Massachusetts Environmental and Land Use Alert

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Massachusetts Developments

MassDEP Fines Environmental Consultant for Inaccurate Description of Cap in Deed Restriction

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dismissing their appeal from an order of the Rutland Zoning Board of Appeals (Board) requiring them to cease and desist operation their dance studio. (*full article*)

Owners of Land Adjacent to Deed Restricted Land Are Entitled to Enforce Deed Restriction Even if Restriction Does Not State That Land Is to be Benefited

The Massachusetts Appeals Court ruled that an owner of land that is located adjacent to a deed restricted piece of property has standing to enforce that deed restriction, even if the deed restriction does not contain an express statement that the adjacent land is intended to benefit from the restriction (*full article*)

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U.S. EPA Considers including Vapor Intrusion in Evaluation of which Sites Should be Placed on CERCLA National Priorities List

On January 31, 2011, the U.S. EPA sought comment from the public on whether to add vapor intrusion as a new component to the hazard ranking system, which is the primary method used to determine which sites should be included on the National Priorities List under CERCLA. *(full article)*

EPA Announces Extension of Reporting Deadline for 2010 Greenhouse Gas Emissions

The Environmental Protection Agency ("EPA") has announced that it intends to extend the March 31, 2011 deadline for submittal of the first annual greenhouse gas ("GHG") emissions reports due under the Greenhouse Gas Reporting Program, 40 CFR Part 98. *(full article)*

BLM Announces Extension of Public Comment Period for Draft Solar Programmatic EIS

In furtherance of efforts to promote solar development on nearly 700,000 acres of government land, on March 7, 2011, the U.S. Department of the Interior, Bureau of Land Management (BLM), announced a 30-day extension of the public comment period for the Draft Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States (Draft Solar Programmatic EIS). *(full article)*

EPA Promulgates New Air Toxics Rules For Boilers, And Waste And Sewage Sludge Incinerators

On February 21, 2011, the U.S. Environmental Protection Agency released several new rules related to emissions of toxic air pollutants that will affect thousands of industrial facilities across the nation. *(full article)*

Prospects for TSCA Legislation in the 112th Congress

The Toxic Substances Control Act (TSCA) has not been amended for over 34 years, but not for lack of critics or legislative effort in recent years. Whether it will be amended in the new Congress, with its Republican majority in the House of Representatives, is unclear. At this early point, there are reasons to think that TSCA legislation may receive serious consideration. *(full article)*

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MassDEP has fined an environmental consultant for providing inaccurate information in a deed restriction and an environmental report causing its client to make inaccurate statements to MassDEP regarding site conditions, according to an agency press release. The consulting company has been assessed a $25,000 penalty and required to conduct additional site work.

In Massachusetts, site clean-up decisions are made by environmental consultants known as Licensed Site Professionals (LSPs) subject to audit by MassDEP. State regulations allow residual contamination to remain in place when the LSP determines that it poses "no significant risk" to human health and the environment so long as certain conditions are met. These conditions could include limitations on uses of the property (e.g., a prohibition on residential use) or a requirement that a cap eliminate the potential for exposure to the material. These types of activity and use limitations are recorded in a deed restriction.

In this case, the 2003 site closure report and deed restriction prepared by the LSP stated that soils contaminated with petroleum compounds, metals and asbestos were covered by a 2-foot cap to eliminate the potential for contact with the contaminated material. Based on this cap, a condition of "no significant risk" had been achieved, and no further remediation work was required. The area was then redeveloped into a park. In 2010, MassDEP discovered that the cap varied in thickness from a few inches to 18 inches, below the 2-foot description in the deed restriction and environmental report. MassDEP concluded that the environmental consultant had made inaccurate statement in these documents.

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

Regulation of Biomass Energy Projects Diverges at the Federal and Massachusetts Levels

The U.S. Environmental Protection Agency ("EPA") and the Commonwealth of Massachusetts, acting through its Department of Energy Resources ("DOER"), are separately in the process of altering their regulations affecting biomass energy projects. Although both agencies explain their actions as responses to scientific studies and uncertainties regarding emissions from biomass energy projects, they are pursuing different approaches and this divergence will have direct impacts on the development of biomass projects over the next several years.

While EPA is delaying any permitting of greenhouse gas ("GHG") emissions from biomass energy plants and other biogenic sources, DOER is tightening existing regulations to significantly limit the type and efficiency levels of biomass projects that can qualify for renewable energy credits ("RECs") under the state's Renewable Portfolio Standard ("RPS").

EPA Proposal to Defer Permitting

Effective January 2, 2011, the federal Clean Air Act Prevention of Significant Deterioration and Title V Operating Permit programs now include permitting requirements for new and modified stationary sources of GHG emissions. EPA's May 2010 tailoring rule, which limits application of these new GHG permitting requirements to large industrial sources and staggers the implementation of permitting requirements over time, included biomass energy sources in the mix of facilities that must obtain air

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permits for GHG emissions. However, on January 12, 2011, EPA announced its intent to defer GHG emission permitting requirements for biomass energy projects for three years. The White House Office of Management and Budget completed its review of EPA's proposed rule in March, and this allows EPA to proceed to issue a final regulation to implement the deferral. EPA has stated a goal of adopting this final rule amendment by July 1, 2011.

In addition to finalizing the deferral, EPA plans to issue guidance as to whether the use of biomass can constitute a best available control technology ("BACT") for limiting GHG emissions at new or modified sources. The type of emission limitations that qualify as BACT is determined on a case-by-case basis, taking into account technical feasibility, cost, and energy, environmental and economic impacts. Previously, in its "PSD and Title V Permitting Guidance for Greenhouse Gases," see www.epa.gov/nsr/ghgdocs/epa-hq-oar-2010-0841-0001.pdf, EPA noted that the use of certain types of biomass and other biogenic sources for energy generation, such as biogas from landfills, could, after evaluation of relevant environmental, energy and economic issues, be deemed BACT.

Massachusetts Amendments to Renewable Portfolio Standard Regulations

The Massachusetts Class I RPS regulations require all retail electricity suppliers to provide at least 15% of sales to end-use customers in the Commonwealth from eligible renewable energy resources by 2020. Initially, eligible renewable energy resources included sources installed after December 31, 1997, that used low-emission advanced biomass power conversion technologies using fuels such as wood, by-products or waste from agricultural crops, food or vegetative material, energy crops, algae, biogas and liquid biofuels. Construction and demolition material is not eligible for the RPS programs; a special commission was created to examine such waste combustion and its potential linkage to the RPS program, but has not yet issued findings or recommendations.

Prompted by a study commissioned by DOER that concluded in some instances and under some conditions certain biomass technologies could produce higher GHG emissions in the shorter term when compared with other fuel sources, see http://www.manomet.org/node/322, DOER issued draft regulations in the fall of 2011 to limit the type of biomass generation units eligible for RECs under the RPS program. Although the proposal does not ban wood-burning, it restricts the types of residue and waste that can be burned, with a reported goal of discouraging poor forest management, and making it more difficult for plants that burn wood to obtain RECs. Under the revised regulations, eligible biomass fuel would be limited to:

> Eligible Biomass Woody Fuel, Manufactured Biomass Fuel, by-products or waste from animals or agricultural crops, food or vegetative material, algae, anaerobic digester gas and other biogases that are derived from such resources, and neat Eligible Liquid Biofuel that is derived from such fuel sources.

Manufactured Biomass Fuel and Eligible Biomass Woody Fuel, which includes forest and non-forest derived residues, forest salvage and dedicated energy crops, are defined in the proposed regulations, available at http://mass.gov/Eoeea/docs/doer/renewables/biomass/225%20CMR%2014.00%20091710%20to%20SoS.PDF.

The draft regulations also added high efficiency criteria that biomass units must meet to obtain full or partial RECs. Eligibility for RECs is critical for the economic viability of many biomass energy projects. DOER proposed to make full RECs available to biomass projects with a 60% efficiency criteria and fractions of RECs available on a sliding scale beginning for units with a 40% efficiency criteria. In addition, project proponents seeking RPS qualification for biomass projects would need to demonstrate to DOER that biomass power units will reduce life-cycle GHG emissions at least 50% over 20 years as compared to natural gas combined cycle electric generation and any fossil

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fuel emissions displaced from serving thermal loads. These are very restrictive proposed standards.

While facilities that received a statement of qualification from the RPS program prior to the rule change would initially maintain their qualification, under the draft rule they would be subject to the new RPS regulatory requirements and face a risk of losing their qualification should they be unable to comply over the longer term.

DOER announced last year that it intended to finalize its biomass rule by December 31, 2010. DOER received significant comments on the rule, and there have recently been leadership changes at DOER and its executive agency. As a result, the proposed rule has not been issued in final form as of early March, 2011.

For additional information on the federal and state biomass regulatory proposals, please contact Stephen Richmond at srichmond@bdlaw.com or Aladdine Joroff at ajoroff@bdlaw.com.

Massachusetts Expands Mechanics' Lien Law to Include Design Professionals and Licensed Site Professionals

On January 5, 2011, Governor Patrick signed into law an extension of the existing traditional "mechanics' lien" protections to design professionals and licensed site professionals. Under the expanded law, these additional professionals will be able to perfect a lien on real property as security for payment for certain services performed in relation to that real property. The new law is effective July 1, 2011.

In particular, 2010 Mass Act. Chapter 424 extends these protections to "design professionals" including architects, landscape architects, professional engineers, licensed site professionals, and land surveyors that are licensed or registered in Massachusetts. The protection applies only to professional services "relating to proposed or actual erection, alteration, repair or removal of a building, structure, or other improvement to real property" performed under a written contract on behalf of or with the consent of the owner of that property.

For further information on the Massachusetts Lien Law or site cleanup, please contact Jeanine Grachuk at jgrachuk@bdlaw.com.

Massachusetts Solid Waste Developments

- The Massachusetts Department of Environmental Protection ("MassDEP") has adopted a rule amendment that will ban the disposal and transfer for disposal of clean gypsum wallboard. The ban will take effect on July 1, 2011, at which time clean gypsum wallboard will join the growing list of items that may not be managed for disposal in Massachusetts. The current disposal ban includes a wide variety of items, such as leaves, yard waste, aluminum containers, metals, glass, single polymer plastics, recyclable paper, asphalt, brick and concrete.

- MassDEP has issued revised final guidance on implementing July 2010 amendments to the solid waste site assignment and permitting statute, M.G.L. Chapter 111, Section 150A, and has established a task force to assist in implementation issues. The statutory amendments transferred responsibility for permitting small transfer stations from MassDEP to local Boards of Health and also eliminated the requirement that MassDEP issue site suitability reports for solid waste facility site assignments and modifications. For further information on the statutory amendments, see MassDEP Issues Draft Solid Waste Facility Site Assignment Guidance at http://www.bdlaw.com/assets/attachments/December%202010%20MA%20Update.pdf.

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Rather than revise its site assignment regulations at this time, MassDEP has indicated in its final guidance that Boards of Health "should refer to these regulations for the minimum criteria to use in reviewing site assignment applications, except that BoHs should now interpret each reference in these regulations to the term "Department" to refer instead to 'Board of Health'." The site assignment regulations provide different authorities to MassDEP and Boards of Health, reflecting the different roles that each have played in the process under the statute. The guidance attempts to provide all of those authorities and roles to Boards of Health. To date there have been no challenges to site assignment procedures under this new guidance, and it remains to be seen whether these procedures would be upheld by a reviewing court.

- MassDEP has taken significant enforcement actions at a Fall River, Massachusetts landfill to address allegations that the landfill and an on-site gas-to-energy facility had hydrogen sulfide and sulfur dioxide emissions that exceeded limits authorized by permit.

  In companion enforcement cases, MassDEP penalized both the landfill operator and the gas-to-energy facility operator. BFI-Fall River, the landfill operator was cited for emissions in excess of permit limits and agreed to pay a $65,546 penalty and to install and operate a landfill gas pretreatment system to reduce hydrogen sulfide emissions. Gas Recovery Systems, a division of Fortistar and the operator of the gas-to-energy facility, agreed to pay a $222,110 penalty. MassDEP attributed the size of the Fortistar penalty to economic benefit, based on MassDEP's estimates of delayed and avoided expenditures.

For additional information about these solid waste developments, please contact Stephen Richmond at srichmond@bdlaw.com.

Mass Appeals Court Strikes Down Local Inflow and Infiltration Fee

The Massachusetts Appeals Court struck down a municipal fee or "inflow and infiltration (I/I) reduction contribution" charged to the developers of residential homes as a condition for connecting to the town's sewer system. *Denver St. LLC v. Town of Saugus*, 78 Mass. App. Ct. 526, 533-534 (2011). In so doing, the Court agreed with the developers that the alleged "fee" constituted an illegal tax rather than a permissible fee because the contribution did not offer particularized benefit to developers nor bear a reasonable relationship to the costs of sewer repairs.

The Town of Saugus suffered from degraded or inadequate sewer infrastructure that allowed water to enter the sewer system resulting in occasional system overloads of treatment plants and, in turn, the release sewage into the Saugus River during certain storm events. In 2005, the Town entered into the Administrative Consent Order (ACO) with the Department of Environmental Protection (DEP), which required the Town to identify and eliminate sources of I/I. The Town created "sewer bank," a program used in a number of other cities and towns in the Commonwealth, which is essentially a mechanism for calculating when I/I reduction was such that new flow would be permitted. Under the sewer bank procedure, the developers, to connect to the sewer system, "purchased" gallons of flow from the sewer bank by making an I/I reduction contribution. The ACO itself did not require that applicants for a sewer connection permit either remove I/I or make an I/I reduction contribution.

To proceed with residential developments, four developer paid over $650,000.00 in I/I fees under protest and then brought suit challenging the purported fee. The trial court ruled that there was "no relationship between the amount of the calculated I/I [reduction] [c]ontribution and the actual cost to the Town . . . for labor and materials necessary to make the physical connection to the sanitary sewer system." She further found that "the Town was obligated to reduce I/I whether new users were added to the system or not. The I/I problem was not caused by, or exacerbated by[,] the new users. In other

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words, the I/I and the [sanitary sewer overflow] problems existed independently of the requirements of new users." The Town appealed.

"A municipality does not have the power to levy, assess, or collect a tax unless the power to do so in a particular instance is granted by the Legislature." *Silva v. Attleboro*, 454 Mass. 165 (2009). Since no law authorized the I/I fee, the Town argued it constituted a permissible fee. "Fees imposed by a governmental entity . . . share [three] common traits that distinguish them from taxes: [1] they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner 'not shared by other members of society'; [2] they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge... and [3] the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses." *Emerson College v. Boston*, 391 Mass. 415, 424-425 (1984).

Focusing on the first and thirds factors, the Court first held there was no particularized benefit to the developer since "every inhabitant of the town (as well as those living in the downstream communities bordering the Saugus River and beyond) benefited from I/I repairs to the dilapidated sewer system. Not only was sewage overflow onto streets and into residences averted, but with each repair, sewage discharge into the environmentally sensitive river and nearby ocean became less likely, with resulting environmental and health benefits extending to all inhabitants of the town." *Denver St. LLC*, 78 Mass. App. Ct. at 533-534.

As to the third factor, the Court explained that, "The I/I reduction contribution did not compensate the town for services related to expenses it incurred in connection with the entry of new users to the sewer system.... The I/I repairs that resulted in credits to the sewer bank were mandated by the DEP to rectify existing environmental problems.... There is ample evidence in the record to support the judge's finding that '[t]he I/I problem was not in any way triggered by or aggravated by new users to the system. But for the I/I problem, the [town's] sewer system would not have required renovation in order to accommodate the new users. The contribution does not go to new infrastructure, but only goes to repair an existing system.'" *Denver St. LLC*, 78 Mass. App. Ct. at 535.

The trial court's judgment were affirmed and developer were awarded repayment of their respect contribution with interest.

For additional information, please contact Brian C. Levey (blevey@bdlaw.com or (781) 416-5733) or Marc J. Goldstein (mgoldstein@bdlaw.com or (781) 416-5715).

Standing On Appeal to Court Not Waived if Unchallenged at Local Level

In *Warrington v. Zoning Bd. of Appeals*, 78 Mass. App. Ct. 903 (Mass. App. Ct. 2010), operators of a dance studio (Warringtons) appealed from a judgment of the Superior Court dismissing their appeal from an order of the Rutland Zoning Board of Appeals (Board) requiring them to cease and desist operation their dance studio. They claim that the individual who sought the enforcement action (Blair) lacked standing to appeal the Building Inspector's refusal to issue a cease and desist order. Blair and the Board allege that the Board's order was proper and that the Warringtons failed to challenge Blair's standing during the administrative proceedings.

The Warringtons, in the course of building a barn on their property, were advised by the Building Inspector that a Special Permit would be required for operation of a dance studio in the barn. Nevertheless, they operated the dance studio for several years without seeking the permit. In October, 2004, Blair sent a letter to the Building Inspector pursuant to G. L. c. 40A, § 7, seeking enforcement of the zoning bylaw and requesting that he order dance operations to cease. The Building Inspector refused to do so.

While Blair was neither an abutter nor an abutter to an abutter within three hundred

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feet of the premises, he was a town resident, owned both commercial and residential property in the Town and held a mortgage on property abutting the Warringtons property. He appealed to the Board which issued the requested cease and desist order. At no point during the Board hearings did the Warringtons challenge Blair's standing to appeal from the Building Inspector's denial of his enforcement request.

The Warringtons then appealed the Board's order claiming that Blair had no standing to appeal from the Building Inspector's refusal to issue the order. Blair argued that the Warringtons standing challenge was too late as they had failed to raise the issue before the Board. The trial court granted judgment to Blair and the Board. The Warringtons appealed.

On appeal, the Appeals Court reaffirmed that "General Laws c. 40A distinguishes between the class of persons entitled to seek zoning enforcement from the building inspector and the class of persons who, if dissatisfied with the building inspector's response to their enforcement request, may appeal to the board. [General Laws] c. 40A appears to recognize the distinction between a right of a nonaggrieved person to seek enforcement (see [G. L. c. 40A,] § 7) and the greater right of an aggrieved person to start an administrative proceeding seeking to compel enforcement (see [G. L. c. 40A,] § 8). Under § 7, a person in writing may request a building inspector to enforce the zoning by-law.... The person need not be aggrieved. To go beyond that stage, if the request for enforcement is rejected, a party must be aggrieved."

The Court explained that, "Status as a 'party aggrieved,' in other words, is the status that confers standing to prosecute an appeal [of the building inspector's ruling a zoning board]. The same standing requirement appears in G. L. c. 40A, § 17, which governs appeals from a zoning board to the court." Since "`[s]tanding is an issue of subject matter jurisdiction,' [l]ack of standing, therefore, cannot be waived and may be raised at any stage of the proceedings."

In sum, the Court held that, "We think that the standing requirements of § 8 are no less fundamental to sound operation of the statutory scheme than are the standing requirements of § 17, and that, as a consequence, "`[a]ggrieved person status is no less a jurisdictional condition to maintaining an appeal to a board of appeal under G. L. c. 40A, § 8, than it is to maintaining judicial review under § 17.'" Therefore, the Warringtons' did not waive their ability to challenge Blair's standing by failure to raise the issue before the Board.

Since the judgment in favor Blair and the Board was in error, the case was must be remanded for examination of the standing issue on the merits.

For additional information, please contact Brian C. Levey (blevey@bdlaw.com or (781) 416-5733) or Marc J. Goldstein (mgoldstein@bdlaw.com or (781) 416-5715).

Owners of Land Adjacent to Deed Restricted Land Are Entitled to Enforce Deed Restriction Even if Restriction Does Not State That Land Is to be Benefited

The Massachusetts Appeals Court ruled that an owner of land that is located adjacent to a deed restricted piece of property has standing to enforce that deed restriction, even if the deed restriction does not contain an express statement that the adjacent land is intended to benefit from the restriction. In *Rosenfeld v. Zoning Board of Appeals of Mendon*, 78 Mass. App. Ct. 677 (2011), the Appeals Court resolved the interpretation of M.G.L. c. 184, § 27(a)(2) that had been left open by the Massachusetts Supreme Judicial Court's decision in *Brear v. Fagan*, 447 Mass. 68, 73 (2006), where the SJC identified but did not answer this question.

The case involved a dispute among neighbors in Mendon regarding the proposed development of property for horse stables, a riding ring, fenced pasture and training areas, and related buildings including a residence for a trainer. Earlier permitting

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resulted in variances to allow a single-family house to be developed, subject to restrictions. Abutters appealed the decision of the Zoning Board of Appeals of Mendon granting a Special Permit to allow the horse-related development.

The Appeals Court quickly disposed of arguments that restrictions in previously granted variances that had expired and were not being utilized for the new development precluded the project, finding that conditions in the variances are only applicable to the extent the variances are actually utilized on the property. As a result, the Appeals Court also did not need to decide whether the variances had, in fact, expired.

The Appeals Court reiterated the SJC's struggle with interpreting M.G.L. c. 184, § 27(a)(2) that results from that provision's lack of punctuation, an ambiguity that leads to two possible readings. First, the statute can be read to require that an intent to benefit adjoining land be stated explicitly in the restriction. Second, the statute can be interpreted to impose this requirement only on non-adjoining land. After careful review of the language, the Appeals Court ruled that explicit language stating an intent to benefit is only required for non-adjoining land in order to establish standing under the statute to enforce the restriction. As a result, the Appeals Court reversed the Superior Court's decision finding the plaintiffs without standing to enforce the deed restriction and remanding the case back to the Superior Court.

Two of the defendants filed a Request for Further Appellate Review with the SJC on February 17, 2011, which is pending.

For additional information, please contact Marc J. Goldstein (mgoldstein@bdlaw.com or (781) 416-5715) or Brian C. Levey (blevey@bdlaw.com or (781) 416-5733).

National Developments

U.S. EPA Considers including Vapor Intrusion in Evaluation of which Sites Should be Placed on CERCLA National Priorities List

On January 31, 2011, the U.S. EPA sought comment from the public on whether to add vapor intrusion as a new component to the hazard ranking system, which is the primary method used to determine which sites should be included on the National Priorities List (NPL) under CERCLA. Vapor intrusion refers to the ability of volatile contaminants to move from soil vapor into the indoor air of buildings.

The Hazard Ranking System (HRS) is a tool used to assess the relative threat of sites to human health and the environment by developing an HRS "score" for each site. An HRS score ranges from 0 to 100, and any site that scores 28.50 or greater is eligible for the NPL. The information used to develop the HRS score includes four pathways by which contaminants can reach human or environmental receptors: ground water, surface water, soil, and air. For each pathway, the likelihood of exposure, the characteristics of the contaminants, and the potential receptors (human or environmental) are considered in developing the final score.

EPA is seeking input on whether the vapor intrusion pathway should be included in this analysis. In addition, EPA is seeking input on ten specific issues:

1. The level and extent of vapor intrusion contamination that would warrant evaluation for placement on the NPL.
2. How to include vapor intrusion in the HRS while maintaining its current structure.
3. The importance of evaluating the "potential threat to populations not demonstrated to be exposed to contaminant intrusion."
4. Available and practical sampling procedures.

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5. Screening sampling strategies that compensate for the variability in vapor intrusion rates under different climatic and seasonal conditions.

6. Sufficiently precise and accurate analytical methods.

7. The importance of the threat posed by exposure to contaminant vapor intrusion via inhalation, dermal contact, and ingestion.

8. Which environmental factors (e.g., porosity of soil) and structural and lifestyle factors (e.g., houses with basements) should appropriately be considered in determining whether sampling for vapor intrusion is warranted.

9. Locations other than residences and schools in which vapor intrusion could result in a significant threat to human health (e.g., community recreation centers).

10. The possible need to consider not only contaminant vapor intrusion, but also intrusion of contaminants in solid (i.e., particulates) and liquid forms.

This request for public input is an outgrowth of the May 2010 U.S. Government Accountability Office (GAO) Report entitled EPA's Estimated Costs to Remediate Existing Sites Exceed Current Funding Levels, and More Sites are Expected to be Added to the National Priorities List (available at http://www.gao.gov/products/GAO-10-380). In that report, the GAO recommended that EPA "determine the extent to which EPA will consider vapor intrusion in listing NPL sites and its effect on the number of sites in the future."

Watch for additional developments on vapor intrusion. EPA has announced that it plans to update its 2002 Draft Guidance for Evaluating the Vapor Intrusion Pathway from Groundwater to Soils. Based on its August 2010 Review of the Draft 2002 Subsurface Vapor Intrusion Guidance, (available at http://www.epa.gov/oswer/vaporintrusion/) EPA plans significant updates to this guidance based on improved scientific understanding and to address the potential for future building construction The new guidance is not expected until November 2012.

Comments are due on or before April 16, 2011. For further information on the Hazard Ranking System, CERCLA, or vapor intrusion, please contact Jeanine Grachuk at jgrachuk@bdlaw.com.

EPA Announces Extension of Reporting Deadline for 2010 Greenhouse Gas Emissions

The Environmental Protection Agency ("EPA") has announced that it intends to extend the March 31, 2011 deadline for submittal of the first annual greenhouse gas ("GHG") emissions reports due under the Greenhouse Gas Reporting Program, 40 CFR Part 98.

A new reporting deadline has not yet been established, but according to the EPA press release, issued March 1, 2011, the agency plans to modify the reporting deadline before the first report is due on March 31, and anticipates requiring submittal of 2010 annual inventory reports later this year, after it has had an opportunity to fully roll out an electronic reporting system, test the system, and obtain industry feedback.

This delay follows a last minute scramble by regulated entities to register for reporting by a mandatory January 30th deadline. This rush to register was caused by the failure of EPA to timely bring on-line the registration elements of the electronic reporting system that it had spent months designing for use by the thousands of entities that will need to report GHG emissions. The scramble to register was particularly difficult for those who import or export, as EPA somewhat inexplicably decided that those entities must use an entirely different electronic reporting system, and then posted no information to guide reporters on the registration process until one week prior to the registration deadline. Consequently, EPA's decision to delay all GHG inventory reporting until the regulated

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community has an opportunity to test and comment on the reporting system is likely a recognition that the initial steps to roll out the reporting system have been rocky, and that more thought and dialogue is necessary to ensure the system will, in fact, work.

The extension announced today does not affect ongoing GHG emissions monitoring requirements for facilities subject to the Greenhouse Gas Reporting Program. These requirements remain in full force. Further, reporters will also need to continue to report any changes in their existing designated representatives, those individuals responsible for certifying, signing and submitting the annual GHG reports.

As EPA's March 1 announcement was only in the form of a press release, the agency will need to take formal action to amend the March 31, 2011 deadline for report submittal that is contained in 40 CFR Part 98, the GHG reporting rule. The brief amount of time for action suggests that EPA may issue an emergency rule amendment to change the reporting deadline, as opposed to using the regular rule amendment process, which takes longer to accomplish because it provides an opportunity for public comment.

For further information on the GHG reporting rule or on this recent agency action, please contact Stephen Richmond at srichmond@bdlaw.com, Amy Lincoln at alincoln@bdlaw.com, or Aladdine Joroff at ajoroff@bdlaw.com.

BLM Announces Extension of Public Comment Period for Draft Solar Programmatic EIS

In furtherance of efforts to promote solar development on nearly 700,000 acres of government land, on March 7, 2011, the U.S. Department of the Interior, Bureau of Land Management (BLM), announced a 30-day extension of the public comment period for the Draft Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States (Draft Solar Programmatic EIS).

BLM and the U.S. Department of Energy (DOE) are each considering taking actions to facilitate solar energy development. BLM has proposed the establishment of a Solar Energy Program applicable to utility-scale solar energy development on BLM-administered lands in Arizona, California, Colorado, Nevada, New Mexico, and Utah. DOE has proposed the development of programmatic guidance to further integrate environmental considerations into its analysis and selection of DOE-supported solar projects. Pursuant to the National Environmental Policy Act and other applicable authorities, the two agencies have jointly prepared the Draft Solar Programmatic EIS to evaluate the environmental, social, and economic effects of the agencies' proposed actions and alternatives.

In recent years, BLM has begun to receive a substantial number of applications for right-of-way authorizations for solar facilities proposed to be located on BLM-administered lands. In pursuing the Draft Programmatic EIS, BLM seeks - among other things - to standardize and streamline the authorization process. In connection with that effort, the program would identify locations best suited for utility-scale production of solar energy, called "solar energy zones" (SEZs), in which development would be prioritized. The Draft Solar Programmatic EIS identifies approximately 677,400 acres of proposed SEZs, out of a total of 22 million acres of public lands, that would be available for potential development under the program.

Other elements of the Solar Energy Program would include: (1) identification of lands excluded from utility-scale solar energy development in the six states covered by the program; (2) establishment of mitigation requirements for solar energy development on public lands (including SEZ-specific requirements); and (3) amendment of BLM land use plans in the six-state area to adopt those elements of the program that pertain to planning.

As a result of the extension, interested parties may now submit comments on the Draft Solar Programmatic EIS until April 16, 2011.

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EPA Promulgates New Air Toxics Rules For Boilers, And Waste And Sewage Sludge Incinerators

On February 21, 2011, the U.S. Environmental Protection Agency released several new rules related to emissions of toxic air pollutants that will affect thousands of industrial facilities across the nation. Among those rules are the Final Air Toxics Standards for Industrial, Commercial, and Institutional Boilers and Process Heaters at area and major sources, also known as the "Boiler MACT" rules. EPA estimates there are 200,840 existing boilers and process heaters, with another 2,400 coming on line in the next three years, that will have to comply with the new Boiler MACT requirements. The Boiler MACT targets emissions of mercury, dioxin, particulate matter, hydrogen chloride, and carbon monoxide with a combination of new numerical emissions limits and new work practice standards, i.e. a biennial "tune-up," for certain boilers.

EPA also promulgated final rules to limit toxic air emissions from Commercial and Industrial Solid Waste Incinerators ("CISWI rule"), Sewage Sludge Incinerators ("SSI rule"), and a final rule for Identification of Non-Hazardous Secondary Materials That Are Solid Wastes ("Solid Waste rule").

While these rules are final, EPA is voluntarily reconsidering portions of the Boiler MACT rules and the CISWI rule. EPA is in the process of developing a proposed reconsideration notice that will identify the specific elements of the rules EPA will reconsider.

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Prospects for TSCA Legislation in the 112th Congress

The Toxic Substances Control Act (TSCA) has not been amended for over 34 years, but not for lack of critics or legislative effort in recent years. Whether it will be amended in the new Congress, with its Republican majority in the House of Representatives, is unclear. At this early point, there are reasons to think that TSCA legislation may receive serious consideration.

This article assesses the significance of the election for TSCA legislation by distilling some lessons from the legislation introduced in the 111th Congress and addressing the overall prospects for TSCA legislation in the 112th Congress.

1. Why did TSCA Legislation Not Pass in the 111th Congress?

Despite a Democratic President and Democratic majorities in both Houses of Congress, TSCA legislation did not get out of committee, or even go to mark-up, in either House. There are several reasons why the legislation did not get further.

First, other priorities prevented a clear focus on TSCA legislation. The economy, health care, and climate change were higher priorities, thus limiting the time available for TSCA.

Second, it was clear that TSCA is not well understood among the Members of Congress. The original statute was passed decades ago, and no bills to overhaul it significantly had been introduced until 2005 and 2008 (the Kid-Safe Chemicals Act), neither of which went far. Congress had conducted only limited oversight of TSCA implementation before 2009. Thus, much of 2009 and early 2010 was spent educating the Members and their staffs on TSCA.

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Third, it is important to recognize that TSCA legislation is likely to be a multi-year effort, and 2009 and 2010 were really the first of several years that may be needed for legislation to pass. The original TSCA legislation was proposed in 1971 and took six years to pass. REACH was debated for six years in the EU before passage.

Fourth, while problems with TSCA had already been identified, there had been no previous consensus on the provisions of an amended TSCA. During 2009, various stakeholder groups developed their own statements of principles for TSCA legislation. At the 30,000-foot level, these statements are generally consistent with each other. The legislation introduced in 2010 translated those concepts into concrete language, but not in a way that satisfied most industry stakeholders. More work remains to be done on forging a consensus on what an amended TSCA should provide.

Fifth, the 2010 legislation included provisions that attracted considerable opposition. Some of those provisions are discussed below.

2. Lessons From the 2010 Legislation for Future Legislation

The legislation introduced in 2010 failed to win significant industry support. As pointed out in the July 29, 2010 hearing on the House bill, much of industry had an overall concern about potential adverse effects of the legislation on innovation and jobs, two themes likely to resonate in the 112th Congress. Without significant industry support, TSCA legislation is unlikely to move forward in this Congress. The following aspects of the legislation caused significant resistance on the part of industry.

The legislation was perceived by some in industry as fulfillment of NGO wish-lists, with industry viewpoints considered only at the margin. For TSCA legislation to succeed, industry will need to have more influence on the content of the legislation.

The legislation would have followed generally the model of chemical registration used in regulating drugs and pesticides. EPA would evaluate every chemical (regardless of hazard or exposure) on the basis of an extensive database against a very protective safety standard, and impose controls on any chemical not meeting that standard. That model was perceived by many in industry as inappropriate for industrial chemicals, for two reasons. First, that approach was seen as impractical; there are only about a thousand pesticide active ingredients, each of which takes millions of dollars in testing and years to reach approval, but there are tens of thousands of industrial chemicals. EPA does not have the resources to review that many chemicals that intensively, nor is it likely to get the resources necessary to do so. Meanwhile, innovation would be impacted while waiting indefinitely for EPA to review chemicals. Second, the model was perceived by some as overkill. Whereas drugs and pesticides are designed to be biologically active, industrial chemicals are not. Whereas drugs are deliberately used in or on the human body and pesticides are deliberately applied to the environment, industrial chemicals are not. Because there may be potential human and environmental exposure to industrial chemicals, regulation of some kind is seen as appropriate, but not the heightened scrutiny appropriate for drugs and pesticides.

The idea that industry has the burden of proof, a key part of the 2010 legislation, is already present in the current TSCA. Section 2(b) states:

> It is the policy of the United States that-- (1) adequate data should be developed with respect to the effect of chemical substances and mixtures on health and the environment and that the development of such data should be the responsibility of those who manufacture and those who process such chemical substances and mixtures ....

The 2010 legislation would have applied that burden of proof idea to all chemicals at once, requiring industry to provide data on tens of thousands of chemicals within just a few years. There would have been no exceptions for low-risk chemicals such as high-molecular-weight polymers or low-volume chemicals. The requirement would have applied to far more chemicals than EPA could possibly review, so that data availability

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itself became a key requirement, rather than EPA review of that data being the goal. This meant that the legislation would have had high costs and burdens, but with limited regulatory significance. Accordingly, to be successful, future legislation may need to limit data development requirements to those chemicals that EPA is likely to review within a limited time period.

The legislation would have applied requirements for existing chemicals to new chemicals, which raised industry concerns about adverse impacts on innovation. Under the current statute, EPA mostly uses modeling rather than test data to identify the risks of new chemicals. NGOs and EPA itself questioned the reliability of modeling as a substitute for data on new chemicals, and the legislation would have required development of data on new chemicals for EPA review prior to commercialization. Many in industry regard the new chemicals program at EPA as one of the leading successes of TSCA, although there is some recognition that modeling may be less useful for entirely new materials such as nanomaterials. There is also industry concern about the need to pay for testing on chemicals that have not proven their commercial viability and that have not generated any revenue to pay for the testing. The legislation would also have extended the EPA review period for new chemicals and new uses of chemicals from 90 days to up to 18 months, during which time new chemicals and new uses could not be commercialized. These provisions led to considerable concern about adverse impacts on innovation. Future legislation may need to adopt a different approach for new chemicals and new uses of existing chemicals.

The legislation would have changed the current TSCA rulemaking standard of "unreasonable risk," which has proven to be very difficult for EPA to satisfy, to "reasonable certainty of no harm," which was expected to be very difficult for most chemicals to satisfy. The problems with the current TSCA standard need to be addressed in future legislation, but the legislation may not succeed if it sets an impossibly high standard, one that approaches zero risk.

A problem perceived with the current TSCA is its lack of deadlines for EPA to review existing chemicals. The 2010 legislation would have imposed stringent deadlines for EPA review, which were perceived by many as unrealistic. The legislation would also have imposed burdens on industry if EPA were to miss its deadlines, which burdens were perceived as adversely affecting innovation. Deadlines may be a good thing, but future legislation should tailor them to realistic expectations of what EPA can reasonably achieve.

Another problem with the current TSCA is thought to be its handling of confidential business information, with far too much information considered to be kept from the public. The 2010 legislation would have imposed both procedural restrictions on confidentiality claims, such as up-front substantiation requirements and time limits on approved claims, and substantive restrictions on the ability to keep chemical identities confidential. Many in industry were willing to accept reasonable procedural requirements, but there is no consensus on the appropriate limits for the confidentiality of chemical identities.

Preemption of state laws is a key motivation for industry support for TSCA reform. The 2010 legislation would have removed TSCA's current preemption provision. Democrats generally oppose federal preemption of state legislation, which may complicate negotiations on a new TSCA bill.

Procedural burdens on EPA under the current TSCA were addressed in the 2010 legislation by removing almost all procedural protections. For example, neither bill would have provided for notice and opportunity to comment on EPA bans or controls on chemicals, and the Senate bill would have precluded judicial review of EPA bans. A more balanced set of procedures will be needed for future legislation, since stakeholder comments inform and improve regulations.

A little-recognized aspect of the 2010 legislation was its removal of current TSCA exceptions for small businesses. The legislation would also have imposed equal

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data obligations on small businesses as on larger ones. This issue could become contentious in future legislation, given Republican concerns for small business.

Several other aspects of the legislation could be addressed as well, such as data compensation and industry funding of TSCA.

3. Prospects for TSCA Reform in the 112th Congress

A. Senate

The Senate in the 111th Congress had 56 Democrats, 2 Independents, and 42 Republicans (an effective 58% Democratic voting share). At the start of the 112th Congress, there were 51 Democrats, 2 Independents, and 47 Republicans (a 6-seat gain for Republicans, for an effective 53% Democratic voting share).

The Senate committee with jurisdiction over TSCA, the Environment and Public Works Committee, continues to be chaired by Senator Barbara Boxer (D-CA). Senator Boxer is a strong proponent of TSCA reform.

The Senate subcommittee with TSCA jurisdiction, the Subcommittee on Superfund, Toxics, and Environmental Health, will continue to be chaired by Senator Frank Lautenberg, also a strong TSCA reform proponent. He sponsored TSCA legislation in 2005, 2008, and 2010. The ranking member will continue to be Senator James Inhofe (R-OK). Although strongly conservative, he has made several statements cautiously supportive of TSCA reform. For example, on October 26, 2010 he issued a statement for a TSCA hearing saying "I commit today to work with [Senator Lautenberg] to develop legislative solutions to the extent they are needed and according to what the best available science is telling us."

Sen. Lautenberg has scheduled an initial TSCA hearing for the first week of February, 2011. Thus, he is not waiting long to restart the TSCA debate in the Senate.

B. House of Representatives

Before its close, the House of Representatives in the 111th Congress had 255 Democrats and 179 Republicans (for a 59% Democratic voting share, with 1 vacancy). At the start of the 112th Congress there were 193 Democrats and 242 Republicans (a 64-seat gain for Republicans, resulting in a 56% Republican voting share).

The House committee with jurisdiction over TSCA, the Energy and Commerce Committee, is chaired by Representative Fred Upton (R-MI). This choice by the House Republican leadership is a critical factor in the prospects for TSCA legislation in this Congress, as Upton is a member of the moderate Republican Main Street Partnership. His rivals for the post were all more conservative. The previous committee chair, Henry Waxman (D-CA), a strong TSCA reform proponent, is ranking member.

On January 20, 2011, Rep. Upton released an agenda for the Energy and Commerce Committee that included consideration of TSCA, albeit in restrained terms:

> Enacted in 1976, TSCA is the only Federal environmental law that regulates all forms of chemical manufacturing from "cradle to grave." Several public and private interests seek changes to TSCA, but they vigorously disagree on what the problems and solutions are. Robust oversight to understand existing authorities should precede major legislation.

Thus, any consideration of TSCA on the House side is likely to begin with oversight hearings.

The House subcommittee with jurisdiction over TSCA, the new Subcommittee on Environment and Economy, is chaired by Representative John Shimkus (D-IL), who is regarded as more conservative than Rep. Upton. The ranking member is

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Representative Gene Green (D-TX). The chair of the former Energy and Commerce subcommittee with jurisdiction over TSCA, Representative Bobby Rush (D-IL), will not be a member of this subcommittee. Upon becoming ranking member, Rep. Green declared, "[w]e do need to update the TSCA .... It's not an industry versus environmental issue. [Both sides] want to open it up and bring [the law] up to today's standards."

C. Analysis

There is some chance that TSCA legislation simply will not progress in the 112th Congress. It is clear that TSCA reform is not on the list of first-year priorities for Republicans in the House. That list includes repeal of health care, reining in EPA on greenhouse gases, and addressing other "job-killing" regulations. The House Energy and Commerce Committee, which is responsible for TSCA, also handles those issues. Thus, TSCA will have to compete for attention without a current Republican champion. The committee chair, while generally seen as moderate, appears eager to establish his conservative bona fides. TSCA legislation would also seem to go against the Republican goal of working toward a smaller and less intrusive federal government.

On the other hand, it may be a mistake to assume that TSCA legislation will not be considered in the 112th Congress. It is noteworthy that Rep. Upton chose to include TSCA in the committee's agenda. TSCA reform is the only environmental legislation being mentioned as possibly being passed by the 112th Congress. One reason is the expectation that over the two years of this Congress, at some point Republicans will want to be "for" something in the environmental area, not just "against" things. Another reason is the support of important industry stakeholders that developed during the 111th Congress.

That industry support arose for several reasons, which mostly continue to apply:

- In 2009, there was a Democratic President and both Houses of Congress were controlled by Democrats. That may have created a sense that TSCA legislation was likely to move, so industry should be part of the process. Now TSCA has become a focus for continuing public policy debate, notwithstanding that the Democratic President is weakened and Republicans control the House. President Obama still has significant power. In the Senate, Democrats still have a small edge, so at least the Senate may propose TSCA legislation.
- A key industry concern is public distrust of chemicals and industry. This distrust probably increased during the 111th Congress, given developments such as publicity about the use of chemical dispersants for the oil spill in the Gulf of Mexico, and public concerns about bisphenol A, phthalates, and other chemicals.
- Another key industry concern is state regulation of chemicals, creating diverse state laws. State regulation of chemicals is also stronger than ever, both of individual chemicals (e.g., seven states passed bisphenol A legislation in 2010) and more broadly (e.g., California's Green Chemistry Initiative). With Jerry Brown as governor of California, the Green Chemistry Initiative is likely to keep moving forward. This movement is gaining strength in the vacuum resulting from a weak TSCA. Even without a preemption provision, an amended TSCA could reduce the drivers for state chemicals regulation requirements.
- REACH is now a reality, showing that modern chemicals management legislation can be implemented. REACH is often perceived by industry as a model of what not to adopt. REACH is now much more of a reality than earlier, with thousands of registrations for chemicals having been submitted by November 30, 2010. Investment in REACH compliance could become a competitive advantage under a modernized TSCA. Data produced under REACH could also make TSCA data requirements more feasible to meet.
- Industry cited changes in technology as a reason for TSCA reform. Increasingly,

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greener chemicals are replacing older chemicals. Government programs such as the Tox21 project promise high-throughput toxicology screening, vastly increasing testing capabilities, although not until years in the future.

The support of some in industry for TSCA reform may have cooled, given the perceived problems with the 2010 legislation. Others continue to support TSCA reform, but it is unclear if industry will push Republicans to consider TSCA legislation.

With industry support, there could be a window of opportunity to forge the meaningful compromises necessary for TSCA legislation to move forward. Democrats would have the most to give up from the 2010 legislation, but they may be willing to compromise in order to achieve some improvements to TSCA. They have tried the approach of the 2010 legislation and should recognize that that approach is not viable for the 112th Congress. They face possible loss of the Senate in two years (Democrats must defend 23 Senate seats in 2012, Republicans only 10). Accordingly, Democrats may regard the 112th Congress as a better forum for TSCA reform than they are likely to have in the future. The Senate champion of TSCA reform, Senator Lautenberg, will be 90 years old when his term is up in 2014; he may be willing to compromise.

Industry supporters of TSCA reform may want to consider taking these steps:

- Work through trade associations to develop concrete industry proposals.
- Inform Congressional staff and members of both Houses that TSCA reform legislation remains important to industry, and why.
- Provide examples of how TSCA reform can avoid being "job-killing" and promote greener products and the jobs that come with them.
- Bring creative ideas on TSCA reform to Congressional staff for their consideration. While Members of Congress are addressing higher priority issues, the hard work of developing a revised approach to TSCA legislation could proceed behind the scenes.
- Push for a smaller, less-comprehensive bill than the 2010 legislation, which may be easier to pass.

In short, TSCA reform should remain on the table for industry in 2011.

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