal waste” under the Universal Waste Rule at 310 CMR 30.1000 could continue to be managed and recycled under that rule. Mercury-added products not classified as “hazardous waste” would need to be separated from solid waste, managed to minimize breakage while they are being stored and transported, and recycled to reclaim their mercury content. The proposed management requirements for products that are not hazardous waste are similar to those currently contained in the Universal Waste Rule.

A copy of the proposed Phase 2 Regulations is available at: http://www.mass.gov/dep/service/regulations/proposed/hgp2reg.doc.

For further information on the Phase 2 proposal, please contact Stephen Richmond at srichmond@bdlaw.com or Krista Hawley at khawley@bdlaw.com.

National Developments

EPA Issues Amendments to SPCC Rule

In November, 2008, the U.S. Environmental Protection Agency (EPA) issued two significant amendments to the Spill Prevention, Control and Countermeasure (SPCC) rule, 40 CFR Part 112. These amendments implement important changes to the scope and applicability of the SPCC rule. Pre-publication copies of the rules can be accessed at http://www.epa.gov/emergencies/docs/oil/spcc/SPCC_waters_signed.pdf. and http://www.epa.gov/emergencies/docs/oil/spcc/SPCC_Final%20Rule_signed.pdf. The first amendment, relating to the definition of navigable waters, will become effective upon publication in the Federal Register. The second amendment, containing a number of changes to the rule, will become effective sixty days after publication in the Federal Register (neither amendment had been published as of the date of this summary).

Also on November 20, 2008, the EPA Administrator signed a proposed rule to extend the compliance date for the 2002 SPCC rule and subsequent revisions from July 1, 2009 to November 20, 2009. The pre-publication copy of the proposed extension can be accessed at http://www.epa.gov/emergencies/docs/oil/spcc/SPCC_ext_signed.pdf. Note, however, that obligations imposed by the 2002 regulation that EPA deems not to constitute changes from its pre-2002 regulatory scheme are already in force, including some obligations that are described more fulsomely and, in the eyes of many, more restrictively by the 2002 rule. This extension applies only to provisions of the 2002 rule and its subsequent amendments that EPA deems to impose wholly new obligations

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on the regulated community. Each affected facility should assess its circumstances carefully to ensure compliance with both the "existing" and the new SPCC requirements imposed under the 2002 rule and its subsequent revisions.

The SPCC rule establishes procedures, methods, equipment, and other requirements to prevent the discharge of oil from non-transportation-related onshore and offshore facilities into or upon the navigable waters of the United States or adjoining shorelines. 40 CFR 112.1(a). The rule is very broadly applicable; EPA has estimated that between 350,000 and 425,000 facilities are subject to its requirements. *See Analysis of the Number of Facilities Regulated by the SPCC Program* (http://www.epa.gov/emergencies/docs/oil/spcc/pap_tpop.pdf), July 1996.

The SPCC rule arises from Section 311(j)(i)(c) of the Clean Water Act, which requires the President of the United States to issue regulations establishing procedures, methods, equipment and other requirements necessary to prevent discharges of oil to navigable waters and adjoining shorelines. 33 U.S.C. 1331. The authority to regulate non-transportation-related on shore facilities was delegated to EPA by executive order, and the authority to regulate certain off shore facilities was provided by memorandum of understanding among EPA, the Department of the Interior and the Department of Transportation.

Navigable Waters Amendment

EPA's first action amends the SPCC rule by redefining and narrowing the definition of "navigable waters" to reflect a decision of the U.S. District Court for the District of Columbia which held that the broad existing definition violated the Administrative Procedure Act. *See American Petroleum Institute (API) v. Johnson*, 541 F. Supp. 2d 165, 173 (D.D.C. 2008).

In the *API* decision, the District Court overturned the "navigable waters" definition that had been adopted by EPA in 2002 (67 Fed. Reg. 47042 (July 17, 2002). That definition had included as navigable waters all waters currently used, used in the past, or susceptible to use in the future, in interstate or foreign commerce, all interstate waters including interstate wetlands, and all other waters the use, degradation or destruction of which could affect interstate or foreign commerce.

The District Court found that the 2002 definition was too expansive and that EPA's analysis of the legal basis for the amendment was too sparse; in effect, that EPA had failed to provide a rational explanation for the change. Further, the court found that "it is extremely difficult to square EPA's conclusion ... that the case law supports a definition of "navigable waters" as broad as the one included in the 2002 SPCC Rule - with the decision and reasoning of the Supreme Court in [*Solid Waste Agency of N. Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001)]." *Id*. at 183. In that case, the U.S. Supreme Court recognized that there were some limitations to the definition of "navigable waters" under the Clean Water Act. The District Court therefore (i) vacated the amended definition of "navigable waters" in the SPCC rule, (ii) restored the initial more limited definition that had been adopted with the enactment of the SPCC rule in 1973, *see* 38 Fed. Reg. 34164 (Dec. 11, 1973), and (iii) remanded the case to EPA for further action. *API* at 185. The recently announced amendment, formally restoring the 1973 definition, reflects EPA's action on remand.

Exemptions and Streamlining Amendment

EPA's second action amends the SPCC rule by adopting numerous changes, including the creation of exemptions for certain containers, provision for streamlined self-certification and additional means to provide flexibility in compliance, and also includes several sector-specific changes impacting agriculture and oil production facilities.

The amendment provides new exemptions from the rule for the following oil containers:

- Hot-mix asphalt and hot-mix asphalt containers;
- Residential heating oil containers used solely at single-family residences;

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- Pesticide application equipment and related mix containers;
- Underground oil storage tanks at nuclear power generation facilities;
- Intra-facility gathering lines subject to the pipeline regulations of the Department of Transportation; and
- Produced water containers that do not contain oil in harmful quantities.

The amendment also adopts several provisions intended to streamline compliance procedures and incorporate additional flexibility for regulated facilities, including the provision of a new SPCC Plan "template" which certain qualifying facilities may complete and self-certify rather than creating a full SPCC Plan.

The existing SPCC rule requires facilities to develop and implement SPCC plans detailing procedures and equipment requirements to help prevent oil discharges from reaching navigable waters. Under a previous amendment to the SPCC rule finalized in December 2006, owners and operators of "qualified facilities" were given the option of self-certifying their SPCC plans rather than requiring that they incur the cost of certification by a professional engineer. Qualified facility status was granted to facilities with (1) 10,000 gallons or less aggregate aboveground oil storage capacity, and, (2) no single discharge event of more than 1,000 gallons of oil to navigable waters or a shoreline, and no two such discharges totaling more than 42 gallons within any twelve-month period, in the three years prior to the SPCC plan certification date. The 2008 amendment extends this "qualified facility" status to certain smaller oil production facilities.

In addition, the amendment creates two tiers within the previously established group of qualifying facilities. Tier I qualified facilities meet the criteria above and have no oil storage containers with an individual aboveground storage capacity of more than 5,000 gallons. All other qualifying facilities are Tier II qualified facilities. Tier I qualified facilities are eligible under the amended rule to utilize and self-certify the SPCC plan template (Appendix G to 40 CFR part 112) rather than prepare an SPCC plan in accordance with the requirements of Section 112.7 and subparts B and C of the rule. Tier II qualified facilities remain authorized to self-certify their SPCC plans, but they may not utilize the simplified SPCC plan template.

The revised rule contains amendments to numerous definitions and provisions. The fundamental definition of a "facility" -- the entity to which the rule applies -- has been amended in an effort to eliminate what the Agency considers to be unnatural characterizations of facility boundaries. "Loading/unloading rack" has been defined for the first time to confirm that requirements for such systems apply to racks that service tank car and tank trucks, and do not apply to "areas" in which loading or unloading of oil occurs without the use of a rack. The revised rule also clarifies or provides greater flexibility in provisions affecting the facility diagram requirement, the general secondary containment requirement, acceptable integrity testing requirements, and facility security requirements, allowing tailored security measures specific to a particular facility.

The revised rule also includes certain sector-specific changes that address oil storage activities in the agricultural sector and the oil production facility sector. Changes impacting the agricultural sector include the exemption of pesticide application equipment and related mix containers, the exemption of farms from the loading rack requirements, and clarification that a nurse tank is exempt from the sized secondary containment requirements.

There are numerous amendments and particularly exemptions that will impact oil production facilities. In addition to the exemptions listed above, several of which are relevant to oil production facilities, the amendment modifies the definition of "production facility", exempts production facilities from requirements applicable to loading racks, and - in one of the more controversial changes - provides a qualified exemption for certain produced water containers and associated downstream piping and appurtenances. The rule also exempts some intra-facility gathering lines that are subject to U.S. Department of Transportation regulations, extends the timeframe by which new oil production

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facilities must prepare and implement SPCC Plans, and establishes alternative criteria through which certain oil production facilities may qualify to self-certify an SPCC Plan.

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Federal Court Allows Retrospective Environmental Mitigation Penalties - Providing Boon to Enforcement But Also Opening the Door to Creative Compliance Solutions

On October 14, 2008, a federal district court held for the first time that facilities found liable under the Clean Air Act's New Source Review ("NSR") program can be subject not only to prospective injunctive relief and penalties, but also ordered to undertake retrospective mitigation to "to remedy, mitigate, and offset" past harm. *United States, et al. v. Cinergy Corp., et al*., 2008 U.S. Dist. LEXIS 81493, No. 1:99-cv-1693-LJM-JMS (S.D. Ind.) (*available at* www.bdlaw.com/assets/attachments/October_2008_US_v_Cinergy_Decision.pdf). While the court has not yet ruled on what mitigation will be required, and the ultimate decision may be appealed, it highlights that the U.S. Environmental Protection Agency ("EPA") and state environmental agencies have powerful tools to address environmental harms, including mandating the mitigation of past impacts of air and water pollution in a manner akin to existing strategies for addressing hazardous waste or Superfund cleanup.

While the *Cinergy* decision could foretell a ramping up of enforcement efforts under the Clean Air Act and other environmental laws, particularly as the Obama Administration prepares to take office, the case also suggests opportunities for companies to address environmental compliance issues with new and creative solutions. California, for example, has already explored mitigation of greenhouse gas emissions as part of the industrial facility permitting process. The solutions employed to date in California demonstrate that mitigation need not be rote application of emissions control technology, but could take the form of mitigation efforts tailored to the particular needs of the industrial facility, communities, and natural resources that are most directly implicated. This may provide flexibility for companies facing permitting challenges or enforcement, and also creates business opportunities for entities in a position to supply environmental agencies and emitters with mitigation options.

United States v. Cinergy

The district court's opinion came in the penalty phase of *United States v. Cinergy Corp.*, an EPA-led enforcement action alleging Clean Air Act violations at Cinergy's Wabash River coal-fired electric utility plant in Terre Haute, Indiana. In addition to seeking prospective relief, such as the installation of pollution control technology and the imposition of permit limits, the government also sought retrospective relief in the form of "specific measures to reduce pollution beyond what is required for prospective compliance to make up for the nearly two decades of illegal pollution."

The district court determined that it had authority to award such retrospective mitigation by virtue of Section 113(b) of the Clean Air Act, which grants federal district courts "jurisdiction to restrain [a] violation, to require compliance, to assess [a] civil penalty, to collect any fees owed the United States . . . *and to award any other appropriate relief*." 42 U.S.C. § 7413(b) (emphasis added). According to the *Cinergy* court, this broad grant of equitable jurisdiction in Section 113(b) allows federal courts to order defendants to take actions "to remedy, mitigate, and offset" harms to the public and the environment caused by Clean Air Act violations.

The concept of ordering mitigation to address past environmental harm is not necessarily new, but has been debated in recent cases. *See, e.g., U.S. Pub. Interest Research Group v. Atlantic Salmon of Me.*, LLC, 339 F.3d 23, 31 (1st Cir. 2003) (ordering fallowing of aquaculture fish pens to remedy harm caused by past violations of the Clean Water Act); *United States v. Deaton*, 332 F.3d 698, 714 (4th Cir. 2003) (ordering filling of ditch and restoration of wetlands to remedy violations of Clean Water

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Act wetlands rules). In the context of Clean Air Act enforcement, retroactive relief is not common, and raises a number of issues, particularly in the context of long-lived pollutants such as greenhouse gases or atmospheric deposition of mercury, nitrogen, and sulfur (acid rain) into water bodies or ecosystems miles downwind of the emissions source.

The *Cinergy* opinion stopped short of detailing what types of mitigation may be appropriate under the Act. However, emissions offsets, which are already required on a prospective basis under the NSR program in non-attainment areas (*i.e.*, geographic areas that are not yet in compliance with the National Ambient Air Quality Standards), are a possible option. In addition, a recent Clean Air Act settlement in California illustrates some mitigation options beyond offsets that may be available to facilities facing claims for retrospective relief or challenges to facility siting and expanded operations.

ConocoPhillips Refinery Expansion

In an agreement with the State of California announced September 11, 2007, ConocoPhillips agreed to spend $10 million to mitigate increased greenhouse gas emissions associated with the expansion of its San Francisco-area Rodeo refinery to resolve a potential challenge from California attorney general Jerry Brown. Some of the mitigation efforts are comparable to offsets under the NSR program, such as ConocoPhillips' agreement to cut 70,000 metric tons of greenhouse gases a year by eliminating a calciner plant in Santa Barbara County. But other efforts are more creative. For example, ConocoPhillips will pay $7 million to the Bay Area Air Quality Management District to finance greenhouse gas emission reduction projects in the region and $2.8 million on California reforestation projects that would sequester 1.5 million metric tons of greenhouse gases. The agreement even extends to mitigation beyond usual Clean Air Act offsetting in that ConocoPhillips will also pay $200,000 to restore San Pablo Bay wetlands.

California's approach in the ConocoPhillips case is but one example of how EPA and states are looking beyond traditional enforcement tools to address environmental concerns, particularly greenhouse gas emissions. At the same time, EPA increasingly has been willing to consider "supplemental environmental projects" or SEPs in the enforcement context. For information about EPA's SEP policy, see www.epa.gov/Compliance/civil/seps/index.html.

Together, the *Cinergy* case and the ConocoPhillips Rodeo Refinery settlement signal that creative mitigation of environmental impacts will become more widespread and accepted in environmental enforcement cases, in disputes over industrial facility siting or expansions, and potentially in land use and commercial development, as the need to reduce environmental footprints outpaces available technology-based solutions. This trend opens the door to mitigation project developers in the areas of wetlands banking, stream bank restoration, water quality credits, species and habitat trading, brownfields, and carbon offsets to tap into this emerging market for enforcement mitigation and identify creative solutions to past environmental harms.

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EPA Updates Emergency Planning and Release Notification Requirements

On November 3, 2008, the U.S. Environmental Protection Agency issued a final rule modifying regulations implementing the Emergency Planning and Community Right-to-Know Act (EPCRA), effective December 3. The revisions were originally proposed on June 8, 1998. EPA described these changes as minor and clarifying. In addition, the EPA has rewritten and reorganized 40 CFR parts 355 and 370 in "plain language." The changes include:

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Changes to Tier I and Tier II inventory forms and instructions. EPA is removing the Tier I and Tier II inventory forms and instructions from the regulation, and making them available on EPA's website. EPA stated that this will make it easier for EPA to make minor changes to the forms, but would go through rulemaking if the EPA proposes significant changes to the forms in the future. Changes to the form or instructions being made at this time include requiring the use of the NAICS code instead of the SIC code and reporting the chemical on the Tier II form by its "chemical name or the common name of the chemical as provided on the [MSDS]."

In addition, EPA is clarifying that a state or local form may be used, and may be submitted in a variety of ways including electronically, as long as the information required by the federal rules is included.

Minor Revisions and Clarifications relating to Emergency Planning. The revised rule add a new provision that requires a facility to provide to the Local Emergency Planning Committee (LEPC) the name of the facility emergency coordinator within 60 days of becoming subject to EPCRA's emergency planning requirements.

The rule previously required reporting to the LEPC of changes at the facility that are relevant to emergency planning, but did not provide a time frame. The revised rule would require such reporting within 30 days of the change.

Minor Revisions and Clarifications relating to Release Notification. The previous rules on emergency release notification required an immediate and a follow-up notification to the LEPC and the SERC after discovery of a reportable release. The revised rule will specify that the initial notification should be oral and the follow-up notification should be written.

The previous rule did not explicitly state the time period during which a release must occur to trigger reporting requirements. The revised rule will specify that the release of a reportable quantity within any 24 hour period triggers immediate reporting.

The continuous release reporting requirements have been clarified to specify that the SERC and LEPC should receive certain notices associated with continuous release reporting, including the initial notification, notification of a statistically significant release, notification of a new release, and notification of a change in the normal range of the release. This codifies statements previously made by EPA in guidance.

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Environmental Appeals Board Opens Door to Regulation of CO2

On November 13, 2008, the Environmental Appeals Board ("EAB" or the "Board") held that EPA must consider regulating carbon dioxide (CO2) emissions limits as part of a permit review under its Prevention of Significant Deterioration ("PSD") program. *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (Nov. 13, 2008). EPA Region 8 initially issued a PSD permit without requiring the Best Available Control Technology ("BACT") for CO_2, claiming that EPA's past policy precluded regulation of CO_2; Sierra Club challenged the permit, arguing that Region 8 not only could, but must require BACT for CO_2. The EAB disagreed with both parties: while the Board found that the Clean Air Act ("CAA" or the "Act") does not compel the Region to impose CO_2 limits in PSD permits, it also concluded that EPA's past policies did not prohibit it from doing so. *Id*. at 63. Because Region 8 had not evaluated whether it should impose BACT for CO_2, the Board ordered the Region to reconsider the permit. *Id*. at 63-64. This decision will likely invigorate the efforts by the Sierra Club and others to compel regulation of CO_2 under existing law.

A. Statutory and Procedural Background

The Clean Air Act ("CAA" or the "Act") requires preconstruction permits for new major sources or major modifications located in areas that have attained the national standards for specific "criteria" pollutants. 42 U.S.C. §§ 7472, 7475(a)(1). As part of the permitting process, the facility must install "the best available control technology [BACT]

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for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility." *Id*. at § 7475(a)(5). Historically, BACT determinations have focused on pollutants that are subject to emissions standards under the Act (*e.g.*, SO_2, NO_x, CO, etc.). Because EPA has never identified CO_2 as a "criteria" pollutant under CAA § 108, it has never developed specific emissions standards for CO_2 emissions. As a result, CO_2 emissions have never been considered in BACT determinations.

Recent events have changed the playing field. In April 2007, the Supreme Court held that CO_2 was an "air pollutant," and that EPA must therefore evaluate whether to regulate it under the Act. *Massachusetts v. EPA*, 549 U.S. 497 (2007) ("Under the clear terms of the [CAA], EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do."). While EPA has made progress toward complying with the Supreme Court's instructions, the pace has been slow; rather than issuing a decision, EPA instead chose to issue an Advanced Notice of Proposed Rulemaking seeking comment on the issue, and has made it clear that further action will not proceed under the current Administration. *See, e.g.*, 73 Fed. Reg. 44,354, 44,354-55 (July 30, 2008). Environmentalists, however, have not been content to sit on the sidelines and await EPA's ultimate determination. Taking heart from the *Massachusetts* holding, they have looked for ways to press for additional regulation of CO_2 under existing law. EPA, meanwhile, continues to insist that no regulation is required unless and until either it completes the review ordered by the Supreme Court, or Congress amends the CAA to compel regulation of CO_2.

The *Deseret Power* decision is at the forefront of this skirmish. On August 30, 2007, EPA Region 8 issued a PSD permit to Deseret Power Electric Cooperative ("Deseret Power" or the "facility") authorizing the construction of a new waste-coal fired electric generating unit in Uintah County, Utah.[1] *Id.* at 1, 5, n.1. During the permit review, the Sierra Club asked the Agency to require BACT for CO2 emissions; Region 8 refused, claiming that it was bound by EPA's historical interpretation that CO_2 was not regulated. The Sierra Club then petitioned for review, alleging that Region 8 violated the Act by failing to require BACT for CO_2, in violation of Sections 165(a)(4) and 169(3).[2] *Id*. at 1, 5, 12 (citing 42 U.S.C. §§ 7475(a)(4), 7479(3)). Ultimately, the Board disagreed with both parties.

B. The Board's Decision

The central issue before the Board concerned whether CO_2 is a "pollutant subject to regulation" under the CAA for which the Region must impose BACT limits. *Id.* at 27. Sierra Club argued that the Board was obligated to impose CO_2 BACT limits because CO_2 is a "pollutant subject to regulation" under the Act. *Id*. Even though EPA has never imposed emissions limits on CO_2, Sierra Club pointed out that Section 821 of the 1990 CAA Amendments required CO_2 monitoring, which has been codified in 40 C.F.R. Part 75.[3] Sierra Club further pointed to *Massachusetts v. EPA*, 549 U.S. 497 (2007), which established CO_2 as an "air pollutant" under the CAA. *Id*. at 1, 6, 8, 14, 23-28, 33.

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[1] Because the facility is located on an Indian reservation, the EPA regional office (not the state) must review and issue the permit. *Id*. at 5, n.1.

[2] Sierra Club also argued that Region 8 violated Section 165(a)(2), because it failed to consider alternatives to the new unit, such as the alternatives that Region 9 considered for the White Pine Energy Station Project in Nevada. *Id.* at 1, 12, 21 (citing 42 U.S.C. § 7475(a)(2)). The Board found that Section 165(a)(2) did not require Region 8 to analyze alternatives to a new plant, unless those alternatives were raised during the public comment period. *Id*. at 2, 6, 22. Here, because neither Sierra Club nor any other party raised possible alternatives to the power plant during the comment period, no such review was required. *Id.* at 6, 22.

[3] The relevant provision, Section 821 of the 1990 Amendments, requires monitoring of CO_2 emissions contributing to climate change; it appears as a note to 42 U.S.C. § 7651k. *Id.* at 32, n.29.

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Region 8, in turn, argued that it did not have authority to impose CO_2 BACT limits in PSD permits, because it was constrained by the Agency's historical interpretation of the phrase "subject to regulation" as referring only to pollutants that are subject to actual emissions control standards. *Id*. at 1-2, 9, 28-29. Because the CO_2 monitoring requirements do not require actual control of CO_2 emissions, and because Section 821 of the 1990 Amendments is not technically part of the CAA, Region 8 argued that CO_2 is not a "pollutant subject to regulation under this Act." *Id*. The EAB disagreed with both parties.

1. Region 8's Arguments

Region 8 relied on a variety of past documents to establish EPA's "historical" interpretation, including EPA's original 1978 PSD preamble, the 2002 NSR Rule, and memoranda addressing regulation of CO_2 emissions under the Clean Air Act. *Id*. at 35-63. The Region further argued that Section 821 of the 1990 Amendments was not part of the Act, and that CO_2 therefore could not be "subject to regulation" under the Act. The Board rejected all of these arguments, characterizing them as, "at best, weak authorities upon which to anchor the Region's conclusion . . . that its authority to require a CO_2 BACT limit is constrained by an historical Agency interpretation of CAA sections 165 and 169." *Id*. at 53.

1978 PSD Preamble. First, Region 8 argued that the 1978 Preamble set forth a "final" determination that "pollutants subject to regulation" under the Act include only those pollutants that are subject to actual emissions controls. *Id*. at 34, n.35 (citing 43 Fed. Reg. 26,388, 26,397 (June 19, 1978) (the "1978 Preamble"). The 1978 Preamble states that the phrase "each pollutant subject to regulation under this Act" refers to those regulations in Subchapter C of Title 40 of the Code of Federal Regulations. *Deseret Power* at 14, 38-39 (citing 43 Fed. Reg. at 26,397). EPA's 1978 Preamble then provides the categories of pollutants regulated under Subchapter C, all of which were subject to actual control requirements. *Id*. at 39-40. Accordingly, Region 8 argued that "subject to regulation" refers only to those pollutants that are subject to actual control requirements, and that its historical interpretation of the phrase was consistent with this list. *Id*. at 40.

The Board disagreed, finding that the 1978 PSD Preamble interprets the phrase "subject to regulation under this Act" to include "any pollutant regulated in Subchapter C of Title 40 of the Code of Federal Regulations for any source type." *Id*. at 3, 40-42. The CO_2 monitoring provisions were promulgated in Subchapter C, and expressly state that a violation of the monitoring requirements is a violation of the CAA. *Id*. at 41. The Board further noted that nothing in the Preamble indicated that the list of regulated pollutants was meant to be exclusive. *Id*. at 40.

2002 NSR Rule. Second, the Region pointed to a similar list of "regulated NSR pollutant[s]" in EPA's 2002 NSR Rule. As with the 1978 preamble, Region 8 argued that because this list is limited to pollutants that are subject to actual emissions controls, pollutants that are subject only to monitoring requirements are not "regulated NSR pollutant[s]." *Id*. at 3-4, 42-43, 48 (citing 67 Fed. Reg. 80,186 (Dec. 31, 2002)). Again, the Board found that the 2002 rule did not explicitly limit the term "regulated NSR pollutant" to pollutants that are subject to actual emissions controls. *Id.* at 43, 48.

EPA Memoranda. The Region pointed to two prior EPA memoranda that articulated the Agency's historical position that CO_2 is not a regulated pollutant under the Act, and therefore not subject to BACT limits: (1) a memorandum from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards, EPA, Definition of Regulated Air Pollutant for Purposes of Title V (Apr. 26, 1993) (the "Wegman Memo"); and (2) a memorandum from Jonathan Z. Cannon, General Counsel, EPA, to Carol M. Browner, Administrator, EPA, EPA's Authority to Regulate Pollutants Emitted by Electric Power Generation Sources (Apr. 10, 1998) (the "Cannon Memo"). *Id*. at 4, 49-50.

The Region argued that the Wegman Memo provides EPA's historical interpretation that CO_2 is not a regulated "air pollutant" under the Act, and that the addition of CO_2 monitoring requirements in 1990 did not require a contrary conclusion. *Id*. at 50-51.

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The Board found, however, that the fundamental premise of this memo – *i.e.*, that CO_2 is not an "air pollutant" – was directly controverted by the later *Massachusetts* decision, which concluded that it is. *Id.* at 50. The Cannon Memo was even more summarily dismissed; while the Board acknowledged that that memo arguably supported the Region's position, the EAB noted that EPA subsequently withdrew the memo. *Id*. at 52. Rather than demonstrating a clear, longstanding, consistent Agency position, the Board concluded that the EPA Memoranda in fact presented a confusing, inconsistent historical record of EPA's position on CO_2. *Id*. at 50.

Section 821 of 1990 CAA Amendments. Finally, the Region argued that Section 821's CO_2 monitoring requirements are separate from the Act and do not dictate that CO_2 is a regulated pollutant under the Act. *Id*. at 55-57. Acknowledging that Section 821 was enacted simultaneously with the 1990 CAA Amendments, Region 8 nevertheless argued that Congress unequivocally made it separate from the Act. *Id.* at 9, 56-57. The Board disagreed, concluding that the legislative history of Section 821 was unclear and did not show that Congress intended Section 821 to be separate from the Act. *Id.* at 58-59. The Board also observed that Region 8's argument was inconsistent with EPA's previous statements that violations of Section 821's monitoring requirements are violations of the Act. *Id*. at 9, 56-61.

2. The Sierra Club's Arguments

While the Board rejected Region 8's claims that it could not regulate CO_2, it also rejected Sierra Club's claims that EPA *must* regulate CO_2. Sierra Club based its argument on the *Massachusetts* decision and the Part 75 CO_2 monitoring requirements, which Sierra Club concluded confirm that CO_2 is a "pollutant subject to regulation under [the Act]." *Id.* at 25. Sierra Club noted that the "plain and unambiguous meaning" of the word "regulation" includes both emissions control standards and monitoring requirements. *Id.* at 25-28. Sierra Club further pointed to the D.C. Circuit's *Alabama Power* decision, in which the court rejected industry's efforts to restrict that language to only sulfur dioxides and particulates. *Id.* at 30 (citing *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979)). The Board, however, found that Sierra Club's reliance on Alabama Power was inapposite, because the additional pollutants at issue in that case were already clearly subject to regulation under other provisions of the Act. *Deseret Power* at 30.

Sierra Club further argued that Congress removed all doubt that CO_2 is a "pollutant subject to regulation" when it imposed CO_2 monitoring requirements in Section 821. *Id.* at 26, 31. Sierra Club pointed out that the language of Section 821 is very similar to that of Sections 165 and 169, and therefore compels EPA to construe what pollutants are "regulated" consistently. *Id*. at 31. The Board, however, insisted that the statutory language must be read in context – a context that included a 13-year period between adoption of the various provisions, different terminology in different sections, and the lack of any express relationship between Section 821 and the PSD provisions. Thus, in the absence of clear Congressional intent to the contrary, the Board concluded that Section 821 did not compel EPA to alter its approach to BACT determinations. *Id*. at 34.

Overall, the Board held that the phrase "'subject to regulation under this Act' is not so clear and unequivocal as [to] foreclose the narrower meaning suggested by the Region," and therefore did not compel the Region to impose CO_2 BACT limits in a permit. *Id*. at 33, 63.

3. The EAB's Holding

Because the EAB found that Region 8's justification for rejecting CO_2 controls – *i.e.*, its alleged inability to regulate in light of EPA's historical interpretation – was invalid, the EAB had no choice but to remand the permit. However, because the Board also found that EPA was not necessarily required to regulate CO_2, it refused to mandate that the Region include a BACT determination for CO_2. Rather, the Board simply ordered the Region to evaluate whether it should require BACT for CO_2. *Id.* at 63. Because the Board also recognized that its decision could have national implications, it further suggested that the Region may wish to seek a national determination from EPA Headquarters. *Id.* at 4-5, 9-10, 63-64.

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C. Implications of the Decision

The *Deseret Power* decision is likely to engender significant controversy and result in additional delays in the PSD permitting process. By requiring EPA to consider BACT for CO_2, the EAB has opened the door to similar challenges by Sierra Club and others in a multitude of pending and future PSD permits. Yet by not compelling BACT for CO_2, the EAB has left open the door for industry to argue that CO_2 limits are not warranted. Thus, as a practical matter, this decision may effectively trump the *Massachusetts v. EPA* decision, by allowing direct regulation of CO_2 emissions through permitting – even before EPA decides whether or not such regulation is warranted.

For a copy of the EAB decision, click here. For more information, please contact Laura McAfee (lmcafee@bdlaw.com, 410-230-1330) or Holli Feichko (hfeichko@bdlaw.com, 202-789-6077).

EPA'S Final Revisions to the Definition of Solid Waste: Recycling the Rules for Recyclable Materials

On October 30, 2008, the United States Environmental Protection Agency ("EPA" or "the Agency") published its long-awaited final rule revising the Resource Conservation and Recovery Act ("RCRA") regulatory definition of solid waste ("2008 Final DSW Rule"), which will go into effect on December 29, 2008. See 73 Fed. Reg. 64668 (October 30, 2008). The 2008 Final DSW Rule revises EPA's regulatory definition of solid waste to exclude conditionally certain types of recycled materials and reclamation operations from the onerous RCRA hazardous waste requirements that otherwise would apply.

The two main elements of the 2008 Final DSW Rule are new exclusions from the definition of solid waste and a new process for obtaining case-by-case determinations that specific materials are non-wastes. EPA also establishes new legitimacy criteria for purposes of assessing whether hazardous secondary materials are being legitimately recycled and, therefore, eligible for one of the new exclusions or a non-waste determination.

The 2008 Final DSW Rule may provide some degree of regulatory relief to persons who generate, recycle, or otherwise manage certain hazardous secondary materials destined for reclamation. However, the potential benefits of the rule are uncertain, given the limited scope of the rule, the numerous conditions placed on the new solid waste exclusions, and the cumbersome process for obtaining non-waste determinations. Moreover, many States may decide not to adopt the rule, which could create complicated issues for interstate movements of hazardous secondary materials. Legal challenges to the 2008 Final DSW Rule may be filed soon in the courts, addressing the issue of whether the rule is consistent with prior rulings of the D.C. Circuit, which limit EPA's authority to materials that are truly "discarded."

A full analysis is available at http://www.bdlaw.com/assets/attachments/223.pdf. For additional information, please contact Donald Patterson (dpatterson@bdlaw.com), Aaron Goldberg (agoldberg@bdlaw.com), or Elizabeth Richardson (erichardson@bdlaw.com).

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