Massachusetts Environmental, Land Use and Real Estate Alert

Beveridge & Diamond PC

February 2009

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Massachusetts Developments

Massachusetts Issues Mandatory Greenhouse Gas Reporting Rules

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Ocean Management Act Status Report

On May 28, 2008, Massachusetts enacted the first in the nation Ocean Management Act. See Chapter 114 of the Acts of 2008 (the "Act"). The legislation requires the development of a comprehensive management plan for virtually all of the State controlled waters of Massachusetts by December 31, 2009. To that end, the Executive Office of Energy and Environmental Affairs (EEA) held eighteen public listening sessions across the State throughout the Fall of 2008. EEA also began a series of individual stakeholder interviews reaching out to representatives of various groups that will be potentially affected by the Ocean Management Plan (OMP). Lastly, EEA set up six workgroups to examine and

identify existing conditions and propose priorities within the Ocean Planning Area. Draft summaries of the listening sessions and stakeholder interviews and the draft reports of the Work Groups can be found on the EEA website. *(full article)*

Massachusetts Appeals Court Deals Blows to Decisions under Local Wetland Bylaws

In two separate cases, the Massachusetts Appeals Court reversed decisions of local Conservation Commissions as overreaching under their local wetland protection bylaws. *(full article)*

Massachusetts Housing Appeals Committee Declines to Review Project Compliance with Federal and State Environmental Cleanup Standards

The Massachusetts Housing Appeals Committee has ruled that it has no jurisdiction over state and federal environmental issues when reviewing an affordable housing project where there is no local regulation of such issues. *(full article)*

Massachusetts Appeals Court Rules Abutters Have Standing to Appeal Based on Density Impacts

In its most recent ruling on whether abutters have standing to appeal a zoning decision under G.L. c. 40A, § 17, the Massachusetts Appeals Court concluded that the crowding of an abutter's residential property by violation of the density provisions of the zoning bylaw generally will constitute harm sufficient to establish standing. *(full article)*

National Developments

White House Calls for Review of Proposed or Recently Finalized Regulations

On January 20, 2009, the White House issued a memorandum to the heads of all executive departments and agencies, calling for the review of all proposed or final regulations that either have not been published in the Federal Register or have been published but have not yet taken effect. *(full article)*

EPA Issues Notice For Reconsideration of Agency's Denial of California Clean Air Act Waiver Request

The Environmental Protection Agency (EPA) today issued a notice for public hearing and comment in the Federal Register on the Bush administration's denial of California's application for a preemption waiver under the Clean Air Act (CAA). *(full article)*

HUD Releases Final RESPA Rule

On November 17, 2008, the Department of Housing and Urban Development ("HUD") issued its final rule on the Real Estate Settlement Procedures Act ("RESPA"). For the first time in more than 30 years, HUD has issued mortgage reforms that will require lenders and mortgage brokers to provide consumers with a standardized Good Faith Estimate disclosing key loan terms and closing costs making it easier to comparison shop among loan originators. RESPA applies to loans secured with a mortgage placed on a one-to-four family residential property. These include most purchase loans, assumptions, refinances, property improvement loans and equity lines of credit. *(full article)*

U.S. Will Likely Support Launch of Mercury Treaty Negotiations

The U.S. State Department met earlier this week with stakeholders to announce that the United States was moving to change its position and support the development of a legally binding mercury agreement at next week's United Nations Environment Program Governing Council's 25th Session in Nairobi, Kenya. *(full article)*

Bisphenol A Developments in 2008: The Year in Review

The potential health effects of bisphenol A have sparked scientific controversy for years, but in 2008 that controversy grabbed the attention of regulators, legislators, litigators, non-governmental organizations, and the general public as never before. *(full article)*

Firm News & Events

B&D Elects New Principals

Beveridge & Diamond, P.C. is pleased to announce that **Katherine T. Gates**, Washington, D.C. office, and **K. Russell LaMotte**, Washington, D.C. office, have been elected as Principals and Shareholders of the Firm.

To access this article, go to: http://www.bdlaw.com/news-news-465.html.

B&D: Proud Sponsor of Two Inaugural Balls

Beveridge & Diamond, P.C. served as an official sponsor of the National Bar Association Inaugural Ball, held at the J.W. Marriott Hotel on Sunday, January 18 and the Green Inaugural Ball, which took place at the National Portrait Gallery on Monday evening, January 19th.

To access this article, go to: http://www.bdlaw.com/news-news-463.html.

Law360 Litigation Almanac Ranks B&D Environmental Practice First in Concentration

In a survey of U.S. litigation trends released this month, Beveridge & Diamond, P.C. was ranked first in terms of having the highest concentration of environmental lawyers compared with all attorneys within a law firm. B&D was recognized as having the third largest environmental law practice in the United States, based on the number of environmental lawyers. The survey was conducted by Portfolio Media, Inc., publishers of the 2009 Law360 Litigation Almanac.

To access this article, go to: http://www.bdlaw.com/news-news-464.html.

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Massachusetts Developments

Massachusetts Issues Mandatory Greenhouse Gas Reporting Rules

On December 29, 2008, the Massachusetts Department of Environment Protection (MassDEP) issued rules imposing mandatory greenhouse gas reporting requirements on a wide range of entities. In particular, the rules require that certain facilities register with MassDEP by April 15, 2009, and report, certify, and verify emissions of greenhouse gases annually, starting with April 15, 2010. The rules implement the Massachusetts Global Warming Solutions Act, Chapter 298 of the Acts of 2008, which was signed into law in August 2008. Because they were issued as emergency regulations, they are immediately effective.

To Whom Do These Rules Apply? As required by the Global Warming Solutions Act, the rules apply to any person owning, operating or controlling a facility that either:

- is required to report emissions to the DEP under the operating permit program and had stationary sources that emitted greenhouse gases during the previous calendar year; or
- has one or more stationary sources that collectively emitted greenhouse gases in excess of 5,000 short tons during the prior calendar year.

Who Must Register by April 15, 2009? Registration is required by any person owning, operating or controlling a facility that either:

- reported air emissions under the operating permit program and combusted any quantity of any fossil fuel that resulted in direct stack emissions of carbon dioxide during 2008; or
- combusted any combination of solid, liquid, and gaseous fossil fuels that resulted in direct stack emissions of more than 5,000 short tons of carbon dioxide emissions during 2008.

Registration is a one-time requirement.

Who Must Report Annual Emissions? DEP has created two categories of entities that must report annual greenhouse gas emissions, beginning with emissions during calendar year 2009. They are:

1. Any person owning, operating or controlling a facility that is required to report emissions to the DEP under the operating permit program; and
2. Any person owning, operating or controlling a facility that is:
    - not required to report emissions to the DEP under the operating permit program, and
    - had stationary sources that collectively emitted greenhouse gases in excess of 5,000 short tons during the previous calendar year.

What Must be Reported? The Climate Registry has developed technical guidelines for quantifying and reporting greenhouse gas emissions. The regulations require reporting in accordance with The Climate Registry's General Reporting Protocol, with limited exceptions. Entities that are required to report but emitted 5,000 short tons or less of greenhouse gases during the prior year must report "direct stack emissions." This includes emissions from stacks, processes, vents, and fugitive emissions, and excludes motor vehicle emissions. Entities that are required to report and emitted more than 5,000 short tons of greenhouse gases during the prior year must report "direct emissions." This includes direct stack emissions and emissions from motor vehicles owned or leased by the person owning, operating or controlling the facility and used primarily to support operations of the facility.

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For illustrative purposes, MassDEP has supplied the following fuel usage examples to demonstrate the quantity of fuel that when combusted would emit approximately 5,000 tons greenhouse gases: 83,100,000 cubic feet of natural gas; 442,000 gallons of No. 2 fuel oil.

The first annual greenhouse gas report is due by April 15, 2010, for the 2009 calendar year. Calculations and reporting are to occur on the basis of carbon dioxide equivalents; however for the 2009 calendar year report only, MassDEP is limiting reporting to carbon dioxide emissions. Following 2009, all reporting must include carbon dioxide equivalents.

How Do You Report? DEP states that it is considering requiring reporting to The Climate Registry and other regional registries, and is seeking comment on what registry to use.

While the regulations are immediately effective, state law requires a public notice and comment period for emergency regulations. MassDEP has already proposed to make changes to the emergency regulations to clarify a number of issues. One such change would adopt a once-in-always-in requirement for annual emission reporting that would prevent facilities from reducing emissions below the reporting threshold once they are first required to report. The notice and comment period for this rulemaking, including MassDEP's proposed revisions, will end February 23, 2009.

DEP has indicated that it will in the near future propose additional regulations relating to verification, voluntary reporting, and reporting of greenhouse gas emissions by retail sellers of electricity.

For further information on climate change issues, please contact Steve Richmond at srichmond@bdlaw.com or Jeanine Grachuk at jgrachuk@bdlaw.com.

Second RGGI Greenhouse Gas Auction Successfully Completed

Under the Regional Greenhouse Gas Initiative (RGGI), ten northeastern states - including all five New England states - have committed to a regional approach to reducing greenhouse gases (GHGs) through the adoption of cap and trade programs in each state. These programs cap emissions from the largest fossil fuel fired power generation sources at their current levels, and then lower the cap 10 percent by the year 2018.

Implementation of these reductions depends upon the ability of holders of carbon allowances to "trade" those allowances, which requires the development of consistent and transparent markets for the purchase and sale of GHG allowances. Each allowance equals the right to emit one ton of carbon dioxide.

Most of the GHG allowances allocated by the ten participating states are distributed through quarterly auctions, conducted in accordance with state rules but regionalized to provide for a more orderly market. Allowances sold at these auctions are all offered by participating states - while private sales are allowed in accordance with most state rules, the auctions are a vehicle to sell only those allowances offered by the participating states.

The first auction was conducted in September of 2008, and all 12,565,387 of the offered allowances were sold, for a clearing price of $3.07 per allowance. The second auction was conducted in December of 2008, and the results were released in January. All 31,505,898 of the offered allowances were sold, for a clearing price of $3.38 per allowance. The submitted bids sought 3.5 times more allowances than were offered for sale, and the auction raised $106.5 million for use by the ten RGGI states. Most of the states have committed to use part of these proceeds to fund energy efficiency and renewable energy projects.

For more information on the RGGI auction process, please contact Steve Richmond at srichmond@bdlaw.com

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Evolving Approaches to Vapor Intrusion in Massachusetts

The Massachusetts Department of Environment Protection (MassDEP) has convened an Indoor Air Workgroup for the purpose of developing comprehensive, updated guidance for addressing sites with vapor intrusion issues. Vapor intrusion refers to the ability of volatile contaminants to move from the groundwater or soil and into the indoor air of buildings. The workgroup consists of representatives from the licensed-site-professional, risk assessment, and legal communities, along with MassDEP staff and other interested groups. Jeanine Grachuk of Beveridge & Diamond, P.C. is participating in this workgroup.

The workgroup is the most recent step in the evolution of MassDEP's approach to assessment, remediation, and closure of sites with volatile contaminants. Regulations implementing the state cleanup law, chapter 21E, have long required assessment and remediation of sites to address vapor intrusion concerns. In 2006, MassDEP made the standards addressing vapor intrusion more stringent in light of evolving data.

In 2008 MassDEP issued guidance identifying "Typical Indoor Air Concentrations" based on the detections of such contaminants in typical residential settings and the risks posed by those contaminants. MassDEP also issued draft guidance describing how such values should be used in evaluating the vapor intrusion pathway. These documents made clear that, at least for certain contaminants, any detectable level of contaminants in indoor air would require further evaluation before site closure could be achieved. Members of the regulated community became aware that MassDEP was taking an active role in directing work at many chlorinated solvent sites in the state. Finally, while regulations provide that that MassDEP should evaluate work at a site based on the standards in effect when closure is achieved, MassDEP Deputy Commissioner Janine Commerford announced that MassDEP was examining perchloroethylene sites that had been properly closed under prior standards to determine if they pose an imminent hazard. She stated that MassDEP would take action at those sites, on a "case-by-case" basis.

For further information on vapor intrusion issues in Massachusetts, or if you would like an update on workgroup discussions, please contact Jeanine Grachuk at jgrachuk@bdlaw.com.

Massachusetts DEP Shifts to Mandatory Electronic Filing for Contaminated Site Cleanup Documents

The Massachusetts Department of Environmental Protection ("MassDEP") Bureau of Waste Site Cleanup announced on February 10 that it has become the first site cleanup program in the nation to implement an all-electronic file submittal and review system. As of January 1, 2009, all documents relating to assessments and cleanups under M.G.L. c. 21E and the Massachusetts Contingency Plan must be filed electronically.

MassDEP stated that its electronic filing system, known as "eDEP," will allow any person online access to records within 10 minutes of submittal. DEP also expects the paperless system will reduce filing costs, provide a secure backup system for records, and provide easier citizen access to cleanup records without the need for in-person file reviews.

MassDEP noted that its next goal in expanding its online services is to make available electronically more than 15 years worth of previous hard-copy submittals also known as "legacy" files. DEP stated it is committed to completing the necessary scanning by July 2009.

For further information, contact Jeanine Grachuk at jgrachuk@bdlaw.com or Krista L. Hawley at khawley@bdlaw.com.

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Massachusetts Proposes New Stormwater Permitting Program

The Massachusetts Department of Environmental Protection (MassDEP) has proposed new regulations to implement a stormwater management program under which the agency would, for the first time, issue individual and general stormwater discharge permits. MassDEP does not have authorization to implement the federal NPDES wastewater permitting program and has never actively required permits for stormwater discharges. Instead, stormwater controls have customarily been addressed by local conservation commissions in the wetlands permitting process.

MassDEP has classified three quarters of the surface waters in Massachusetts as impaired and believes that 60% of the pollutants that damage surface water quality come from stormwater runoff. To address this problem, MassDEP is proposing to implement a statewide general permit program for stormwater that will apply to two classifications of private property owners:

1. Statewide, property owners with impervious areas containing at least five acres will be required to obtain general stormwater permits and to comply with good housekeeping practices or, for new developments, with more stringent standards from the Massachusetts Stormwater Handbook.

2. In areas of the state where the state has identified total maximum daily load (TMDL) concerns in receiving waters, nearby property owners with impervious areas containing at least two acres will be required to obtain general stormwater permits and to comply with more stringent control standards, including implementing best management practices (BMPs). TMDL areas identified by MassDEP notably include the Charles River watershed.

Permit requirements for property owners of existing properties anywhere in the state subject to the general permit will include the implementation of what MassDEP refers to as baseline performance standards. A stormwater team will need to be formed, and a stormwater plan will need to be developed. Team members will need to be delegated specific responsibilities for implementing the plan, and a log will need to be kept for recording actions taken to implement the plan. The plan must include standard operating procedures to conduct source control and pollution prevention measures, and at least twice per year sweeping of paved surfaces. Permit holders will be required to submit annual compliance certifications and to pay an annual fee.

Permit requirements for property owners of redeveloped properties anywhere in the state subject to the general permit will include those listed above for existing properties, and in addition antidegradation requirements, implementation of BMPs that allow infiltration of at least 40% of the required redevelopment volume, or if infiltration is not possible equivalent controls or treatment. Off-site mitigation will be permitted to meet the pollution reduction requirements if the highest practicable level of stormwater management is implemented on site.

Permit requirements for property owners of newly developed properties anywhere in the state subject to the general permit will include those listed above for existing properties, and in addition the requirements of standards 3-6 in the Massachusetts Stormwater Handbook. These include minimizing runoff through recharge, removing 80% of total suspended solids, source control and pollution prevention at some sites, and the use of specific controls in certain drinking water source areas and outstanding resource water areas. No off-site mitigation will be allowed.

Permit requirements for owners of existing properties in TMDL areas subject to the general permit will include those listed above for existing statewide properties, and in addition site improvements as necessary to meet the pollution reduction requirements for the specified surface water. Off-site mitigation will be permitted to meet the TMDL pollution reduction requirements if the highest practicable level of stormwater management is implemented on site.

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Permit requirements for owners of redeveloped properties in TMDL areas subject to the general permit will include those listed above for redeveloped statewide properties, and in addition site improvements as necessary to meet the pollution reduction requirements for the specified surface water. Off-site mitigation will be permitted to meet the TMDL pollution reduction requirements if the highest practicable level of stormwater management is implemented on site.

Permit requirements for owners of newly developed properties in TMDL areas subject to the general permit will include those listed above for newly developed statewide properties, and in addition site improvements as necessary to meet the TMDL pollution reduction requirements for the specified surface water. Off-site mitigation will be permitted only to meet the TMDL pollution reduction requirements if the highest practicable level of stormwater management is implemented on site.

Some of the issues that may prove controversial in the proposed rules include the following:

A. Aggregation. To determine whether a site contains the minimum impervious acreage necessary to fall under the rule (two acres or five acres), the rule proposes that contiguous lots should be aggregated if there is a common stormwater management system or shared arrangements for the operation, maintenance or use of the impervious surfaces. Shared arrangements sufficient to require aggregation include snow removal, landscaping and parking.

B. Redevelopment. To determine whether a site has been redeveloped such that the permit requirements may be invoked, MassDEP has proposed to define redevelopment to include reconstruction, rehabilitation, repair or improvement of a roof that results in the substantial improvement of a building or structure. MassDEP explains in commentary that substantial improvement means that the work by itself or together with other work increases the fair market value of the building by more than 50%. Redevelopment may also include repair or improvement of 5,000 or more square feet, or at least five percent of a paved surface.

C. Timing. Due to expected costs of pollution reduction requirements in TMDL areas, MassDEP has proposed that existing properties will have ten years to install structural stormwater controls to meet TMDL pollution reduction requirements.

Written comments on the proposal are being accepted through March 11, 2009. For more information about the proposed Massachusetts stormwater permitting program, please contact Stephen Richmond at srichmond@bdlaw.com.

Third Annual New England Construction and Demolition Materials Summit Leads to Agreement on Action Steps By Industry, Government and End Users

On January 16, 2009, the Environmental Business Council of New England held its Third Annual Construction and Demolition Materials Regional Summit in Westborough, Massachusetts. Beveridge & Diamond, P.C. was the Platinum Sponsor of this event and Steve Richmond, Shareholder at Beveridge & Diamond, served as the conference chair and moderator.

Approximately 175 people participated in the summit from throughout New England, representing construction and demolition material (C&D) generators, C&D processors and recyclers, C&D material purchasers, federal, state and municipal government officials, trade association representatives, consultants, and other interested parties.

The summit began with a keynote address from Commissioner Laurie Burt of the Massachusetts Department of Environmental Protection (MassDEP), who spoke of

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the growing regionalization of the C&D market and the efforts that MassDEP was undertaking to expand both the supply and the demand for C&D materials.

The keynote address was followed by presentations that were structured to include several components:

- An overview of construction and demolition (C&D) market data for the New England Region;
- Focused discussions of specific C&D material streams, including the opportunities for developing more robust markets for these streams, and the barriers that exist to achieving those markets; and
- A concluding action agenda discussion in which participants were asked to develop and commit to specific action plans that could be implemented over the next year to pursue market development and overcome identified barriers.

The following action items were developed at the summit for pursuit during the coming calendar year and efforts have begun already to implement these items. We hope to review progress on each item at the next annual C&D regional summit in 2010.

Asphalt Shingles

1. A group comprised of representatives of asphalt manufacturers, processors and recyclers will seek a meeting with Commissioner Luisa M. Paiewonsky of the Massachusetts Highway Department, seeking a commitment from MassHighway to agree to specifications that allow the use of some recycled material in asphalt used in state highway construction and repaving. Ben Harvey, of E. L. Harvey & Sons, Inc., agreed to coordinate this approach.
2. MassDEP agreed to review the asbestos testing requirements at facilities that recycle asphalt shingles to determine whether those requirements are consistent with the level of risk that has been identified and the testing requirements imposed in similar operations. Jim Colman, of MassDEP, agreed to coordinate this review.

Gypsum Wallboard

1. A group will be convened by the recycling industry to approach Commissioner David Perini of the Massachusetts Division of Capital Asset Management (DCAM), seeking a commitment to require recycled content in gypsum wallboard used for state construction projects. MassDEP will separately explore opportunities for use of recycled content with DCAM.

   No coordinator was identified for the recycling industry portion of this activity. Volunteers are requested. Jim Colman, of MassDEP, agreed to coordinate the MassDEP portion of this activity.
2. A meeting among interested parties and MassDEP will be held on the advisability of expanding the disposal ban to include clean gypsum wallboard. Jim Colman, of MassDEP, agreed to coordinate this activity.
3. MassDEP will initiate a discussion, within the context of the state's solid waste master plan revisions, of the advisability of requiring source separation at certain construction/ demolition sites. Jim Colman, of MassDEP, agreed to coordinate this activity, and Bob Petrucelli, of Associated General Contractors of Massachusetts, agreed to actively participate on behalf of his membership

For more information on the Third Annual Construction and Demolition Materials Summit, please contact Steve Richmond at srichmond@bdlaw.com.

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Ocean Management Act Status Report

On May 28, 2008, Massachusetts enacted the first in the nation Ocean Management Act. *See* Chapter 114 of the Acts of 2008 (the "Act"). The Act became effective on August 26, 2008. The legislation requires the development of a comprehensive management plan for virtually all of the State controlled waters of Massachusetts by December 31, 2009. To that end, the Executive Office of Energy and Environmental Affairs ("EEA") held eighteen public listening sessions across the State throughout the Fall of 2008. EEA also began a series of individual stakeholder interviews reaching out to representatives of various groups that will be potentially affected by the Ocean Management Plan ("OMP"). Lastly, EEA set up six workgroups to examine and identify existing conditions and propose priorities within the Ocean Planning Area. The workgroups were established to examine habitat; fisheries; transportation, navigation and infrastructure; sediment; recreation and cultural services; and renewable energy. Draft summaries of the listening sessions and stakeholder interviews and the draft reports of the Work Groups can be found on the EEA website.

Public Listening Sessions

Public listening sessions were held in eighteen communities across the State and attracted participation by more than 350 people. The goals of these sessions were to inform the public about the Act and to solicit public comment and input on the development of the OMP. Comments from the listening sessions have been compiled into a draft "Summary of Issues" found on the EEA website. The summary broadly organizes the comments into the following categories: Economy; Energy; Species and Habitats; Navigational Safety; Public Trust; Research Uses; Hazards; and other uses. In addition to comments on specific uses, speakers also addressed the planning process and vocalized an expectation that the OMP would result in a balance of the very diverse interests of the ocean users. Among the participants the issues raised most often were: wind energy siting; fishing industry interests; protection of unique, sensitive or threatened species; coordination among jurisdictions; continued citizen engagement; public trust and an eco-system based approach to the OMP.Stakeholder Interviews

At the same time the public listening sessions were being held, EEA began to hold individual meetings with representatives of stakeholder groups with potential interests in the OMP. According to the "Preliminary Stakeholder Interview Summary Report," interviewees were selected to encompass a diversified group of ocean users and included members of the following groups: government entities including local, state, federal and tribal representatives; ocean resource users, including representatives of fishing, tourism, energy, navigation, recreation, research, and marine trades; and non-governmental organizations including trade associations, conservation groups, community advocacy groups, consultants and watershed protection organizations. Many of the same issues that stood out in the public listening sessions as priorities were also raised by the stakeholders. Among those were alternative energy project siting; protection of unique, sensitive or threatened species; coordination among jurisdictions; protection of the fishing industry and the public trust.

Establishment of Work Groups

Lastly, EEA has established Work Groups to investigate examine and identify existing conditions and propose priorities within the Ocean Planning Area. The Work Groups membership consists of State agency staff and private parties. Each of the Work Groups has issued a draft report which will provide valuable information in the preparation of the final OMP.

Summary

The planning process for the establishment of the OMP is well on its way. The Act set an ambitious time line and EEA appears intent upon complying with the Legislature's dictates. The first deadline is fast approaching. Pursuant to the Act, at least six months before establishing an OMP, EEA must provide public access to the draft plan. Since

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the deadline for the final plan is December 31, 2009, a draft plan is required by July 2009.

For more information on the Ocean Management Act, please contact Deborah Eliason at deliason@bdlaw.com.

Massachusetts Appeals Court Deals Blows to Decisions under Local Wetland Bylaws

In two separate cases, the Massachusetts Appeals Court reversed decisions of local Conservation Commissions as overreaching under their local wetland protection bylaws.

In one case, the Appeals Court ruled that the Lexington Conservation Commission had applied a heightened burden of proof in its rules and regulations that was not permitted under the bylaws. In *Conroy v. Conservation Commission of Lexington,* 73 Mass. App. Ct. 552 (2009), the applicant sought to construct a single-family house on an undeveloped lot in Lexington bisected by an intermittent stream. The applicant proposed to locate a house in the 50-foot buffer zone protected under the local wetland protection bylaw. The Commission denied the project under its local bylaw. The applicant appealed the adverse decision to the Superior Court, which reversed the Commission's decision. The Commission appealed that decision to the Appeals Court.

Although the bylaw provides that the applicant has the burden of proving by "a preponderance of the credible evidence" that the proposed work in the buffer zones would not harm interests protected by the bylaw, the rules and regulations promulgated by the Commission, supplemented with a commentary, hold the applicant to a tougher "clear and convincing standard" in determining whether to approve reductions in the buffer zone. Although acknowledging the Commission's power to promulgate rules and regulations to effectuate the purposes of the bylaw, and that deference was due to the Commission on its reasonable interpretation of its own bylaw, the Appeals Court found that the more stringent "clear and convincing" burden of proof used by the Commission in its rules conflicted with the lesser "preponderance of the credible evidence" standard that the town's legislative body had promulgated and authorized.

The applicant did not get the whole result sought, however. Despite the applicant's request that the Appeals Court simply apply the correct "preponderance of the evidence" standard rather than remand the case to the Commission for further hearings, the Appeals Court opined that reversal was not necessarily required under that standard because the Commission relied, at least in part, on a publication concerning forest buffers in the Chesapeake Bay. The Court dismissed the applicant's argument that this publication was inapplicable, saying "[c]ommon sense suggests, at least until demonstrated otherwise, that trees function in the same way in Lexington as they do in the Chesapeake Bay Area, which stretches from New York to Virginia." *Id.* at 562-563.

In a second case, the Appeals Court upheld a trial court decision in which the judge had determined that the evidence was "overwhelmingly" contrary to the Commission's determination that the applicant had failed to meet its burden of proof. In *Pollard v. Conservation Commission of Norfolk*, 73 Mass. App. Ct. 340 (2008), the applicant proposed to construct a single-family house on a property in Norfolk in which 97 percent of the property is subject to wetland regulation under the state wetland protection act and/or local wetland bylaw.

The applicant submitted to the Commission considerable unrebutted expert evidence through an environmental consulting and engineering firm. The expert opined that the project would have "no impact" on the ability of the buffer zone to protect the interests protected by the bylaw and "fully complie[d]" with the requirements of the bylaw. Through the consultant, the applicant provided a detailed discussion of the wetland functions and an individualized assessment of the impact of the proposed work on six specific wetland values and discussed the substantial mitigation efforts proposed. No other party, including the Commission, presented any evidence. Despite the uncontradicted evidence, the Commission issued an order of conditions denying

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permission for the project under its local bylaw, finding that the applicant had not satisfied its burden to demonstrate that the project would not impact the buffer zones. The applicant appealed the Commission's decision to the Superior Court, which overturned the Commission's denial. The Commission appealed the Superior Court's decision.

The Commission argued that it was entitled to determine the probative value of evidence before it. The Appeals Court did not disagree, noting that the Commission is not required to credit the opinion of an expert, even if it is uncontradicted. However, the Appeals Court stated instead that the question was really whether the Commission determined the probative value of evidence in accordance with established legal principles.

The Appeals Court found that the Commission's findings were insufficient to allow the Court to make a determination on whether it had complied with established legal principles and that the Commission failed to clarify the issue on appeal by identifying anything in the record to explain its rejection of the appellant's evidence or the deficiencies it alleged with the evidence in the decision. The Commission's mere statements that the evidence was "not credible" and that the applicant "failed to sustain their burden," were "not credibility determinations that are entitled to deference." *Id*. at 351. The Appeals Court concluded that the "commission's choice has left us unable to determine with any reasonable degree of certainty that its decision was arrived at with fairness and without predisposition." *Id*. The Appeals Court affirmed the decision of the Superior Court overturning the Commission's decision.

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

Massachusetts Housing Appeals Committee Declines to Review Project Compliance with Federal and State Environmental Cleanup Standards

The Massachusetts Housing Appeals Committee ("HAC") has ruled that it has no jurisdiction over state and federal environmental issues when reviewing an affordable housing project where there is no local regulation of such issues. *Green View Realty, LLC v. Zoning Board of Appeals of Holliston*, No. 06-16 (HAC, January 12, 2009).

In this case, the developer proposed to build 200 affordable, mixed-income condominium units on a 53-acre site in Holliston. The Zoning Board of Appeals (the "ZBA") denied the comprehensive permit in part based on concerns regarding the remediation of the site. The HAC addressed numerous issues in its decision ordering the ZBA to issue the requested comprehensive permit, including those related to the cleanup of contamination on the site stemming from illegal, unsupervised dumping that occurred on the property beginning in the 1960s.

Both the U.S. Environmental Protection Agency and the Massachusetts Department of Environmental Protection had investigated and assessed contamination at the site; more than 300 drums, thousands of tires, debris, and more than 70 tons of contaminated soil had been removed. The developer proposed to complete remediation of the site in conjunction with the construction of the housing project, transporting hazardous and recyclable materials off site, monitoring and treating groundwater as necessary, and consolidating non-hazardous waste and existing fill into a smaller sealed and capped disposal area.

Because considerable further assessment and design remained before a "permanent solution" could be achieved, the ZBA asserted the developer had failed to satisfy its burden of establishing a *prima facie* case that its proposal complied with applicable environmental standards. The HAC noted that, in fact, the work already done on the site, which included a conceptual remedial plan, would be sufficient to satisfy this burden. However, the HAC concluded that it need not reach the question of whether the developer established a *prima facie* case as to the remediation issues because the

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Holliston zoning bylaw does not regulate the remediation activity proposed.

The HAC noted that under the structure of the comprehensive permit law, its focus is on local concerns and there is nothing in Massachusetts General Laws, Chapter 40B, to indicate it should consider environmental issues raised under federal and state law. In fact, the HAC stated it has no authority to hear a dispute as to whether a developer is adhering to state or federal law. Only where a municipality has distinct local regulations that parallel state law may issues raised under local requirements may be considered.

The ZBA asserted its local bylaw did regulate consolidation of a landfill and in fact prohibited such activities on the site. The HAC reviewed the bylaw provisions cited by the ZBA in detail before concluding that the bylaw intended to regulate new landfills and not remediation activities.

Because consolidation of the landfill, remediation and other activities were not regulated under the local bylaw, the HAC concluded they were not properly at issue and therefore not a basis for denial of the comprehensive permit.

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

Massachusetts Appeals Court Rules Abutters Have Standing to Appeal Based on Density Impacts

In its most recent ruling on whether abutters have standing to appeal a zoning decision under G.L. c. 40A, § 17, the Massachusetts Appeals Court concluded that the crowding of an abutter's residential property by violation of the density provisions of the zoning bylaw generally will constitute harm sufficient to establish standing. In *Dwyer v. Gallo*, 73 Mass. App. Ct. 292 (2008), the Court reversed a ruling of the lower court and concluded that abutters of two undersized lots proposed to be developed with single-family homes had standing to appeal the grant of two special permits permitting such development.

The applicant in Dwyer secured two special permits to allow him to construct two homes on adjacent, undersized lots and two abutters appealed the decision, asserting that the two lots had merged for zoning purposes. On review, the Superior Court concluded that the abutters did not have standing to pursue their appeal. Applying the familiar rubric of *Standerwick v. Zoning Board of Appeals*, 447 Mass. 20 (2006), the Court found that while the abutters enjoyed a presumption that they were persons "aggrieved" for the purposes of establishing standing, the applicant had rebutted that presumption with evidence on issues such as impact to the abutters' property value. The lower court found that the abutters were unable to establish standing without the benefit of that presumption.

The Appeals Court reversed the decision on standing, concluding that the abutters had established they were persons aggrieved based on the incremental increase in density posed by the construction of the two homes in close proximity to their own. The parties live in a neighborhood that is more dense than allowed by current zoning, and courts have recognized an abutter's legal interest in preventing further construction in that context. Moreover, the bylaw specifically included in its purposes the prevention of overcrowding of land and undue concentration of population. As a result, the Appeals Court concluded the abutters' concern regarding density therefore was a legal interest protected by the bylaw and a proper basis for standing.

The Court noted that such a concern was not a general civic interest in the enforcement of the bylaw – which is insufficient to establish standing – but specific to the abutters based on their proximity to the proposed construction and resulting impacts such as loss of privacy. The Court concluded that density concerns "are directly protected by the zoning scheme at issue, and the articulated effects on the Dwyers' privacy and use and enjoyment of their property constitute sufficient direct harm to confer standing on them."

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Having established standing, the Court found that the two lots at issue had in fact merged because they had been held in common ownership and therefore the special permits were granted improperly. The lots were created through a 1937 subdivision plan, which predated the 1956 adoption of the local zoning bylaw. The lots had been held in common ownership since at least 1945. The Court found there was no clear language in the bylaw indicating an intent to eliminate the application of the merger doctrine to lots that were created prior to the adoption of the zoning bylaw. Therefore, the two undersized lots were considered merged for zoning purposes and the special permits.

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National Developments

White House Calls for Review of Proposed or Recently Finalized Regulations

On January 20, 2009, the White House issued a memorandum to the heads of all executive departments and agencies, calling for the review of all proposed or final regulations that either have not been published in the Federal Register or have been published but have not yet taken effect. This request was one of the first steps in implementing President Obama's plan for managing the Federal regulatory process. The White House stressed, however, that this request did not apply to any regulations that affect critical health, safety, environmental, financial, or national security matters, or are subject to statutory or judicial deadlines. A printable PDF of this memorandum, is available at http://www.bdlaw.com/assets/attachments/emanuel-regulatory-review[1].pdf

On January 21, 2009, the Office of Management and Budget ("OMB") clarified the previous memorandum's required treatment of regulations that have been published in the Federal Register but not yet taken effect. This memorandum instructed department and agency heads to "consider" postponing for a period of 60 days -- not indefinitely -- the effective dates of those regulations that raise "significant concerns involving law or policy." The second memorandum further instructed that, if a department or agency head chooses to extend an effective date, he or she should "promptly" provide a 30-day period for public commenting about that extension and the rule in question, and then make a "fair evaluation." A printable PDF of this memorandum is available at http://www.whitehouse.gov/omb/asset.aspx?AssetId=424.

In addition to these memoranda, the Obama Administration has performed an apparently wholesale withdrawal of all non-final regulatory initiatives undergoing review by the OMB, pursuant to Executive Order 12866 (September 30, 1993). For a detailed list of all initiatives of the Environmental Protection Agency ("EPA") that were under review by, and for the most part withdrawn from, the OMB in the last week, as well as those initiatives of other departments and agencies, please go to http://www.reginfo.gov/public/do/eoReviewSearch;jsessionid=0a65171430d65659b8aef90e4a0b813d9d6d8e8f7217.e38Nch4NbhuNa40LbN8Tb3aKa38Le6fznA5Pp7ftolbGmkTy and insert the name of the department or agency of interest in the box labeled "Regulatory Review Completed in Last 30 Days."

These actions by the Obama Administration seem designed to ensure that no regulatory initiative originating in the last administration is proposed or finalized prior to review by the new administration's incoming appointees. For further information on these developments please call or e-mail Richard Davis in our Washington, D.C. office at (202) 789-6025 or rdavis@bdlaw.com. This alert was prepared with the assistance of Heidi Price.

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EPA Issues Notice For Reconsideration of Agency's Denial of California Clean Air Act Waiver Request

The Environmental Protection Agency (EPA) today issued a notice for public hearing and comment in the Federal Register on the Bush administration's denial of California's application for a preemption waiver under the Clean Air Act (CAA). The waiver would allow the state to set strict automobile greenhouse gas emission and fuel efficiency standards. EPA's notice follows President Obama's January 26, 2009 executive order directing the agency to revisit its prior denial of California's waiver request. For more detail on the waiver application, EPA's prior denial of the waiver, and Obama's executive order, see http://www.bdlaw/news-news-468.html.

President Obama's executive order last week directed EPA to reconsider its prior denial of the waiver. Language in EPA's notice suggests the agency is leaning toward overturning the denial. It states, "EPA believes that there are significant issues regarding the Agency's denial of the waiver. The denial was a substantial departure from EPA's longstanding interpretation of the Clean Air Act's waiver provisions and the history of granting waivers to California for its new motor vehicle emission program." The notice goes on to note that many parties, members of Congress, scientists, and other stakeholders have raised concerns about the denial of the waiver. A copy of the notice can be accessed at www.bdlaw.com/assets/attachments/EPA_CA_Waiver_Notice_(2_6_09).pdf.

EPA's notice will disappoint the State to some degree though, as EPA did not do as California Air Resources Board Chair Mary Nichols had suggested in a January 21 letter to EPA Administrator Lisa Jackson and skip a public hearing on the waiver request. Rather, in accordance with CAA Section 209(b)(1)'s requirement of "notice and opportunity for a public hearing," the EPA notice provides for a 60-day comment period and a public hearing to be held in Washington, DC on March 5, 2009. Interested parties should take advantage of the opportunity to participate in the public process on this issue. EPA will accept written comments on the waiver request until April 6, 2009.

EPA's notice leaves at least two major issues unresolved that may pose significant hurdles to the agency overturning its prior waiver denial. (These issues are described in more detail in B&D's January 27, 2009 Client Alert). First, for EPA to reverse its prior decision, it will have to develop a legal rationale for a complete reversal of its prior legal analysis. It is unclear how EPA can justify reversing its prior legal analysis if it ultimately grants the waiver request.

Second, it is not clear how EPA's reconsideration of the waiver will affect or be reconciled with California's pending lawsuit in the U.S. Court of Appeals for the District of Columbia (*California v. E.P.A.*, appeal docketed, No. 08-1178 (D.C. Cir. May 5, 2008)). That case, brought by California to challenge former EPA Administrator Stephen Johnson's denial of the waiver request, has been briefed, and the decision to dismiss or remand it to the district court at this point lies solely with the Court of Appeals and not the parties. As of today, the parties have not filed a motion to stay or remand the case.

Interestingly, the court issued an order yesterday granting a motion to extend the time for reply briefs and revising the schedule that has the last brief filed in early April. The government defendants may request a stay of the case based on EPA's reconsideration process, but it is unclear how the court would view such a request. It may come down to whether and how the automobile industry, which has been granted intervenor party status, responds. The government and automakers may use the reconsideration process and pending litigation as an opportunity to structure a compromise, one which may be tied to the anticipated federal bail-out legislation.

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HUD Releases Final RESPA Rule

On November 17, 2008, the Department of Housing and Urban Development ("HUD") issued its final rule on the Real Estate Settlement Procedures Act ("RESPA"). The new rule is available at http://www.hud.gov/offices/hsg/sfh/res/finalrule.pdf. For the first time in more than 30 years, HUD has issued mortgage reforms that will require lenders and mortgage brokers to provide consumers with a standardized Good Faith Estimate ("GFE"), available at http://www.hud.gov/offices/hsg/sfh/res/gfestimate.pdf, disclosing key loan terms and closing costs making it easier to comparison shop among loan originators. RESPA applies to loans secured with a mortgage placed on a one-to-four family residential property. These include most purchase loans, assumptions, refinances, property improvement loans and equity lines of credit.

The goals of the new HUD rule are as follows: (i) provide more accurate estimates of costs of settlement services shown on the GFE; (ii) improve disclosure of yield spread premiums; (iii) facilitate comparison of the GFE and the HUD-1/HUD-1A Settlement Statements (HUD-1 can be downloaded at www.hud.gov/offices/hsg/sfh/res/hud1.pdf and HUD-1A at http://www.hud.gov/offices/hsg/sfh/res/hud1-a.pdf ; (iv) ensure that at closing borrowers are aware of final costs of their particular mortgage loan and transaction; (v) clarify HUD–1 instructions;(vi) expressly state that RESPA permits the listing of an average charge on the HUD–1; and (vii) strengthen the prohibition against requiring the use of affiliated businesses.

Under the new rule, HUD will require mortgage lenders and brokers to provide borrowers with a three-page Good Faith Estimate, including a summary of the loan, escrow account information and a summary of settlement charges. The standardized GFE includes a "trade-off table", which will allow borrowers to compare similar loans with different settlement charges and interest rates. Lenders have the option of filling out this table. The third page also includes a "shopping chart," which will allow the borrower to compare loans offered by different originators. Lenders and brokers will also be required to use the new HUD-1 form.

Although certain sections of the law took effect on January 16, 2009, the new standardized GFE and revised HUD-1 will not be required until Jan. 1, 2010. These forms may be used any time before then, however.

For more information on the final RESPA rule, please contact Deborah Eliason at deliason@bdlaw.com.

U.S. Will Likely Support Launch of Mercury Treaty Negotiations

The U.S. State Department met earlier this week with stakeholders to announce that the United States was moving to change its position and support the development of a legally binding mercury agreement at next week's United Nations Environment Program ("UNEP") Governing Council's 25th Session in Nairobi, Kenya. Among other matters, the Governing Council will decide whether to initiate negotiations on a mercury treaty at the meeting. State Department officials indicated that the United States would likely support the initiation of a new negotiating process with the goal of completion of an agreement by late 2011 or 2012. The negotiation could involve significant attention to risk-mitigation measures applicable to mercury-containing products of interest to the IT and electronics sector.

UNEP has been working for several years on developing a new framework for international controls on mercury. Until the recent change in Administration, the U.S. government had strongly advocated for voluntary initiatives instead of a binding treaty. The shift in the U.S. position to support the formation of a mercury treaty will align the United States more closely with tradition supporters of a new binding agreement, such as the EU. The EU in particular has long pushed for a new agreement on mercury as well as other heavy metals. As a result, the EU will push for a inclusion of a mechanism that would allow expansion of the treaty's scope to include other heavy metals.

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U.S. officials, however, indicate that the United States will oppose a broader "adding mechanism," and will instead take the position that the treaty should focus exclusively on mercury given its unique capabilities to travel long distances in the environment. At the same time, the U.S. delegation will call for the treaty to be comprehensive with respect to all source categories for mercury.

U.S. officials explicitly indicated their intent that the treaty mandate would include within its scope specific provisions focusing on mercury in products, although they stated

that the treaty should include different types of control measures for different source categories. This focus on products, despite their relatively small contributions of mercury into the environment compared to other source categories, is in part a reflection of the fact that more significant source categories of mercury deposition, such as fossil fuel combustion, are more politically contentious and will take more time to address. Work on mercury in products could mirror the various mercury-related restrictions emerging at the local, state and national levels in many jurisdictions, including content limits, product bans and phase-outs.

It remains to be seen whether other key countries, including China and India, will support the initiation of a new treaty next week. If they do, a UNEP mercury treaty would potentially have significant impacts on electronic products containing mercury, primarily because decisions at the multilateral level on mercury will in turn drive national-level regulatory proceedings. It would also provide the EU and other like-minded countries with a forum to press for greater controls on the life-cycle management of chemicals and heavy metals in products. Finally, the new U.S. position on mercury may signal the beginning of a broad shift in U.S. policy, both domestically and internationally, regarding product regulation more generally.

For background documents, see: http://www.unep.org/gc/gc25/working-docs.asp.

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Bisphenol A Developments in 2008: The Year in Review

The potential health effects of bisphenol A ("BPA") have sparked scientific controversy for years, but in 2008 that controversy grabbed the attention of regulators, legislators, litigators, non-governmental organizations, and the general public as never before. The attached article reviews the highlights of the 2008 BPA developments and provides some thoughts about developments expected in 2009.

BPA is a monomer used to manufacture polycarbonate, a hard plastic with many applications, but in 2008 it was best known for use in baby bottles and sports bottles. BPA also is used to manufacture epoxy resins, the protective linings on the inside of food cans. Under some conditions, low levels of BPA can leach out of polycarbonate and epoxy into the contents of the food container, resulting in human exposure.

The BPA controversy revolves around the significance of "low-dose" studies indicating that the chemical may cause adverse health effects at exposure levels orders of magnitude below levels determined to be safe using traditional toxicological methods. Until 2008, no national governmental agency had sufficient confidence in these low-dose studies to express concern about BPA exposures in people. That changed in 2008, and with that change the level of public concern about BPA skyrocketed. FDA became a particular center of attention. The new Congress and Administration may change the approach FDA took in 2008 with respect to BPA.

The full summary can be found at http://www.bdlaw.com/news-461.html.

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