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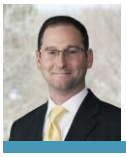

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MASSACHUSETTS ENVIRONMENTAL DEVELOPMENTS

New Conservation Restrictions for the Northern Long-Eared Bat Will Have Limited Impact on Development in Massachusetts

Authors: Virginie Roveillo and Steve Richmond

A new Endangered Species Act rule protecting the northern long-eared bat will likely have only limited impact on development and land use activities in Massachusetts due to fairly specific restrictions imposed by the final rule published in January by the U.S. Fish and Wildlife Service (FWS). *See* 81 Fed. Reg. 1900 (Jan. 14, 2016). The northern long-eared bat was listed as a threatened species in April 2015 and its protection was governed by an interim rule until the final rule was published. Because the range of the northern long-eared bat's range covers 37 states including Massachusetts and much of New England, land owners, developers, and other stakeholders have been awaiting finalization of the rule.

Under section 4(d) of the Endangered Species Act, the FWS may develop species-specific prohibitions and exceptions tailored to a threatened species' conservation needs. Here, the finalization of the rule was a response to the declining population of northern long-eared bats resulting from the spread of white nose syndrome, a fungal disease that affects hibernating bat species. The structure of regulation under the rule relies in fact on the reach of white nose syndrome. While the rule prohibits the "purposeful take" (intentional capture and handling) of northern long-eared bats across the bat's range except in certain very limited circumstances, the rule regulates the "incidental take" (harm that is incidental to and not the purpose of an otherwise lawful activity) of northern long-eared bats differently and in a much less limiting manner.

FWS has developed a map that tracks the occurrence and spread of white nose syndrome in the U.S. ("the WNS zone"), which FWS intends to update and post each month here. Incidental take of northern long-eared bats is not prohibited in areas within the bat's range that are not yet affected by white nose syndrome. For areas within the WNS zone and within known caves, mines, and similar structures in which bats hibernate (known as "hibernacula"), the incidental take of northern long-eared bats is prohibited without a permit. In areas within the WNS zone but outside of hibernacula,

the incidental take of northern long-eared bats resulting from activities other than tree removal is not prohibited. Incidental take resulting from tree removal is prohibited without a permit if (1) the tree removal occurs within a quarter-mile of known northern long-eared bat's hibernacula, or (2) the tree removal cuts or destroys known occupied maternity roost trees or any other trees within a 150-foot radius of the maternity roost tree in June and July. Thus, landowners within the WNS zone are expected to research available data on the presence of northern long-eared bats and their roosts prior to undertaking tree removal activities.

All of the New England states are currently within the WNS zone. Private landowners and project developers in Massachusetts planning tree removal activities should contact the Massachusetts Natural Heritage & Endangered Species Program to determine whether the northern long-eared bat is present in the area and whether maternity roost trees or hibernacula are located within or near a project area. If so, an incidental take permit from the FWS may be required.

It appears that the final rule will also have limited impact on permitting under the Multi-Sector General Permit (MSGP) for Stormwater Associated with Industrial Activities unless the stormwater controls that are implemented impact hibernacula or roosting areas themselves. The MSGP includes an evaluation of the presence of a threatened species as a factor in determining a facility's eligibility for permit coverage. EPA recently concluded that if the northern long-eared bat is the only listed species potentially present in a facility's "action area," and the facility will not be conducting discharge-related activities (such as the construction and operation of stormwater controls), no further threatened species review is required. However, where a facility is going to conduct discharge-related activities in an area where the northern long-eared bat may be present, it would first need to conclude that those activities will not adversely affect the bat and then seek concurrence from EPA. As a practical matter, these impacts seem limited to instances where tree removal that impacts roosting areas is required in order to construct or operate stormwater controls. Under those circumstances, EPA may impose certain measures or restrictions under the auspices of the section 4(d) rule, although what those measures and restrictions would look like is not yet clear.

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For additional information about implementation of the section 4(d) rule in New England, please contact Steve Richmond or Virginie Roveillo.

Accutest Laboratories New England Notifies Clients of Potential Data Concerns

Author: Jeanine L.G. Grachuk

Notification of potential data quality issues by a Massachusetts laboratory is raising concerns about the possible impact on current and closed remediation sites in Massachusetts that relied on that data.

Accutest Laboratories New England (ANE) sent letters in late 2015 notifying some clients of potential data quality issues in particular lab results. Based on the letters we have reviewed, the data at issue was developed pursuant to volatile analytical methods (numbers 524.2, 624 and 8260B/C) between January 2012 and March 2015. According to the letters, ANE is performing a review of the data and will notify clients of the results of that review by March 31, 2016.

The potential data issues reported by ANE relate to VOC analyses and sites contaminated with VOCs, such as tetrachloroethylene (PCE) and trichloroethylene (TCE), are under intense scrutiny by MassDEP due to the possibility that the contaminant could volatize into indoor air of occupied commercial or residential buildings. Indeed, as reported elsewhere in this alert, MassDEP is beginning to notify owners of certain previously closed TCE sites that additional testing is necessary to determine if the contamination at these sites poses an imminent hazard under today's standards. An accurate understanding of the concentration of VOCs in groundwater, soil vapor, and indoor air is often critical to understand the potential for human exposure, as well as to characterize and remediate the site.

It is possible that these notifications are an outgrowth of two recent settlements by an affiliate of ANE, Accutest Corporation, which is known as Accutest Laboratories, with the U.S. Department of Justice (DOJ) and New Jersey to resolve allegations of improper testing of environmental samples.

According to the Settlement Agreement with the DOJ, the United States alleged that Accutest Laboratories violated the False Claims Act by submitting, under contract with various federal agencies, results of analytical testing which were not performed in accordance with U.S. EPA guidelines. The allegations were disputed by Accutest Laboratories, and it has not admitted any wrongdoing. More specifically, the allegations involved analyses performed during 2011 through 2013 involving semi-volatile organic compounds. The DOJ alleged that, in some cases, the lab did not strictly follow the applicable method by:

1. "not performing the required number of 'shakes' and/or not waiting the required period of time between 'shakes' of waste water samples, potentially resulting in the inability to fully extract all of the SVOA compounds in the samples;"
2. not 'spiking' a soil or waste water sample with a known compound in the correct sequence or manner, potentially affecting the quality control process that ensured all SVOA compounds in a sample were likely to be fully extracted;" and
3. "altering the settings on GC/MS instruments or disregarding calibration protocols."

The DOJ settlement requires Accutest Laboratories to pay a penalty of $3 million. In addition, it requires Accutest Laboratories to notify any customer "that could have been impacted" by the alleged activities, which may be the impetus for the Massachusetts notifications by the related Accutest company.

In the New Jersey Settlement Agreement, the state alleged that Accutest Laboratories failed to comply with the requirements of its certification to conduct laboratory testing. In addition to incorporating certain allegations in the federal action described above, New Jersey alleged that, during periods of time between 2007 and June 2013, Accutest Laboratories deviated from required extraction methods including by not always performing "the required number of extractions, potentially preventing the full extraction of all of the compounds in the samples …." The allegations were disputed by Accutest Laboratories, and it has not admitted any wrongdoing in the Settlement Agreement.

The New Jersey settlement requires Accutest Laboratories to pay $2 million to resolve the allegations and notify any impacted customers in New Jersey.

For more information on site remediation in Massachusetts, please contact Jeanine Grachuk.

Net Metering Uncertainty Threatens to Disrupt Explosive Growth of Solar Power

Author: Brook Detterman

After experiencing explosive growth in Massachusetts and elsewhere and driving the creation of new jobs and infrastructure, unresolved restrictions on "net metering" threaten to slam the brakes on considerable gains made by the solar power industry. Legislative options have foundered in Massachusetts, creating uncertainty for the nascent industry.

Solar power has experienced a tremendous growth spurt over the past several years, driven by decreasing costs, better financing options, and a variety of incentive programs. Massachusetts has a goal of installing 1,600 megawatts of solar

power by 2020. More than 850 megawatts are already installed, which is similar in capacity to a typical coal-fired power plant. According to the Massachusetts Clean Energy Center, the solar industry has already created about 12,000 jobs in Massachusetts. The broader clean energy sector is valued at more than $11 billion annually and employs about 99,000 people in Massachusetts — more than life sciences. The sector is growing at about 11–12% per year, attracting significant investment, and helping to drive the Massachusetts innovation economy.

Further growth in the solar industry is in jeopardy as Massachusetts and other states debate how they will handle "net metering" programs. Like all distributed electrical generation, solar energy relies on net metering to facilitate a connection to the electrical grid. In effect, buildings with solar systems use the electrical grid as a giant battery, adding power when the sun shines and taking power when it doesn't. Net metering programs basically allow the meter to spin in both directions, resulting in a system in which the solar power produced during sunny days can "net out" electricity used during dark or rainy periods. Without net metering, solar — or any other distributed form of renewable energy — just isn't economically viable.

Net metering is not automatic: it is a regulatory program established to encourage solar and other distributed energy systems (such as small wind turbines) by giving them an efficient and fair mechanism for connecting to the grid. Most states (about 40) have implemented some form of net metering. In Massachusetts, net metering has existed since the 1980s, but was significantly modified by legislation in 2008 that expanded the type of eligible facilities and required utilities to credit power at the retail rate (as opposed to the much lower wholesale rate). The program also is subject to caps: each utility in the state has a limit on how much solar capacity it can connect under the net metering program (these caps apply to commercial projects, but not to individual homes).

During 2015, utilities began to reach their net metering caps, significantly slowing solar installations in parts of Massachusetts, stalling several large projects, and putting the industry into a holding pattern. National Grid and Unitil have hit their caps in several parts of the state, and Eversource has indicated that it will soon reach its cap as well. In November, 2015, the Massachusetts House passed a compromise bill that would have raised the net metering caps by 2% (to about 1,400-1,500 megawatts in total), while lowering net metering payments to the wholesale rate and required a re-evaluation of solar incentives contained in the state's renewable energy portfolio standard (RPS). But the Senate didn't pass the bill before going home for its winter recess, leaving the net metering program in limbo. The Massachusetts House plans to pass the comprehensive energy bill in 2016, but may handle solar separately and has indicated that it may try to raise the net metering cap to about 2,400 megawatts.

One criticism of net metering programs is that they allow solar customers to use the electricity grid as a "free" battery, getting the benefits of reliable power without paying for the costs of maintaining the grid. This argument has some merit. On the flip side, the true value of solar power is often much higher than standard electricity prices because solar panels typically generate power when demand, and prices, are highest. The late-afternoon period, when solar panels are generating the most power, is a time of heavy electricity use when utilities must often purchase "peak power" from power generators at rates much higher than ordinary "baseload" power. Solar can help offset peak demand, lowering costs for both the utility and ratepayers.

Across the country, net metering programs are the subject of much debate. Some utility companies oppose net metering on economic grounds: in effect, they are losing customers to solar, while gaining "competitors" in the form of many tiny power plants. Faced with significant competition from Solar City and other installers, Warren Buffet's NV Power led the push against Nevada's net metering program, arguing that solar was over-compensated and damaging its business. Despite overwhelming support among Nevada voters for the net metering program (about 75%, across all parties), Nevada rolled back its net metering program in a dramatic fashion. The fallout was immediate. Elon Musk's SolarCity fired 550 workers, while two other large solar installers (Vivant and Sunrun) have announced plans to close their Nevada operations. Several lawsuits are pending.

Here in the Northeast, Maine lawmakers have recently discussed a unique form of net metering that would compensate solar power producers based on the actual "value of solar." Right now, net-metering programs in Maine compensate

solar owners at a rate of 13 cents/kilowatt-hour, which is roughly the retail price of power when purchased from the utility. But a study conducted by the Maine Public Utilities Commission found that the actual value of solar power produced in Maine is 33 cents/kilowatt-hour. In addition to displacing expensive "peak" power (a primary economic benefit of solar), the study cited lower air pollution, energy diversity, and reduced need for new power plant investments as reasons why solar is worth more than other types of power.

In response to all this state-level action, two U.S Senators have proposed legislation that would require states to properly account for the benefits of distributed solar before changing net metering valuations. The move also would prevent retroactive changes to net metering programs, like those imposed by Nevada. Notably, the legislation (which is an amendment to the Energy Policy Modernization Act of 2015) is sponsored by Minority Leader Harry Reid, of Nevada, and Senator Angus King, of Maine. The bill may face an uphill battle during an election year, but indicates that net metering is at the forefront of the energy infrastructure debate.

There is certainly room for compromise. Utilities maintain a vast, efficient system of electrical infrastructure that benefits everyone, including solar customers who are tied into the grid and using it as a storage system. Allowing utilities to charge a reasonable fee to solar customers in exchange for that service seems fair. At the same time, it also makes sense to compensate solar owners for the actual value of the power that they generate — at a rate higher than the typical retail price.

Stakeholders on both sides of the debate should recognize the merits of moving forward in a way that allows solar development to continue in a robust, equitable fashion across Massachusetts. But before that can happen, the legislature must act to raise the net metering cap. When it does, it should take the long view. Wholesale power rates are inappropriate compensation for solar owners providing valuable peak power, with zero emissions. And utilities deserve fair compensation for the grid service that they provide. The numbers are tricky, and the debate is fraught. But one thing is clear: with 12,000 solar jobs at stake, a growing $11 billion clean energy sector, and an increasing demand for power, the legislature must act soon.

For more information about alternative energy and its development, contact Brook Detterman.

Nonprofits Seeking to Use Brownfields Tax Credits Beware: Directive Gutted by Massachusetts Superior Court Remains Online Without Notice

Author: Jeanine L.G. Grachuk

Massachusetts Department of Revenue guidance declared a "naked, confiscatory attempt by a state administrative agency to appropriate private property to fill government coffers" by the Massachusetts Superior Court remains on the department's website without any notice of the court's actions, potentially misleading nonprofits seeking to use brownfields tax credits. The court's decision has been appealed by DOR but there is no indication on DOR's website that the directive has been declared unlawful by the trial court.

The brownfields tax credit program was created in 1998 to allow eligible taxpayers to receive a tax credit if they pursue an environmental response action and achieve either a permanent solution or remedy operation status under the state cleanup law, M.G.L. c. 21E. The credit applies only to costs incurred on or after August 1, 1998. In 2006, the legislature expanded the program to nonprofits and, as they are not taxpayers, allowed the credit to be transferred. From 2006 to 2013, DOR allowed nonprofits to benefit from the tax credit for work performed from August 1, 1998. On November 18, 2013, DOR issued Directive 13-4: Guidance with Respect to Brownfields Tax Credit Applications, in which it stated that nonprofit organizations were not entitled to receive the credit for a response action completed in a taxable year that began before the June 24, 2006 amendments.

In subsequent litigation, a redevelopment company and several universities challenged determinations made by DOR to deny brownfields tax credits for remediation projects completed prior to 2006. 131 Willow Ave., LLC v. Commissioner of Revenue, 33 Mass.L.Rptr. 49 (2015). In making this determination, DOR relied on the language of the Directive 13-4.

The court held that the plain language of the statute is unambiguous and does not contain any exclusion for nonprofits

as to whether the environmental cleanup is completed before or after the 2006 amendment, and therefore the Directive is "unreasonable and DOR's denial of the applications based on that directive was unlawful." DOR has filed a notice of appeal and the guidance remains on the DOR's website as apparently valid guidance. Nonprofits should be aware that the directive remains on the DOR website without any indication that it has been ruled unlawful and should follow the appeal carefully.

For more information about brownfields developments and tax credits, please contact Jeanine Grachuk.

Regulators and Environmental Groups Differ on How to Address Stormwater Contribution to Algae Blooms in the Charles River

Author: Marc J. Goldstein

The battle over phosphorous in the Charles River and its resultant toxic algae blooms is heating up again, with EPA finalizing its MS4 permit targeting municipalities and their stormwater runoff into the river and environmental groups renewing their lawsuit against regulators, claiming that EPA is improperly ignoring the stormwater contribution of commercial, industrial, institutional and high density residential sites in the Charles River Watershed.

Issuance of Final MS4 Permit Targets Municipalities for Phosphorous Reduction

Much to the frustration of the Conservation Law Foundation and the Charles River Watershed Association, EPA remains focused on regulating stormwater from municipalities through its General Permit for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems in Massachusetts (known as MS4 systems). As confirmed by EPA Regional Stormwater Coordinator Thelma Murphy at a Boston Bar Association meeting this week, EPA expects to issue a final stormwater permit in March after a five-year effort to develop a successor to the 2003 MS4 General Permit under the National Pollutant Discharge Elimination System (NPDES) program.

The 2003 permit expired in 20008 and was administratively continued; EPA proposed a successor permit in 2010, and has spent the intervening years collecting and responding to comments and drafting the final permit. The MS4 General Permit covers small storm water systems operated by municipalities and cities located in urbanized areas. A map showing the urban areas covered by the MS4 program following the 2010 Census is located on the EPA Region 1 web site regarding the MS4 permitting.

As reported in the Boston Globe without mention of the actual permit at issue, the communities contributing stormwater to the Charles River are likely to face increased regulation of their stormwater to help control phosphorous contamination in the Charles River, which is blamed for blooms of toxic algae caused by cyanobacteria and other contaminants.

Murphy reported that EPA has compiled its responses to the approximately 1,200 comments that it received during the public comment period that ended in February 2015 into a document of more than 500 pages. The requirements numerous communities to address Total Maximum Daily Loads (TMDLs) in the Charles River Watershed and elsewhere have drawn "significant comments" according to EPA. As proposed in the Draft Permit, communities ranging from Ashland and Mendon to Cambridge and Somerville to Dover and Sherborn will need to develop and implement phased plans over the next 20 years to address phosphorus in the Charles River Watershed. Other communities (Auburn, Charlton, Dudley, Gardner, Grafton, Granby, Hadley, Harvard, Hudson, Leicester, Ludlow, Millbury, Oxford, Shrewsbury, Spencer, Springfield, Stow, Templeton, Wilbraham, and Winchendon) will need to develop plans to reduce phosphorus in lakes and ponds by as much as 65 percent.

In response to concerns about costs to municipalities and timing of implementation, Murphy said that the permit will not be effective upon issuance but will begin at least six months after its release. The delay is expected to assist municipalities address funding for compliance activities within their normal fiscal calendar.

Murphy also stated that EPA had concluded a study of the potential costs for compliance. A consultant retained by EPA determined that for small communities (less than 15,000 people), the costs would range between $39,000 and $92,000

annually; for medium communities (between 15,000 and 50,000 people), the costs would range from $91,000 to $212,000 annually; and for large communities (greater than 50,000 people), the costs would range from $216,000 to $492,000 annually.

Whether the Massachusetts Department of Environmental Protection will agree with the permit as issued remains to be seen, particularly in light of the extensive public comments delivered by MassDEP last year in response to the Draft Permit.

CLF and CRWA Renew Lawsuit to Compel Action against Other Stormwater Actors

At nearly the same time as EPA prepares to issue the MS4 permit addressing stormwater into the Charles River from municipalities, environmental groups announced that they are refiling their lawsuit alleging that EPA has failed to take legally required steps to enforce provisions of the Clean Water Act against commercial, industrial, institutional and high density residential sites discharging to the Charles River watershed.

The original lawsuit by the Conservation Law Foundation and the Charles River Watershed Association was withdrawn in August 2015 in pursuit of a negotiated settlement with EPA. Having failed to "find common ground" with EPA according to a joint press release by CLF and CRWA, the groups refiled their lawsuit on February 25, 2016 alleging that EPA was required to notify commercial, industrial, institutional, and high density residential dischargers responsible for stormwater runoff in the Charles River watershed that they must apply for NPDES discharge permits based on the determination contained in the TMDL for the Charles River pursuant to 40 CFR § 124.52(b).

CLF said it also refiled its lawsuit in Rhode Island on the same basis seeking to protect the Mashapaug Pond, Spectacle Pond, Bailey's Brook, North Easton Pond, and Sakonnet/Cove, and Lawton Brook watersheds.

For further information about stormwater permitting, enforcement, and litigation, please contact Marc J. Goldstein.

Double Counting and Inflexibility Are Unreasonable in 4A Negotiations Says Mass. Appeals Court: Court Affirms Award of Attorneys' Fees under Chapter 21E

Author: Jeanine L.G. Grachuk

Seeking 80 percent of remedial costs from each of two potentially responsible parties and "inflexibility" in pre-litigation negotiations are sufficiently unreasonable to trigger attorneys' fees under the Massachusetts cleanup statute, Chapter 21E, according to the Massachusetts Appeals Court in a recent decision.

Chapter 21E provides for a pre-litigation negotiation process in Section 4A that requires notice and good faith negotiations in advance of filing suit. As a "stick" to ensure compliance with its requirements, this provision allows a court to award attorneys' fees to a party if the other party acts improperly. Specifically, the statue allows a grant of attorneys' fees when the following conditions occur:

- The plaintiff may recover attorneys' fees when the court finds that the person against whom the civil action has been brought is liable; and one of the following is true:
    - the defendant failed without reasonable basis to make a timely response to the notification; or
    - the defendant did not participate in negotiations in good faith; or
    - the defendant failed to enter into or carry out an agreement to pay its equitable share (or perform response actions) without reasonable basis.
- The defendant may recover attorneys' fees when:
    - the plaintiff did not participate in negotiations or dispute resolution in good faith;
    - the plaintiff had no reasonable basis for asserting that the defendant was liable; or
    - the plaintiff's position with respect to the amount of the defendant's liability was unreasonable.

Chapter 21E, Section 15, contains a different attorneys' fees provision that allows recovery of attorneys' fees when a person advances the purposes of Chapter 21E, which is not discussed in this alert.

In the recent case of *R.M. Packer Co. v. Marmik, LLC*, 88 Mass. App. Ct. 654 (2015), the plaintiff, R.M. Packer Co., had delivered diesel to an underground storage tank that overflowed, causing a release of about 800 gallons of diesel. Packer cleaned up the fuel release at a cost of $300,000, which was covered by insurance. Packer then issued 4A demand letters to both the owner of the tank, Marmik, LLC, and the user of the tank, Dockside Marina, seeking 80% of it costs from *each* of them. The parties were unable to come to an agreement regarding these claims, and Packer initiated suit against both defendants seeking recovery under Chapter 21E, common law negligence, and Chapter 93A.

After an eight-day bench trial, the judge found in favor of Dockside on all claims and awarded Dockside attorneys' fees in the amount of $66,409.50. The judge awarded fees on the basis that the plaintiff had no reasonable basis for asserting that the defendant was liable because, as found by the judge: (a) Dockside had ordered gasoline (not diesel); (b) the gasoline was to be supplied to a different tank; (c) Dockside had properly reported to Packer the levels of product in both the gasoline and diesel tanks; (d) Packer's employee mistakenly delivered diesel, not gasoline; and (e) Packer's employee should have first measured the level in the diesel tank but did not.

The subsequent appeal involved only the award of attorneys' fees to Dockside. The Appeals Court affirmed, but on a different basis. In its opinion, the Appeals Court first considered the basis on which the trial court had awarded fees and stated that, if Dockside was an operator of the tanks, then Packer would have had a reasonable basis for asserting Dockside's liability. After describing the reasons that Dockside may be considered an operator and the fact that MassDEP had issued a Notice of Responsibility to Dockside for the spill, the Appeals Court stated that it did not need to decide this issue.

Instead, the Appeals Court upheld the award of attorneys' fees based on §4A(f)(3), "the plaintiff's position with respect to the amount of the defendant's liability was unreasonable." In doing so, the Appeals Court focused on the statement of the trial judge that "'Packer's insistence that Dockside contribute eighty percent of the clean up costs … when Packer knew well that Dockside was blameless in this instance' was alarming. Particularly when that demand is considered with the similar one made to Marmik (together significantly exceeding the actual cost of remediation), and Packer's inflexibility despite its own responsibility for the spill." While it is not clear in this case whether Packer's initial demands to Dockside and Marmik for a combined total of 160% of response costs would have been sufficient to support an award attorneys' fees, when these "alarming" initial demands are combined with Packer's "inflexible" position during negotiations, the Appeals Court felt the line of "reasonableness" has been crossed.

For more information on cost recovery claims in Massachusetts, please contact Jeanine Grachuk or Marc Goldstein.

An Update on Reopening TCE Sites in Massachusetts

Author: Jeanine L.G. Grachuk

The Massachusetts Department of Environmental Protection plans to begin contacting some owners of properties with closed trichloroethylene (TCE) remediation sites and requiring them to conduct testing, following a review of approximately 1,000 sites with TCE in groundwater closed prior to the 2014 changes to the TCE standards. We reported in our last edition that MassDEP has been considering reopening such sites contaminated with TCE that had been assessed and closed under older, more lenient regulations.

At the January 28, 2016 Waste Site Cleanup Advisory Committee meeting, MassDEP stated that approximately 200 sites of the 1,000 it reviewed *may* present a significant indoor air issue. If initial testing of groundwater, soil vapor, or indoor air suggests that further investigation or other action is necessary to address an indoor air issue, MassDEP will require the owner to take that action.

We understand that MassDEP is concerned about the potential health risks of TCE at these sites for several reasons:

- First, TCE is volatile, and therefore TCE in soil or groundwater under or near a building may seep into the air of

that building. If this occurs, there is a potential exposure pathway for humans occupying or residing at that location.

- Second, the scientific understanding of the potential health risks of TCE has evolved significantly, with the result that the standard in Massachusetts has become more strict. For example, the reportable concentration for TCE in groundwater near buildings has changed from 300 *u*g/L before 2006 to 5 *u*g/L today. As a result, MassDEP has indicated that it is possible that sites closed properly under the prior standard *could pose an imminent hazard* under current standards.
- Finally, as MassDEP has described in its fact sheet on TCE Toxicity Information: Implications for Chronic and Shorter-Term Exposure (August 15, 2014; revised 3/27/2014), a potential risk posed by TCE exposure is developmental heart defects, which can occur after only short-term exposure during a critical phase of gestation. As a result, MassDEP has emphasized that the possibility that TCE concentrations in indoor air are significant should be considered fairly early in the site assessment process to ensure any imminent hazard is addressed promptly.

For more information on site remediation in Massachusetts, please contact Jeanine Grachuk.

MassDEP Issues Final LNAPL Guidance

Author: Jeanine L.G. Grachuk

MassDEP issued its long-awaited final policy on how to close LNAPL sites under revised 2014 regulations on February 19, 2016. The final policy, "Light Nonaqueous Phase Liquid and the MCP: Guidance on Site Assessment and Closure," ends a long period of public comment and revision to the guidance that began in July 2014 with the first public review draft.

The guidance is targeted at Massachusetts Licensed Site Professionals (LSPs) who perform site remediation work under the Massachusetts regulatory scheme and provides an overview of LNAPL – Light Nonaqueous Phase Liquid – behavior in the environment and describes tools that can be used to assess LNAPL, how specific lines of evidence can be utilized to develop a site-specific conceptual site model, and how to use these lines of evidence to comply with the state regulations. The guidance emphasizes that there is inherent complexity and uncertainty in assessing LNAPL sites and recommends a multiple lines of evidence approach. The guidance continues to provide as an option for petroleum sites a simplified approach that is presumptively compliant with the state requirements.

The revised regulations require a deed restriction known as an activity and use limitation (AUL) if NAPL with Micro-Scale Mobility remains in place. "NAPL with Micro-Scale Mobility" refers to NAPL in the environment with a footprint that is not expanding but which is visibly present and has the potential to move short distances, including to pool in an excavation. The guidance clarifies that despite the regulatory language, MassDEP does not expect an AUL to be recorded for those sites with *de minimis* levels of LNAPL (less than ½ inch). However, because the regulations do not provide for a *de minimis* exception, MassDEP will exercise "enforcement discretion" in those cases. MassDEP explains that AULs should instead be recorded for those sites with "conditions that are more likely to warrant measures to manage NAPL as the result of future excavation or other activities affecting subsurface conditions." See Guidance, page 25.

For more information on site assessment and cleanup in Massachusetts, please contact Jeanine Grachuk.

MASSACHUSETTS LAND USE DEVELOPMENTS

No Appeal to Housing Court for Major Development Projects Says Top Mass. Court

Author: Marc J. Goldstein

Appeals of major development projects of 25 or more dwelling units or 25,000 square feet or more of gross floor area cannot go to the Massachusetts Housing Court, as jurisdiction for these projects is exclusively with the Superior Court and Permit Session of the Land Court, according to a recent decision by the highest Massachusetts court.

In *Skawski v. Greenfield Inv'rs Prop. Dev. LLC*, No. SJC-11926 (Feb. 11, 2016), Greenfield Investors Property Development LLC proposed a project of approximately 135,000 square feet of retail commercial space for which it received a special permit from the Greenfield Planning Board. When abutters appealed the decision to the Housing Court, Greenfield requested a transfer of the appeal to the Permit Session of the Land Court pursuant to M.G.L. c. 185, § 3A, which was opposed by the abutters and denied by the Chief Justice of the Trial Court without explanation.

Greenfield renewed its effort to move the case out of the Housing Court after the Appeal Court's decision in *Buccaneer Dev., Inc. v. Zoning Bd. of Appeals of Lenox*, 83 Mass.App.Ct. 40, 43–44 (2012). In Buccaneer, the Appeals Court held that M.G.L. c. 185, § 3A, the statute creating the Permit Session of the Land Court, deprived the Housing Court of subject matter jurisdiction to hear major development permit appeals. However, Greenfield's motion to dismiss for lack of subject matter jurisdiction was denied by the Housing Court, which distinguished the holding in Buccaneer, stating that "the Appeals Court ruled effectively that the developer's choice of forum trumped the defendants' right under G.L. c. 185C, § 20[,] to transfer the case to the Housing Court" and that where the developer's request to transfer the case to the Permit Session has been denied, allowance of the defendants' motion to dismiss "would deprive the plaintiffs entirely of their statutory right to judicial review of the [p]lanning [b]oard's decision."

The ruling was reported to the Appeals Court, which reversed the judge's order, finding that M.G.L. c .185, § 3A, did in fact deprive the Housing Court of subject matter jurisdiction over major development permit appeals. Skawski v. Greenfield Investors Prop. Dev., LLC, 87 Mass.App.Ct. 903, 905–906 (2015). The Massachusetts Supreme Judicial Court accepted the application for further appellate review.

The Court applied standard techniques of statutory interpretation to arrive at its decision that the law creating the Permit Session had deprived the Housing Court of jurisdiction. Noting that the statute did not explicitly reject the Housing Court's jurisdiction over permit appeals, which was established earlier in M.G.L. c. 40A, § 17, the Court looked to see if the "clear implication" of Section 3A was to divest the Housing Court of jurisdiction over these appeals. The Court looked to the text of the Act as well as its legislative history and determined that "it is plain that the Legislature sought to reduce the costs and delays of the permitting process required to conduct business and develop property." The Court rejected the abutters' argument that the purpose of the statute was to merely create a new alternative venue in the Permit Session of the Land Court rather than to supplant the jurisdiction of any other courts in hearing appeals of this sort. "But, if its purpose were simply to create a new permit session in the Land Court, there would be no need to mention the concurrent original jurisdiction of the Superior Court. By specifying that the Superior Court Department shared concurrent jurisdiction with the permit session of the Land Court, and not also specifying any other court department as having concurrent jurisdiction, the Legislature impliedly reflected its intent that these major development permit appeals be adjudicated only by these two courts."

Dealing a blow to the developer who spent time, effort, and money pursuing this tactic, the Court refused to dismiss the case outright, instead transferring the case from the Housing Court to the Permit Session. "Dismissal would be especially unfair here, where the abutters timely filed their appeal in a court that appeared at the time to have jurisdiction under G.L. c. 40A, § 17; where the defendants did not challenge the Housing Court's jurisdiction until the Appeals Court issued its opinion in the Buccaneer case in 2012, eighteen months after the appeal was filed and well after the abutters might have filed a timely new appeal in the Land Court or Superior Court; and where our conclusion regarding the absence of jurisdiction in the Housing Court rests principally on the doctrine of implied repeal rather than the express language of § 3A."

The Skawski decision provides clarity that the Housing Court is not a permissible venue any longer for appeals of permits that fall in the jurisdiction of the Permit Session. However, what remains unaddressed is the failure of the Chief Justice of the Trial Court to timely review and transfer such cases to the Permit Session at the request of developers. While this will no longer be an issue from the Housing Court, developers preferring a single judge of the Land Court to the rotation of the Superior Court and the land use expertise of the judges in the Land Court to the uncertainty of the Superior Court experience still remain frustrated by the delay, denial, and lack of explanations for decisions on transfer requests.

For more information about land use and development issues in Massachusetts, including litigating permit appeals, please contact Marc Goldstein and Brian Levey.

Local Wetlands Bylaw Decision Survives Pre-emption Challenge

Author: Brian C. Levey

The Massachusetts Appeals Court has again upheld the validity of a local conservation commission's ruling under a local wetlands bylaw notwithstanding that the commission's partial reliance on the State Wetland Protection Act was erroneous. *Parkview Electronics Trust v. Conservation Commission of Winchester*, Appeals Court No. 13-P-276 (January 12, 2016).

The Massachusetts Wetlands Protection Act, G. L. c. 131, § 40, sets forth minimum wetlands protection standards. Local communities are free to impose more stringent requirements. As a result, local commissions may find that a project meets state law while also concluding that it fails the more rigorous local requirements. Previously, in *Healer v. Department of Envtl. Protection*, 73 Mass. App. Ct. 714, 718-19 (2009), the Court outlined the requirements that a local conservation commission must meet in order to exercise jurisdiction over wetlands exclusively on the basis of a more stringent local by-law:

A local authority exercises permissible autonomous decision-making authority only when its decision is based *exclusively* on the specific terms of its by-law which are more stringent than the act…. The simple fact, however, that a local by-law provides a more rigorous regulatory scheme does not preempt a redetermination of the local authority's decision by the [Department of Environmental Protection] except to the extent that the local decision was based *exclusively* on those provisions of its by-law that are more stringent and, therefore, independent of the act. (Emphasis added.)

In this case, the Winchester Wetlands Bylaw has a broader definition of "land subject to flooding" than does the state statute. Nonetheless, Parkview argued that an order of resource area delineation (ORAD) issued by the Winchester Conservation Commission was invalid under *Healer* because it was not based "exclusively" on the more stringent provisions of local law. The case arose after Parkview, the owner of an industrial park that was often subject to flooding, raised the driveway on its property to, in effect, create a berm to prevent future flooding. An abutter filed a request for an abbreviated notice of resource area delineation (ANRAD) with the Commission claiming that the berm diverted water onto his property. The Commission issued an ORAD with a heading referring to both the state Wetlands Protection Act and the Winchester Wetlands Bylaw.

Parkview appealed to Superior Court and unsuccessfully sought to annul the local bylaw decision. Parkview also filed an appeal from the ORAD with the Massachusetts Department of Environmental Protection (MassDEP), requesting a superseding order of resource area delineation (SORAD) claiming that the Commission's decision to assert jurisdiction was in error. MassDEP issued a SORAD that concluded that since the driveway was not within the 100-year flood plain shown on the Federal Emergency Management Agency's flood insurance rate map, it was not within the jurisdiction of the Wetlands Protection Act and that "MassDEP's responsibility [is] to address only those interests identified in the Wetlands Protection Act…."

On appeal to the Appeals Court, Parkview maintained that since the ORAD issued by the Commission was not based "exclusively" on the local by-law, it was, under *Healer*, preempted by the SORAD. The Appeals Court first reiterated that to the extent that "the commission relied on the [state] act in asserting jurisdiction, *Healer*, makes clear that its decision is subject to being superseded by that of the DEP." But, when a local commission "in addition to reliance on State law, also relies independently on a local by-law, as in this case, its decision interpreting and applying the local by-law is not subject to DEP review." Therefore, notwithstanding that the Commission initially asserted jurisdiction on the basis of both State and local law, and MassDEP subsequently found that the property was not governed by the State law, "the local by-law remain[ed] as an alternative basis for the commission's jurisdiction." Carefully reviewing the ORAD, the Court satisfied itself that there was some reference to and reliance upon the more stringent local definition of "land subject to flooding" in the ORAD to serve an alternative basis for the commission's decision.

Interpreting the "exclusivity" language in *Healer*, the Court opined that it meant only that "in order for a local commission to ensure that its decision is not subject to MassDEP review, the commission must base its decision exclusively on local law. Insofar as a commission's decision is based on local law and State law, MassDEP has jurisdiction to review it and supersede that portion of the commission's decision that is based on State law. For this reason, local commissions purporting to act under both State law and independently under local law should make it clear in their written decisions and orders that there is a dual basis for their determinations."

The Court also rejected Parkview's claims that the definition of "land subject to flooding" in the local by-law was so vague as to violate due process.

For more information about the developments that impact wetlands please contact Brian Levey or Marc Goldstein.

NATIONAL DEVELOPMENTS

EPA Issues Proposal to Amend RMP Rule

Authors: Steve Richmond, Maddie Kadas, and Julius Redd

The U.S. Environmental Protection Agency has released a long awaited proposal to update the Accidental Release Prevention rules at 40 C.F.R. Part 68, which implement the Clean Air Act Section 112(r)(7) risk management planning (RMP) program. A pre-publication version of the rule can be accessed here. There are currently 12,500 facilities in the United States that are subject to the RMP program, and a substantial number of those will be affected by this proposed amendment package. Read the full article.

Understanding New Lithium Battery Transport Requirements & Emerging Developments as Safety Concerns Mount

Authors: Aaron Goldberg, Beth Richardson, and Tim Serie

Growing concerns over the safety of air shipments of lithium batteries have prompted international authorities, the U.S. Federal Aviation Administration ("FAA"), and Congress to take action. On January 19, 2016, the International Air Transport Association ("IATA") issued an Addendum to the 57th Edition of the Dangerous Goods Regulations ("DGR"), further restricting shipments of lithium batteries by air. The International Civil Aviation Organization's ("ICAO") is also planning changes to the lithium battery rules for its 2017-2018 Edition of the Technical Instructions for the Safe Transport of Dangerous Goods by Air ("ICAO-TI"), and is even considering an outright ban on bulk lithium ion battery shipments as cargo on passenger aircraft. Read the full article

USDA Declares "Do-Over" on Overhaul of Biotechnology Regulations

Authors: Kathy Szmuszkovicz, Jamie Auslander, and Alan Sachs

The U.S. Department of Agriculture's ("USDA") Animal and Plant Health Information Service ("APHIS") is renewing efforts to amend or replace its existing rules governing plant-based biotechnology, while highlighting possible changes to its regulations that may significantly expand the scope of biotechnology products and processes subject to APHIS jurisdiction. Akin to an advance notice of proposed rulemaking, APHIS's Notice of Intent seeks public input on scoping for a Programmatic Environmental Impact Statement ("PEIS") under the National Environmental Policy Act ("NEPA"). APHIS's non-exclusive proposals range from status quo to transformative, and its notice provides a rare opportunity for agriculture and biotechnology stakeholders to help shape what may become a wholly new regulatory program to replace APHIS's three-decades-old regulations at 7 C.F.R. Part 340. Comments are due by March 7, 2016. Read the full article.

ENERGY STAR Disqualifications on the Rise: How to Make Sure Your Product Isn't Next

Authors: Dan Eisenberg, Paul Hagen, and Russell Fraker

The U.S. Environmental Protection Agency ("EPA") appears to have significantly increased its enforcement of the ENERGY STAR Program's conformity verification rules over the past year. During 2015, under the broad category of "non-lighting

products," EPA removed, or disqualified, from the Program 169 products that it had previously granted the right to bear the ENERGY STAR label. The 2015 total was more than three times the number of such products disqualified in 2014, and higher than the four prior years combined. Read the full article.

Lessons from Lumber Liquidators' Recent Lacey Act Criminal Sentence: Are You Exposed to Costly Environmental Compliance Risks?

Authors: Pete Anderson, Laura Duncan, and Tim Serie

On February 1, 2016, Lumber Liquidators, Inc. ("Lumber Liquidators") was sentenced to pay over $13 million in criminal fines and penalties, and placed on a scrutinizing five-year term of probation for violating the Lacey Act. This crime arose from importing hardwood flooring from China made of illegally-sourced timber. This is the first felony conviction related to the import of illegal timber and the largest ever financial penalty for timber trafficking under the Lacey Act. This sentence clearly demonstrates the serious consequences of violating the Lacey Act, and provides a number of useful lessons for companies who are regulated generally, as well as those who import materials subject to the Act's requirements. Read the full article.

EPA Codifies New Changes to FIFRA Minimum Risk Pesticide Requirements

Authors: Kathy Szmuszkovicz and Alan Sachs

On December 28, 2015, the U.S. Environmental Protection Agency (EPA) finalized important changes to the "minimum risk" pesticide exemption under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). *See* EPA, "Pesticides; Revisions to Minimum Risk Exemption," 80 Fed. Reg. 80653 (Dec. 28, 2015). EPA's new rule goes into effect February 26, 2016, with the exception of the deadline for compliance with new labeling requirements for minimum risk products, which is February 26, 2019. Read the full article.

FIRM NEWS & EVENTS

Henry L. Diamond - 1932-2016

We are saddened to announce the passing of one of our founders, Henry L. Diamond. Henry was an early advocate for conservation and greatly influenced the development of environmental law in the United States. Read the full tribute.

Beveridge & Diamond Elects Six New Principals

Beveridge & Diamond is pleased to announce that Lauren A. Hopkins (San Francisco), Eric L. Klein (Washington, DC), Heidi P. Knight (Wellesley), Jayni A. Lanham (Baltimore), John H. Paul (New York) and Bina R. Reddy (Washington, DC) have been elected Principals of the Firm. Read the full article.

DC Water General Counsel Randy Hayman Joins Beveridge & Diamond

Randy E. Hayman, who has served since November 2010 as the General Counsel of DC Water, the municipal water agency for Washington, DC, joined Beveridge & Diamond, P.C. (B&D) as a Principal in the Firm's Washington office on January 25, 2016. From his tenure as DC Water's chief legal officer, his prior service as General Counsel of the Metropolitan St. Louis Sewer District and in the state of Missouri Attorney General's Office, as well as in private practice, Mr. Hayman brings significant experience with corporate transactional matters, environmental and land use permitting, litigation, and regulatory compliance and enforcement defense. The Washington Business Journal presented Mr. Hayman with its *Minority Business Leader* and *Legal Champion* awards in 2014. Read the full article.

Beveridge & Diamond Defeats Negligence Claims Against DC Water

Litigators in Beveridge & Diamond's Washington office secured partial summary judgment for firm client DC Water on negligence and statutory claims related to alleged lead in drinking water. Multiple Plaintiffs in a consolidated tort action asserted that DC Water acted negligently, violated consumer protection laws, and caused injuries due to allegedly elevated levels of lead in water in the early 2000s. In a 23-page decision, Judge Frederick Weisberg of the District of

Columbia Superior Court dismissed claims of negligence and of violations of the Consumer Protection Procedures Act (CPPA). Read the full article.

Beveridge & Diamond Secures Unanimous Ruling in Pennsylvania Supreme Court Shielding Biosolids Land Application from Tort Claims

Litigators in the Firm's Washington, DC office secured a unanimous ruling from the Supreme Court of Pennsylvania in favor of Beveridge & Diamond client Synagro and persuaded the Court to hold that land application of biosolids is an agricultural activity shielded from untimely litigation by Pennsylvania's Right to Farm Act (RTFA). Read the full article.