Massachusetts Environmental and Land Use Alert

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Massachusetts Environmental Developments

Still Unsettled: Massachusetts DEP issues Interim-Final Guidance on Vapor Intrusion at Contaminated Sites

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Solid Waste Regulatory Reforms in Process at MassDEP

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Massachusetts Land Court Dockets Finally Available Online

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Top Massachusetts Court Reverses Local Board's Decision Denying Special Permit

The expansion of a mobile home park in Shirley, Massachusetts, prompted an unusual reversal of a local board's decision on a Special Permit by the Massachusetts Supreme Judicial Court. *(full article)*

Deadline for Appeals of Local Wetland Decisions to Court Sometimes Difficult to Judge

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Congress Limits DOT Authority over the Transport of Lithium Batteries

On February 6, 2012, Congress passed legislation, which is expected to be signed soon by President Obama, to prohibit the United States Department of Transportation ("DOT") from issuing or enforcing any regulation regarding the transport of lithium batteries by aircraft that is more stringent than the requirements of the Technical Instructions for the Safe Transport of Dangerous Goods by Air issued by the International Civil Aviation Organization ("ICAO"). *(full article)*

Federal District Court Grants Preliminary Injunction in Challenge to City of Dallas Flow Control Ordinance

The U.S. District Court for the Northern District of Texas has issued a preliminary injunction enjoining the City of Dallas from implementing the City's control ordinance, which the City enacted in September 2011. *(full article)*

EIP and CCAN Drop NPDES Ash Transport Water Permit Appeal

Both the Environmental Integrity Project (EIP) and the Chesapeake Climate Action Network (CCAN) have voluntarily dismissed an appeal pending before the Maryland Court of Special Appeals, challenging Maryland's application of the United States Environmental Protection Agency's (EPA) Steam Electric standards established for ash transport water. *(full article)*

Firm News & Events

Defense Research Institute Reports on Beveridge & Diamond Trial Win

DRI, the leading organization for defense lawyers, reports in its latest issue of its online magazine The Voice on the Firm's recent trial win for DC Water in Cormier v. D.C. Water and Sewer Authority, 2011 D.C. Super. Lexis 7, 139 DWLR 2157 (D.C. Super. Ct. Sept. 30, 2011). *(full article)*

Beveridge & Diamond Leads Successful Defense of Power Plant Permit in Case of First Impression in Texas

Beveridge & Diamond's Texas office secured a ruling from a Texas state district court denying novel claims that a wastewater permit for a Texas power plant was issued by the Texas Commission on Environmental Quality in violation of the plaintiffs' due process rights. *(full article)*

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Massachusetts Environmental Developments

Still Unsettled: Massachusetts DEP issues Interim-Final Guidance on Vapor Intrusion at Contaminated Sites

For several years, the Massachusetts Department of Environmental Protection (MassDEP) has been working toward developing updated, comprehensive guidance for addressing sites with vapor intrusion issues. Vapor intrusion refers to the ability of volatile contaminants to move from soil vapor into the indoor air of buildings. In a major step in this process, MassDEP issued "Interim-Final" guidance on December 20, 2011, that sets forth its current understanding of how to comply with state cleanup regulations (the MCP) at vapor intrusion sites. However, MassDEP has already announced that regulatory changes will be needed, and these may be completed by July 2012.

In a nutshell, the guidance provides a very clear sense of MassDEP's expectations at vapor intrusion sites. At the same time, the guidance allows for environmental consultants (known in Massachusetts as licensed site professionals or LSPs) to vary from the guidance based on professional judgment documented in submittals to the agency. In addition, the guidance addresses some of the specific technical issues that have been generating considerable uncertainty in the regulated community: what if anything is required in areas where GW-2 standards have been met; how to evaluate whether a vapor intrusion pathway exists based on multiple lines of evidence; how to end an immediate response action associated with a critical exposure pathway; and what is needed to close a vapor intrusion site. The guidance states that it will be updated as the science evolves, and hence the title "Interim-Final."

Moreover, the legal landscape surrounding vapor intrusion is about to change. As part of the process of developing the vapor intrusion guidance, MassDEP staff have indicated that changes to the MCP are appropriate to address vapor intrusion. Taking advantage of a broader regulatory initiative at MassDEP to fast-track regulation changes that will streamline the agency's operations, MassDEP is poised to adopt vapor-intrusion changes by July 2012.

The specific proposals we have heard include clarifying site closure for vapor intrusion sites, including to address the potential for the construction of new buildings, amending critical exposure pathway provisions to clarify closure requirements. Mass DEP is holding a meeting to discuss these changes on Thursday, February 9, 2012. We anticipate proposed draft regulations during spring 2012. In addition to regulatory changes relating to vapor intrusion, MassDEP is considering updating numerical standards, simplifying deed restrictions, and addressing long-standing obstacles to site closure at sites contaminated by light nonaqueous phase liquids.

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

Solid Waste Regulatory Reforms in Process at MassDEP

As previously reported, the Massachusetts Department of Environmental Protection (MassDEP) is busily studying regulatory reform options to streamline its operations in order to respond to fairly significant budget reductions. The primary targets of its efforts are to upgrade information technology systems, restructure internally, and implement regulatory reforms, particularly where these reforms will reduce staff time necessary to complete core functions.

In October of 2011, MassDEP issued a draft action plan for regulatory reform which sought public comment on possible regulatory changes. Emerging from that process in the solid waste arena MassDEP has just announced a series of reform steps that it intends to pursue with draft regulations in the Spring of 2012. The agency expects to have a draft set of regulations prepared for review by the Commissioner's office by the

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end of March. The solid waste program reforms that are currently being pursued include changes in permitting and compliance/enforcement, as follows:

Permitting Changes

MassDEP had originally proposed to consider the use of permits by rule for transfer stations which handle less than 100 tons per day of solid waste. Following receipt of public comment, including comments that suggested the state solid waste statute required written approval for new or expanded solid waste facilities, MassDEP has revised its plans and now intends to propose a regulatory revision that will require issuance of individual written permits for all new or expanded facilities, regardless of size, but will allow modifications and renewals to occur by self-certification with presumptive approval, except where expansions are proposed.

MassDEP had originally proposed to consider the use of permits by rule for approval of some types of post-closure uses at closed landfill sites, such as green energy projects and passive recreation. However, following comments questioning impacts to public health, safety and the environment, MassDEP now intends to propose a regulatory revision that will require issuance of individual written permits for all post closure uses except for those uses which are entirely outside of the landfill footprint.

While MassDEP did not initially propose any changes to its elaborate special waste program, following receipt of public comments it now intends to pursue regulatory revisions that would simplify the special waste approval process and change from written approvals to self-certifications with presumptive approval.

MassDEP has just recently closed the comment period on a set of draft regulatory changes that propose to create a new category of site-assignment exempt facilities, many of which would require either permits by rule or individual permits. These facilities generally fall into two categories: recycling facilities, and aerobic and anaerobic digestion facilities.

Compliance/Enforcement Changes

Current regulatory requirements call for the use of third party engineers to perform certain review and reporting functions. MassDEP intends to increase the use of third parties to perform monitoring activities at solid waste facilities, although the details of this program have not yet been developed. Among the ideas MassDEP is considering is the use of inspectors who will report directly to MassDEP, and the use of auditors who will report only to the facility that is subject to the audit. MassDEP is holding a series of meetings in February and March to further develop this program.

Beveridge & Diamond, P.C. has been actively involved in advising clients on these emerging regulatory developments. For more information, please contact Stephen Richmond at srichmond@bdlaw.com or Marc Goldstein at mgoldstein@bdlaw.com.

MassDEP Issues Revised AAL/TEL Guidance for Regulating Air Emissions

The Office of Research and Standards (ORS), the risk assessment office within the Massachusetts Department of Environmental Protection (MassDEP), has issued a revised comprehensive guidance that sets numerical allowable ambient limits (AALs) and threshold effects exposure limits (TELs) for a wide array of air pollutants.

AALs and TELs are very important guidelines, as they are intended to establish levels of airborne pollutants that are protective of public health and the environment. MassDEP's prior version of the AALs and TELs was last published in 1995 and there has been a substantial amount of new information about various substances that MassDEP regulates which was not reflected in the AALs and TELs in use by the agency.

ORS issued the AALs to address exposures to multiple chemical compounds and to estimate levels of exposure over multiple years that it considers protective of public

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health. AALs are expressed as annual average concentrations. ORS developed the TELs, by contrast, to provide limits that are protective of public health for short term exposures (24 hours), and they are therefore expressed as 24-hour average concentrations.

The use of AALs and TELs in air permitting can be controversial, as the numerical thresholds that ORS has selected to moderate exposures are not regulatory limits - they are based on risk assessment methodologies that do not take into account individual site conditions. Consequently, it is important to ensure that appropriate risk assessment techniques are applied when AALs and TELs are to be used to set air permitting emission limits.

For more information on the use of AALs and TELs, please contact Stephen Richmond at srichmond@bdlaw.com.

Information and Nominations Sought with respect to Commercial Wind Leasing and Site Assessment Activities on the Atlantic Outer Continental Shelf Offshore of Massachusetts

On February 6, 2012, the federal Bureau of Ocean Energy Management ("BOEM") issued a Notice of Intent to prepare an Environmental Assessment ("EA") as part of the Department of Interior's "Smart from the Start" wind energy initiative for the Atlantic Outer Continental Shelf ("OCS") offshore of Massachusetts.

The process for wind energy leasing and development on the OCS involves three key phases: (i) lease issuance; (ii) approval of a site assessment plan; and (iii) approval of a construction and operation plan. The first phase entails issuing commercial renewable energy leases that give lessees an exclusive right to apply for approval of subsequent plans. BOEM is at the beginning of the first phase of wind energy leasing offshore of Massachusetts.

In support of the first two phases described above, BOEM is planning to prepare an EA that will consider the environmental impacts associated with issuing renewable energy leases and approving site assessment activities on such leases. This EA will not take the place of environmental review under the National Environmental Policy Act for specific projects; additional site and project specific environmental review will be required when lessees propose specific development activities, such as the construction or operation of any wind energy facility. Whether additional environmental analysis will be required for a proposed site assessment plan will depend upon BOEM's judgment as to whether the EA adequately considered the environmental impacts of the activities in a particular lessee's proposed site assessment plan.

BOEM's EA will focus on leasing and site assessment activities in the area of the OCR offshore of Massachusetts that BOEM identified, in consultation with other federal agencies and the Massachusetts Renewable Energy Task Force, for consideration for potential future wind energy leasing (the "Call Area"). The Call Area is identified in a second document published by BOEM on February 6, 2012, titled "Commercial Leasing for Wind Power on the Outer Continental Shelf Offshore Massachusetts – Call for Information and Nominations." The Call for Information and Nominations provides an opportunity for people to express an interest, by submitting nominations, for commercial leases that would allow a lessee to propose the construction of a wind energy project in the Call Area. BOEM previously issued a Request for Information that solicited such nominations; parties that indicated interest previously may confirm, revise or withdraw their nominations based on the current definition of the Call Area.

BOEM will identify the areas to be analyzed in the EA by determining, based on information that it receives in response to the Notice of Intent for the EA and the Call for Information and Nominations, the areas within the Call Area in which interest exists. The EA will consider the environmental impacts associated with reasonably foreseeable

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scenarios for: (i) leasing, not including development itself; (ii) site characterization, including geophysical, geotechnical, archaeological and biological surveys; and (iii) site assessments, including the installation and operation of meteorological towers and buoys.

The areas in which BOEM is seeking public input regarding the EA include: (i) identification of the alternatives to be considered in the EA; (ii) environmental and/or socioeconomic issues to be analyzed; (iii) measures that could mitigate impacts to environmental resources and socioeconomic conditions; and (iv) identification of historic properties or potential effects to historic properties from the leasing and site assessment activities in the Call Area. Comments are due by March 22, 2012.

For more information, please contact Aladdine Joroff at ajoroff@bdlaw.com.

Massachusetts Land Use Developments

Massachusetts Land Court Dockets Finally Available Online

The Massachusetts Land Court has joined most other Massachusetts state courts in finally offering access to its dockets online. The service, available at www.masscourts.org, and known as CourtView eAccess, is fully searchable by name of party, docket number, and other criteria and requires no login or password. Information available includes attorneys that have filed appearances in the case, type of case, scheduled events such as conferences and hearings, and the full docket. The underlying documents associated with those docket entries are not linked or otherwise accessible through the web page, however.

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

Top Massachusetts Court Reverses Local Board's Decision Denying Special Permit

The expansion of a mobile home park in Shirley, Massachusetts, prompted an unusual reversal of a local board's decision on a Special Permit by the Massachusetts Supreme Judicial Court. Having arrived at a new interpretation of the disputed bylaw provisions *sua sponte*, the Court also took the somewhat rare step of applying the bylaw prospectively rather than retroactively to the case at hand in *Shirley Wayside Ltd. Partnership v. Board of Appeals of Shirley*, SJC-10869 (February 7, 2012).

The local permitting concerned the expansion of an existing mobile home park that had become a non-conforming use when the Town of Shirley amended its zoning bylaws. Although the proposed increase from 65 to 79 mobile homes met two of the three criteria in the bylaw for expanding a pre-existing nonconforming use, the Shirley Board of Appeals denied the requested Special Permit on the basis that it failed the third – that the expansion not be substantially more detrimental to the neighborhood than the existing nonconforming structure or use. The Board cited seven concerns ranging from the impacts of additional students in the schools where mobile homes do not add much to the tax base and devaluation of surrounding properties to density and traffic.

In a *de novo* trial, the Land Court held that no rational board could have come to these conclusions and, as a result, the Board's decision to deny the Special Permit was reversed. A divided panel of the Appeals Court reversed the Land Court's decision, reinstating the Board's denial.

On further appellate review, the SJC seized on a very different interpretation of the operative bylaw provisions governing minimum lot size and setbacks, one that had not been considered by the Board, the parties, the Land Court, or the Appeals Court.

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Finding that these dimensional provisions applied to the entire parcel on which the mobile home park was located, the SJC ruled that the primary ground on which the Board had rested its denial – density – was unfounded. However, one result of its new interpretation was that the setbacks also applied to the entire property and the more than six-year-old plans had one mobile home impermissibly in a setback. In consideration of the "equitable considerations" – presumably a combination of mercy and an understanding of the practical realities of having to remand to allow the plans to be redrawn and potentially relitigated – the SJC applied this interpretation of the bylaw prospectively, not retroactively, in a departure from usual practice.

Finally, the SJC cautioned local boards that they do not have unfettered power to simply reject expansions of nonconforming uses simply because they are nonconforming. Relying on *Davis v. Zoning Bd. of Chatham*, 52 Mass. App. Ct. 349, 357 (2001), the Board had argued that the policy considerations that favor eventual elimination of nonconforming uses provided the Board adequate power to deny an expansion solely on the basis that the underlying use was nonconforming. The SJC disagreed, stating that where a local bylaw provides that nonconforming uses may be expanded subject to specific criteria, a local board is obligated to apply those standards rationally and it "may not conclude that an expansion will be substantially more detrimental to the neighborhood in the absence of credible evidence."

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

Deadline for Appeals of Local Wetland Decisions to Court Sometimes Difficult to Judge

In a continuing reminder of the difficulties of determining when the 60-day period starts for filing an appeal of a decision under local wetland bylaws to court, the Massachusetts Appeals Court dismissed an appeal for being untimely.

The trouble arises from the language of G.L. c. 249, § 4, which provides the mechanism for such appeals, as well as certain other appeals of local decisions. Section 4 provides that a petition for certiorari, as the relief is known, "shall be commenced within sixty days next after the proceeding complained of." However, the term "proceeding complained of" has been interpreted to mean "the last administrative action" taken by an agency, which is when the agency makes a final decision, not necessarily when it memorializes that decision in written form. As a result, reliance on the date of the decision may (and often will) lead to an incorrect calculation of the last day in which such an appeal can be filed. In the unpublished Rule 1:28 decision, *Carney v. Town of Framingham*, 10-P-1676 (July 11, 2011), a somewhat complicated hearing enforcement and structure and series of orders at the local conservation commission resulted in an untimely appeal by the applicant.

Savvy litigants would be wise to pay careful attention to the proceedings before the local board to determine when the period starts and to appeal earlier rather than later.

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

National Developments

U.S. District Court Vacates EPA's Delay of the Effectiveness of the Boiler MACT

A U.S. District Court has overturned an attempt by the U.S. Environmental Protection Agency (EPA) to delay the implementation of the Boiler MACT, one of the most wide-reaching air rules that EPA has crafted under the toxic air pollutant program, 40 CFR Part 63, Subpart DDDDD.

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EPA has been attempting to promulgate the Boiler MACT for a number of years, and has met with significant resistance by the regulated community. The Boiler MACT is intended to regulate emissions from industrial boilers and furnaces across a wide array of industries.

In response to a series of lawsuits, EPA delayed the rule, then reissued it, then revised it, and then announced on May 18, 2011 that it was delaying the applicability of the revisions in order to reconsider their impacts. See 76 Fed. Reg. 15266. Shortly thereafter, industry groups sought judicial review of the revisions in the U.S. Circuit Court of Appeals, District of Columbia Circuit. While that substantive challenge was pending, Sierra Club and other environmental groups challenged EPA's announcement of the delay in the U.S. District Court for the District of Columbia, and on January 9, 2012, the District Court vacated the stay and remanded the rule to the agency for further proceedings. *Sierra Club v. Jackson*, 2012 U.S. Dist. LEXIS 2457 (C.A. 11-1278, Jan. 9, 2012). The court held that while EPA did have the authority to delay the effectiveness of the rule, in this case it had acted arbitrarily and capriciously because it did not apply the appropriate test for determining whether a delay should be issued.

The effect of the vacatur is that the revisions to the Boiler MACT become immediately effective. However, EPA quickly issued guidance stating that "using our enforcement discretion, EPA will issue a no action assurance letter shortly, informing sources that EPA will not enforce any of the administrative notification requirements for new or existing boilers and incinerators in the 2011 Rules for a period of time while EPA works to take final action on the proposal to reset these dates." Further, EPA stated that it was not aware of any new boilers that would be immediately subject to the rule, but if any came to its attention that were "facing permitting or compliance challenges" EPA would issue a stay or otherwise address these concerns. In addition, EPA stated that it will ensure facilities have a full three years to achieve compliance with the rule. A copy of this guidance letter is available at www.bdlaw.com/assets/attachments/01_18_2012_EPA_Letter_to_Wyden1.pdf.

EPA currently expects to issue a final revised Boiler MACT rule in May 2012, after it completes its reconsideration. In addition, the legal challenge to the rules and debate in Congress over the appropriateness of the rules may significantly affect the requirements that ultimately apply. As is often the case with contested rulemakings, the final outcome remains uncertain.

For more information on the Boiler MACT, please contact Steve Richmond at srichmond@bdlaw.com or Jeanine Grachuk at jgrachuk@bdlaw.com.

Congress Limits DOT Authority over the Transport of Lithium Batteries

On February 6, 2012, Congress passed legislation, which is expected to be signed soon by President Obama, to prohibit the United States Department of Transportation ("DOT") from issuing or enforcing any regulation regarding the transport of lithium batteries by aircraft that is more stringent than the requirements of the Technical Instructions for the Safe Transport of Dangerous Goods by Air issued by the International Civil Aviation Organization ("ICAO"). See H.R. 658, Section 828(a), available in House Conference Report 112-381 (112th Cong., 2d Sess.) (http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt381/pdf/CRPT-112hrpt381.pdf) at 125.

The main effect of this legislation is to block DOT from unilaterally issuing more stringent requirements for transport of lithium batteries and products containing such batteries by aircraft, such as the Department proposed to do in 2010. See 75 Fed. Reg. 1302 (January 11, 2010). However, the legislation includes an exception that allows DOT to continue enforcing the existing prohibition on transport of lithium metal batteries aboard passenger aircraft (set forth in Special Provision A100 of 49 CFR 172.102). See H.R. 658, Section 828(b)(1). In addition, if DOT obtains credible reports that lithium batteries meeting ICAO requirements have substantially contributed to the initiation or propagation of a fire on board an aircraft, it can issue narrowly crafted regulations to

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address such risk. See H.R. 658, Section 828(b)(2). Moreover, DOT may soon finalize some regulatory amendments to bring the existing U.S. rules more in line with current international standards.

It is important to note that the ICAO Working Group of the Whole on Lithium Batteries is meeting the week of February 6, 2012, in Montreal to consider various industry and governmental proposals for changes to the current ICAO requirements, including: (1) eliminating certain exceptions that currently exist for regulation of the transport of small lithium ion and lithium metal batteries; (2) subjecting certain categories of lithium cells and batteries to additional requirements for the securing of dangerous goods and protection of packages during loading; (3) amending pilot notification requirements for lithium ion and metal batteries; (4) establishing alternatives to the current process for securing approvals for transporting large lithium ion batteries; (5) developing an ICAO lithium batteries training program for shippers; and (6) various other industry alternatives to fully regulating lithium batteries as dangerous goods. The Working Group is also expected to review flammability test data compiled by the Rechargeable Battery Association ("PRBA") and a recent Federal Aviation Administration ("FAA") study regarding the potential fire threat posed by the bulk shipment of lithium batteries. See generally http://www.icao.int/safety/DangerousGoods/Pages/Working-Group-of-the-Whole-on-Lithium-Batteries.aspx.

In a related development, the U.S. Postal Service, which had published a final rule last summer that would have restricted the conditions under which lithium batteries could be mailed internationally from the United States, decided to withdraw that rule in advance of its effective date. The withdrawal was necessitated by an ICAO request for a delay in implementation of the proposed changes until ICAO had an opportunity to review the changes and incorporate them into the Technical Instructions for the Safe Transport of Dangerous Goods by Air. See 76 Fed. Reg. 55799 (September 9, 2011)

For more information, please contact Aaron Goldebrg at agoldberg@bdlaw.com, Paul Hagen at phagen@bdlaw.com or Elizabeth Richardson at erichardson@bdlaw.com.

Federal District Court Grants Preliminary Injunction in Challenge to City of Dallas Flow Control Ordinance

The U.S. District Court for the Northern District of Texas has issued a preliminary injunction enjoining the City of Dallas from implementing the City's flow control ordinance (available at www.bdlaw.com/assets/attachments/SolidWasteFeeOrdinance1.pdf), which the City enacted in September 2011. The ordinance requires all solid waste generated, found, or collected inside the City to be disposed of at a City-owned or -operated facility. A violation of the ordinance is a criminal offense, and the a defense to criminal prosecution is available only if (1) no City-owned or -operated facility is permitted to accept the waste or (2) the waste is composed solely of recyclable material.

The National Solid Wastes Management Association and various solid waste companies and haulers filed suit challenging the ordinance on multiple federal and state law grounds. The plaintiffs moved quickly for a preliminary injunction, which was supported by amici curiae the American Forest & Paper Association (represented by Beveridge & Diamond) and the North Texas Association of Public Employees. Judge O'Connor of the Northern District of Texas held a one-day preliminary injunction hearing and following the hearing, on January 31, issued an order granting a preliminary injunction (available at www.bdlaw.com/assets/attachments/Order.PDF.)

Because the court found that a preliminary injunction was appropriate on the basis of the plaintiffs' federal Contract Clause claim, the court's order does not address the plaintiffs' other claims (e.g., standardless delegation of power, Texas constitutional claims, and lack of notice and hearing in violation of the City's charter). The court will take up these issues at an expedited trial on the merits of the plaintiffs' claims, if the case proceeds to trial.

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Addressing the plaintiffs' Contract Clause claim, the court found that the express terms of the solid waste franchise agreements that the City had previously entered into with certain of the plaintiffs and other hauling companies gave the franchisees an ongoing contractual right to dispose of solid waste collected within the City at any location legally authorized, or permitted, to operate as a disposal, collection, or processing facility, not just at facilities that the City may authorize by ordinance. Impairment of this contractual relationship was found because the flow control ordinance impairs the franchisees' rights under the franchise agreements -- namely, the right to dispose of solid waste collected within the City at legally facilities other than those owned or operated by the City. The court also found that the City's express reservation of police powers in the franchise agreements did not lessen the substantial impairment. While the terms of the franchise agreements may have put the franchisees on notice that their contractual rights were subject to potential future City regulations, the City's own reservation of police powers made clear that the franchisees assumed only the risk of lawful, necessary exercises of the City's police powers. The court found that the Dallas flow control ordinance was not such a lawful, necessary exercise of the City's police powers.

Turning to the issue of whether the flow control ordinance is justified by a significant and legitimate public purpose, the court found, based on the evidence currently before it, that the ordinance was enacted for purposes of raising revenue. For this finding, the court relied heavily on statements made by the City Mayor and City Council when passing the ordinance. The court determined that the City's desire to raise revenue through the flow control ordinance was not a significant and legitimate public purpose because the ordinance was not adopted to address a fiscal problem but, rather, was adopted for the financial benefit of the City. The plaintiffs demonstrated to the court's satisfaction that the ordinance was not necessary to remedy a broad and general social or economic problem or other similar situation. Additionally, the court found that the flow control ordinance is not reasonably necessary to achieve its purported non-financial goals.

While an expedited trial on the merits may be to come in the case, the City may seek an interlocutory appeal, and it is possible that the Fifth Circuit may be less inclined to invoke the seldom-used Contracts Clause to strike down a local law that that claims a public safety and environmental purpose. However, as it stands currently, the district court's opinion is well supported and reasoned and likely to discourage flow control efforts nationwide, particularly those that disrupt existing franchise agreements and have no compelling public service or environmental need for flow control.

Jimmy Slaughter and Bryan Moore from Beveridge & Diamond's Washington and Texas offices represent amicus curiae American Forest & Paper Association.

For more information, contact Jimmy Slaughter at jslaughter@bdlaw.com or Bryan Moore at bmoore@bdlaw.com.

EIP and CCAN Drop NPDES Ash Transport Water Permit Appeal

Both the Environmental Integrity Project (EIP) and the Chesapeake Climate Action Network (CCAN) have voluntarily dismissed an appeal pending before the Maryland Court of Special Appeals, challenging Maryland's application of the United States Environmental Protection Agency's (EPA) Steam Electric standards established for ash transport water. In an appeal that contested a power plant's National Pollutant Discharge Elimination System (NPDES) permit issued by the Maryland Department of the Environment, appellants asserted that a state must impose its own more stringent effluent limitations, rather than apply EPA's effluent limitation guidelines that EPA established under that categorical standard. EIP and CCAN dropped their appeal before filing a reply brief because they could not find a way to undermine a key procedural argument of first impression in Maryland: that there was no jurisdiction to hear the appeal under a new Maryland statute that established the procedure for review of environmental permits.

In a briefing before the Maryland Court of Special Appeals, Beveridge & Diamond,

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P.C. explained that the Court lacked jurisdiction because there is no statutory right to an appeal from the decision of the Circuit Court (the trial level court in Maryland), when that court conducted judicial review of an administrative agency decision on an environmental permit. “It is an often stated principle of Maryland law that appellate jurisdiction, except as constitutionally authorized, is determined entirely by statute, and that, therefore, a right of appeal must be legislatively granted.” (citations omitted). There were only three possible statutory bases for the appeal: (1) a general right to an appeal, (2) the appeal provided in the Maryland Administrative Procedure Act (APA) for judicial review of contested cases, and (3) the underlying statute providing the right to judicial review. Beveridge & Diamond’s brief addressed each of these three possible sources of a right to appeal, and why none are available under current law.

Maryland’s environmental permit review procedures had been statutorily revised in recent years, and this revision eliminated the appeal right. Under the old procedure, the State’s APA explicitly provided a right to an appeal. The former right of appeal under the APA was extinguished as of January 1, 2010, when the new, streamlined procedure for most environmental permitting went into effect. That streamlined procedure entirely eliminated APA contested case hearings for permits and provided a direct appeal to a Maryland Circuit Court. The new law did not provide any right of further appeal.

Under Beveridge & Diamond’s analysis, without any explicit statutory basis for further appeal, none exists. Apparently EIP and CCAN were unable to find any way around this result. In response to the briefing of this legal issue, the State is expected to introduce emergency legislation to be introduced in the Maryland legislative session that convenes January 11, 2012. The emergency legislation would re-establish a right to appeal to the Maryland Court of Special Appeals for challenges to Maryland Department of the Environment permitting decisions.

For more information, please contact Pamela Marks at pmarks@bdlaw.com.

District Court Rules in FOIA Action That Communications Between DOJ Attorneys Representing Agencies With Adverse Interests In Superfund Action Are Not Privileged

A January 25, 2012 ruling in *Menasha Corporation v. United States Department of Justice*, a Freedom of Information Act (“FOIA”) action in the Eastern District of Wisconsin, has significant implications for the government’s ability to claim deliberative process privilege for interagency communications in response to FOIA requests and for the scope of privilege protections available to the government in Superfund actions. The full text of the order is available at http://www.bdlaw.com/assets/attachments/Menasha%20Corp%20v_%20US1.pdf.

The plaintiffs in the Menasha action are Potentially Responsible Parties (“PRPs”) associated with the Lower Fox River Superfund Site in Wisconsin, who filed a FOIA request seeking documents from the Department of Justice (“DOJ”)’s Environmental and Natural Resource’s Division (“ENRD”). The plaintiffs brought the action in federal district court to challenge DOJ’s decision to withhold certain documents exchanged between attorneys in ENRD’s Environmental Enforcement Section (“EES”) and the Environmental Defense Section (“EDS”). DOJ argued that the documents were privileged under the work product doctrine and attorney-client privilege and also protected from FOIA disclosure under the deliberative process privilege. Judge Griesbach was not persuaded by DOJ’s “unitary executive” theory. His January 25, 2012 order rejects the government’s argument that the ENRD attorneys within the different divisions were all representing the same client (the United States) and finds that the communications were not privileged because the interests of EES (representing EPA in its enforcement capacity) and EDS (defending the Army Corps of Engineers as a PRP) were “clearly adverse.”

This decision is likely to have a significant impact on governmental privilege claims in both the FOIA and Superfund contexts. First, it places a limit on agencies’ ability to

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claim the deliberative process privilege for interagency communications in situations where the requesting party can argue that the agencies' interests are adverse. Although the adversity may not always be as clear as it is in the Superfund setting, the *Menasha* ruling may be used to challenge deliberative process privilege claims for interagency communications and documents in situations where the agencies' interests are not aligned. Second, the *Menasha* ruling, if adopted more broadly, should make it more difficult for counsel for governmental PRPs and the Environmental Protection Agency to engage in communications and exchange information that is not available to other PRPs (although the normal confidentiality provisions for settlement discussions would still apply). The result may be a more level playing field for private and government PRPs which, as Judge Griesbach noted in his decision, would be consistent with "CERCLA's express mandate that government PRPs be treated, both procedurally and substantively, like private PRPs." 42 U.S.C. § 9620(a)(1).

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Firm News & Events

Defense Research Institute Reports on Beveridge & Diamond Trial Win

DRI, the leading organization for defense lawyers, reports in its latest issue of its online magazine The Voice on the Firm's recent trial win for DC Water in Cormier v. D.C. Water and Sewer Authority, 2011 D.C. Super. Lexis 7, 139 DWLR 2157 (D.C. Super. Ct. Sept. 30, 2011). To read the article, please go to http://www.bdlaw.com/assets/attachments/11-30-11%20The%20Voice.pdf.

Beveridge & Diamond Leads Successful Defense of Power Plant Permit in Case of First Impression in Texas

Beveridge & Diamond's Texas office secured a ruling from a Texas state district court denying novel claims that a wastewater permit for a Texas power plant was issued by the Texas Commission on Environmental Quality in violation of the plaintiffs' due process rights. The district court's ruling signals that the principles of associational standing and adequate representation, as recognized by the U.S. Supreme Court and the Texas Supreme Court, are applicable to administrative hearings in Texas.

In the district court case, the plaintiffs claimed that they were improperly denied party status in a state administrative hearing to contest the merits of the wastewater permit, although the plaintiffs in the district court case were members of an association that participated fully as a party to the administrative hearing. From the preliminary phase to issuance of the permit, the administrative hearing spanned over 14 months and included a four-day merits hearing during which the parties presented and examined numerous expert witnesses.

Although their association was named and participated as a party to the administrative hearing, the district court plaintiffs also sought standing in the administrative proceeding in their individual capacities. Claiming that their standing bid was unlawfully rejected, the plaintiffs filed suit in state district court after the close of the administrative proceedings and asked the district court to set aside the permit and remand the case to the agency for a re-trial of the entire administrative hearing.

The district court case presented associational representation issues of first impression in Texas – i.e., whether the plaintiffs were adequately represented in the administrative hearing by their association such that any due process concerns were satisfied. The parties briefed the issues to the district court and, immediately following oral argument, the district judge ruled from the bench denying the plaintiffs' claims.

Two additional lawsuits remain pending before the district court challenging issuance of the same wastewater permit on other grounds. The disposition of those cases could have additional implications for contested administrative hearings in Texas.

Bryan Moore, a Principal in the Firm's Texas office, serves as lead counsel for the permittee and argued the case before the district court. The district court's final order is available at http://www.bdlaw.com/assets/attachments/Final%20Judgement%20Rolkes%20v%20TCEQ.pdf. To read the district court brief filed by Beveridge & Diamond, please see http://www.bdlaw.com/assets/attachments/Oak%20Grove%20-%20Rolke%20Appeal%20-%20Response%20Brief%20-%20Travis%20County%20District%20Court%20-%20FINAL%20Date%20Stamped.pdf.

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