Massachusetts Environmental and Land Use Alert

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Massachusetts Developments

Expansion of the Massachusetts' Lobbying Law May Catch Many Unaware

Effective January 1, 2010, who qualifies as a lobbyist and what must be reported by each lobbyist under the state lobbying law have been substantially expanded. We believe that many individuals who do not consider themselves lobbyists may be subject to this expanded rule. Further, the clients of these individuals may find that sensitive information must be publicly reported. *(full article)*

Deadline Approaches For First Time Massachusetts Greenhouse Gases Reports

Many facilities in Massachusetts will be required to submit first-time annual greenhouse gas inventory reports to the Massachusetts Department of Environmental Protection (Mass DEP) by April 15, 2010. This annual reporting requirement was established under M.G.L. c. 21N, the Climate Protection and Green Economy Act, St. 2008, c. 298, §6, and by Mass DEP regulations adopted in 2009 at 310 CMR 7.71.*(full article)*

Massachusetts DEP Announces Online Availability of Paper Files relating to Contaminated Sites

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The Massachusetts Supreme Judicial Court has ruled that appeals challenging the certification of an environmental impact report for a private project under the Massachusetts Environmental Policy Act, G.L. c. 30, §§ 61-62I, must be filed within thirty days of "at the very least, …the issuance of the first permit issued from those listed in the [Final] EIR" regardless of whether the first permit is related to the subject matter of the appeal or publicly noticed. (*full article*)

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In a public meeting held January 27, 2010, the Securities and Exchange Commission ("SEC") voted 3-2, along party lines, to issue guidance clarifying that existing SEC rules require publicly-held companies to disclose material climate-related information. *(full article)*

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The U.S. Environmental Protection Agency recently announced its intention to establish regulations governing stormwater from newly developed and redeveloped properties that could impose significant new requirements on a broad group of stakeholders. *(full article)*

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Other News

Stephen Richmond Elected to Board of Directors of Sudbury Valley Trustees

Beveridge & Diamond, P.C. is pleased to announce that Stephen Richmond has been elected to the Board of Directors of the Sudbury Valley Trustees. Mr. Richmond is the Managing Principal of the Firm's Massachusetts office. *(full article)*

Previous Issues of the Massachusetts Environmental and Land Use Alert

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What is Lobbying?

The definition of lobbying under the revised law is convoluted and this alert does not describe every element; however, at its core, lobbying of the executive branch includes actions to influence decisions of certain officers or employees where such decisions concern legislation or the adoption, defeat or postponement of rules or regulations, or communications with certain officials to influence a decision concerning policy. Lobbying includes not only actual communications with government employees, but also includes strategizing, planning, and research if performed in connection with or for use in such communications. Exemptions include participation in advisory committees or task forces, activities in compliance with written agency procedures regarding evidentiary proceedings, and responding to requests for

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information.

A person who performs limited lobbying work may be exempt if the work is "simply incidental" to his or her usual work. To qualify, the lobbying must be limited to 25 hours during any reporting period (every six months), and the individual must receive less than $2500 compensation for that work. In applying this exemption, it is not clear what the "compensation" for lobbying activities is for an individual that is a salaried professional who is volunteering for a nonprofit organization. Since research and strategy are included as part of lobbying efforts, for many it will be difficult to qualify for the "simply incidental" exemption.

What must be Reported?

The previous law generally required each lobbyist to report, for each reporting period, campaign contributions; gifts, meals, entertainment and other expenses incurred in the course of lobbying activities; and all bill numbers that the lobbyist worked to influence if the bill number was identified during that work.

Under the revised law, the lobbyist will need to disclose what items he or she was attempting to influence, for whom the work was being done, and the position taken. For attorneys and their clients, be wary, as this may require disclosure of otherwise privileged information.

In particular, the revised law expands these reporting requirements to require disclosure of:

1. each client for whom lobbying services were provided;
2. all bill numbers and names of legislation and other governmental action that the lobbyist acted to promote, oppose or influence;
3. the lobbyist's position, if any, on each such bill or other governmental action;
4. the client or clients on whose behalf the lobbyist was acting with respect to each such bill or governmental action;
5. the amount of compensation received for lobbying services from each client; and
6. "all direct business associations with public officials."

For further information, contact Jeanine Grachuk at jgrachuk@bdlaw.com.

Deadline Approaches For First Time Massachusetts Greenhouse Gases Reports

Many facilities in Massachusetts will be required to submit first-time annual greenhouse gas inventory reports to the Massachusetts Department of Environmental Protection (Mass DEP) by April 15, 2010. This annual reporting requirement was established under M.G.L. c. 21N, the Climate Protection and Green Economy Act, St. 2008, c. 298, §6, and by Mass DEP regulations adopted in 2009 at 310 CMR 7.71.

The reporting requirements apply to any entity owning, operating or controlling a facility that either:

> (i) emitted any amount of regulated greenhouse gases during calendar year 2009 and is otherwise required to report emissions to Mass DEP under the major source air operating permit program (Title V Program), administered in Massachusetts pursuant to 310 CMR 7.00, Appendix C; or
>
> (ii) emitted greenhouse gases in calendar year 2009 from one or more stationary sources in an amount of at least 5,000 tons of carbon dioxide equivalents.

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Reporting is required only for the emissions of the following greenhouse gases: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride. Carbon dioxide equivalents are established in a protocol published by The Climate Registry, a non-profit greenhouse gas standard setting organization.

For those entities required to report, Mass DEP has adopted the calculation methodologies established in a general reporting protocol issued by The Climate Registry in 2008 and updated in 2009. The methodologies can be found at the following link: http://www.theclimateregistry.org/resources/protocols/general-reporting-protocol/.

In many cases the calculation methodologies adopted by Mass DEP vary from those adopted for greenhouse gas reporting under the new federal reporting rule, 40 CFR Part 98, and therefore it is important that facilities required to report under both rules carefully review the differences. The federal rule applies to facilities in specified source categories with annual greenhouse gas emissions of at least 25,000 tons of carbon dioxide equivalents, covering a wider range of greenhouse gases. The first annual reports under the federal program are not due until 2011.

For further information on greenhouse gas reporting, please contact Stephen Richmond at srichmond@bdlaw.com.

Massachusetts DEP Announces Online Availability of Paper Files relating to Contaminated Sites

The Massachusetts Department of Environmental Protection (MassDEP) announced that it is making available online all public documents relating to the 40,000 sites reported under the state cleanup program since 1987. This includes hard-copy reports submitted to DEP and related correspondence prepared by DEP, but excludes non-public information such as private financial or enforcement-senstive information.

As of January 1, 2010, MassDEP has scanned most of these files, and has begun uploading these files onto the MassDEP website. MassDEP's goal is to post all the files online by the middle of 2010. Reports filed after January 1, 2009 are required to be submitted electronically, and are available on the MassDEP website almost immediately.

More information is available on the MassDEP website at http://www.mass.gov/dep/service/online/filerev.htm. For further information, please contact Jeanine Grachuk at jgrachuk@bdlaw.com.

Massachusetts SJC Defines Trigger for MEPA Appeal Period

The Massachusetts Supreme Judicial Court (the "SJC") has ruled that appeals challenging the certification of an environmental impact report ("EIR") for a private project under the Massachusetts Environmental Policy Act, G.L. c. 30, §§ 61-62I ("MEPA"), must be filed within thirty days of "at the very least, …the issuance of the first permit issued from those listed in the [Final] EIR" regardless of whether the first permit is related to the subject matter of the appeal or publicly noticed. The Court left open the question of whether such claims must be brought within thirty days of the first issuance of any permit regardless of its inclusion in the Final EIR.

For larger private projects that trigger MEPA review, the project proponent files an environmental notification form ("ENF") with the Secretary of the Executive Office of Energy and Environmental Affairs (the "Secretary") prior to receiving any permits or approvals from state agencies. The Secretary then determines whether the project requires a more in-depth environmental impact report ("EIR"). After public notice and a public review period, the Secretary issues a final statement as to whether the Final EIR ("FEIR") complies with MEPA. State agencies generally issue permits for projects after FEIR approval. Challengers to the Secretary's certification of a FEIR for a private project must commence suit no more than thirty days after "the first issuance of a permit." G.L.

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c. 30, § 62H.

In *Town of Canton v. Commissioner of the Massachusetts Highway Department*, SJC-10431 (Jan. 19, 2010), the Town of Canton (the "Town") sought to challenge the FEIR submitted by developers of the Westwood Station project on the basis of adverse traffic impacts. Westwood Station submitted a draft EIR in January 2007 and a FEIR in September 2007. The Town commented on the traffic issues in both EIRs and the Secretary issued the certification of the FEIR on November 1, 2007. As required by MEPA, the Town filed a written notice of its intent to challenge the certification of the FEIR in court based on its traffic concerns, but filed no lawsuit since no "permit" had issued triggering the thirty-day limitations period. In January 2008, however, the Department of Environmental Protection ("DEP") did issue a sewer connection permit for the project which was listed in the FEIR (the "DEP Permit"). DEP did not publish notice of this permit or notify the Town directly. Nine months later, in September 2008, MassHighway issued a finding under G.L. c. 30, § 61H, concerning traffic impacts (the "MassHighway Finding") and the Town filed suit within thirty days challenging both the FEIR and the MassHighway Finding.

The developer argued the suit must be dismissed as untimely where it was filed more than thirty days after the "first issuance of a permit"-- the DEP Permit. The Town asserted that the thirty-day period should not commence until an approval related to the subject matter of its challenge issued -- in this case the MassHighway Finding related to traffic. The Town further argued that, even if it should have commenced its suit within thirty days of the DEP Permit, the time limit should have been tolled because there was no public notice of that permit.

Relying on the plain language of MEPA, the Court concluded that both the subject matter of the permit and the lack of public notice were irrelevant to triggering the thirty-day limitations period. In so ruling, the Court left the burden on challengers of an FEIR to make inquiry as to whether any permits or approvals have been issued by any state agency.

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

Massachusetts SJC Rules DEP Cannot Impose Conservation Steps on Municipalities Without Regulations

The Supreme Judicial Court ("SJC") of Massachusetts has ruled that the Massachusetts Department of Environmental Protection ("DEP") cannot impose water conservation requirements on municipalities merely through conditions in registrations required under the Massachusetts Water Management Act, G.L. c. 21G (the "Water Management Act"), but must instead impose such requirements through regulation.

In *Water Department of Fairhaven v. Department of Environmental Protection*, SJC-10430 (January 14, 2010), and thirteen companion cases, municipalities and their water departments challenged DEP's authority to impose water conservation measures as part of their renewals of water withdrawal registrations. In response to concerns about water supplies in Massachusetts, the Legislature passed the Water Management Act, which required municipalities to file registration statements with DEP on or before January 1, 1988 establishing the amount of their existing water withdrawal from a water source. Municipalities that filed the registration statements were guaranteed that they could withdraw the amount of water specified in the registration statements for the next ten years and, provided they filed renewed registration statements before the expiration of each successive ten-year period, for further ten-year periods.

The initial registrations in 1988 and the second round of registrations in 1998 contained conditions imposed by DEP concerning metering, record-keeping, and reporting requirements. In issuing the 2008 registration statements, however, DEP imposed various water conservation conditions, including conditions limiting registrants' water

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consumption to 65 residential gallons per capita per day, limiting water loss, and other performance standards. DEP reserved the right to take enforcement actions against violators of these conditions and also provided a right to request an administrative hearing if registrants believed they were aggrieved by the registration renewal process.

Fourteen municipalities and their water departments filed suit against DEP arguing that the water conservation measures and the administrative hearing process could not be imposed through the conditioning of registrations. The Superior Court agreed that DEP had exceeded its authority under the Act, and the SJC granted DEP's application for direct appellate review.

After reviewing the statutory history of the Water Management Act, the SJC noted that DEP has broad authority to issue regulations to carry out the Act's purpose, including water conservation, provided that such regulations do not infringe upon the registrants' entitlement to existing withdrawals of water. The SJC declared that although these conditions may have been lawful if they had been imposed by regulation, DEP's failure to issue regulations authorizing these conditions rendered them unlawful. "If the department wishes to require registrants to take specified conservation measures, it must do so by regulation."

The SJC similarly found that DEP has the authority to create an administrative adjudicatory proceeding for registrants to challenge adverse decisions rendered by DEP, but it must promulgate regulations through the public process in order to do so.

For further information, please contact Marc J. Goldstein at mgoldstein@bdlaw.com or Krista L. Hawley at khawley@bdlaw.com.

National Developments

SEC Votes to Issue Guidance on Climate Change Disclosure Requirements

In a public meeting held January 27, 2010, the Securities and Exchange Commission ("SEC") voted 3-2, along party lines, to issue guidance clarifying that existing SEC rules require publicly-held companies to disclose material climate-related information. The guidance, which the SEC indicated will be issued in the form of an "interpretive release," is not expected to create new legal requirements or modify existing requirements. Instead, based on the discussion at the public meeting, the guidance is expected to underscore the provisions of existing reporting rules that make it necessary for SEC-reporting companies to assess whether climate-related risks or opportunities have a material impact requiring disclosure. The decision to issue guidance marks the SEC's first formal recognition that companies must specifically consider climate-related information in public disclosures.

While the guidance has not yet been released, SEC Chairman Mary Schapiro's statement on the forthcoming guidance is available at http://www.sec.gov/news/speech/2010/spch012710mls-climate.htm. B&D will post the guidance and an analysis of the same as soon as it is released. In the interim, a webcast of the January 27, 2010 meeting may be viewed at http://www.connectlive.com/events/secopenmeetings/.

Background

The SEC action stems in part from a 2007 investor petition and recent supplement requesting the SEC to require companies to address climate-related risks when reporting other financial risks. The petition proposed three "key elements" for inclusion in the interpretive release: (1) disclosure of physical risks associated with climate change; (2) disclosure of financial risks associated with present or probable regulation of GHG emissions; and (3) disclosure of legal proceedings relating to climate change. Additional background relating to the 2007 petition and related activity is available at http://www.bdlaw.com/news-776.html.

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Discussion at January 27 Meeting

Statements made during the public meeting on January 27 indicate that SEC guidance may closely track the proposed elements of climate-related disclosure set forth in the 2007 investor petition. For example, Chairman Schapiro stated that existing, long-standing rules require a company to disclose significant effects caused by severe weather (a potential physical impact of climate change). Chairman Schapiro also noted that companies must consider whether potential legislation concerning climate change is likely to occur, and if so, companies must evaluate the impact of such legislation on a company's liquidity, capital resources, or results of operations.

The SEC made clear that the guidance will not draw conclusions regarding the facts of climate change or whether climate change is occurring. In her statement during the public meeting, Chairman Schapiro emphasized that the SEC is "not making any kind of statement regarding the facts as they relate to climate change" and is not "opining on whether the world's climate is changing; at what pace it might be changing; or due to what causes." As a result, the SEC guidance is not expected to resolve the question of whether climate change and its potential effects, including increased severe weather events and sea-level rise, constitute "known trends" within the meaning of existing SEC reporting rules.

For more information, please contact Holly Cannon at (202) 789-6029, dcannon@bdlaw.com, or Lauren Hopkins at (202) 789-6081, lhopkins@bdlaw.com.

EPA Seeks Comments on Proposal to Expand Stormwater Regulation at Newly Developed and Redeveloped Sites

The U.S. Environmental Protection Agency ("EPA") recently announced its intention to establish regulations governing stormwater from newly developed and redeveloped properties that could impose significant new requirements on a broad group of stakeholders. EPA has thus far taken two actions to meet its goal of finalizing this new rule by November 2012. First, EPA solicited comments on an Information Collection Request ("ICR") to be sent to all owners, operators, developers, and contractors of developed sites, owners and operators of municipal separate storm sewer systems (MS4s), and states and U.S. territories (*see* http://www.epa.gov/npdes/pubs/icr_fedreg.pdf). That comment period closed on December 29, 2009. In a second Federal Register notice (http://www.epa.gov/npdes/regulations/fedreg_swmanagement.pdf) on December 28, 2009, EPA articulated and solicited comments on five specific regulatory initiatives under consideration, with written comments due on February 26, 2010, and at several public listening sessions to be held in January 2010. Several of the listening sessions have already been held, but additional sessions will be held over the next few weeks in Denver, CO, Dallas, TX, and Washington, DC. A virtual listening session will be held on February 3, 2010. Go to http://cfpub.epa.gov/npdes/stormwater/rulemaking.cfm#stakeholder for more information.

The new rule, permit, or both that emerges from this initiative could affect a substantial number of entities, including entities not primarily engaged in construction. EPA proposes to send the stormwater ICR to establishments that construct residential, industrial, or commercial buildings; construct highway, streets, or bridges; and other heavy and civil engineering construction firms. *See* 74 Fed. Reg. 56191 at 56192, available at http://www.epa.gov/npdes/pubs/icr_fedreg.pdf. Because EPA has stated that the proposed stormwater ICR could be sent to any entity that develops or redevelops sites, and because the Agency has historically sought to impose controls on both construction contractors and the owners for which they work, the final stormwater rule could cover a wide range of activities and array of entities, including those not primarily or exclusively engaged in construction.

The five specific initiatives that EPA is considering and on which it has solicited public comment suggest an ambitious agenda. First, EPA is considering establishing specific nationally-uniform requirements such as standards to control stormwater from newly

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developed and redeveloped areas. These requirements may include an obligation to ensure that post-construction runoff hydrology mimics pre-construction hydrology. Second, the Agency seeks comments on an expanded scope of regulation that would also require the retrofitting of existing developed property. Third, the Agency is considering upgrading the regulatory requirements for Phase II Municipal Separate Storm Sewer Systems (MS4s) to make the program for small systems more rigorous and, probably, better able to implement any new substantive requirements. Fourth, EPA is considering expanding coverage of the federal stormwater program to areas beyond the boundaries of Census urbanized areas. That is, the Agency is considering a geographical expansion of MS4s to include areas that are subject to rapid development, as well as those that have already been largely developed. And, finally, EPA is soliciting comments on other potential changes to the current regulatory program, including a new requirement to require National Pollution Discharge Elimination System (NPDES) permits for stormwater runoff from developed or re-developed (and possibly existing developed) sites. Taken together, these regulatory initiatives would expand EPA's NPDES program into new areas including, for the first time, the control of runoff management issues that currently are addressed as an element of local land use planning.

More information about this stormwater initiative, including links to the cited Federal Register notices, is available at: http://cfpub.epa.gov/npdes/stormwater/rulemaking.cfm. For more information, please contact Richard Davis at (202) 789-6025 (rdavis@bdlaw.com) or Ami Grace-Tardy at (202) 789-6076 (agrace@bdlaw.com).

EPA Proposes Stricter Smog Standards

On January 7, 2010, the U.S. Environmental Protection Agency (EPA) proposed to decrease the national standard for ground-level ozone (smog) from 0.075 ppm to between 0.060 and 0.070 ppm. EPA, *EPA Strengthens Smog Standard/ Proposed standards*, Jan. 7, 2010, http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceeac8525735900400c27/d70b9c433c46faa3852576a40058b1d4!OpenDocument. The existing level of 0.075 ppm was established by the Bush Administration in 2008, over the objections of some of the Agency's scientific advisers.

EPA announced in September of 2009 that it intended to reconsider the 2008 ozone rule, based on the current Administration's belief that the 2008 standard was not protective enough of human health. Ground-level ozone, which forms when emissions from industrial facilities, power plants, landfills and motor vehicles react in the sun, is linked to health problems including aggravation of asthma and other respiratory illnesses. Id.

The 0.060 to 0.070 ppm range for the revised primary standard is based on EPA's conclusion that a lower range is necessary to provide increased protection for children and other "at risk" populations. EPA also proposed a new cumulative, seasonal secondary standard based on weighted hourly concentrations during peak ozone season to provide increased protection against ozone-related adverse impacts on vegetation and forested ecosystems. EPA, Ground-level Ozone Regulatory Actions, http://www.epa.gov/air/ozonepollution/actions.html#jan10s (includes link to proposed rule).

The proposed rule was published in the Federal Register on January 19, 2009 (75 Fed. Reg. 2939). Written comments are due by March 22, 2010. Public hearings have been scheduled on February 2, 2010 in Arlington, Virginia and Houston, Texas, and February 4, 2010 in Sacramento, California.

For more information, please contact David Friedland at (202) 789-6047 (dfriedland@bdlaw.com) or Laura McAfee at (410) 230-1330 (lmcafee@bdlaw.com). This alert was prepared with the assistance of Sarah Doverspike.

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Other News

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Sudbury Valley Trustees is a regional land trust dedicated to conserving land and protecting wildlife habitat in the watershed of the Concord, Assabet and Sudbury Rivers in Central Massachusetts. The organization has over 3,300 members who support conservation work in 36 different municipalities, and has helped to preserve over 6,000 acres of diverse conservation lands in its watershed.

To read more about the Sudbury Valley Trustees, please visit their website at http://www.sudburyvalleytrustees.org/home.

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