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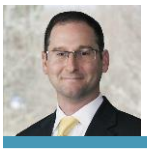

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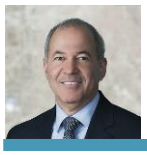

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March 2014

MASSACHUSETTS ENVIRONMENTAL DEVELOPMENTS

Massachusetts Enacts Commercial Food Waste Disposal Ban

By: Stephen Richmond

The Massachusetts Department of Environmental Protection (MassDEP) has expanded its waste disposal bans to include commercial food wastes produced by large generators, effective October 1, 2014.

Under the amended waste ban rule, the new restriction will apply to waste streams from any entity disposing of one ton or more of food waste per week. Any person disposing of, contracting for disposal of, or transporting food and vegetative materials from such a large scale generator will need to separate and divert those materials to reuse, recycling or composting operations.

MassDEP's RecyclingWorks program has assembled a Food Waste Estimation Guide which is intended to help businesses predict whether their activities will trigger these new requirements. Further agency guidance on the organic waste disposal ban can be found here.

Food wastes are joining a large and growing list of materials already banned for disposal by MassDEP in order to promote reuse and recycling. Banned materials currently include leaves, yard waste, batteries, tires, white goods, metal and glass containers, single polymer plastics, recyclable paper, metal, wood, asphalt, brick, concrete, cathode ray tubes and clean gypsum wallboard.

According to MassDEP, organic wastes such as food waste currently represent the largest single component of the waste stream after other banned wastes are excluded. MassDEP has set a statewide goal of diverting 30% of food waste from disposal by 2020, which would amount to 350,000 tons of diverted organic wastes per year.

To help accomplish this aggressive target, MassDEP has devoted substantial resources and state funds to spur the development of an organics recycling infrastructure. These efforts have included:

- establishing a low interest loan program for the purchase of containers and equipment for organics recycling, offering pilot grants;
- capital grants and per ton subsidies to municipalities willing to develop organics recycling facilities and roll out organics recycling programs;
- identifying state properties where anaerobic digestion facilities may be developed and issuing an RFP for selection of a developer for a facility project on public land;

- revising the regulatory permitting process for organics recycling facilities to provide exemptions from permitting and a fast track permit-by-rule option;
- offering pre-permitting assistance to private developers of facilities; and
- providing funding opportunities for private facility development through the Department of Energy Resources (DOER) and Massachusetts Clean Energy Center.

Through DOER, there have also been recent changes to the renewable portfolio standard for renewable energy producers which improve the ability of anaerobic digester facility owners to earn high value renewable energy credits.

The diversion of organic food wastes from disposal to reuse and recycling represents a substantial shift in the practice of waste management, both for the generators of this material and for the solid waste management industry. The release of the final disposal ban regulation caps a multiyear policy development process which has been a primary focus of state solid waste planners and represents a very large investment of state resources and funding.

Numerous implementation issues still need to be addressed in order to transition smoothly to the waste ban by October 1, 2014. Among those issues are the calculation of waste generation quantities to determine which facilities are subject to the ban, whether a separate transportation infrastructure will be available to manage source-separated organic material, and whether diversion, composting and digestion facilities will be available with sufficient capacity to absorb the expected flow of material. MassDEP has expressed strong optimism that these challenges will be met. It is an interesting time for all who are involved in this transition.

For more information on the development and implementation of the commercial food waste disposal ban, please contact Stephen Richmond at srichmond@bdlaw.com.

Massachusetts Issues Solid Waste Regulatory Reform Rules

By: Stephen Richmond

The Massachusetts Department of Environmental Protection (MassDEP) has been working on a large scale regulatory reform process since 2011, and in furtherance of that process has released a number of regulatory changes over the past two years.

In each case the changes have simplified some regulatory processes and added new complexities to others. On February 14, 2014, MassDEP issued a final rule reform package changing the rules governing the regulation of solid waste facilities and the result is the same: some simplification and new complexity. In this case, however, it is clear that the predominant goal of the final changes is not to simplify the regulatory structure but instead to shift significant workload and costs from MassDEP to the solid waste industry.

Beveridge & Diamond worked with members of the solid waste industry to evaluate the scope of the initial draft proposal, and in the MassDEP response to comments document released with the final rule it is clear that MassDEP listened and responded to many of the concerns raised by the industry about the sweeping scope and cost shifting of the initial draft proposal, but in many cases the requirements adopted in the final rule continue to add significant costs and regulatory burdens when compared to those that existed previously. In at least one surprising case, as discussed below, the final rule also reduces the stringency of prior environmental protections, a component of the proposal that was objected to by both industry participants and public advocates. For a copy of the final revised rule, click here. For a copy of the response to comments document, click here.

Among the changes that MassDEP has adopted are the following:

- The new rules create a new class of registered and certified third party solid waste management inspectors, who are charged with auditing and reporting on solid waste regulatory and permit non-compliance. The purpose of this development is to allow MassDEP to transfer to private sector companies and public sector entities the responsibility to audit and report on compliance and non-compliance at solid waste management facilities. All new inspectors will need to become registered with MassDEP, which will then maintain a list of approved parties. Solid waste management facility owners and operators must then hire inspectors from the MassDEP-approved list as described below. MassDEP will create procedures for removing inspectors from the approved list, and removal will invoke a right to an adjudicatory appeal, creating new regulatory appeals opportunities under the state solid waste program.
- Solid waste facility owners and operators now have an obligation to hire third party inspection firms to conduct

comprehensive unannounced operation and maintenance compliance inspections at mandated frequencies (for many facilities as often as every two months). All identified non-compliance must be reported to MassDEP, along with recommendations for corrective measures. Inspections conducted under this program must follow detailed performance standards, and inspectors must prepare inspection reports of their activities, certified under the pains and penalties of perjury. Facility owners and operators must (i) also certify the truth and accuracy of each report, (ii) further certify that they provided any information required and requested by the inspector in a timely fashion and did not unduly influence the inspector, and (iii) submit these reports to MassDEP and the local Board of Health.

- Solid waste facility owners and operators with facilities that are subject to the existing waste bans must also hire third party inspection firms to conduct unannounced waste ban inspections on a frequency that is graduated based on the tonnage of material that is authorized for acceptance at their facilities. As with operation and maintenance inspections, waste ban inspections must follow detailed performance standards, inspectors must prepare certified inspection reports, and facility owners and operators must certify and submit these reports to MassDEP and the local Board of Health.
- Streamlined permitting requirements will apply to all solid waste transfer stations except for those that manage at least 50 tons per day (TPD) of construction and demolition (C&D) materials. These new procedures will allow for small changes at permitted facilities without the formality of a MassDEP permit modification, but facility owners and operators will still need to submit documentation to MassDEP detailing the changes. MassDEP clarified in its response to comments document on the rulemaking that C&D material management remains a high priority issue for the agency and that it therefore intends that any facility handling more than 50 tons per day of C&D material should not receive streamlining benefits.
- The streamlined permitting procedure will be used for several limited activities that in the past have required MassDEP permitting action. Activities eligible for presumptive approval (without MassDEP concurrence) include certain post-closure uses of solid waste facility sites that are no longer managed as solid waste facilities, the acceptance of special wastes which in the past have required MassDEP review and approval, and certain minor operational, equipment and administrative changes.
- For solid waste transfer stations with permits, new noncompliance reporting obligations now apply. Owners and operators of these facilities must now have a responsible corporate official sign, certify and submit to MassDEP compliance certifications within 120 days of the effective date of the new rule and then at least every five years after that. In addition, a number of activities will trigger the need to submit new compliance certifications prior to the five-year deadline. These certifications will require attestations, under the pains and penalties of perjury, that the responsible official has accurately stated whether the facility is in compliance, that the official has accurately identified all violations and dates by which the violations will be corrected, and that the facility has plans and procedures in place to maintain compliance.
- The solid waste management regulation now contains substantially increased reporting requirements. Solid waste facility owners and operators now have a continuing and seemingly unlimited duty to *immediately* correct any incorrect facts in any application, report or document submitted to MassDEP in the past, report in advance each planned change or activity which *might* result in non-compliance, report each change of information listed in any solid waste permit application, report by the next business day any emergency condition having an extended impact on facility operations or pollution controls, and notify of any change in owner or operator name or mailing address.
- In a surprising relaxation of stringent tonnage controls at transfer stations, the rules now provide that transfer facilities permitted to accept 50 TPD or more of solid waste may now increase their tonnage by up to twenty five percent (25%) beyond the limits authorized in their MassDEP permit without the need to obtain any MassDEP permit approval. As indicated by the response to comments document, this change was adopted over the objections of both solid waste industry groups and citizens advocates.
- The new rules also effectively eliminate the special waste program that MassDEP has administered for decades. In the past, MassDEP approval has been required for the management of a wide array of special wastes that the agency has deemed to pose special environmental or public health concerns that require additional protections. Effective with these changes, MassDEP has removed itself from the special waste regulation process, except for some baseline performance requirements for asbestos waste, medical/biological waste, and sludge.

For more information on the MassDEP's solid waste regulatory reform process or for questions about the impacts of the new solid waste requirements, please contact Stephen Richmond at srichmond@bdlaw.com or Marc J. Goldstein at mgoldstein@bdlaw.com.

MASSACHUSETTS LAND USE DEVELOPMENTS

Massachusetts Affordable Housing Law Trumps Municipal Master Plan

By: Brian Levey

In yet another in a string of recent decisions favorable to the development community, the construction of a large rental project under Massachusetts General Laws Chapter 40B, known as the Comprehensive Permit Law, was upheld notwithstanding its location on the lone vacant lot in an otherwise fully-developed industrial park.

Reversing the local zoning board's denial of the developer's 40B application, the Housing Appeals Committee issued its decision in *Hanover R.S. Limited Partnership v. Andover Zoning Board of Appeals*, HAC Decision No. 12-04 (December 17, 2013), "to clarify the standard" it applies in determining when a local master plan can block a Chapter 40B project. In so doing, the HAC may have signaled an increasing unwillingness to reverse a Comprehensive Permit denial as the shortfall of affordable units continues to grow.

In order to encourage and expedite the development of affordable housing projects in Massachusetts, Chapter 40B allows a municipality to grant a Comprehensive Permit encompassing all necessary local approvals for affordable housing projects that meet certain criteria through a single set of public hearings before the municipality's Zoning Board of Appeals. The statutory scheme establishes difficult thresholds for a municipality to deny or impose tough conditions on such projects and provides a special administrative review body known as the Housing Appeals Committee (HAC) to review developer appeals with a very favorable standard.

In this case, the developer sought to build a 248-unit mixed-income rental housing project on a ten-acre site, the last vacant parcel on a dead-end boulevard in an industrial park already populated by ten businesses. Located in Andover's Industrial D zoning district, residences were otherwise prohibited at the site under the local zoning bylaw. After the Andover Zoning Board of Appeals (ZBA) denied an application for Comprehensive Permit, an appeal to the HAC followed.

Having denied the permit request, the ZBA was faced with proving that a valid local concern existed and that it outweighed the regional need for affordable housing. Under state regulations, a municipal master plan can be a legitimate "local concern" only if it (1) was legitimately adopted and still operates as a viable planning tool, (2) promotes affordable housing, and (3) actually has been implemented in the area of the proposed affordable housing site. Since this three-part test is not considered a "high" bar for the municipality to meet, the "real focus" of these disputes turns on balancing the relative weights of the particular interest of the master plan on the one hand with the need for regional need for affordable housing on the other hand.

Where a municipality's affordable housing stock is below 10 percent – which is the case in most cities and towns – this is "compelling evidence" that regional housing needs trump any local objections. Constructed this way, the state has firmly and intentionally pressed its finger on the scale, tipping it in favor of affordable housing from the get-go.

Here, the balancing test crystalized around whether the Town's prohibition on residential uses in the Industrial D district outweighed regional housing needs. The ZBA made a valiant showing. It convinced the HAC that actual conflicts did exist between Andover's planning concerns and construction of housing at the site. The proposed project did not promote either land use planning interests in developing all lots in the park for commercial or industrial uses, the existing office and industrial uses, or maximum tax valuations. The HAC also agreed that Andover had a solid history of planning and the master plan had met with some success in growing affordable housing: Andover was hovering around the benchmark 10 percent minimum affordable housing stock and more than 1,300 units of low- and moderate-income housing had been created and 16 Comprehensive Permits had been approved over the last 30 years.

Notwithstanding this showing, the HAC nonetheless found that the Town fell short of meeting its burden. In so doing, it relied heavily on one simple fact – the Town's housing stock had less than 10 percent affordable units. The HAC concluded that the "town's failure to meet its statutory minimum 10% housing obligation 'provides compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal.'"

In a potentially ominous signal to municipalities, the HAC went on to opine that the "relatively low goal of 10% is a minimum, and that well more than 10% of most communities' housing stock would need to be low or moderate income housing in order to satisfy the growing need for affordable housing." Future cases will determine whether this language represents the HAC's self-styled "clarification" that as the Commonwealth's affordable housing deficit continues to rise, it will become increasingly difficult for municipalities with less than 10 percent affordable housing to successfully defend the denial of a 40B application.

For more information about this case or affordable housing developments under Chapter 40B, please contact Brian C. Levey at blevey@bdlaw.com or Marc J. Goldstein at mgoldstein@bdlaw.com.

Actual Notice, Constructive Notice, and Duty of Inquiry All Critical in Determining Whether Appeal of Building Inspector's Decision is Timely Says Massachusetts Appeals Court

By: Marc Goldstein

Just how strictly Massachusetts courts will apply the 30-day deadline for appealing a decision by a local building inspector's zoning determination to the zoning board of appeals continues to evolve, balancing actual notice, constructive notice, and "a duty of inquiry," in the Massachusetts Appeals Court's decision in *Paul Miles-Matthias v. Zoning Board of Appeals of Seekonk,* No. 13-P-635 (Feb. 11, 2014). The problem is caused by the fact that parties other than those who make the request to the building inspector are not given notice of either the request for the ruling or the building inspector's decision, even though M.G.L. c. 40A, § 15, requires an appeal to be filed within 30 days of such a decision.

The underlying case involves a neighborly dispute over the use of a common driveway as access for a new Approval Not Required (ANR) subdivision in the Town of Seekonk, Massachusetts. Although three of the four lots of defendant John Dias' subdivision had frontage, that frontage was unusable due to wetlands and he sought a ruling from Seekonk's building commissioner (as the building inspector is known in that town) to use a common driveway instead. The plaintiffs, owners of abutting property who have rights in the common driveway, learned of Dias' request soon after it was made in writing to the building commissioner on February 26, 2010, and registered their opposition with the building commissioner on a "fairly regular basis."

The building commissioner mailed her decision approving the use of the common driveway for access on March 26, 2010, to Dias, but it was not until April 14, that the plaintiffs learned of the decision and requested a written copy, which was received on April 19. On April 22 and 27, the plaintiffs took steps to learn how to file an appeal and gather the necessary paperwork, including a certified abutters list, ultimately filing the appeal on May 3.

Despite the fact that the 30-day period under M.G.L. c. 40A, § 15, counted from March 26 expired on April 25, the Seekonk Zoning Board of Appeals proceeded and issued a decision leaving the building commissioner's decision intact. The plaintiffs appealed that decision to Superior Court, where that court ruled that the appeal was timely, that the plaintiffs had standing, and that the building commissioner's decision was substantively incorrect. An appeal to the Massachusetts Appeals Court followed.

The Appeals Court reiterated the framework established in *Connors v. Annino*, 460 Mass. 790 (2011) to require investigation of (i) actual notice of the building commissioner's decision and (ii) constructive notice that leads to a duty of inquiry regarding the permit. In this case, the plaintiffs had actual notice of the decision on April 14, 2010, 19 days after the building commissioner's decision, leaving 11 days for them to perfect the appeal within the statutory 30 days. However, this is mitigated by the fact that these plaintiffs had constructive notice that the building commissioner had this matter and would be issuing a decision, leading to a duty of inquiry regarding the permit, the Court said. In short, because the plaintiffs knew about the request to the building commissioner, they had an obligation to check in regularly about the issuance of a decision, particularly where they had decided already that they would appeal any decision that allowed for the use of the common driveway to access the subdivision. "Therefore, the plaintiffs were on constructive notice from early 2010, when they first learned that Dias had requested a zoning determination, but about which they failed to inquire after approximately March 12th ... Under these circumstances, the plaintiffs here failed to satisfy their duty of inquiry."

While acknowledging the Supreme Judicial Court in *Connors* cautioned that there is no "bright line rule defining what constitutes 'adequate notice,'" even the "modest deviation" that the Superior Court judge permitted in this case was impermissible under these circumstances. Indeed, the modest nature of the additional time period beyond the allowed 30 days was irrelevant for these purposes, the Court said.

Even though the untimeliness of the decision left the Seekonk Zoning Board without jurisdiction to rule on the original appeal, ending the case at that point, in the remainder of the decision, the Court upheld the Superior Court's determination that the plaintiffs had standing and ruling that the lower court had misinterpreted the Seekonk zoning bylaw, ruling that the common driveway was a permissible accessory use.

For more information about this case or land use appeals generally, please contact Marc J. Goldstein at mgoldstein@bdlaw.com or Brian C. Levey at blevey@bdlaw.com.

NATIONAL DEVELOPMENTS

EPA Region 1 Focuses Enforcement Lens on Risk Management Under the Clean Air Act

By: Stephen Richmond

Until recently, occupational safety programs, covering subjects such as mechanical integrity, process hazard analysis and management of change, were not issues of concern for most environmental managers or environmental lawyers. These programs were typically considered the purview of the Occupational Safety and Health Administration (OSHA), and they were therefore addressed by occupational safety managers. Environmental professionals take note: those days are over.

Under Section 112(r) of the federal Clean Air Act, the U.S. Environmental Protection Agency (EPA) is now aggressively enforcing safety and risk management requirements that can impact the accidental release of chemicals. The authority for these actions is found in the risk management provisions of the Clean Air Act, the General Duty Clause at Section 112(r)(1) and the risk management program at Section 112(r)(7).

In the past few years, Beveridge & Diamond has been involved in numerous matters in which we have counseled clients and defended enforcement actions arising under these Clean Air Act provisions, and our experience is that EPA is increasingly relying on them to drive risk management program changes at industrial and commercial facilities. Facilities implicated by this enforcement trend include industrial plants that manage larger quantities of flammable or toxic substances, commercial facilities with large refrigeration systems, and any facility with a risk management program (RMP) plan. In the latter part of 2013, EPA Region 1 issued two complaints addressing risk management issues, signaling that businesses in New England should expect a more pronounced enforcement focus in this area. Environmental managers need to be well versed in these provisions, effective immediately.

Statutory Basis

Section 112(r) of the Clean Air Act contains two important sections in which environmental and safety laws converge.

First, the General Duty Clause in Section 112(r)(1) states a risk management principle: owners and operators of stationary sources managing extremely hazardous substances have a general duty, in the same manner and to the same extent as exists under OSHA, to (i) identify hazards which may result from releases using appropriate hazard assessment techniques, (ii) design and maintain a safe facility taking steps as are necessary to prevent releases, and (iii) minimize the consequences of accidental releases.

Second, Clean Air Act Section 112(r)(7) provides a broad authority to EPA to issue regulations addressing chemical release prevention, detection and correction, and stipulates that EPA must require owners and operators of stationary sources that manage regulated substances above certain threshold quantities to prepare and implement RMP plans. This requirement is implemented through the RMP rule at 40 C.F.R. Part 68. Facilities subject to the RMP rule and which are also subject to the OSHA process safety management (PSM) program at 29 CFR 1910.119 will find that the entirety of the PSM program is incorporated into the RMP rule and therefore the OSHA PSM program is fully enforceable by EPA through the Clean Air Act.

Enforcement History

For many years, EPA's risk management enforcement program focused nearly exclusively on simple RMP cases, with enforcement actions brought against facilities that did not have RMP plans in place, or against facilities that had plans but were missing significant elements of the RMP program. EPA rarely invoked the general duty provision in Section 112(r)(1), citing that provision only in a relatively few egregious release cases where severe planning deficiencies were alleged and significant chemical releases had occurred.

More recently, EPA has turned its enforcement focus to both the RMP program and the General Duty Clause, and it is currently

aggressively enforcing both. Using specially trained EPA staff and contractors hired through the National Older Worker Career Center, EPA has conducted numerous inspections that are focused exclusively on RMP and general duty issues. In 2011, EPA issued a detailed protocol for these inspections, a copy of which can be accessed here.

The size and complexity of RMP and General Duty Clause cases have increased substantially, as have the number of cases that are being pursued. Whereas just a few years ago, cases were settling in the $1,000 – 20,000 range, EPA, with assistance from the Department of Justice, has begun pursuing very high penalties to resolve these cases. In 2013, EPA settled an RMP case against Tyson Foods, requiring a payment of a $3.95 million civil penalty and the performance of supplemental environmental projects (SEPs) worth $300,000. In the same year, EPA also settled an RMP case against Dyno Nobel, requiring payment of a $257,000 civil penalty, and (with assistance from the Department of Justice) against Coffeyville Resources, requiring a payment of a $300,000 civil penalty and significant injunctive relief.

Certain regions within EPA have led the enforcement efforts in this area, while other regions have lagged. In 2013 alone, Region 6 pursued and settled at least 20 risk management cases, and Region 7 settled at least 12. Since 2010, Region 6 has settled at least 32 of these cases, Region 4 has settled 16 and Region 7 has settled 14. In New England, Region 1 has been much less active, pursuing only six cases since 2010. However, in late 2013, on the very last day of EPA's fiscal year, Region 1 issued two administrative complaints under the RMP rules, suggesting that Region 1 is beginning to devote more enforcement effort to this emerging area.

Region 1 Cases

Both recent Region 1 cases arose over allegations that manufacturing facilities had failed to comply with the RMP rules.

The first case, *In re: Holland Company, Inc.*, Docket No. CAA-01-2013-0045, concerns a company that uses hydrochloric acid in a water treatment chemical manufacturing plant and occasionally stores that acid in quantities that exceed the threshold which triggers RMP plan requirements. EPA alleged in its complaint that the company failed to submit an RMP plan to EPA and failed to take the several risk management steps necessary to comply with the RMP rule, including developing an RMP management system, completing a hazard assessment and hazard review, develop and implement operating procedures, complete employee training, administer a mechanical integrity program, and follow reasonable and generally accepted good engineering practices (RAGAGEP). Each of these allegations is customarily a concern for safety managers under OSHA, but in this case they arise under the federal Clean Air Act.

No specific penalty amount was identified in the complaint, but EPA acknowledged that its penalty would be limited to no more than $295,000 in accordance with the administrative penalty cap in the Clean Air Act, Section 113(d).

The second case, *In re: Metal Finishing Technologies, LLC*, Docket No. CAA-01-2013-0073, concerns a company that used chlorine to treat wastes produced in a manufacturing process in quantities that exceed the RMP plan threshold. This facility had previously submitted an RMP plan to EPA, and EPA alleged in its complaint a number of risk management deficiencies, including failure to update the RMP plan to list the current facility emergency contact, failure to compile written process safety information at the facility, failure to follow guidance published by The Chlorine Institute (thereby allegedly violating the RAGAGEP requirement in the RMP rule), and failure to complete a process hazard analysis, maintain written operating procedures, train employees, comply with mechanical integrity requirements, implement a management of change program, and establish a contractor program. All of these allegations could be viewed as OSHA process safety management issues, which in the past have been the exclusive enforcement domain of OSHA.

EPA proposed in the complaint to assess a penalty of $233,600. The company settled the case in February, 2014, agreeing to perform a supplemental project that eliminated the use of chlorine gas at its facility, at a cost of $54,000, plus the payment of a $12,400 civil penalty.

What Will Come Next?

The extent to which EPA Region 1 expands its risk management enforcement program remains an open question. If the enforcement trends from other EPA regions are a guide, additional expansive activity in this area is likely. Recent Region 1 cases cite only to established RMP rule standards, but it is not a stretch to anticipate an extension of enforcement activities to include the more complex and controversial use of the General Duty Clause to claim violations arising from failures to identify hazards, design and maintain safe facilities, and minimize the consequences of accidental releases.

For more information on Risk Management Plan and General Duty Clause requirements and enforcement, please contact

Stephen Richmond at srichmond@bdlaw.com.

EPA Issues Final Rule Approving Use of Revised ASTM E1527 Standard

By: Jeanine Grachuk

The U.S. Environmental Protection Agency (EPA) issued a Final Rule on December 30, 2013 that approves use of the 2013 ASTM International E1527 standard for Phase I Environmental Site Assessments (2013 Standard) as an approved method for meeting "All Appropriate Inquiry." All Appropriate Inquiry is a component of several affirmative defenses to liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). This rule became effective December 30, 2013. While the previous standard may continue to be used, EPA has indicated that it will initiate rulemaking in the near future to remove the prior standard as an approved method.

As we reported previously, the ASTM International "E1527-05 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" (2005 Standard) has been a tool for complying with EPA's All Appropriate Inquiry requirements since November 2006. The codification of the ASTM standard at 40 CFR Part 312 confirmed that the 2005 Standard could be used for performing environmental due diligence by purchasers seeking to establish the innocent purchaser or bona fide prospective purchaser defenses under CERCLA. ASTM International's bylaws require standards to be updated and re-issued every eight years; after a three-year process, the organization recently revised the 2005 Standard and presented the 2013 Standard to EPA for approval as a tool to meet All Appropriate Inquiry obligations.

While the revisions to ASTM E1527-05 may not significantly impact the general performance of Phase I environmental site assessments, there are several potentially significant changes that could, for instance, increase the cost of such assessments and the likelihood of identifying recognized environmental conditions (RECs). The changes include:

- Clarified definitions of RECs and Historical RECs;
- Addition of the concept of "Controlled RECs," situations in which previous releases at a property that underwent risk-based closures were addressed, but contaminants were allowed to remain in place under certain restrictions or conditions, such as deed restrictions including Notices of Activity and Use Limitations;
- Addition of vapor migration as a potential migration pathway that must be evaluated; and
- A presumption that consultants should review agency files (as opposed to treating this as an additional task subject to an additional fee) or explain why such review is not necessary.

EPA received 41 comments on its proposal to adopt the 2013 Standard. Many comments criticized the EPA's proposal to allow users to rely on *either* the 2005 Standard or the 2013 Standard when performing All Appropriate Inquiry. Commenters worried allowing use of either the 2005 Standard or the 2013 Standard to satisfy All Appropriate Inquiry would fail to establish a system in which one standard practice applies to all transactions, create confusion in the market place and increase the difficulty of qualifying for CERCLA liability protections.

In response to these comments, EPA commended the 2013 ASTM standard stating that its use "will result in greater clarity for prospective purchasers with regard to potential contamination at a property" and recommended its use. Further, EPA stated that while the 2005 standard may continue to be used for now, EPA plans to publish a rulemaking in the "near future" to remove the 2005 standard from the regulations and eliminate its use to meet All Appropriate Inquiry.

For more information on this regulatory change or site remediation generally, please contact Jeanine Grachuk at jgrachuk@bdlaw.com.

Ninth Circuit's Decision Narrowing Rights of Subrogation under CERCLA Left Undisturbed by U.S. Supreme Court

By: Virginie Roveillo

The U.S. Supreme Court let stand the Ninth Circuit's decision that the common law principle of subrogation does not apply to CERCLA section 107(a), requiring insurers to carefully meet statutory requirements for proceeding under either Section 107(a) or 112(c) to recover monies paid for environmental remediation. *Chubb Custom Insurance Company v. Space Systems/Loral, Inc.*, 710 F.3d 946 (9th Cir. 2013), cert. denied, 2014 U.S. LEXIS 327.

Chubb Custom Insurance Company (Chubb) issued an environmental insurance policy to Taube-Koret Campus for Jewish Life (Taube-Koret) that included coverage for environmental remediation. Pursuant to this policy, Chubb reimbursed Taube-Koret $2.4 million for cleanup costs Taube-Koret incurred in responding to contamination on its property. Chubb then filed claims for cost recovery under CERCLA sections 107(a) and 112(c), asserting equitable and statutory rights of subrogation. The district court dismissed Chubb's claims, and the Ninth Circuit affirmed.

CERCLA section 112(c) provides that "any person…who pays compensation…to any *claimant* for damages or costs resulting from a release of a hazardous substance shall be subrogated to all rights…and costs of removal… that the claimant has under this chapter…" (emphasis added). The Ninth Circuit held that a claimant is "a person who demands reimbursement of environmental cleanup costs from (i) the Superfund or (ii) a potentially liable party." Because Taube-Koret had not made a written demand for payment from either the Superfund or a PRP, Chubb did not meet the statutory requirements to bring a subrogated claim. Thus, under the Ninth Circuit's decision, an insurer's right of subrogation under section 112(c) vests when an insured makes a demand on the Superfund or a PRP, and not when an insured makes an insurance claim.

CERCLA section 107(a) imposes strict liability on PRPs for "necessary costs of response incurred by any other person…" The Ninth Circuit held that section 107(a) does not authorize a subrogated cost-recovery action because section 107(a) only applies to a person who is *statutorily* liable for or subject to the costs of cleanup – i.e., those who directly respond to the cleanup and other PRPs. Chubb's insurance payment was made under the insurance policy it had issued to Taube-Koret – a *contractual* obligation – and it was therefore foreclosed from bringing a claim under section 107(a). The Ninth Circuit's decision means that the common law principle of subrogation does not apply to CERCLA section 107(a). Insurers must instead proceed under section 112(c), being careful to meet the statutory requirements thereunder.

For more information about this case or CERCLA litigation, please contact Virginie K. Roveillo at vroveillo@bdlaw.com or Marc J. Goldstein at mgoldstein@bdlaw.com.

EPA Issues Long-Awaited Regulations on Pesticide Data Submitters' Rights

By: Kathy Szmuszkovicz, David Barker and Mackenzie Schoonmaker

EPA has issued a long-awaited final rule updating its pesticide data compensation regulations under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA). Most significantly, the final rule amends 40 C.F.R. § 152.84 to confirm that applicants who choose to cite data in support of their applications must provide offers to pay to data submitters at the time of their applications. It also confirms that such applicants must submit data certification forms to EPA at the time of application confirming they have made the required offers.

In support of the final rule, EPA stated that "[t]here is no dispute that FIFRA section 3(c)(1)(F) requires applicants for registration or amended registration to offer to pay compensation to original data submitters when the application seeks to rely on previously submitted data that are subject to FIFRA compensation requirements." EPA noted that the recent passage of the Pesticide Registration Improvement Renewal Act (commonly called PRIA 3), "has only made it more clear that a completed data certification form must be submitted at the time of application." EPA stated that ensuring that data submitters receive offers to pay at the beginning of the application process rather than the end serves "to assist EPA in ensuring that the Agency meets its FIFRA section 3(c)(1)(F) obligations," to allow data submitters to protect their rights in the data, and to "encourage early resolution of data compensation disputes," and that it is more efficient than allowing "piecemeal" submission of application materials. EPA noted that the original regulatory language allowing submission of application materials "at any later time prior to EPA's approval of the application" was not intended to allow follow-ons to withhold their offers to pay and data certification forms, but to avoid delays caused by the data gap certification process, which has been eliminated in the revised regulations.

In adopting the final rule, EPA rejected the argument that the data certification form served only an "administrative function," stating that it "lies at the core of EPA's duty to ensure compliance with the data protection provisions of FIFRA Section 3(c)(1)(F)." EPA also rejected the suggestion that follow-ons should be permitted to provide notices of intent instead of offers to pay at the start of the application, concluding that EPA could not lawfully consider applications to be complete without the data certification form confirming that offers to pay had been submitted.

The final rule also takes the following actions:

1. *Definition of "exclusive use period."*

EPA updated the definition of the term "exclusive use period" to incorporate additional exclusive use criteria established under the 1996 Food Quality Protection Act.

2. *Sources of data requirements.*

The final rule removes from 40 C.F.R. § 152.90(a) the requirement for an applicant to use a Registration Standard (the EPA reregistration decision documents issued prior to 1988) as the source of his/her list of data requirements for the selective method as registration standards are out of date. Instead, the regulations refer applicants to the data requirements in 40 C.F.R. Part 158. In the preamble to the final rule, EPA explains that this change is not intended to limit follow-ons' compensation obligations to only those data that are identified in Part 158. EPA states that its regulations "make it explicitly clear that the regulations are intended to be flexible and that EPA reserves the right to require additional data, or, in some instances, to waive studies that EPA concludes are not relevant to its registration decision under FIFRA." EPA expressly confirms that "where EPA has imposed additional requirements beyond those listed in the 40 C.F.R. part 158 data tables, applicants will be required to satisfy those requirements . . . ."

3. *Data gaps.*

Regarding data gaps, EPA continues to allow a claim of a data gap to satisfy an initial screen of an application, but has eliminated the data gap certification procedures. EPA believes that without this requirement, there are still numerous means to ensure protection of a data submitter's interest in compensable data should an applicant incorrectly assert a data gap exists. EPA notes that data submitters may petition to deny applications for which they believe offers to pay should have been submitted for more studies than the follow-on included in the letter.

4. *Exclusions from subpart E and data call-ins.*

EPA has revised 40 C.F.R. Part 152, subpart E to replace the limited listing of actions to which subpart E does not apply with a single reference to actions that may be accomplished by notification or non-notification. EPA also clarifies in the final rule that recipients of data call-ins (DCIs) must follow the procedures established in the DCI rather than the procedures in subpart E.

5. *Means of contact.*

The regulations require data citers to include an email address in the contact information provided with an offer to pay.

* * *

A copy of the Federal Register notice announcing the final rule is available here. For more information on EPA's final rule, or issues related to data submitters' rights generally, please contact Kathy Szmuszkovicz at kes@bdlaw.com, David Barker at dab@bdlaw.com, or Mackenzie Schoonmaker at mss@bdlaw.com.

U.S. Government Prosecutes First Wind Project under the Migratory Bird Treaty Act

By: James M. Auslander, Nadira Clarke, John G. Cossa, and Parker Moore

The U.S. Department of Justice ("DOJ") recently announced the settlement of its first-ever criminal enforcement action brought against a wind farm operator under Migratory Bird Treaty Act ("MBTA"). The DOJ and U.S. Fish and Wildlife Service ("FWS") charged the operator with misdemeanor violations of the MBTA by taking over 160 migratory birds without a permit. This action signals new potential exposure for operators of wind facilities that, until now, have been spared prosecution under this strict-liability criminal statute and implementing regulations.

Originally enacted in 1918 to prevent the overhunting and poaching of migratory birds, the MBTA makes it a crime to "take" any migratory bird "by any means and in any manner," regardless of whether the take is intentional or incidental to an otherwise innocent activity. The Act authorizes regulations governing the issuance of permits for the take of migratory birds in certain circumstances. Generally, the FWS has not made permits available for otherwise lawful activities that incidentally take migratory birds. Specifically, no regulation expressly allows for permits for the unintentional, incidental take of migratory birds associated with the operation of projects such as a wind energy facilities. Consequently, whether a business is prosecuted for the unintentional or incidental take of a migratory bird has depended solely on the prosecutorial discretion exercised by the FWS in conjunction with the DOJ.

The U.S. historically has brought criminal actions under the MBTA against otherwise lawful commercial activities for the sole

reason of migratory bird impacts. These cases have arisen in connection with power plants, transmission lines, oil and gas facilities, chemical plants, and timber harvesting, despite the fact that the associated bird deaths were incidental to operations. This practice has led to disparate judicial standards regarding whether an activity creates exposure to criminal liability under the MBTA, and tended to soften the strict liability standard suggested by the language of the Act.

Until now, the government has refrained from prosecuting wind energy operators for similar take of migratory birds. Rather, it has been the policy of the FWS to work cooperatively with wind developers to minimize the impacts of these projects on migratory birds. In March 2012 the FWS finalized comprehensive "Land-Based Wind Energy Guidelines" for this purpose. While these guidelines are not legally binding and do not create a permit shield from potential liability, as a practical matter it has generally been thought that compliance with these guidelines and with FWS recommendations for a particular project would insulate a developer from prosecution.

This first criminal prosecution of a wind developer under the MBTA demonstrates that wind developers are not "safe" from MBTA prosecution. It also highlights the need to understand and adhere to the FWS' expectations for such projects. The issue of avian mortality at wind facilities is one of growing concern in the environmental community and for developers. A statutory or regulatory fix is unlikely. But criminal enforcement is more likely where the FWS is dissatisfied with a wind project's impacts on migratory birds and an operator's efforts to minimize or mitigate them.

For more information on this development or its implications for a specific project, please contact James Auslander at (202) 789-6009, jauslander@bdlaw.com; Parker Moore at (202) 789-6028, pmoore@bdlaw.com; or John Cossa, (202) 789-6093, jcossa@bdlaw.com. For questions regarding criminal enforcement, please contact Nadira Clarke, (202) 789-6069, nclarke@bdlaw.com. *See also* John Cossa, Wind Energy Development and the Protection of Migratory Birds, 15 A.B.A. Int'l Envtl. and Resources L. Comm. Newsl 1, 24-30 (March 2013).

FTC Continues Crackdown on Improper Environmental Marketing Claims

By: Laura Duncan, Lauren Hopkin,s and Ryan Carra

The Federal Trade Commission ("FTC") recently settled an enforcement action against Down to Earth Designs, Inc., which does business as gDiapers, for various improper environmental marketing claims regarding the company's popular diaper system. Details of the enforcement action, which focused on claims such as "biodegradable," "compostable," and "plastic-free," are described below.

This represents the fourth set of publicized enforcement actions (totaling 12 defendants) against companies making environmental marketing claims since FTC updated its enforcement guidance, known as the Green Guides, in October 2012. This action highlights the need for companies to carefully scrutinize their environmental marketing claims to ensure that they are not inadvertently implying any environmental benefits that cannot be substantiated, and to carefully review the placement of environmental marketing claims on product labels and advertisements (including websites).

The FTC Complaint

The diaper system marketed by gDiapers consists of a reusable outer shell (gPants), disposable pad liners (gRefills), and baby wipes (gWipes). The claims contested by FTC include: 1) gRefills and gWipes are biodegradable or "certified" biodegradable; 2) gRefills and gWipes are compostable; 3) gDiapers are plastic-free; and 4) gRefills offer an environmental benefit because they can be flushed.

Biodegradable Claims

According to the FTC complaint, the company represented that gRefills and gWipes were "100% biodegradable" and "certified" biodegradable, including claims that the products would biodegrade when disposed of in trash cans, and that gWipes would biodegrade when flushed. The Green Guides require an unqualified biodegradable claim to be supported by proof that the entire product or package will completely break down and return to nature within one year after customary disposal. Any qualifications must be made "clearly and prominently."

FTC alleged that the claims were deceptive or misleading because the company could not substantiate that either product would degrade in a landfill or that the gWipes would biodegrade when flushed. The agency noted that the gRefills and gWipes packaging contained unqualified biodegradable claims on the front panel, revealing on the back and side panels that the

products would only biodegrade in "home and commercially-approved composts." Furthermore, contrary to its "certified" biodegradable claims, FTC alleged that the company did not obtain any independent, third-party certification that either product was biodegradable.

The day the enforcement action was announced, gDiapers responded on its website that it only intended to claim that the products would biodegrade when composted and that it had stated on its website and packaging that "nothing truly biodegrades in a landfill." The company also admitted that although it used an internationally recognized biodegradable testing protocol – ASTM D6400 – for testing, its test results were not certified by a third party.

Compostable Claims

FTC also alleged that compostable claims for gRefills and gWipes were improper because they were not adequately qualified to state that products soiled with solid human waste could not be composted. The Green Guides require that unqualified compostable claims be supported by competent and reliable scientific evidence that all materials in the product or package will break down into, or become part of, *usable compost* safely and in about the same time as the materials with which it is composted. Any necessary qualifications must be made "clearly and prominently."

The agency stated that the gDiapers home page contained unqualified claims that its gRefills and gWipes were compostable – only on other parts of its website did the company disclose that only "wet ones" were compostable. The company responded that its "goal has always been to communicate to our customers that home composting was for 'wet ones only,' which was always on our website and packaging. This disclaimer is now in close proximity to any composting claims we make and a regular part of our communications to customers."

Plastic-Free Claims

The company also claimed that the gDiapers system was "plastic free" and would help consumers "[e]nd plastic diaper use." FTC alleged that the claims were deceptive or misleading because the gPants component of the gDiapers system contains plastic. The company stated on its website that gPants "were never meant to be part of the 'plastic free' claim."

Environmental Benefit Claims

Finally, the company claimed that gRefills offered an environmental benefit ("Earth-friendly" and "Eco-friendly") because they can be flushed. The agency alleged that these claims were improper because gDiapers did not disclose any specific environmental benefits and substantiate that the specific benefits were true.

The Green Guides prohibit unqualified environmental benefit claims. Environmental benefit claims must be clearly and prominently qualified with specific and significant information about the claimed environmental benefit (*e.g.*, "This eco-friendly car gets 60 mpg on the highway.").

Lessons for Marketers

As appears to be the case here, marketers often inadvertently imply broader environmental attributes than they can substantiate. Claims that are not intentionally deceptive are the most common trigger for an FTC enforcement claim. Marketers should carefully scrutinize their claims to ensure that each reasonable interpretation of the claim can be substantiated. Furthermore, any necessary qualifying language should be clearly and prominently displayed in each place a claim appears.

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Beveridge & Diamond actively counsels clients on environmental marketing and other product-related environmental issues. Please see our recent article "Top Ten Tips to Tell Customers you are 'Going Green' Without Running Afoul of FTC – or Twitter," available here. If you have questions about how the FTC Green Guides may affect the presentation or marketing of your products, please contact Shareholder, Laura Duncan (lduncan@bdlaw.com), or Associates, Lauren Hopkins (lhopkins@bdlaw.com) and Ryan Carra (rcarra@bdlaw.com).

United States Ratifies Convention Restricting Use, Emissions, and Handling of Mercury

By: Paul Hagen and Russell LaMotte

In November, the United States became the first country to deposit its instrument of acceptance (equivalent to a ratification) to

the Minamata Convention on Mercury.[i] The Convention restricts the use, emissions, and handling of mercury across a variety of industries, including electronics, energy, mining, and waste.[ii]

The Obama Administration has evidently taken the position that the Convention does not require new implementing legislation in the United States at this time. The Administration also took the highly unusual step of ratifying the Convention without first seeking advice and consent of the Senate, possibly reflecting some frustration with the decades-long challenges Presidents of both parties have encountered in obtaining Senate approval of treaties generally and international environmental agreements in particular.

Key provisions of the Convention include:

- A list of mercury-added products to be banned by Party countries by 2020. The current list includes many batteries, fluorescent lamps (including those used in electronic displays), measuring devices, pesticides, and cosmetics. A mechanism was also established whereby other mercury-added products could be banned.
- A mandate for the use, within five years of entry into force, of "best available" techniques and practices to control mercury emissions from several major source categories, including coal-fired power plants.
- Phase-out of primary mercury mining within 15 years of entry into force.
- A mechanism whereby guidelines for the handling, transport, and disposal of mercury-containing waste may be established.

A total of 93 countries have signed the Convention since it was opened for signature in Kumamoto, Japan last month. The Convention will enter into force upon ratification or accession by 50 states. The text of the Convention had been in development under the auspices of the United Nations Environment Program ("UNEP") since February 2009.

Mercury-Added Products

The Convention establishes a new global framework for restricting the use of mercury in products. Specifically, the agreement contains a list of mercury-added products for which state Parties must prohibit the manufacture, import or export by 2020. Parties may register for exemptions from the phase-out date of up to five years, with an extension of up to five more years available upon approval of the Conference of the Parties ("COP"). The convention requires the COP to review the list of banned mercury-added products no later than five years after entry into force. When considering amendments or additions to the banned product list, the COP must take into account any proposals submitted by the Parties, relevant information submitted by the Parties, and the availability of mercury-free alternatives.

Mercury-added products to be banned by 2020 include:

- Batteries (except for zinc silver oxide button batteries with mercury content less than 2% and zinc air button batteries with mercury content less than 2%);
- Switches and relays (except very high accuracy capacitance and loss measurement bridges and high frequency radio frequency switches and relays in monitoring and control instruments with maximum mercury content of 20 mg per bridge, switch or relay);
- Compact fluorescent lamps ("CFLs") for general lighting purposes not greater than 30 watts with mercury content exceeding 5 mg per lamp burner;
- The following linear fluorescent lamps ("LFLs") for general lighting purposes: triband phosphor of less than 60 watts with mercury content exceeding 5 mg per lamp; halophosphate phosphor of not greater than 40 watts with mercury content exceeding 10 mg per lamp;
- High-pressure mercury vapor lamps ("HPMVs") for general lighting purposes;
- The following cold cathode fluorescent lamps and external electrode fluorescent lamps ("CCFLs" and "EEFLs") for electronic displays: short length lamps with mercury content exceeding 3.5 mg per lamp; medium length lamps with mercury exceeding 5 mg per lamp; and long length lamps with mercury content exceeding 13 mg per lamp;
- Cosmetics with mercury content above 1 ppm (with some exceptions for eye cosmetics using mercury as a preservative

where no effective and safe substitute preservatives are available);

- Pesticides, biocides, and topical antiseptics; and

The following non-electronic measuring devices (with some exceptions for devices installed in large-scale equipment or those used for high-precision measurement where no suitable mercury-free alternative is available): barometers; hygrometers; manometers; thermometers; and sphygmomanometers.

The Convention's provisions restricting mercury in products represent an important evolution in the development of global environmental accords that could serve as a precedent for further product restrictions at the global level.

Other Restrictions on Mercury

The Convention contains other provisions restricting uses of mercury, as well as restrictions on mercury mining, transport, and emissions. For example, the Convention requires state Parties to take action that will:

- Within five years of entry into force, mandate the use of "best available" techniques and practices to control mercury emissions from the following source categories: coal-fired power plants; coal-fired industrial boilers; smelting and roasting processes used in the production of non-ferrous metals; waste incineration facilities; and cement clinker production facilities.
- Forbid new primary mercury mining immediately and existing primary mercury mining within 15 years of entry into force;
- Only allow the export of mercury to Parties and non-Parties providing written consent (and certification, for non-Parties) and ensuring that the mercury will not be used in a way forbidden by the Convention; and
- Prohibit or restrict the use of mercury or mercury compounds in the production of certain chemicals, including: chlor-alkali; acetaldehyde; vinyl chloride monomer; sodium or potassium methylate or ethylate; and polyurethane.

Waste Provisions

The Convention also contains a mechanism whereby guidelines for the handling, transport, and disposal of mercury-containing waste may be established. The guidelines would apply to waste substances or objects consisting of, containing or contaminated with mercury or mercury compounds at a threshold level to be established by the COP in collaboration with the relevant bodies of the Basel Convention, and would be drafted taking into account Parties' existing waste management regulations and programs. The extent to which used electronics destined for reuse, refurbishment or recycling constitute waste is an active topic of discussion under the Basel Convention and the outcome will be important in light of potential new obligations in relation to the management of mercury-containing wastes.

For more information about the Convention or Beveridge & Diamond's international supply chain practice, contact Paul Hagen at (202) 789-6022 or Russ LaMotte at (202) 789-6080.

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i. United Nations Environment Programme Press Release: Global Treaty on Mercury Pollution Gets Boost from United States. http://www.unep.org/newscentre/Default.aspx?DocumentID=2755&ArticleID=9691&l=en

ii. The text of the Convention is available at http://www.unep.org/hazardoussubstances/Portals/9/Mercury/Documents/dipcon/CONF_3_Minamata%20Convention%20on%20Mercury_final%2026%2008_e.pdf.

FIRM NEWS

Two New Associates Welcomed in B&D's Wellesley Office

By: Marc Goldstein

The Wellesley office of Beveridge & Diamond is very pleased to welcome two new associates, who will help continue the office's focus on environmental, land use, and litigation. Heidi Knight has relocated from B&D's Baltimore office and will continue her

practice on regulatory compliance, environmental transactions, and due diligence, with particular emphasis on the Clean Air Act and its state equivalents. She regularly counsels coke producers, petroleum product manufacturers, chemical companies, automotive part manufacturers, and other industrial clients on air and other environmental and safety matters. Ms. Knight is admitted in Maryland only, and is practicing pursuant to Mass. Sup. Jud. Ct. Rule 3:07, RPC 5.5(c)(1) under the direct supervision of Principals of the Firm.

Virginie Roveillo joins the office from the Conservation Law Center in Bloomington, Indiana after graduating from Middlebury College and Pace University School of Law. Her practice will include all aspects of environmental law including regulatory compliance counseling for the firm's national clients.

Beveridge & Diamond Wins Summary Reversal of Attorney Fee Award in California Court of Appeal

By: Jimmy Slaughter

Litigators from the Firm's California and Washington offices secured the reversal of a half-million dollar fee award in the California Court of Appeal on January 22 when a unanimous panel ruled that a fee award granted by the trial court could not stand when an intervening change in law resulted in a reversal of the underlying judgment on the merits. *Northern California Recycling Association v. County of Solano*, 2014 WL 235443 (Cal. App. 2014). The ruling followed the Firm's prior victory on the merits in the Court of Appeal when a panel decided that California law preempted a voter initiative that sought to limit solid waste imports into Solano County, California. *Sierra Club v. County of Solano*, 2013 WL 3963602 (Cal. App. 2013). The latest ruling rejected arguments that a fee award that was correct at the time of issuance by the trial court could stand despite a later appellate reversal. The Court wrote that "where the petitioners ultimately failed to achieve any relief and their judgment was reversed as a result of a change in the law, the attorney fee award falls along with the underlying judgment." The opinion is available here. The 2013 merits decision has been the subject of articles in *BNA Daily Environment Report*[1] and *Westlaw Journal* (both quoting Firm Principal Jimmy Slaughter), and Law360[2]. For more information, contact Jimmy Slaughter (jslaughter@bdlaw.com), Lily Chinn (lchinn@bdlaw.com) or Gary Smith (gsmith@bdlaw.com).

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[2] Subscription Required

Beveridge & Diamond Helps City of Albany and Adjoining Communities Forge Successful Plan to Improve Hudson River Water Quality

By: Richard S. Davis, Stephen L. Gordon, John H. Paul, and Benjamin F. Wilson

A team of lawyers from Beveridge & Diamond's Washington, DC and New York offices represented the Albany Pool Communities (APC) in negotiating a consent decree with the New York State Department of Environmental Conservation (DEC) to implement a 15-year, 53-project, $136 million stormwater infrastructure improvement and combined sewer overflow (CSO) management plan. APC consists of six communities in the Capital Region of New York, including the City of Albany's Water Board, the City of Cohoes, the City of Rensselaer, the City of Troy, the City of Watervliet, and the Village of Green Island.

Under the consent order, APC, along with the Albany County and Rensselaer Country sewer districts, will upgrade their systems and complete green infrastructure projects to reduce CSOs into the Hudson River. These projects will bring APC and the sewer districts into compliance with New York State water quality standards and federal Clean Water Act requirements.

Through our representation and based on expert analysis by the APC's consultant team (which was led by Clough Harbour & Associates, and included CDM-Smith and ARCADIS (formerly Malcolm Pirnie)), APC scientifically justified a CSO plan that was tailored to meet the applicable water quality standards. Moreover, by developing a regional framework within which the communities could place projects where they would do the most good for the rivers, the Plan allows the communities to achieve full compliance at a cost that is roughly 1/10th of that of CSO programs for similarly-sized communities acting alone. This exciting result was made possible by the Firm's creation of an inter-municipal group capable of coordinating and executing 53 projects region-wide over a 15 year period. The integrated plan also enables APC to pursue grant and loan support as a single entity instead of as six competitors.

In a press statement about the decree, Assemblyman John McDonald said, "Since 2004, the Albany Pool communities have

worked closely and collaboratively with the DEC to address the generations old challenge of combined sewer overflows. As a former mayor and the Assembly member who now represents the Albany Pool communities, I know firsthand the amount of effort that went into this Long Term Control Plan and I commend all of the parties involved for agreeing to a plan that improves the water quality of the Hudson River while at the same time implementing a plan that is sensitive to the ratepayers. This collaboration amongst these communities and the DEC is a model for future collaborative efforts of local governments and state agencies and is an effort that all should be proud to have been a part of."

The agreement also garnered praise from environmental organizations. Paul Gallay, president of the Hudson Riverkeeper, said "When these waters are fishable and swimmable again, we will look back on this agreement as the turning point. Congratulations to DEC and the Albany area communities for putting us on the right track to a clean Upper Hudson."

Beveridge & Diamond's team included Richard Davis and Benjamin F. Wilson of the Firm's Washington, DC office, and Steve Gordon and John Paul of the Firm's New York office.

Beveridge & Diamond represents a number of municipal and regional water systems nationwide on stormwater and wastewater matters, as well as other Clean Water Act enforcement and permitting issues. The APC consent decree marks the third time in less than one year that Beveridge & Diamond's Clean Water Act team has secured a favorable result for a major U.S. municipality or water district. In July 2013, the Firm assisted the San Antonio Water System in finalizing a consent decree involving its $1 billion sewer system project, and, in January 2014, Beveridge & Diamond secured judicial approval the $3.7 billion Clean Water Act "Deep Tunnel" project that the Metropolitan Water Reclamation District of Greater Chicago has been diligently constructing since 1975.

Beveridge & Diamond Secures Approval of $3.7 Billion Clean Water Act Consent Decree

By: Richard Davis, Sarah Albert, and Benjamin Wilson

Litigators from Beveridge & Diamond's Washington and Baltimore offices won approval of a major Clean Water Act consent decree over the objections of environmental groups. On January 6, 2014 Judge George Marovich of the U.S. District Court for the Northern District of Illinois entered a historic consent decree between the United States, Illinois, and the Metropolitan Water Reclamation District of Greater Chicago (MWRDGC or the District) to govern the ongoing Tunnel and Reservoir Plan (TARP), a multi-billion dollar project to improve stormwater control and wastewater management throughout metropolitan Chicago. The ruling comes after 7 years of consent decree negotiation with the US Environmental Protection Agency, the Department of Justice, and the State of Illinois, and 3 years of aggressive litigation brought by several environmental groups that sought more work than called for in the decree. Benjamin F. Wilson, Richard Davis and Sarah Albert lead the multi-office team from Beveridge & Diamond that represents MWRDGC regarding the consent decree and the litigation.

The court adopted the District's legal and factual arguments and rejected every challenge mounted by the environmental groups, which were represented by large Chicago law firms.

In a January 13 press statement, MWRDGC Executive Director David St. Pierre said of the ruling, "This is a great day for our constituents as we can move forward on many initiatives that have been held in check because of pending litigation. These include green infrastructure, storm controls and a comprehensive evaluation of the District's real estate portfolio."

"All of us at Beveridge & Diamond congratulate the Metropolitan Water District on this great result. We are proud to have been a part of their team, and we look forward to supporting the District's ongoing efforts to deliver outstanding service to the citizens of the Chicago area," said Benjamin F. Wilson, Beveridge & Diamond's Managing Principal.

The case is *United States v. Metro. Water Reclamation Dist.*, N.D. Ill., No 1:11 CV 8859, 1/6/14

Beveridge & Diamond represents a number of municipal and regional water systems nationwide on stormwater and wastewater matters, as well as other Clean Water Act enforcement and permitting issues. For example, the Firm recently assisted the San Antonio Water System in finalizing a consent decree involving its $1 billion sewer system project. It also recently helped fashion a unique 6-community regional solution for combined sewer overflows for the Capital District of New York State (the Albany region).

Benjamin F. Wilson Receives ABA's 2014 Spirit of Excellence Award

Beveridge & Diamond, P.C. is pleased to announce that the American Bar Association (ABA) Commission on Racial and Ethnic

Diversity in the Profession has selected Benjamin F. Wilson, the Firm's Managing Principal, as a 2014 recipient of its *Spirit of Excellence* award.

The *Spirit of Excellence* award honors those who have excelled in their professional settings while paving the way for others. Mr. Wilson will receive the award on February 8 at the 2014 ABA Midyear Meeting in Chicago, IL.

"I am humbled and grateful to receive this recognition, and I congratulate my fellow honorees Frankie Muse Freeman, Hon. Brenda Harbin-Forte, Patricia D. Lee, I.S. Leevy Johnson, Prof. Leo M. Romero, and Wendy C. Shiba for their dedication to racial and ethnic diversity in our profession. I look forward to celebrating our progress in these areas and discussing the important work that remains," commented Mr. Wilson.

Learn more about the 2014 Spirit of Excellence Awards.

Beveridge & Diamond Again Named a Top National Environmental and Litigation Firm by U.S. News/Best Lawyers

U.S. News Media Group and *Best Lawyers* have once again awarded Beveridge & Diamond's environmental and litigation practices a Tier 1 nationwide ranking in the 2013 Best Law Firms list. With 98 lawyers in offices in six states and the District of Columbia, the firm helps clients from a range of industries solve complex environmental and natural resource challenges across the U.S. and internationally.

The Firm's practice in Washington, D.C. was recognized with Tier 1 rankings for environmental law and litigation, and a Tier 2 ranking for arbitration. The San Francisco office was recognized with Tier 1 rankings for environmental law and litigation, and the Baltimore office with a Tier 1 ranking for commercial litigation. The Firm's Boston office was recognized for its land use practice, and the Austin office for its environmental practice.

"We thank U.S. News and Best Lawyers for again recognizing our firm's focused depth and strength of expertise that we bring to bear across the U.S. and indeed the world. Our clients and our lawyers make our success possible, and I want to thank and honor them for this recognition," said Benjamin F. Wilson, Beveridge & Diamond's Managing Principal.

The 'Best Law Firms' rankings are now in their fourth year and feature law firms that are given consistently impressive performance ratings by clients and peers. Beveridge & Diamond has been repeatedly recognized as a top tier firm by U.S. News & World Report/Best Lawyers.