Massachusetts Environmental and Land Use Alert

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Massachusetts Developments

Massachusetts DEP Begins Broad Regulatory Reform Initiative

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Developments in Greenhouse Gas Emissions Regulations

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Senator Lautenberg Proposes Revised TSCA Legislation For 112th Congress

On April 14, 2011, Senator Lautenberg (D-NJ) introduced the "Safe Chemicals Act of 2011" ("SCA 2011"), S. 847,[1] a revised version of his 2010 legislation to overhaul the Toxic Substances Control Act ("TSCA"). *(full article)*

EPA Proposes New General Permit for Stormwater Discharges from Construction Activity

On April 25, 2011, the U.S. Environmental Protection Agency ("EPA") issued for public comment a new draft general permit for stormwater discharges from construction activities involving more than one acre. *(full article)*

Supreme Court to Decide Whether to Review Appellate Decision Finding Cell Phone Radiation Claims Preempted

The United States Supreme Court is poised to consider whether to grant a petition for certiorari to review the October 2010 decision by the U.S. Court of Appeals for the Third Circuit holding that federal telecommunications regulations preempted a state law tort action claiming damages based on the radio frequency ("RF") radiation emitted by cell phones. *(full article)*

Firm News & Events

Henry Diamond Receives DOI's Lifetime Conservation Achievement Award

Beveridge & Diamond, P.C. is pleased to announce that Interior Secretary Ken Salazar has awarded the Secretary of the Interior's Lifetime Conservation Achievement Award to Henry L. Diamond. *(full article)*

Beveridge & Diamond, P.C. Purchases Renewable Energy Credits Equal to 100% of Firm's Electricity Usage

Beveridge & Diamond, P.C., a national law firm known for its environmental practice, has entered into an agreement to purchase renewable energy certificates (RECs) for wind-generated electricity in an amount equivalent to 100% of its annual electricity usage in all of its offices nationwide. *(full article)*

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Massachusetts Developments

Massachusetts DEP Begins Broad Regulatory Reform Initiative

Change is afoot at the Massachusetts Department of Environmental Protection (MassDEP). MassDEP has announced a comprehensive effort to identify and implement changes that would enable MassDEP to meet its responsibilities with fewer resources. This effort comes after sharp reductions in MassDEP's budget over the last several years, from $62 million in 2002 to $46 million for the 2011-2012 fiscal year. According to MassDEP, this comprehensive effort will focus on upgrades to information technology systems, internal restructuring and regulatory reforms.

As part of this effort, MassDEP has sought input from the regulated community, specifically seeking ideas for regulatory reforms that would fit within the following guiding principles:

- Recommended reforms should not weaken or undermine environmental protection standards in any way. Proposals to reduce direct oversight or to privatize certain tasks must be coupled with robust compliance and enforcement mechanisms.
- All of MassDEP's programs should be considered as potential candidates for regulatory or permitting reforms. Not every program will necessarily be a good candidate for this type of reform effort, but we need to begin with an open mind.
- Recommended regulatory or permitting changes should be aimed primarily at helping MassDEP manage its responsibilities within our current staffing levels. Potential changes that increase staffing needs will not be considered; changes that maintain the current staffing level may be considered, but will not receive the same priority as labor-saving reforms.
- Reforms should prioritize regulatory provisions within the agency's control and discretion, and should not rely on changes to state or federal law. However, proposed statutory changes could be considered as part of longer-term efforts at regulatory reform.
- Reforms should not be targeted at transferring new responsibilities to municipalities, as our cities and towns also are strained by budget decreases.

MassDEP is expecting to act quickly. According to a MassDEP press release, it anticipates that specific recommendations for regulatory reform will be made to the MassDEP Commissioner, Kenneth L. Kimmell, during the summer of 2011. After the Commissioner evaluates these recommendations, the public will be provided an opportunity to comment on the proposed reforms prior to implementation of changes.

For further information regarding this regulatory reform initiative, please contact Jeanine Grachuk at jgrachuk@bdlaw.com.

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By written agreement dated April 11, 2011, the Massachusetts Department of Environmental Protection has accepted full delegation of the federal major source air permitting program, known as the Prevention of Significant Deterioration (PSD) program, from the U.S. Environmental Protection Agency. Notice of the delegation was published in the Federal Register on May 31, 2011. *See* 76 Fed. Reg. 31241

Under the federal Clean Air Act, states may implement the PSD permitting program in either of two ways: (i) by including a PSD program in its regulations and then seeking formal EPA approval of those regulations in the state implementation plan; or (ii) by seeking delegation of the program from EPA. When a state seeks and accepts delegation, as MassDEP has done here, it agrees to implement the federal PSD rules directly, and state-issued PSD permits are considered equivalent to EPA issued permits

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under the federal Clean Air Act. 42 U.S.C. § 7410, 40 C.F.R. § 52.21(u).

MassDEP's acceptance of the PSD delegation follows several years of controversy. Prior to 2003, MassDEP administered the PSD program in Massachusetts under an EPA delegation. In 2002, however, EPA changed the federal PSD rules in two significant ways, allowing regulated industries to (i) use the more favorable actual-to-projected-actual test to evaluate whether modifications were subject to PSD permitting; and (ii) use a more permissive ten-year baseline emissions period to evaluate those projects. In protest of these measures, MassDEP refused to adopt them in state permitting, and notified EPA that it would no longer accept delegation of the program. EPA rescinded its PSD delegation on March 3, 2003.

MassDEP's action was curious, as the agency always had the authority to require more stringent requirements under state law. The effect of the 2003 rescission was only to require major sources to engage in duplicative permitting; beginning in 2003, each facility subject to major source permitting was required to obtain two air permits for each major modification (one from EPA and the other from MassDEP) rather than a single permit. It is difficult to understand what benefit this inefficiency provided.

The re-delegation of the PSD program to MassDEP eliminates the duplication created by the 2003 delegation rescission and provides a welcome simplification for an otherwise complex permitting program.

For more information on PSD permitting in Massachusetts, please contact Stephen Richmond at srichmond@bdlaw.com.

Developments in Greenhouse Gas Emissions Regulations

In the face of continued silence regarding the development of a national regulatory program for greenhouse gas emissions, a number of states are proceeding with greenhouse gas emission programs, presenting the likelihood that many businesses will become subject to a wide array of new greenhouse gas requirements with no national consistency. Independent of the state initiatives, thousands of companies across the country must also continue to prepare for the revised September 30th deadline for reporting 2010 greenhouse gas emissions data to the Environmental Protection Agency ("EPA").

EPA's next round of greenhouse gas-related regulations, proposed performance standards for power plants, were originally slated to be issued in July 2011, but many expect these rules will be delayed. Also on EPA's plate this summer is preparation of briefs to respond to the petitioners in *Coalition for Responsible Regulation v. EPA*, one of three cases regarding the EPA's authority to regulate greenhouse gases under the Clean Air Act in the U.S. Court of Appeals for the District Court of Columbia Circuit. The governments' briefs in this case, which addresses the agency's greenhouse gas "endangerment finding," are due in August.

Northeastern and Mid-Atlantic States Re-evaluate RGGI Participation

Ten states, including all of New England, currently participate in the Regional Greenhouse Gas Initiative ("RGGI"), the country's first regional mandatory cap and trade program for greenhouse gas emissions. RGGI, which applies only to emissions from fossil-fuel power plants, became a model for other compacts among states and Canadian provinces considering cap and trade programs. The members of two such compacts, the Western Climate Initiative and the Midwestern Greenhouse Gas Reduction Accord, both issued model rules in 2010.

Under RGGI, regulated emitters must provide emission allowances or, to a limited extent, offsets for every ton of regulated greenhouse gases that they emit. These allowances are nearly all sold through regional quarterly auctions and the revenues are distributed to the participating states, based on pre-determined allocation schemes. Bids in the auctions are subject to a reserve price of $1.89 per allowance, to ensure that the

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price of emissions does not drop below that point.

As allowance prices in RGGI clear at or near the reserve price, several states have raised questions about their ongoing participation in the program's regulation of power sector emissions. In May, the Governor of New Jersey announced his intent to pull his state out of RGGI at the end of 2011. According to the New Jersey Department of Environmental Protection, the state will continue to participate in the three remaining 2011 RGGI auctions of carbon allowances and will require that all regulated entities within the state have sufficient allowances in their accounts to cover their emission obligations for the initial RGGI compliance period, which also ends on December 31, 2011. The nine other states still participating in RGGI confirmed that they will continue to recognize all New Jersey vintage 2009, 2010 and 2011 allowances in circulation through the RGGI auction in June. Prior to the 3rd and 4th 2011 auctions, the states will confirm whether or not they will continue to accept New Jersey allowances offered for sale in those auctions.

To date, New Jersey, which accounted for 14% of the RGGI region's emissions in 2010, has raised over $102 million through the sale of RGGI allowances; originally intended to support energy efficiency and renewable energy programs, almost two-thirds of this money was moved to the state's general fund. Whether Governor Christie is able to clear the necessary legislative hurdles to withdraw from RGGI remains to be seen. Similar legislative initiatives to pull out of RGGI in New Hampshire, Maine and Delaware all failed in April, after receiving various levels of support. The process went furthest in New Hampshire, where a proposed bill passed in the state House of Representatives before failing in the Senate. In Maine and Delaware, the proposals died in committees. In Massachusetts, meanwhile, there remains strong support for RGGI participation; RGGI and the Commonwealth's Renewable Portfolio Standard are viewed as key building blocks in the program devised to meet the Global Warming Solutions Act's statewide goal of reducing greenhouse gas emissions 25% below 1990 levels by 2020, and by 80% over 40 years. *See* http://www.bdlaw.com/news-371.html.

California's Cap and Trade Carbon Program Encounters Roadblock

In 2006, California enacted legislation AB 32, the Global Warming Solutions Act, which requires the state to develop regulations that will reduce its greenhouse gas emissions to 1990 levels by 2020. As part of that mandate, the California Air Resources Board ("CARB") is developing a regulatory cap and trade program for greenhouse gas emissions. The scope of California's program, which it hopes will be a part of the broader Western Climate Initiative, goes beyond that of RGGI, extending to "significant" sources of emissions as well as power plants.

In 2009, environmental justice groups filed a lawsuit claiming, in part, that CARB failed to adequately consider alternatives to a cap and trade program as a mechanism for reducing greenhouse gas emissions, as required by the California Environmental Quality Act ("CEQA"). Although a May decision by a California court in *Association of Irritated Residents et. al. v. CARB* agreed that CARB failed to satisfy its obligations under CEQA, the court did confirm CARB's authority to establish a cap and trade program. The question for California is whether it can comply with the requirements in the court's ruling prior to the scheduled January 1, 2012 launch date for the trading program. CARB has taken the position that the California Attorney General's appeal of the decision has stayed the Superior Court's ruling, including the enjoinment on CARB from taking any action to implement the proposed cap and trade program. So for now, CARB is proceeding on parallel paths: (i) conducting the additional review of alternatives to the trading program, suggesting that the work could be done by summer; and (ii) taking additional steps to implement the cap and trade program, such as selecting SRA International to create a system to manage the program's accounts and allowances.

For the cap and trade program to start as currently scheduled, CARB must submit final regulations to the State by the end of October. Any delay in the implementation of the program will defer the potential revenue stream from the program's sale of allowances

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to emitters. However, even in the face of questions about important program features, such as its start date and how allowances will be allocated to the utility sector, sales of California carbon allowances continue. For instance, on the same day the court issued its ruling, 25,000 allowances traded at a little over $14 per ton.

Developments regarding the Federal Greenhouse Gas Reporting Program

On May 19, EPA issued a final rule establishing categories of greenhouse gas related data that shall be treated as confidential for 34 industry sectors, i.e., under 34 subparts of the Greenhouse Gas Reporting Rule, 40 CFR Part 98. While either eight or nine categories of data were given confidential status, the number different for fossil fuel and industrial gas suppliers versus direct emitters of greenhouse gases, the rule does not extend confidentiality to emissions data and calculation methods. EPA did not make a decision on a previous proposal to consider inputs to emission equations as public information, and a separate rule is expected for seven additional regulated sectors. The final rule is available at http://www.gpo.gov/fdsys/pkg/FR-2011-05-26/pdf/2011-12930.pdf.

EPA has also invited interested parties to test the Electronic Greenhouse Gas Reporting Tool in June before the system is finalized. Testing will take place over two periods, form June 6-17 and June 20-July 1, with 1,000 stakeholders participating in each event. Requests for an account to participate in the testing should be submitted at http://sandbox.ccdsupport.com/ghg/login.do

For more information on the state or federal climate change initiatives, please contact Aladdine Joroff at ajoroff@bdlaw.com or Stephen Richmond at srichmond@bdlaw.com.

Mass DOER Proposes to Severely Limit Energy Credits for Biomass Plants

Following the issuance of a state-sponsored study that raised questions about the greenhouse gas emission benefits of power generated by biomass combustion plants, the Massachusetts Department of Energy Resources (DOER) has proposed rules that would limit the eligibility of biomass plants for critical renewable energy credits.

Under the Massachusetts Green Communities Act, electricity suppliers are required to buy an increasing percentage of electricity from renewable energy producers. This is known as the renewable portfolio standard. The renewable energy producers are provided two important incentives to develop renewable energy sources: (i) predictable and steadily increasing demand for their power output, and (ii) financial benefits from renewable energy credits (RECs).

However, electricity produced from the combustion of biomass is not going to enjoy the full benefits of this model if DOER's proposed rules are adopted. Reflecting skepticism about the greenhouse gas benefits of biomass-fueled power, DOER's draft rules propose an extremely high bar for biomass plants seeking to qualify for state incentives. First, the rules would require biomass plants to achieve 60% efficiency to qualify for RECs (plants achieving 40% can qualify for ½ REC). *See* proposed Sec. 225 C.M.R. 14.05(8)(b)(3). None of the current biomass plants in Massachusetts achieves this level of efficiency. Second, the rules would not provide any financial credit for plants that burn construction and demolition-derived wood wastes. See definition of Eligible Biomass Fuel at proposed 225 C.M.R. 14.02.

The DOER rules, if adopted as proposed, are expected to have a powerful negative effect on the development of new biomass plants in Massachusetts.

As required by the Green Communities Act, DOER filed the proposed rules with the Clerk of the state House of Representatives on May 3, 2011. The draft rules are expected to be referred to the Joint Committee on Telecommunications, Utilities, and Energy for a 30-day review. Upon completion of that review, the Committee may provide comments to DOER, and DOER will then promulgate the final regulation.

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For more information on DOER's proposed rules, please contact Stephen Richmond at srichmond@bdlaw.com.

SJC Raises the Bar for Standing

In a setback to development opponents, the Massachusetts Supreme Judicial Court has announced that persons challenging zoning approvals must offer "credible evidence" proving that they will be "injured or harmed by proposed changes to an abutting property," and can no longer rely on claims that "they simply will be 'impacted' by such changes." *Kenner v. Zoning Bd. of Appeals*, 459 Mass. 115, 122 (2011). Challengers must show "more than minimal or slightly appreciable harm" in order to have standing to maintain an appeal. Rather, "adverse effect on a plaintiff must be substantial enough to constitute actual aggrievement.... To conclude otherwise would choke the courts with litigation... where...[project opponents] have not been... truly and measurably harmed...." (Emphasis added.)

The Hiebs sought and obtained a Special Permit to raze, reconstruct and expand their home near the Chatham waterfront. Although the home's footprint was unchanged, the proposed height of the new home was seven (7) feet taller than the existing home. The Hiebs' home is located between the Kenner's residence and the Atlantic Ocean. The Kenners appealed the Special Permit claiming, among other things, that the taller structure would obstruct their ocean view. The Kenners testified as to their personal opinions that the increased height would diminish their enjoyment of the property and impact their views and vistas from their dining room, deck, and screened porch. They also introduced photographs with superimposed images to show the extent of the obstruction of their ocean view. A view of the property was also taken.

After trial, the Land Court (Trombly, J.) ruled that even though the Kenners' complaint that the increased height would block their ocean view was the type of "individualized harm" needed to demonstrate standing, "any impact of the increased height...on the Kenners' view ocean was *de minimis* [(so minor as to be disregarded)] and, as such, was not sufficient to confer standing on the Kenners." The Appeals Court reversed and, on further appellate review, the Supreme Judicial Court upheld the Land Court's judgment.

The *Kenner* Court recited the established standing case law. "The right or interest asserted by a plaintiff...[in a zoning appeal] must be one that G. L. c. 40A is intended to protect. Generally speaking, concerns about the visual impact of a proposed structure on an abutting property are insufficient to confer standing. However, where a municipality's zoning bylaw specifically provides that...the visual impact of a proposed structure [must be considered], this 'defined protected interest may impart standing" to the project opponent. Since the Chatham Zoning Bylaw calls for review of a project's "[i]mpact of scale, siting and mass on neighborhood visual character, including views, vistas and streetscapes," the Kenner's were required to prove both (1) particularized harm to their own property and (2) a detrimental impact on the neighborhood's visual character to establish standing. This they failed to do.

Since the Court could not conclude that the Judge's ultimate finding was "clearly erroneous," it upheld the Land Court. After *Kenner*, trial courts will be more likely to scrutinize the quantity and quality of the evidence of actual harm offered by project opponents to establish standing, and less likely to automatically assume standing when an opponent invokes impacts. Similarly, the case serves as reminder to appellate courts not to substitute their judgment of what constitutes standing for that of the trial court.

Massachusetts Regains Authority to Enforce its Oil Spill Prevention Act

In the battle between the United States and Massachusetts to determine which sovereign has authority to protect the environment in Buzzards Bay from oil spills,

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Massachusetts has won a small victory, but perhaps not the war. On May 17, 2011, the First Circuit Court of Appeals vacated a federal District Court decision that the Massachusetts Oil Spill Prevention Act was preempted by federal law and could not be enforced.

Here is the background. In order to prevent oil spills such as the spill of 98,000 gallons of oil into Buzzards Bay in 2003, the state enacted the Massachusetts Oil Spill Prevention Act (MOSPA). The primary requirement of the law was that any vessel transporting more than a specified amount of oil was required to have a tug escort and certain crew. Almost immediately after passage of MOSPA, the United States sued Massachusetts, asserting that MOSPA was preempted by the Ports and Waterways Safety Act. Under this federal statute, the U.S. Coast Guard is responsible for ensuring the flow of commercial traffic through Buzzards Bay. Subsequently, in 2007, the Coast Guard enacted regulations that expressly purported to preempt MOSPA. This set up a classic tug-of-war between federal and state sovereigns regarding the protection of a valuable environmental and commercial resource, Buzzards Bay.

In 2008, the district court preliminarily enjoined enforcement of MOSPA and in 2010 the district court held that MOSPA was preempted by the federal law based in large part on the rules that the Coast Guard promulgated in 2007. Massachusetts appealed to the First Circuit. The First Circuit held that the Coast Guard did not comply with the National Environmental Policy Act (NEPA) when it enacted its regulations. Specifically, the Coast Guard had determined that the proposed rules were exempt from review under NEPA because they fell within a categorical exclusion for regulations "in aid of navigation." However, this categorical exclusion does not apply when "extraordinary circumstances" exist, such as when the proposed action is "likely to be highly controversial." The court held that the Coast Guard's determination that its proposed regulations were not likely to be highly controversial and therefore fell within the categorical exclusion was arbitrary and capricious in light of the extensive "worried comments" received from local and state officials over the proposed rule.

Based on the its determination that environmental review was required under NEPA and was not conducted, the Court of Appeals vacated the judgment of the District Court and instructed the District Court to direct the Coast Guard to take actions consistent with its opinion. At the same time, the First Circuit vacated the injunction, with the result that Massachusetts may now enforce MOSPA. However, the war is not over, as the First Circuit did not take any position on the overarching preemption issue.

For further information on MOSPA or other environmental issues in Massachusetts, please contact Jeanine Grachuk at jgrachuk@bdlaw.com.

National Developments

Senator Lautenberg Proposes Revised TSCA Legislation For 112th Congress

On April 14, 2011, Senator Lautenberg (D-NJ) introduced the "Safe Chemicals Act of 2011" ("SCA 2011"), S. 847,[1] a revised version of his 2010 legislation to overhaul the Toxic Substances Control Act ("TSCA"). Senator Lautenberg is the Chairman of the Senate Environment and Public Works Committee's Subcommittee on Superfund, Toxics, and Environmental Health. The bill is cosponsored by four others, including Senator Boxer (D-CA), who chairs the full Committee.[2] More information about the similar Senate bill introduced in 2010 is available here.[3]

As with the previous version, SCA 2011 would place the burden of proof on chemical manufacturers and processors to show that their chemicals meet a new safety standard in order for those chemicals to enter or stay on the market. Overall, SCA 2011 is similar to the bill that was introduced in 2010, but several differences, particularly regarding mixtures and prioritization, are noted below.

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Scope

- Unlike the previous version, SCA 2011 would not specifically amend the definition of "chemical substance" to include chemicals in articles. However, chemical substances imported as part of an article would be subject to the same requirements as if they had been imported in bulk, except as EPA and Customs and Border Protection could provide by rule.
- While current TSCA allows testing and reporting rules and control actions to be issued for mixtures, EPA rarely does so. SCA 2011 deletes a number of the previous version's requirements for mixtures, staying closer to the TSCA status quo. It would allow EPA to take actions relating to mixtures in the same manner as actions relating to chemical substances if EPA determined that doing so would be reasonable and efficient.
- SCA 2011, like its predecessor, would allow EPA to determine that nanoscale versions of existing macroscale chemicals are new chemicals.[4]

New Prioritization Scheme

- EPA would have to assign 20-30 persistent, bioaccumulative, toxic, and potentially high-exposure chemicals within one year after enactment to "priority class 1" for "immediate" (within eighteen months) risk management actions.
- EPA would have to assign an undetermined number of chemicals to "priority class 2" for safety standard determinations, with new chemicals being added to this class 2 list over time as determinations are completed.
- EPA would assign the lowest risk chemicals to "priority class 3" if it determined they have "intrinsic properties" such that they would pose no risk at anticipated exposure levels and use patterns.
- Presumably, most chemicals would not fall into any of these classes.

Safety Standard

- SCA 2011 would amend the current standard for action under TSCA, "unreasonable risk of injury to health or the environment," to require an EPA determination that a chemical presents a "reasonable certainty that no harm will result to human health or the environment," considering aggregate exposure and, to the extent practical, cumulative exposure (including exposures from FDA-regulated uses and from house dust) and the health of vulnerable populations.
- For new chemicals, EPA could alternatively determine that the chemical (including its metabolites or degradation products) is not expected to manufactured or released into the environment in high volumes, known to be toxic or persistent and bioaccumulative, or found in biomonitoring studies.

Minimum Data Set

- SCA 2011 would require EPA to develop, within one year, a standard minimum data set to be required from manufacturers and processors for
    - All new chemicals, to be submitted with premanufacture notifications;
    - All new uses of chemicals for which EPA has made a safety standard determination;
    - Chemicals on the priority class 1, 2, or 3 lists, to be submitted within 18 months after listing (note that only priority class 2 may have been intended); and
    - All other existing chemicals, to be submitted within five years after enactment. Most chemicals would be subject to this requirement. There would be no exemptions for low-risk chemicals, such as polymers or low volume chemicals.
- Data compensation would be available for the minimum data sets, in a manner as prescribed under the current TSCA.

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Safety Determinations

- SCA 2011 would require EPA to conduct safety standard determinations of chemicals on the priority class 2 list. As with the previous version of the legislation, the burden of proof would be on manufacturers and processors to submit information within 30 months of listing showing that their chemicals meet the safety standard.
- SCA 2011 would require EPA to complete its safety determinations within one year of receiving a complete submission (extended from 180 days in the previous version) and to renew the determinations every 15 years.
- As under the previous version of the SCA, an affirmative safety determination would have to identify the uses evaluated and any conditions needed to ensure that the safety standard is met, which could include a wide variety of restrictions. Any other uses would become subject to new use notification requirements.
- A negative determination would lead to a ban on manufacture, processing, or distribution within one year unless, within that time, EPA determined that the chemical would meet the safety standard (e.g., due to intervening controls). A negative determination would not be subject to judicial review.

EPA Data Authority

- The provisions of SCA 2011 are similar to those of its predecessor with regard to information gathering. SCA 2011 would require manufacturers and processors of existing chemicals to submit to EPA within one year of enactment either a detailed declaration of current manufacture or processing, or a declaration of cessation of manufacturing or processing. The declaration of current manufacture or processing would have to be updated every three years or upon certain new information. The same declaration would be required for new uses of existing chemicals for which EPA has not made a safety determination, including uses not ongoing at the time of enactment and ongoing uses at a significantly increased volume.
- SCA 2011 would also give EPA authority to issue orders for chemical testing without having to undertake a full rulemaking process, and to make testing and other data publicly available online.

Confidential Business Information

- Like the prior version, SCA 2011 would declare certain information ineligible for confidentiality protection, including chemical identity (except for new chemicals); health and safety studies for commercial chemicals; and information indicating the presence of a chemical in a consumer article intended for use by children or to which children may reasonably be exposed.
- EPA would have to specify by rule within one year of enactment the types of information for which it would not prospectively specify the term of confidentiality. All other eligible types of information would have a maximum confidentiality protection period of five years.
- EPA would be able to determine that information previously considered to be entitled to confidentiality protection is no longer entitled to that protection.

Control Actions

- EPA's safety determinations could impose a wide range of conditions to ensure that chemicals meet the safety standard, with no express provision for notice and comment rulemaking procedures.
- If EPA were to determine that a chemical would not meet the safety standard without additional controls and another agency could take action to address the aggregate and cumulative exposures to the chemical, EPA would have to request that the other agency take action. The other agency would be required to take the action, if appropriate. If the other agency did not take action, EPA could do so.

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- SCA 2011 would require EPA to identify localities subject to disproportionate exposure to toxic substances ("hot spots") and to develop action plans to reduce the disproportional exposures.
- SCA 2011 would change the current TSCA judicial review standard requiring "substantial evidence" for many TSCA actions to the more common "arbitrary or capricious" standard of review.

Other Changes to TSCA

- SCA 2011 would give EPA authority to order recalls or other actions in case of imminent harm.
- SCA 2011 would implement the Stockholm Convention,[5] LRTAP POPs Protocol,[6] and Rotterdam Convention,[7] once ratified by the Senate.
- EPA would be required to establish a Children's Environmental Health Research Program, which would include biomonitoring research, and a green chemistry and engineering program to create market incentives for development of safer alternatives to existing chemicals.
- SCA 2011 would delete TSCA's current preemption provision and allow states and localities to adopt and enforce their own chemical laws, regulations, or standards unless compliance with both the state or local standards and the SCA 2011 standard would be impossible.
- EPA could require payment of fees from any person required to submit data.

Reception and Prospects

SCA 2011 comes soon after the Senate's first TSCA hearing of the 112th Congress, on February 3, 2011. At that hearing a main theme was that TSCA legislation could be passed, despite the results of the 2010 elections.[8]

However, it is clear that SCA 2011 has not resolved all of the disagreements that attended last year's TSCA legislative proposals. The American Chemistry Council for one, stated in response to the bill's release that "it appears many of our concerns have not been addressed in this new version, and the bill introduced today could put American innovation and jobs at risk."[9] The NGO umbrella group Safer Chemicals, Healthy Families, on the other hand, said SCA 2011 showed its sponsors' "clear intention to protect families from toxic chemicals linked to serious health problems" and "predict[ed] action in this Congress despite the partisan divide."[10]

With the Republican majority in the House of Representatives unlikely to consider TSCA legislation this Congress, passage of SCA 2011 is unlikely. Nevertheless, SCA 2011 will probably stimulate efforts by stakeholders to educate Congress and each other on a variety of approaches to overhauling TSCA that can address the deficiencies in the current statute while obtaining sufficient support to be enacted.

For more information about the Safe Chemicals Act of 2011, please contact Mark Duvall, mduvall@bdlaw.com, or Alexandra Wyatt, awyatt@bdlaw.com.

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1 The Safe Chemicals Act of 2011 is available at http://lautenberg.senate.gov/assets/SafeChem.pdf. A summary is available at http://lautenberg.senate.gov/assets/SafeChem-Summary.pdf.

2 As of the publication of this alert, the other cosponsors of SCA 2011 are Senators Franken (D-MN), Klobuchar (D-MN), and Schumer (D-NY). The 2010 SCA did not have any co-sponsors.

3 See Beveridge & Diamond, P.C., Proposed Legislation Would Overhaul TSCA, April 23, 2010, http://www.bdlaw.com/news-852.html; see also Beveridge & Diamond, P.C., Prospects for TSCA Legislation in the 112th Congress, Jan. 28, 2011, http://www.bdlaw.com/news-1049.html.

4 See Beveridge & Diamond, P.C., Proposed TSCA Amendments Would Target Nanomaterials, June 2, 2010, http://www.bdlaw.com/news-891.html.

5 Stockholm Convention on Persistent Organic Pollutants, 40 I.L.M. 532 (2001).

6 Protocol on Persistent Organic Pollutants to the Convention on Long-Range Transboundary Air

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Pollution, 37 I.L.M. 505 (1998).

[7] Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 38 I.L.M. 1 (1999).

[8] See Beveridge & Diamond, P.C., Senate Holds First Hearing of the 112th Congress on TSCA Modernization, Feb. 15, 2011, http://www.bdlaw.com/news-1072.html.

[9] Press Release, American Chemistry Council, ACC Responds to Introduction of Senator Lautenberg's Chemical Safety Legislation, Apr. 14, 2011, http://www.americanchemistry.com/s_acc/sec_news_article.asp?CID=206&DID=11863.

[10] Press Release, Safer Chemicals, Healthy Families, "Safe Chemicals Act of 2011" Introduced Today; Legislation Would Protect American Families from Toxic Chemicals, Apr. 14, 2011, http://www.saferchemicals.org/2011/04/safe-chemicals-act-of-2011-introduced-today-legislation-would-protect-american-families-from-toxic-chemicals.html.

EPA Proposes New General Permit for Stormwater Discharges from Construction Activity

On April 25, 2011, the U.S. Environmental Protection Agency ("EPA") issued for public comment a new draft general permit for stormwater discharges from construction activities involving more than one acre. *See* 76 Fed. Reg. 22,882, available at http://www.epa.gov/npdes/pubs/cgp_2011frnotice.pdf. EPA is developing this draft construction general permit ("CGP") to implement the Agency's new Effluent Limitations Guidelines and New Source Performance Standards for the Construction and Development Industry. Because the existing permit is set to expire on June 30, 2011, EPA also is proposing to extend that permit until January 31, 2012. When EPA finalizes the new CGP, likely in early-January 2012, operators of construction activities will be subject to significantly more stringent erosion and sediment control, inspection, and monitoring requirements.

Background

Pursuant to Section 402 of the Clean Water Act ("CWA"), EPA prohibits any person from discharging pollutants to navigable waters without a permit. Beginning in 1990, EPA established regulations under the National Pollutant Discharge Elimination System ("NPDES") program for owners and operators to obtain permits for stormwater discharges associated with construction activity. Since that time, EPA has carried out the NPDES program, first by promulgating permit application requirements, and later by creating a series of general permits for construction stormwater discharges. The current CGP took effect in 2008.

When EPA develops a NPDES permit, the CWA requires the Agency to incorporate into it conditions for meeting technology-based effluent limits established under Sections 301 and 306 of the statute. Prior to the promulgation of an effluent limitations guideline ("ELG"), EPA permit writers establish these technology-based limitations using their Best Professional Judgment. It was their exercise of that Best Professional Judgment that supported the effluent limitations (primarily expressed as Best Management Practices) contained in the Agency's 2008 CGP.

On December 1, 2009, EPA issued its Effluent Limitations Guidelines and New Source Performance Standards for the Construction and Development Industry ("C&D Rule"). *See* 74 Fed. Reg. 62,996, available at http://edocket.access.gpo.gov/2009/pdf/E9-28446.pdf. EPA designed the C&D Rule, which took effect February 1, 2010, to control sediment pollution from construction for all sites that disturb one or more acres and, for the first time, to impose nationally-applicable numeric effluent limitations on stormwater discharges from sites that disturb greater than 20 or 10 acres based on a schedule established by the rule. Under the C&D Rule construction sites must implement Best Management Practices ("non-numeric effluent limits") to control stormwater discharges, such as erosion and sediment controls, soil stabilization requirements, dewatering requirements, pollution prevention measures, prohibitions on certain discharges, and use of surface outlet structures.

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The C&D Rule was challenged before it took effect on February 1, 2010. During the course of litigation, EPA discovered that the data it had used to calculate the numeric limit for turbidity were misinterpreted. Ultimately, EPA sought a voluntary remand of the numeric turbidity limit so it could recalculate the limit. All other portions of the C&D Rule remained in effect and subject to implementation in any new permit. Since the remand took effect on January 4, 2011 EPA has been working to develop a recalculated limit with the goal of proposing and promulgating that revised limit in time for it to be incorporated into a reissued CGP along with the un-remanded, non-numeric requirements of the C&D Rule.

New Proposed Construction General Permit

On April 25, 2011, EPA published notice of its new draft CGP. As proposed, the draft permit incorporates the C&D Rule's non-numeric effluent limits as prescriptive requirements and design standards, but includes only a placeholder for inclusion of the numeric effluent limit for turbidity, which EPA continues to develop. Even without the numeric limit, however, the proposed CGP's requirements are significantly more stringent than those of the current permit.

The new proposed CGP includes a number of changes to the 2008 CGP, as well as a suite of wholly new requirements. The proposal would require operators to:

- Establish at least a 50-foot undisturbed, natural buffer area around any waters of the U.S., including wetlands, occurring on or adjacent to their sites, or achieve an equivalent level of protection by implementing alternative measures. The operator must maintain the selected alternative for the duration of permit coverage.

- Before beginning earth-disturbing activities, install and make operational all stormwater controls required under Section 2 of the permit and identified in the site's Stormwater Pollution Prevention Plan ("SWPPP"). This requirement does not apply to earth disturbances related to initial site clearing and establishing entry, exit, and access of the site, for which stormwater controls may be installed immediately after the earth disturbance if necessary. Notably, the draft permit does not differentiate in this requirement between controls scheduled in a SWPPP to be phased in over the course of construction and controls the SWPPP requires to be installed for project commencement.

- Immediately initiate stabilization on exposed portions of the site where earth-disturbing activities have permanently or temporarily ceased, and will not resume for a period exceeding 14 calendar days, or for a period of 7 or more calendar days if (a) earth-disturbing activities occur within 50 feet of a water of the U.S. located on or immediately adjacent to the construction site, (b) the site discharges to sediment- or nutrient-impaired waters, (c) the site discharges to high quality waters (i.e., Tier 2, 2.5, or 3 waters), or (d) the activity disturbs slopes of 15% or greater. A host of new stabilization criteria must be met under all stabilization scenarios.

- Remove sediment deposited on the site, tracked out of the site, or accumulated near sediment controls before it compromises the effectiveness of onsite controls and/or is discharged to surface waters.

- Stabilize all entrance and exit points created on the site for a minimum of 50 feet into the site so that no soil is left exposed and no sediment is discharged during storm events.

- Avoid earth-disturbing activities on steep slopes (i.e., slopes of 15% or greater), unless infeasible or inconsistent with the requirements of the project.

- Install and maintain controls to protect any storm drain inlets to which the site discharges and the operator has access.

- Design, install, implement, and maintain effective pollution prevention measures to minimize the discharge of pollutants. At a minimum, these measures must minimize

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(a) the discharge of pollutants from equipment and vehicle washing, wheel wash water, and other wash waters (wash waters must be treated in a sediment basin or alternative control with equivalent treatment), (b) the exposure of building materials, wastes, and other materials to precipitation and stormwater, and (c) the discharge of pollutants from spills and leaks (operators also must implement prescribed chemical spill and leak prevention and response procedures).

- Visually assess the quality of site discharge (e.g., color, odor, floating, settled, or suspended solids) if a site inspection occurs during a discharge-generating precipitation event.

- Undertake corrective actions for addressing erosion and sediment control installation, maintenance, and repair issues and for addressing sediment discharges within an allotted timeframe (typically 7 days) and in accordance with specific procedures.

Beyond these non-numeric effluent limits set forth in the proposed CGP, EPA plans to incorporate into the permit the numeric effluent limit for turbidity after it is re-promulgated later this year. Once the numeric limit is recalculated and added to the new CGP, EPA will implement the limit in a phased approach. Construction sites that disturb 20 or more acres at once must monitor discharges from construction areas and comply with the numeric effluent limitation beginning August 1, 2011 (or when EPA incorporates the limit into the final new CGP). Construction sites that disturb between 10 and 20 acres at once must begin monitoring discharges from the site and comply with the numeric effluent limitation on February 2, 2014. Operators on sites subject to the numeric limit will be required to perform sampling during all discharge-generating precipitation events. The first sample will be required to taken within the first hour after the discharge begins, and a minimum of 3 samples will be required to be taken for each event. If any one sample exceeds the turbidity limit, specified corrective actions will be required.

The feasibility and legality of implementing enforceable numeric limits on stormwater discharges from construction sites has repeatedly been questioned by prospective permittees. In fact, its legality already has been challenged in litigation although the Agency sought time to reconsider its limitation before the court had an opportunity to address those challenges on their merits. As a result, once finalized and implemented, the new CGP and its expected incorporation of a numeric effluent limitation for turbidity almost certainly will be the subject of further litigation.

Comments on the new proposed CGP must be submitted to EPA by June 24, 2011.

For more information, please contact Richard Davis at (202) 789-6025 (rdavis@bdlaw.com) or Parker Moore at (202) 789-6028 (pmoore@bdlaw.com).

Supreme Court to Decide Whether to Review Appellate Decision Finding Cell Phone Radiation Claims Preempted

The United States Supreme Court is poised to consider whether to grant a petition for certiorari to review the October 2010 decision by the U.S. Court of Appeals for the Third Circuit holding that federal telecommunications regulations preempted a state law tort action claiming damages based on the radio frequency ("RF") radiation emitted by cell phones. *See Farina v. Nokia*, 625 F. 3d 97 (3d Cir. 2010).

In the underlying action, the petitioner brought suit against various cell phone manufacturers and retailers of wireless handheld devices on behalf of a putative class of all past, current, and future Pennsylvania purchasers and lessees of cell phones. *Id.* at 107. Under several tort theories, the petitioner alleged that the respondent cell phone manufacturers and retailers had improperly warranted and marketed their cell phones as safe to operate, had suppressed information regarding the health risks of RF radiation, and that respondents' phones, absent headsets, were unsafe due to RF radiation emitted during a phone's customary use. *Id.* at 104, 107-109.

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The Third Circuit affirmed the lower court's dismissal of the petitioner's lawsuit on conflict preemption grounds, ruling that the FCC regulations regarding the specific absorption rate ("SAR") — the maximum amount of RF radiation a device may emit based on the amount absorbed in the body — represented the FCC's "considered judgment' about how to balance competing objectives of protecting the health and safety of the public and allowing industry to maintain an efficient and uniform nationwide wireless network. *Id.* at 125. The Third Circuit found that allowing juries to perform their own risk-utility analysis to determine whether cell phones in compliance with FCC standards were nevertheless unreasonably dangerous would conflict with and "second guess" FCC regulations. *Id.* The court also expressed concern that if tort claims were not preempted, RF radiation standards could vary from state to state and eradicate the uniformity that was necessary to regulate a national wireless network. *Id.* at 126.

The Third Circuit's decision created an apparent split among Circuit Courts of Appeal regarding the preemptive effect of the FCC regulations. In 2005, the Fourth Circuit found that similar state law claims were not preempted and found no evidence of any congressional objective to ensure uniform national RF radiation standards for cell phones. *See Pinney v. Nokia*, 402 F.3d 430, 458 (4th Cir. 2005).

Seizing upon this conflict, the petitioner, in his appeal of the Third Circuit ruling, asks the Supreme Court to consider whether state law claims premised on cell phone companies' alleged misrepresentations regarding the safety of their products are impliedly preempted because they would frustrate the purpose of the FCC's RF radiation standard. *See Farina v. Nokia*, U.S. No. 10-1064, Petition for a Write of Certiorari, at i (filed Feb. 22, 2011), available at http://www.scotusblog.com/case-files/cases/farina-v-nokia-inc/. On the principal substantive issue, the petitioner contends that the FCC regulations impose no substantive standards on a cell phone's RF radiation emissions but merely define the level of emissions that triggers the FCC's obligation to conduct an environmental analysis under the National Environmental Policy Act. *Id.* at 22-25. Given that the FCC guidelines constitute mere procedural requirements, the petitioner questions the preemptive effect they can have on state health, safety, and consumer-protection laws. *Id.* at 24-25. Additionally, the petitioner points to a "savings clause" in the statutory authority under which the FCC regulations at issue were promulgated which purportedly disclaims any preemptive effect over state laws. *Id.* at 17-22.

In opposition to the petition, the respondent cell phone manufacturers and retailers (including but not limited to Motorola, Inc., Nokia Inc. and Sony Electronics, Inc.) dispute the petitioner's characterization of the RF standards as merely procedural, asserting that the FCC promulgated its rules as substantive ones grounded in the FCC's long-established and broad rulemaking authority to regulate communications. *See Farina v. Nokia*, U.S. No. 10-1064, Brief in Opposition for Respondents, at 18-19 (filed April 29, 2011), available at http://www.scotusblog.com/case-files/cases/farina-v-nokia-inc/. Further, respondents also contest the effect of the savings clause, contending that Congress would have never charged the FCC with adopting rules on RF standards only to render the regulations a nullity in the face of conflicting state law. *Id.* at 20. Respondents also note that the Court has declined to give broad effect to savings clauses where doing so would upset regulatory schemes established by federal law. *Id.* at 19.

This is not the first time the Supreme Court has been asked to review a Circuit Court's decision related to the preemptive effect of federal telecommunications regulations related to FCC's RF standards. In 2005, the Court denied a certiorari petition brought by cell phone manufacturers and retailers, which asked the Court to reverse the Fourth Circuit's decision reinstating five class action lawsuits (including Farina) involving the same claims. *See Pinney v. Nokia*, 402 F. 3d 430 (4th Cir. 2005). That petition was denied. *See Nokia v. Naquin*, 546 U.S. 998 (2005).

Given that the success rate for certiorari petitions before the Supreme Court is approximately 1.1%, it is statistically unlikely that Plaintiff's petition will be granted. Nevertheless, given that two federal circuit courts have come to opposite conclusions on this issue, the possibility that the Court may grant certiorari is at least somewhat higher.

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Additionally, the Supreme Court on May 31st invited the Acting Solicitor General to file a brief in the case expressing the view of the United States. Given the Court's request for further briefing, the possibility that the Court may grant the petition now appears to be somewhat higher. It is not clear when the Court will next consider the certiorari petition because it has not yet set a new conference date for this matter.

For more information, please contact Daniel Krainin at dkrainin@bdlaw.com, Paul Hagen at phagen@bdlaw.com or Ryan Tacorda at rtacorda@bdlaw.com.

Firm News & Events

Henry Diamond Receives DOI's Lifetime Conservation Achievement Award

Beveridge & Diamond, P.C. is pleased to announce that Interior Secretary Ken Salazar has awarded the Secretary of the Interior's Lifetime Conservation Achievement Award to Henry L. Diamond. The award was presented in recognition of Mr. Diamond's dedication over the past 50 years to the conservation of lands and waters across the Nation and for his direct support to the mission of the Department of the Interior. The Lifetime Conservation Achievement Award is the Department's highest honor for a private citizen and was presented to Mr. Diamond at an event hosted by the Secretary on May 10.

"Henry's mark on the American landscape is unmistakable and we are very proud to see his life-long commitment to land and water conservation recognized with this high honor from the Department of the Interior," said Ben Wilson, the firm's Managing Principal.

Mr. Diamond first attracted public attention in 1962 when he edited the report by the Outdoor Recreation Resources Review Commission for President Kennedy. The seminal report of this commission led to creation of the Land and Water Conservation Fund, the national system of wilderness areas and wild and scenic rivers. Twenty years later he chaired a task force that pressed for a timely review of land and water conservation, which prompted President Reagan to establish the President's Commission on Americans Outdoors.

Mr. Diamond was associated with the late Laurance S. Rockefeller over many years in his conservation efforts. Mr. Diamond served as Executive Director of the influential 1965 White House Conference on Natural Beauty, which Mr. Rockefeller chaired. He served as a member and then as chairman of the President's Citizens' Advisory Committees on Recreation and Natural Beauty and Environmental Quality. He also served Governor Nelson Rockefeller as the first environmental commissioner for the state of New York, leading the nation's first state environmental agency. As Commissioner, he led a 533 mile bicycle ride across New York State to successfully promote a $1.2 billion environmental bond issue. Mr. Diamond has served on more than 30 other boards and commissions, including Resources for the Future, Environmental Law Institute, The Woodstock Foundation, the Jackson Hole Preserve, Inc. and Americans for Our Heritage and Recreation.

Mr. Diamond's leadership continues presently as co-chair of the bipartisan Outdoor Resources Review Group, sponsored by Senators Jeff Bingaman and Lamar Alexander. The Group's Report, Great Outdoors America, was invaluable in forming the conclusions of the America's Great Outdoors initiative.

To read the Department of the Interior's press release, please go to http://www.doi.gov/news/pressreleases/Salazar-Presents-Lifetime-Conservation-Achievement-Award-to-Henry-L-Diamond.cfm.

Beveridge & Diamond, P.C. Purchases Renewable Energy Credits Equal to 100% of Firm's Electricity Usage

Beveridge & Diamond, P.C. ("B&D"), a national law firm known for its environmental practice, has entered into an agreement to purchase renewable energy certificates (RECs) for wind-generated electricity in an amount equivalent to 100% of its annual electricity usage in all of its offices nationwide. As part of its commitment as a Green Power Leader in the ABA-EPA Law Office Climate Challenge, B&D is purchasing 1,500 megawatt hours ("mWh") of RECs from Community Energy, Inc. annually, making it one of the first firms in the country to hit the 100% mark on REC purchases. The estimated greenhouse gas reduction attributable to B&D's purchase is approximately the same as removing 203 passenger vehicles from the roadways or eliminating the carbon dioxide from 116,200 gallons of consumed gasoline.

In June of 2007, B&D enrolled in all three ABA-EPA Climate Challenge programs -- the Green Power Partnership, Energy Star, and Best Practices for Office Paper Management. B&D was the first law firm to make commitments to all three Challenge programs at all of its offices nationwide. The Green Power Partnership is an EPA program that promotes the use of renewable electricity through the purchase of credits that force "green power" to displace fossil fueled power. B&D's purchase of wind-generated electricity RECs qualifies the firm for recognition as a "Leader" under the Green Power Partnership.

Since February 2008, all of B&D's offices have been using paper that has a minimum 30% post-consumer content for all standard in-house printing and copying (with some offices using 80-100% post-consumer content paper). Since 2007, B&D has implemented paper recycling and double-sided printing as the default setting in its offices as part of its commitment under the Best Practices for Office Paper Management program of the ABA-EPA Law Office Climate Challenge.

The Firm believes that office sustainability is an ongoing process, and will continue to make investments and adopt systems designed to meet best practices of energy and environmental management consistent with the goals of the Challenge and beyond.

For more information about B&D's sustainability efforts, please visit http://www.bdlaw.com/firm-community.html.

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