Massachusetts Environmental and Land Use Alert

BEVERIDGE & DIAMOND PC

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Massachusetts Office
15 Walnut Street
Suite 400
Wellesley, MA 02481
(781) 416-5700

Authors

Marc J. Goldstein
mgoldstein@bdlaw.com

Jeanine L.G. Grachuk
jgrachuk@bdlaw.com

Brian C. Levey
blevey@bdlaw.com

Stephen M. Richmond
srichmond@bdlaw.com

For more information about our firm, please visit www.bdlaw.com

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Massachusetts Developments

Massachusetts MEPA Office Issues Revised Greenhouse Gas Emissions Policy and Protocol

The Massachusetts Environmental Policy Act (MEPA) office has issued a revised and updated greenhouse gas emissions policy and protocol to govern projects undergoing MEPA review, effective May 5, 2010. *(full article)*

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MassDEP Adopts Federal Land Disposal Restriction Program and other Amendments to its Hazardous Waste Rules

On April 16, 2010, the Massachusetts Department of Environmental Protection (MassDEP) adopted amendments to the state's hazardous waste rules. These revisions included adoption of the federal Land Disposal Restriction (LDR) program, as well as revisions to several other hazardous waste provisions for consistency with the federal program. (*full article*)

National Developments

EPA Explains Implementation of Greenhouse Gas Regulation With Issuance of Final "Tailoring Rule"

The Environmental Protection Agency has finalized its plan to regulate greenhouse gasses under the existing Clean Air Act. While the debate in Congress continues over climate change legislation, on May 13, 2010, EPA released what is being called the final piece of the three-part puzzle for regulating GHGs beginning in early 2011. *(full article)*

Senators Kerry and Lieberman Unveil Comprehensive Energy and Climate Bill

On May 12, 2010, Senators John Kerry (D-MA) and Joseph Lieberman (I-CT) unveiled a "discussion draft" of their long-awaited climate change and energy bill, the American Power Act. Key features of the bill include economy-wide targets for greenhouse gas emission reductions, a cap-and-trade program extending to electric utilities, manufacturing facilities, and natural gas distributors, and a fee imposed on fuel refiners in the form of a requirement to purchase and retire allowances. *(full article)*

EPA Looks to Expand Mandatory GHG Emissions Reporting Program

The Mandatory Greenhouse Gas Reporting Program is less than a year old, and already the United States Environmental Protection Agency is looking to expand the program's scope. *(full article)*

Proposed Legislation Would Overhaul TSCA

The "Safe Chemicals Act of 2010," S. 3209, introduced April 15 by Senator Lautenberg (D-NJ), proposes to fundamentally overhaul the Toxic Substances Control Act. A companion proposal in the House of Representatives, the discussion draft for the "Toxic Chemicals Safety Act of 2010," was released the same day by Representatives Waxman (D-CA) and Rush (D-IL). This long-awaited legislation offers concrete targets for discussion and analysis in a political environment that features broad consensus regarding the need for modernization of TSCA, but far less consensus regarding the specific shape that modernization should take. *(full article)*

Federal Court Rejects Challenge to CWA Permit Regulating Upland Ditches

The U.S. District Court for the District of Columbia recently determined that upland manmade ditches may be subject to federal jurisdiction under the Clean Water Act. *(full article)*

Firm News

Beveridge & Diamond Makes PAR's "The Best" List for Advancing Women Lawyers in New Partner Classes

We are pleased to announce that Beveridge & Diamond, P.C. has made "The Best" list in the Project for Attorney Retention's (PAR) New Partner Report. *(full article)*

Previous Issues of the Massachusetts Environmental and Land Use Alert

Back to Top

Massachusetts Developments

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The Massachusetts Environmental Policy Act (MEPA) office has issued a revised and updated greenhouse gas emissions policy and protocol to govern projects undergoing MEPA review, effective May 5, 2010.

Under MEPA, projects that meet certain categorical thresholds must prepare either an environmental notification form (ENF) or both an ENF and an environmental impact report (EIR). Under the revised policy, the Secretary of Energy and Environmental Affairs (Secretary) will require the quantification of greenhouse gas (GHG) emissions by certain project proponents, as described below, and the commitment by such project proponents to adopt GHG emission reduction actions to accomplish the statutory requirement that state agencies adopt all feasible measures to avoid, minimize, and mitigate damage to the environment. At this time, carbon dioxide emissions are the primary focus of the policy, although the Secretary may seek to require evaluation of other GHGs for certain projects such as landfills and wastewater treatment plants.

The revised policy will apply to proponents who propose a project requiring the preparation of an EIR, and to those proponents who request full EIR waivers. The Secretary may also require quantification of GHG emissions for notices of project change on an individual basis.

Projects with de minimis GHG emissions may be exempted from the policy upon a showing that GHG emissions will be negligible. Similarly, project proponents that commit in advance to exceptional GHG reduction measures may request approval to not quantify GHG emissions as prescribed by the policy.

For those who are subject to the revised policy, the MEPA EIR analysis must now include a three step process to evaluate GHG emissions. First, the EIR must identify an appropriate GHG emission baseline condition for each aspect of a proposed project. Second, the EIR must include a calculation of estimated GHG emissions associated with the baseline condition in accordance with a methodology described in the policy. Finally, the EIR must include a calculation of estimated emissions reductions based on available mitigation measures by comparing project alternatives to the baseline conditions.

The policy establishes methodologies for estimating GHG emissions from several types of project categories: building-related stationary sources, process-related stationary sources, indirect transportation emissions and direct transportation emissions. Evaluation of some other categories are generally not required, including waste generation, materials consumption, conversion of biomass associated with land clearing, and construction related emissions.

The policy also contains an appendix that lists potential mitigation measures which can be used to reduce project GHG emissions. The MEPA office intends to identify in EIR scoping documents the specific mitigation measures and alternatives that must be quantified by project proponents, and the mitigation measures listed in the appendix will clearly be prominent measures for the GHG mitigation analyses. While the policy includes a statement of preference for direct mitigation, it also states that offers of GHG offsets will be considered when avoidance or minimization strategies are not feasible.

While the MEPA office intends that the policy will be applied to all projects requiring an EIR, except for certain projects with de minimis emissions, it has also committed to seeking a change in the MEPA regulations that will establish an EIR threshold for carbon dioxide emissions. A proposal to amend the regulations at 301 CMR 11.00 is expected later in 2010.

For more information on the MEPA greenhouse gas emissions policy and protocol, please contact Stephen Richmond at srichmond@bdlaw.com.

Back to Top

Update on MassDEP's Efforts to Develop Comprehensive Guidance on Addressing Vapor Intrusion at Contaminated Sites

The Massachusetts Department of Environmental Protection (MassDEP) has been working toward developing updated, comprehensive guidance for addressing sites with vapor intrusion issues for the past several years. Vapor intrusion refers to the ability of volatile contaminants to move from soil vapor into the indoor air of buildings. This "Alert" provides an update on MassDEP's progress.

Regulations implementing the state cleanup law, chapter 21E, have long required assessment and remediation of sites to address vapor intrusion concerns. In April 2006, MassDEP made the standards addressing vapor intrusion more stringent in light of evolving data. As part of these revisions, the perchloroethylene standard that applies to groundwater underneath a building was lowered by two orders of magnitude (from 3,000 ug/L to 50 ug/L). Subsequently, MassDEP began examining perchloroethylene sites closed under prior standards to determine if they pose an imminent hazard. http://www.mass.gov/dep/cleanup/laws/viaud.htm. Of about 600 sites examined, MassDEP determined that additional assessment or remedial work would be required for about 100 sites.

In 2008 MassDEP issued guidance identifying "Typical Indoor Air Concentrations" based on the detections of such contaminants in typical residential settings and the risks posed by those contaminants. MassDEP also began evaluating how typical indoor air concentrations should be used in evaluating the vapor intrusion pathway. In response to questions and comments from the regulated community, in late 2008, MassDEP convened an Indoor Air Workgroup for the purpose of developing updated, comprehensive guidance for addressing sites with vapor intrusion issues. The workgroup consists of representatives from the licensed-site-professional, risk assessment, and legal communities, along with MassDEP staff. After many workgroup meetings, in August 2009, the MassDEP issued draft vapor intrusion guidance for review and comment.

In spring 2010, MassDEP announced that it had contracted with a consulting firm to conduct a review of the vapor intrusion requirements and guidance of the fifty states to assist it in continuing its development of guidance. While the study is still being completed, MassDEP has posted a brief description on its website, at www.mass.gov/dep/cleanup/laws/visurv.pdf. Informally, MassDEP has indicated that workgroup meetings will reconvene around June 2010, with the goal of issuing the final guidance in December 2010.

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

EPA Region 1 Revises Residual Designation for Certain Charles River Communities and Issues Draft Permit – Comment Period Expires June 30, 2010

Continuing to demonstrate its position as a leader on stormwater regulation issues, Region 1 of the Environmental Protection Agency (EPA Region 1) proposed amendments to its Preliminary Residual Designation for the Charles River (Preliminary Designation) and issued a Draft General Permit for Residually Designated Discharges in Milford, Bellingham and Franklin, Massachusetts (Draft Permit). As described below, the Preliminary Designation and Draft Permit would subject privately-owned impervious surfaces in excess of two (2) acres located in the Charles River watershed towns of Milford, Bellingham, and Franklin to permitting under the National Pollutant Discharge Elimination System (NPDES) program. The comment period for both documents expires on June 30, 2010.

EPA Region 1's issuance of the Preliminary Designation in November 2008 was an unprecedented exercise of EPA's so-called "Residual Designation" authority under the

Back to Top

Clean Water Act to designate additional stormwater sources for regulation on a case-by-case or category-by-category basis based on localized conditions. At the time, EPA Region 1 justified the exercise of this authority on the basis that these discharges contributed (1) to violations of water quality standards and (2) wasteload allocations that are part of a Total Maximum Daily Load (TMDL) for the discharge of phosphorus to the Charles River. This Preliminary Designation was not effective until a general permit was issued by EPA and has remained preliminary and subject to comment for nearly a year and a half.

The Preliminary Designation, as revised by the proposed amendments, would cover stormwater discharges ("Designated Discharges") from:

- two (2) or more acres of impervious surfaces;
- located on a single lot or two or more contiguous lots owned by the same person or where the footprint of the same building, structure, low impact development techniques, or structural storm water best management practice spans the contiguous lots owned by different persons; and
- located in the Charles River watershed towns of Milford, Bellingham, and Franklin.

The amendments proposed by EPA Region 1 modified previous language concerning which contiguous lots were included, narrowed an exemption for government-owned lands, and made the owner of the site responsible in the first instance for permitting, where the operator had that obligation in the Preliminary Designation.

EPA Region 1 simultaneously issued the Draft Permit for comment, which describes the proposed requirements for those with Designated Discharges, beginning with the submission of a Notice of Intent to be covered under the General Permit. The requirements fall into two categories: development and implementation stormwater management program and plan (SMP) and the Phosphorus Reduction Requirement. The SMP includes certain defined Baseline Performance Standards, including establishment of a Stormwater Management Team, training, pavement sweeping, management of snow and deicing chemicals, management of waste and hazardous materials, management of landscaped areas, and execution of an illicit discharge detection and elimination (IDDE) program.

The Phosphorus Reduction Requirement requires the permittee to achieve a reduction in the phosphorus load in storm water discharging directly or indirectly to the Charles River that is equal to 65% of its existing phosphorus load through a series of steps, including development of a Preliminary Phosphorus Reduction Plan within two (2) years of the granting of authorization to discharge under the permit, development of a Final Phosphorus Reduction Plan within three (3) years of the granting of the permit, and ongoing compliance activities.

EPA Region 1's efforts in these three towns have been seen as a pilot likely to be applied to the entire Charles River watershed with possible broader applications.

The issuance of the Draft Permit and proposed amendment to the Preliminary Designation come at a time when EPA Region 1 is also focused on the issuance of new Small MS4 General Permits (MS4 Permit) that govern storm water discharges by certain municipalities. The comment period for the MS4 Permit for the North Coastal Region, which includes the Charles River and Neposnet River watersheds, closed March 31, 2010, and EPA Region 1 is expected to issue for comment one or more MS4 Permits covering Merrimack, South Coastal, and the so-called Interstate regions in the coming months. EPA has stated its intention to issue final MS4 General Permits by the end of 2010.

For further information, please contact Marc J. Goldstein at mgoldstein@bdlaw.com.

Back to Top

MassDEP Proposes Ban on Disposal of Clean Gypsum Wallboard

The Massachusetts Department of Environmental Protection (MassDEP) has proposed to amend the state solid waste rules to ban the disposal, or transfer for disposal, of clean gypsum wallboard, effective September 1, 2010.

Currently, waste handling and disposal facilities in Massachusetts must comply with a disposal ban on a number of materials that have been identified by MassDEP as materials that have sufficient recycling infrastructure in place to support a disposal ban. The current list includes many traditional components of the solid waste stream, such as leaves, tires, recyclable paper, metal and glass containers, single polymer plastics, metal, wood, asphalt, brick and concrete. The new proposal would add to this list clean gypsum wallboard.

The proposed rule amendment is targeted to wastes created from construction projects which generate scrap wallboard, primarily from wall and ceiling installations. This change has been contemplated by MassDEP since at least 2003, and is intended to both increase the recycling of this material and reduce its disposal in landfills, where it may contribute to the generation of hydrogen sulfide gas.

MassDEP estimates that there is a current infrastructure in-state with the capacity to recycle approximately 80,000 tons of gypsum wallboard waste. Two facilities have been identified by MassDEP as accepting clean gypsum wallboard material for recycling, one located in Cambridge, Massachusetts, and the other in Newington, New Hampshire.

The proposed disposal ban will not include gypsum wallboard that has been contaminated with paint, wallpaper, joint compound, adhesives, nails or other substances. MassDEP does not feel there is an adequate infrastructure in place to recycle the amount of such used wallboard that is produced in the state.

MassDEP suggests in its background document on the proposed rulemaking that solid waste facilities would not need to conduct recordkeeping or load inspections for vehicles delivering materials with less than five cubic yard capacity, and that delivered loads with 20 percent or less of wallboard and other banned construction and demolition material, and pieces of wallboard sized at two square feet or less, would be exempt. These details are proposed to be addressed in written policy rather than in the rule itself.

Public hearings on the proposal are scheduled for June 14 and June 16, 2010, and written comments may be submitted to MassDEP until July 6, 2010. For additional information about this proposed rulemaking, please contact Stephen Richmond at srichmond@bdlaw.com.

EPA Proposes Renewal of NPDES General Permit for Contaminated Sites

On April 26, the U.S. Environmental Protection Agency (EPA) announced the availability for review and comment of a draft National Pollutant Discharge Elimination System (NPDES) General Permit for discharges from contaminated sites in Massachusetts and New Hampshire (the Draft Permit). This permit will replace the existing general permit, which expires September 9, 2010.

The Draft Permit will apply where there is a point source discharge to surface water relating to (1) remediation activities to address sites contaminated by petroleum or hazardous materials, (2) construction de-watering at sites known to be contaminated, and (3) identified miscellaneous contaminated discharges (e.g., aquifer pump testing of formerly contaminated area). The permit divides these types of activities into subcategories, and applies different requirements to each subcategory.

According to a fact sheet prepared by EPA, here are some of the significant differences in the Draft Permit as compared to the existing general permit:

- In many cases, the Draft Permit reduces the amount of analytical data required

Back to Top

to be submitted with the Notice of Intent.

- The Draft Permit adds monitoring and reporting of chloride.
- The Draft Permit clarifies that influent and effluent monitoring requirements are based on the parameters identified in the EPA authorization letter.
- The Draft Permit increases the minimum number of consecutive months of laboratory data demonstrating compliance with applicable limits that are required in order to be eligible for a reduction in influent and effluent monitoring.
- The Draft Permit clarifies requirements for certifying, based on laboratory data, that the permittee continues to believe that certain parameters are not present.
- The Draft Permit requires annual certification that Best Management Practices Plan was followed during the previous calendar year only during the first two years. This is a reduction from the existing general permit, which requires certification every year.
- The Draft Permit streamlines Endangered Species Act and National Historic Properties Act review.

The public comment period ends on May 26, 2010. More information is available on the EPA's website at: http://www.epa.gov/region1/npdes/rgp.html. For further information, please contact Jeanine Grachuk at jgrachuk@bdlaw.com.

Massachusetts Appeals Court Rules Company Has Right to Adjudicatory Hearing Under Chapter 30A Despite Not Falling in an Appealable Category Under Septic System Regulations

The Massachusetts Appeals Court ruled in *Hercules Chemical Co. v. Department of Envtl. Protection*, 76 Mass. App. Ct. 639 (2010), that the manufacturer of an additive to septic systems that had been approved for sale in Massachusetts for nearly 10 years was entitled to an adjudicatory hearing under M.G.L. c. 30A upon the Department of Environmental Protection's (MassDEP) decision to revoke that approval, regardless of the fact that the decisions at issue did not clearly fall into one of the appealable categories listed in regulations governing septic systems.

In 1995, MassDEP approved Hercules Chemical Company's (Hercules) product "Aid-Ox" as an additive and restorative under Title 5, the regulations governing septic systems in Massachusetts, based on a finding that the product would not (1) harm septic system components, (2) adversely affect system function, or (3) adversely affect the environment as required under 310 CMR 15.027. Since that time, Aid-Ox had been available in Massachusetts without any change in its chemical composition.

In 2006, MassDEP informed Hercules it was concerned Aid-Ox could harm the biomat of septic systems and, as a result, the product was no longer consistent with the requirements of 310 CMR 15.027. Hercules filed a written response to MassDEP including expert opinions that the product was harmless when used as a restorative for failing systems. MassDEP then changed its approach, abandoning its previously articulated safety concerns and focusing instead on the product's use as a restorative for failing systems. MassDEP noted that under its regulations, chemical additives may not be used in place of a required upgrade to a "failing" system. As a result, MassDEP informed Hercules it would remove Aid-Ox from the list of approved additives and informed the company that it could seek approval under the Innovative/Alternative System program. Hercules sought and was denied approval under this program.

When Hercules sought an adjudicatory hearing of these decisions, an administrative hearing officer found there was no right to an adjudicatory hearing on the issues and that the request for a hearing on the delisting decision was untimely. The hearing officer relied largely on the regulations at 310 CMR 15.422 that provide a list of decisions under Title 5 for which an applicant has a right to request an adjudicatory hearing and that the list did not include decisions of this type. On appeal to the Superior Court, a judge

Back to Top

dismissed Hercules' complaint.

Despite the limited list of appealable decisions in 310 CMR 15.422, the Appeals Court found that MassDEP's combined actions had an effect equivalent to revoking a license under G.L. c. 30A, § 13. A license is defined as "any license, permit, certificate, registration, charter, authority or similar form of permission required by law." Because no septic additive may be sold in Massachusetts without MassDEP approval, the Appeal Court ruled that the revocation entitles the license holder to a hearing under Chapter 30A. The Appeals also found the appeals were timely where the matters were consolidated on appeal and the second appeal was timely, the entire matter was timely appealed.

For further information on this decision, please contact Marc Goldstein at mgoldstein@bdlaw.com.

MassDEP Adopts Federal Land Disposal Restriction Program and other Amendments to its Hazardous Waste Rules

On April 16, 2010, the Massachusetts Department of Environmental Protection (MassDEP) adopted amendments to the state's hazardous waste rules. These revisions included adoption of the federal Land Disposal Restriction (LDR) program, as well as revisions to several other hazardous waste provisions for consistency with the federal program.

Most of the LDR program has been incorporated by reference, except where delegation is prohibited or where the state has opted to adopt more stringent provisions. Examples of more stringent requirements adopted by MassDEP are a prohibition on the use of underground injection as a means of hazardous waste land disposal and a prohibition on the placement of any lab packs containing hazardous waste, or any ignitable or reactive hazardous wastes, in any land disposal unit. MassDEP also has not adopted the federal waiver and variance provisions for surface impoundments and variances from treatment standards that are allowed under the federal RCRA program.

MassDEP's public notice states that the proposed rules "mirror analogous federal RCRA requirements and have been drafted to meet the applicable EPA authorization requirements, particularly with respect to equivalency. Once promulgated by MassDEP and formally approved by EPA, these rules will expand MassDEP's authority to implement the federal RCRA program in Massachusetts."

For further information, please contact Stephen Richmond at srichmond@bdlaw.com or Jeanine Grachuk at jgrachuk@bdlaw.com.

National Developments

EPA Explains Implementation of Greenhouse Gas Regulation With Issuance of Final "Tailoring Rule"

The Environmental Protection Agency ("EPA") has finalized its plan to regulate greenhouse gasses ("GHGs") under the existing Clean Air Act ("CAA"). While the debate in Congress continues over climate change legislation, on May 13, 2010, EPA released what is being called the final piece of the three-part puzzle for regulating GHGs beginning in early 2011. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule (the "Tailoring Rule," available at http://www.epa.gov/NSR/documents/20100413final.pdf). The Tailoring Rule follows closely on the heels of two other GHG-related final rules issued by EPA within the last two months: the Johnson Memorandum and the Light Duty Vehicle Rule. While the previous two rules confirm that GHG emissions from stationary sources will be subject to regulation under the Clean Air Act beginning January 2, 2011, the Tailoring Rule establishes a phased implementation plan "tailoring" the stationary source permitting programs of the CAA

Back to Top

to GHG emissions and limiting the number of sources affected by new GHG permitting requirements.

Background

EPA's Final Reconsideration of the "Johnson Memorandum"

The permitting requirements of the CAA's Prevention of Significant Deterioration ("PSD") program only apply to newly constructed or modified major sources that emit one or more pollutants "subject to regulation." See 40 C.F.R. 52.21(b)(50). Obtaining a PSD permit requires a source to install the best available control technology ("BACT") for those regulated pollutants that the source emits in quantities meeting or exceeding a threshold expressed in tons per year ("tpy"). EPA issued the Johnson Memorandum in 2008 in response to a decision by the EPA Environmental Appeals Board, which remanded a PSD permit to EPA for a determination of whether GHG emissions were "subject to regulation," thereby requiring application of BACT for GHG pollutants. *See In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB 2008). In the Johnson Memorandum, EPA concluded that the PSD regulations apply only to those pollutants for which EPA had established actual emissions controls, which, at the time, did not include GHGs.

On March 29, 2010, EPA issued a final rule affirming the Johnson Memorandum's interpretation that PSD permitting requirements are not triggered for a pollutant such as a GHG until a final nationwide rule requires actual control of emissions of the pollutant. *See* Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Clean Air Act Permitting Programs; Final Rule, 75 Fed. Reg. 17,004 (April 2, 2010), available at http://edocket.access.gpo.gov/2010/pdf/2010-7536.pdf. In the final rule, EPA further refined its interpretation to establish that the triggering date is when the emissions control "takes effect," not when the final rule is signed or published in the Federal Register. Finally, EPA expanded the Johnson Memorandum's "subject to regulation" trigger to the Title V permitting program which requires major sources of air pollutants to obtain a permit incorporating in one document the myriad of requirements applicable to the individual facility. Thus, the final rule affirming the Johnson Memorandum established that PSD and Title V permitting requirements will apply to a newly regulated pollutant such as a GHG when and only when a regulatory control on emissions of that pollutant "takes effect."

The Light Duty Vehicle Rule

Released on April 1, 2010, just three days after the rule affirming the Johnson Memorandum, the Light Duty Vehicle Rule ("LDVR") is EPA's first national emissions standard to control GHG emissions from passenger cars and light duty trucks. *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25324 (May 7, 2010), available at http://edocket.access.gpo.gov/2010/pdf/2010-8159.pdf. The first GHG standards under the LDVR take effect when the 2012 model year begins, which is no earlier than January 2, 2011. On that day, the LDVR will make GHGs "regulated pollutants" under EPA's interpretation, which, according to the Johnson Memorandum, will trigger PSD and Title V permitting requirements for all GHG-emitting stationary sources.

The PSD and Title V Greenhouse Gas Tailoring Rule

According to EPA, the final tailoring rule (available at http://www.epa.gov/NSR/documents/20100413final.pdf) is intended to reduce what is expected to be a massive permitting burden on previously unregulated sources when the LDVR takes effect and GHGs become a regulated pollutant under EPA's interpretation of the Clean Air Act. To reduce the burden, the Tailoring Rule increases the threshold level of GHG emissions that will trigger the permitting requirements. Under the CAA, new or modified major sources must obtain PSD permits and implement BACT if the source emits at least 100 or 250 tpy (depending on the type of source) of a regulated pollutant. Likewise, Title V permitting requirements apply to sources that emit at least 100 tpy of a regulated

Back to Top

pollutant. According to EPA, while the statutory thresholds are appropriate for criteria pollutants, such as lead and sulfur dioxide, they are not feasible for GHGs, which are emitted in much higher volumes. Applying the statutory thresholds to GHG emissions would sweep thousands of new or modified sources into the PSD program, and subject millions of sources to the requirements of Title V.

The Tailoring Rule seeks to reduce the permitting burden by "tailoring" the requirements of the PSD and Title V permitting programs to cover only the largest GHG-emitting sources. The rule establishes a schedule to phase in the permitting requirements for GHGs in two initial steps:

Step 1: (January 2, 2011 – June 30, 2011)

- During the first six-months, no sources would be subject to permitting requirements due solely to GHG emissions.
- Only sources that would be otherwise subject to PSD requirements (*i.e.*, sources that are newly constructed or modified in a way that significantly increases emissions of a pollutant other than GHGs) may be subject to permitting requirements for their GHG emissions. Further, these sources would only need to go through a GHG BACT analysis if their GHG emissions increase by 75,000 tpy or more.
- Similarly, only sources currently subject to Title V (i.e., major sources for a pollutant other than GHGs) will be subject to Title V requirements for GHGs.

Step 2: (July 1, 2011 – June 30, 2013)

- PSD requirements will apply to modifications at existing facilities if the modification increases GHG emissions by at least 75,000 tpy, even if the modification does not exceed the significance threshold of any other pollutant. New construction projects will trigger permitting requirements if the facility will emit at least 100,000 tpy of GHGs, even if the project does not exceed the permitting threshold for any other pollutant.
- Title V operating permits will apply to facilities that emit at least 100,000 tpy of GHGs, even if the source does not exceed the significance threshold for any other pollutant.

Outline of the Future

The final Tailoring Rule also outlines a third step for implementing requirements between June 30, 2013 and April 30, 2016. The third step will be preceded by an additional rulemaking action set to begin in 2011 and conclude no later than July 1, 2012. According to EPA, the Step 3 rulemaking will consider reducing the GHG emission threshold to a level not lower than 50,000 tpy, and will consider the possibility of permanently exempting smaller sources from permitting requirements and other "streamlining options" designed to reduce regulatory burdens. EPA will not require permits for smaller sources in step three until at least April 30, 2016.

Other Noteworthy Points

- The thresholds that will trigger GHG permitting requirements under the final Tailoring Rule are significantly higher than the 25,000 tpy threshold originally proposed in the rule's October 27, 2009 proposal. See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Proposed Rule, 74 Fed. Reg. 55,292 (Oct. 27, 2000). The increase is due in part to comments from state permitting agencies that expressed concern over the administrative burdens of a lower threshold.
- According to EPA, the new GHG emissions thresholds will also take effect in state, local, and tribal programs that administer their own CAA permitting

Back to Top

requirements under EPA approval (*i.e.*, state implementation plans or "SIPs"). The final rule asks states to inform EPA whether they must make rule changes to implement the new GHG emissions thresholds, and if so, when such changes will be adopted. If a state is unable to implement the new thresholds, EPA will "take appropriate action to ensure that the existing CAA permitting rules do not apply to sources excluded" by the Tailoring Rule.

- The final rule applies to six GHGs: Carbon dioxide (CO_2), Methane (CH_4), Nitrous oxide (N_2O), Hydrofluorocarbons (HFCs), Perfluorocarbons (PFCs), and Sulfur hexafluoride (SF_6). Because some GHGs have greater potential to effect climate than others, the GHG thresholds express GHG emissions in "carbon dioxide equivalents" (CO_2e). The CO_2e metric translates emissions of gases other than CO_2 into CO_2e by using the gases' climate change potential. Total GHG emissions will be calculated by summing the CO_2e emissions of all six regulated GHGs.

- EPA plans to develop supporting guidance to assist permitting authorities, including guidance on identifying BACT for GHGs.

Conclusion

Issuance of the final Tailoring Rule is the most significant step to date toward regulation of GHG emissions. The rule eases the implementation of CAA permitting requirements that would otherwise apply to a multitude of GHG-emitting sources beginning January 2, 2011, when the LDVR takes effect and, according to EPA, makes GHGs "subject to regulation" under the PSD and Title V permitting programs. Nevertheless, stakeholders can continue to expect new developments on all fronts of the GHG issue, including proposed legislation and additional regulatory developments and guidance. There is a high likelihood the Tailoring Rule will be challenged in court given the arguably questionable bases EPA has to alter by rule the emissions thresholds set forth in the CAA, delay implementation of GHG permitting requirements, and order the Tailoring Rule to take effect even in SIP-approved state permitting programs. If the Tailoring Rule is rejected by a federal court, it could impose burdensome permitting requirements on a massive amount of small GHG sources and create a regulatory clog difficult to address without Congressional intervention. For now, large emitters of GHGs should watch the issue closely and be sure to understand the permitting obligations scheduled to take effect in 2011.

For additional information or questions regarding this final rule and its relation to other EPA rules regarding GHGs, please contact David Friedland at dfriedland@bdlaw.com, (202) 789-6047, Amy Lincoln at alincoln@bdlaw.com, (415) 262-4029, Laura LaValle at llavalle@bdlaw.com, (512) 391-8020, or Graham St. Michel at gstmichel@bdlaw.com, (202) 789-6039.

Senators Kerry and Lieberman Unveil Comprehensive Energy and Climate Bill

I. Summary

On May 12, 2010, Senators John Kerry (D-MA) and Joseph Lieberman (I-CT) unveiled a "discussion draft" of their long-awaited climate change and energy bill, the American Power Act. Key features of the bill include economy-wide targets for greenhouse gas ("GHG") emission reductions, a cap-and-trade program extending to electric utilities, manufacturing facilities, and natural gas distributors, and a fee imposed on fuel refiners in the form of a requirement to purchase and retire allowances. The bill also would provide numerous incentives and concessions, including loan guarantees for nuclear plant operators, expansion of offshore drilling, consumer rebates, and assistance for trade-exposed industries.

The bill emerges after nearly eight months of negotiations and numerous setbacks, most

Back to Top

notably, the abrupt departure of sponsor Lindsey Graham (R-SC), who was expected to secure critical bipartisan support for the bill. Despite the optimism of Senators Kerry and Lieberman, prospects for the bill's passage appear slim given the difficult political climate and renewed concerns regarding offshore drilling, a key concession in the bill.

The discussion draft of the 987-page bill is available at http://kerry.senate.gov/americanpoweract/pdf/APAbill.pdf.

II. GHG Emissions Limitations for Targeted Sectors

The bill would set nationwide GHG reduction targets to be achieved primarily through the bill's central feature, a cap-and-trade program for the electricity and manufacturing sectors. In addition, petroleum refiners would be required to purchase allowances (to cover the emissions associated with the use of fuels they produce), but would not be permitted to trade these allowances. Specific provisions relating to the bill's GHG emissions limitations are summarized below.

- *GHGs Covered*: The bill would apply to emissions of the "Kyoto six" GHGs — carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6) — plus nitrogen trifluoride (NF_3). The U.S. Environmental Protection Agency ("EPA") would have the authority to designate additional GHGs through rulemaking.

- *Overall Targets*: The bill would require a 4.75 percent reduction in GHG emissions below 2005 levels by 2013; a 17 percent reduction by 2020; a 42 percent reduction by 2030; and an 83 percent reduction by 2050.

- *Which Sectors Are Covered?* The bill would require "covered entities" to match their GHG emissions with allowances, which are issued on an economy-wide basis annually, and which decrease over time. Electric utilities would be covered entities beginning in 2013, while natural gas distributors and manufacturing facilities — including industrial gas producers and importers, nitrogen trifluoride sources, and various other industries (*e.g.*, lime manufacturing, cement production) — would be phased-in as covered entities beginning in 2016. Petroleum refiners and importers would be required to purchase and immediately retire allowances on a quarterly basis beginning in 2013 to account for emissions associated with the use of covered fuels.

- *Threshold for Coverage:* The bill sets an emissions threshold of 25,000 metric tons of carbon dioxide equivalent per year for most categories of manufacturing facilities (although several categories of manufacturers are included as covered entities without reference to an emissions threshold, *e.g.*, titanium dioxide and adipic acid production). Natural gas distributors would be covered entities if they deliver 460 million cubic feet or more of natural gas per year. Electric utilities and refiners that meet the definitions in the bill are covered irrespective of total emissions. Approximately 7,500 entities are expected to be regulated under the bill.

- *Allowance Allocation:* Covered entities (excluding refiners) subject to the cap-and-trade program initially would receive a certain percentage of allowances distributed free of charge, with the percentage of auctioned allowances gradually increasing to 100 percent by 2030. Allocations to electric utilities would be based 75 percent on historic GHG emissions and 25 percent on retail sales. (This differs from the House-approved Waxman-Markey bill, which proposed an allocation based 50 percent on historic emissions and 50 percent on retail sales.) Refiners would be required to purchase allowances directly from EPA, and EPA would guarantee the availability of these allowances at the most recent auction price.

- Offsets: The bill would authorize up to two billion tons of offset credits per year for use toward compliance with emissions reduction obligations, 500,000 of

Back to Top

which can be international offsets. Domestic offset credits could be used on a one-to-one basis (i.e., domestic offsets and allowances would "count" equally toward compliance obligations), while international offset credits would be discounted at a rate of 25 percent. Emitters may use offsets to meet a portion of their allowance requirements; that portion is equal the emitter's percentage share of the total GHG emissions by covered entities times two billion. (In other words, they get a share of the pool of allowed offsets equal to their share of the covered entities total GHG emissions. As those numbers are not set yet, it is difficult to assess how restrictive this quantitative limit will be in practice.)

EPA and the Department of Agriculture ("USDA") would be required to establish a domestic offsets program and to consider a specific list of eligible project categories, including: fugitive methane emissions (from coal mines, landfills, and oil and gas distribution facilities); agricultural, grassland, and rangeland sequestration and management; afforestation and reforestation; land use and forestry; and carbon capture and sequestration. A "positive list" of presumptively approved offset project types is included; EPA and USDA can add to it over time. The eligibility date for offset projects is set at January 1, 2009 (Waxman-Markey set it at January 1, 2001), though the bill does provide a means for the approval of offsets generated by projects dating back to 2001. Section 740 provides that "regulatory or voluntary greenhouse gas emission offset program may apply to [EPA and the USDA] for approval as a qualified early offset program." The USDA would administer agriculture and forestry offsets and EPA would administer all others. The bill does not list eligible project categories for international offsets, but would establish a mechanism for generating international offset credits from reduced deforestation ("REDD") activities.

- *Linkage:* The bill would permit EPA, in conjunction with the Department of State, to authorize the use of international allowances or credits toward compliance with the bill's GHG emission limitations. In addition, EPA would be required within one year of the bill's enactment to develop regulations allowing individuals or entities to exchange state allowances for federal emission allowances.

III. Cost Containment Mechanisms

In addition to the offsets provisions, the bill includes a significant cost containment mechanism that Waxman-Markey did not: a "hard" "price collar" to keep the price of carbon between $12 and $25 per ton. The price floor is set at $12 in 2013 plus 3% + CPI in subsequent years; the price ceiling is set at $25 in 2013 plus 5% + CPI in subsequent years. Note that the ceiling thus will increase at a faster rate than the floor. In addition to containing the cost of compliance, the price collar provides a great deal of cost certainty by limiting market fluctuation, Some commentators have warned that fixing such parameters at the outset can cause market distortions later, as conditions change.

IV. Market Oversight

Covered entities (except for refiners that have purchased allowances directly from EPA) would be able to trade allowances on a national GHG emissions market. However, participation in the primary market would be limited to entities that are subject to the bill's compliance obligations or that are registered with the Commodity Futures Trading Commission ("CFTC") as "regulated greenhouse gas market participants." The CFTC, in conjunction with EPA, appears to have broad authority under the bill to permit or deny access to the primary market based on a determination as to whether "additional participants are necessary for a liquid and well-functioning market . . . ." The bill would require derivatives sold on the secondary market to be cleared by a CFTC-approved "greenhouse gas clearing organization." The bill also includes numerous provisions designed to prohibit fraud and manipulation with respect to GHG instruments, and the CFTC is authorized to limit excessive speculation.

Back to Top

V. Preemption of State and EPA Authority to Regulate GHGs

The bill would permanently preempt state authority to regulate GHGs through sub-national cap-and-trade programs. To mitigate the impact, the bill provides for some limited recognition of offsets generated under these programs. It also allows and in some cases requires EPA to incorporate registries and work done by state and voluntary organizations. For example, Section 733(b)(1) allows the EPA to "establish a registry (or expand an established emission allowance registry) for use in issuing and recording credits approved and issued." Section 735(c) states that EPA, when establishing offset methodologies, "shall give due consideration to methodologies for offset projects existing as of the date of enactment of the Act." Thus, EPA is given the flexibility to build on what NGOs, state governments such as California, and regional initiatives such as the Regional Greenhouse Gas Initiative ("RGGI") and the Western Climate Initiative ("WCI") have done.

While states' cap-and-trade programs would be preempted, the bill would not prevent the states from continuing to develop GHG control programs or establish state-wide GHG emissions limits or energy efficiency measures.

The bill also would partially preempt EPA authority to regulate GHGs under certain programs. For example, it would prohibit EPA from regulating GHGs pursuant to the National Ambient Air Quality Standards, New Source Review, and Title V permitting authorities under the Clean Air Act. EPA would, however, retain authority under the bill to regulate existing power plants under Section 111(d) of the Clean Air Act. Moreover, EPA could continue to develop New Source Performance Standards for sources that are not covered entities (except those eligible to receive offset credits) and could potentially regulate GHGs under other federal statutes (e.g., the Clean Water Act).

VI. Other Key Provisions

- *Offshore Drilling:* The bill contains provisions to expand domestic oil drilling, including revenue sharing for states that allow increased production off their shores. However, the bill would also allow a state to prohibit drilling within 75 miles of the state's shores.

- *International Competitiveness:* The bill would establish a border adjustment mechanism to take effect in 2025, which would essentially require importers to buy carbon allowances for commodities such as steel, aluminum, or cement from countries that do not have GHG reduction programs. In addition, the bill would establish an international reserve for the provision of allowance rebates to eligible sectors that are trade sensitive (determined by EPA through rulemaking).

- *Performance Standards for New Coal-Fired Power Plants:* Coal-fired power plants permitted after January 2020 would be required to reduce CO_2 emissions by at least 65 percent. New plants permitted between 2009 and 2015 would be required to reduce CO_2 emissions by at least 50 percent within four years from the date on which certain carbon capture and storage commercialization targets are met.

- *Consumer Rebates:* Two-thirds of revenues generated by the bill would be rebated to consumers through energy bill discounts and direct rebates. Additional rebates would be available for families that are disproportionately affected by increased energy costs.

VII. Next Steps

Despite the bill's initial introduction as a "discussion draft," pressure is mounting from environmental groups for formal introduction into the Senate. The bill is currently undergoing economic review at EPA, and results of this review are expected in late June. Meanwhile, Senate Majority Leader Harry Reid (D-NV) is scheduled to confer with committee chairs in May to evaluate support for the bill and determine the timing

Back to Top

of floor debate. If the bill passes the Senate, it would need to be reconciled with the Waxman-Markey bill that was approved by the House last June.

For more information, please contact Russ LaMotte at rlamotte@bdlaw.com, (202)-789-6080, Nicholas van Aelstyn at nvanaelstyn@bdlaw.com, (415) 262-4008, or Lauren Hopkins at lhopkins@bdlaw.com, (202) 789-6081.

EPA Looks to Expand Mandatory GHG Emissions Reporting Program

The Mandatory Greenhouse Gas ("GHG") Reporting Program is less than a year old, and already the United States Environmental Protection Agency ("EPA" or the "Agency") is looking to expand the program's scope. Four proposed amendments published on April 12, 2010, would add to the information already being reported under the program and bring new facilities within the program's purview. Specifically, annual reports submitted under the program would have to include information on the reporting entity's U.S. parent company(ies), applicable North American Industry Classification System ("NAICS") codes, and whether any of the GHG emissions being reported are from cogeneration (i.e., producing both electric and useful thermal energy) activities. See 75 Fed. Reg. 18455 (April 12, 2010). New source categories proposed to be added to the program include electronics manufacturing, fluorinated gas production, the injection and sequestration of carbon dioxide, and certain segments of the petroleum and natural gas industries. *See* 75 Fed. Reg. 18652; 18576; 18608 (April 12, 2010).

In addition to the April 12 proposals, the Agency has sent a draft final rule to the White House that would add four more source categories to the program: industrial landfills, wastewater treatment facilities, underground coal mines, and magnesium production. The proposals and draft rule are discussed in more detail below.

I. Proposed new reporting requirements.

The additional reporting requirements proposed April 12 would apply to all facilities meeting the applicability criteria of the GHG emissions reporting program (found at 40 CFR part 98, subpart A), and would require facilities to submit the following information as part of their annual GHG emissions reports: (1) the name, address, and ownership status of U.S. parent company(ies)[1]; (2) primary and other applicable NAICS code(s); and (3) whether any reported GHG emissions are from cogeneration units. *See* 75 Fed. Reg. at 18457-64.

According to EPA's statements in the proposed rulemaking, the parent company and NAICS information will assist the Agency in aggregating comprehensive corporate-level and sector-level GHG emissions, *id*. at 18461-62, while information on cogeneration units is intended to assist in the development of future GHG-mitigation strategies. *Id*. at 18463.

A complete copy of the proposed rule amendment as published in the Federal Register on April 12, 2010, is available at http://www.bdlaw.com/assets/attachments/75%20Fed.%20Reg.%2018455.pdf. Comments on the proposal are due June 11, 2010.

II. Proposed mandatory GHG reporting for additional source categories.

A. Five source categories re-proposed for inclusion in the reporting program.

A second proposed rulemaking issued April 12 proposes to add five more source categories to the GHG reporting program: electronics manufacturing; production of fluorinated gases; use of electrical transmission and distribution equipment; manufacture or refurbishment of electrical equipment; and import and export of pre-charged equipment and closed cell foams. *See* 75 Fed. Reg. at 18652. All five of these categories were part of EPA's original GHG reporting program, as it was proposed in April, 2009, but were among several categories EPA elected not to include when finalizing the reporting program in October, 2009 based on concerns raised in public

Back to Top

comments about costs and technical feasibility. *Id*. at 18654; *see* 74 Fed. Reg. 16448 (April 10, 2009).

The re-proposal includes changes to the categories' scope and applicable requirements designed to address these concerns. For example, based on public comments, EPA has proposed to clarify the affected source category for electric power transmission and distribution system equipment by defining a "facility" in this category as an "electric power system." 75 Fed. Reg. at 18681. "Electric power system" would be defined as the collection of SF_6- and PFC-insulted equipment that is linked through electric power transmission or distribution lines and operated as an integrated unit by one entity. SF_6- and PFC-insulted equipment includes gas-insulated substations, circuit breakers and other switchgear, gas-insulated lines, and power transformers containing SF_6 and PFCs. Equipment also includes gas containers such as pressurized cylinders, gas carts, new equipment owned but not yet installed, or other containers. *Id*. EPA is soliciting comments on further clarification of "facility" in this context and whether the Agency should incorporate the definition of a transmission/distribution entity used by the Regional Greenhouse Gas Initiative ("RGGI"). *Id*. at 18681.

With respect to electronics manufacturing facilities (e.g., facilities that manufacture semiconductors, liquid crystal displays, micro-electro-mechanical systems, and photovoltaic cells ("PV" cells)), the Agency has proposed new methods for estimating facility emissions and for reporting controlled emissions from abatement systems. *See id*. at 18655-69. Facilities under the electronics manufacturing subpart would have to report annual emissions from the production and transformation of fluorinated gas and destruction of fluorinated GHGs. *Id*. at 18670. EPA seeks comments on whether it should require reporting processes where GHGs are generated as by-products or intermediaries, and where fluorinated gas transformation is not co-located with fluorinated gas production facilities. *Id*.

For importers and exporters of pre-charged or closed-cell foams, reporting would include the type, charge sizes, and total pieces of equipment imported or exported. *Id.* at 18683. Foam importers would further report on the volume and fluorinated GHG density of the foam imported. *Id.* EPA seeks comments on the distribution of imports and exports, and the likely coverage at the proposed 25,000 $mtCO_2e$ threshold. *Id*. at 18685.

Lastly, with respect to the manufacture and refurbishment of electrical equipment, the proposal is aimed specifically at SF_6 or PFC-insulated closed pressure equipment and sealed-pressure equipment, such as gas-insulated substations, circuit breakers and other switchgear, gas-insulated lines, or power transformers. *Id*. at 18686. The proposed reporting threshold is total annual purchases of SF_6 and PFCs exceeding 23,000 pounds. *Id*. EPA is seeking comment on whether transformers that use PFCs are manufactured in the United States, and whether PFC emissions occur at the same rate as SF_6 emissions.

Facilities in all five of these re-proposed categories would have to report emissions of fluorinated GHGs (e.g., perfluorocarbons (PFCs), hydrofluorocarbons (HFCs), sulfur hexafluoride (SF_6), and nitrogen trifluoride (NF_3)). Data collection requirements for affected facilities would begin in 2011, with the first reports due to EPA March 21, 2012. *Id*. at 18655.

A copy of the proposed rule is available at http://www.bdlaw.com/assets/attachments/75%20Fed.%20Reg.%2018652.pdf. Comments are due June 11, 2010.

B. *Supplemental proposal to require reporting on injection and sequestration of carbon dioxide.*

Another proposed amendment to the GHG reporting program would require monitoring and reporting on carbon dioxide (CO_2) injection and geologic sequestration ("GS"). *See* 75 Fed. Reg. at 18576. CO_2 injection facilities would be required to report CO_2 transferred onsite, the source of the CO_2, and CO_2 injected. *Id.* at 18579. GS facilities would be required to calculate CO_2 sequestered, factoring in leakages, fugitive, vented,

Back to Top

or other CO_2 emissions. *Id*. The proposal includes an amendment to the reporting programs general provisions to apply the program to CO_2 injection and sequestration on and under the Outer Continental Shelf. *Id*. at 18580. EPA states in the proposal that it's seeking information on CO_2 injection and GS to aid in the Agency's evaluation of GHG mitigation technology and relevant policy options. *Id.*

Comments on the proposal must be received by June 11, 2010. A copy of the proposed rule is available at http://www.bdlaw.com/assets/attachments/75%20Fed.%20Reg.%2018576.pdf.

C. Supplemental proposal to require GHG emissions reporting from petroleum and natural gas systems.

In the fourth proposed rule issued on April 12, 2010, EPA proposed to create 40 CFR part 98, subpart W, which would require certain facilities within the petroleum and natural gas industry to report if they emit 25,000 metric tons or more of CO_2e through vented, fugitive, or flare combustion sources. *See* 75 Fed. Reg. at 18610-11. These facilities would include: offshore petroleum and natural gas production facilities; onshore petroleum and natural gas production facilities (including enhanced oil recovery); onshore natural gas processing plants; onshore natural gas transmission compression facilities; onshore natural gas storage facilities; liquefied natural gas ("LNG") storage; LNG import and export facilities; and natural gas distribution facilities owned or operated by local distribution companies. *Id*. at 18611. The Agency proposes the use of direct GHG emissions monitoring only for the most significant sources, and where other monitoring options are unavailable. *Id.* Component count and emissions factors are proposed methodologies for smaller sources. *Id*. Data collection at these source would begin in 2011, with the first report due to EPA in 2012. *Id*. at 18612. To ease the burden on sources, EPA opted not to propose the use of best available monitoring methods for the first year of data collection, but seeks comments on that decision. *Id.* Comments are due on or before June 11, 2010. A copy of the proposed rule is available at http://www.bdlaw.com/assets/attachments/75%20Fed.%20Reg.%2018608.pdf.

III. Draft final rule to require four more sectors to report GHG emissions.

In addition to the proposed rulemakings published on April 12, EPA has also sent to the White House for review a draft final rule that would extend the GHG reporting program to cover four more industry source categories: industrial landfills; wastewater treatment facilities; underground coal mines; and magnesium production. These four sectors were among the source categories originally proposed for inclusion in the program in April, 2009, but deferred when the final reporting program rule was issued later that year. According to the summary of the rule on the White House Office of Management and Budget's website, EPA has concluded, after review of the relevant public comments, that the four categories do not need to be re-proposed. Rather, EPA has addressed the comments and is prepared to issue a final rulemaking incorporating the source categories into the reporting program. The draft final rule was submitted to the White House on April 30 for final interagency review. No publication date has been set. The status of the rulemaking is available on www.reginfo.gov under RIN 2060-AQ03.

For additional information, please contact Stephen Richmond at srichmond@bdlaw.com, Amy Lincoln at alincoln@bdlaw.com, or Bina Reddy at breddy@bdlaw.com.

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[1] Among the issues open for comment is whether EPA should require only the highest-level U.S. parent company for each facility or a list of all U.S. parent companies. See 75 Fed. Reg. at 18457 n.3.

Proposed Legislation Would Overhaul TSCA

The "Safe Chemicals Act of 2010" ("SCA"), S. 3209, introduced April 15 by Senator Lautenberg (D-NJ), proposes to fundamentally overhaul the Toxic Substances Control

Back to Top

Act ("TSCA"). A companion proposal in the House of Representatives, the discussion draft for the "Toxic Chemicals Safety Act of 2010" ("TCSA"),was released the same day by Representatives Waxman (D-CA) and Rush (D-IL). This long-awaited legislation offers concrete targets for discussion and analysis in a political environment that features broad consensus regarding the need for modernization of TSCA, but far less consensus regarding the specific shape that modernization should take. Stakeholder dialogue on the bills is ongoing, but major points of disagreement remain—even between the two bills themselves—and prospects for passage of the legislation during this term of Congress are low.

This complex legislation would make extensive changes to the industrial chemicals management framework in the United States. For the first time, chemical manufacturers, importers, and processors would be responsible for submitting a minimum data set for all chemicals in commerce and for establishing that their chemicals met a safety standard of "reasonable certainty of no harm." The Environmental Protection Agency ("EPA") would be required to prioritize, evaluate, and manage new and existing chemicals in tight timeframes. EPA's authority to impose restrictions and conditions on existing chemicals would be greatly enhanced, particularly by its ability to impose such conditions in its safety determinations. Confidentiality provisions would be narrowed, while EPA's authority to order data production and testing would be expanded. These and numerous other proposed changes to the legal framework would modernize various dimensions of TSCA, but would also impose substantial new burdens on both industry and EPA. This alert reviews the major changes proposed by the SCA and the TCSA.

For the full analysis, please visit http://www.bdlaw.com/news-852.html.

For more information, please contact Mark Duvall at mduvall@bdlaw.com or Alexandra Wyatt at awyatt@bdlaw.com.

Federal Court Rejects Challenge to CWA Permit Regulating Upland Ditches

The U.S. District Court for the District of Columbia recently determined that upland manmade ditches may be subject to federal jurisdiction under the Clean Water Act ("CWA"). In *National Association of Home Builders v. U.S. Army Corp of Engineers*, No. 07-972 (D.D.C. Mar. 30, 2010), the court rejected a challenge by the National Association of Homebuilders ("NAHB") to the U.S. Army Corps of Engineers' authority to issue nationwide permit 46 ("NWP 46"), which extends CWA jurisdiction to discharges of dredged or fill material into upland ditches. The ruling marks a significant setback to development interests and could lead to changes in the Corps' Section 404 permitting practices.

The Corps issued NWP 46 in 2007 as a general permit to cover certain manmade, upland ditches that convey water to or divert it from CWA-jurisdictional waters. The permit allows the Corps to determine on a case-by-case basis whether these ditches are subject to CWA jurisdiction and, therefore, whether a landowner must obtain a Section 404 permit before discharging dredged or fill material into them. NAHB, which has long argued that the CWA does not reach any manmade ditches constructed in uplands, challenged the permit shortly after it took effect.

NAHB argued that the Corps violated the Administrative Procedure Act by issuing NWP 46 as a means to regulate upland ditches as "waters of the United States" and requiring permits for discharges to features over which it has no authority. NAHB asserted that ditches are expressly included in the CWA's definition of "point source," but not in its definition of "waters of the United States." This nuance, NAHB reasoned, indicated that Congress intended ditches to be viewed as point sources that convey discharges to jurisdictional waters, but not as jurisdictional waters themselves. The group further argued that ditches are not "relatively permanent, standing or continuously flowing" hydrologic features and, therefore, do not satisfy the test for CWA jurisdiction articulated

Back to Top

in the U.S. Supreme Court's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). *See* http://www.bdlaw.com/news-59.html.

The court rejected these arguments. It said that NAHB did not meet the requirements for sustaining a facial challenge to NWP 46 – *i.e.*, showing that "no set of circumstances exists under which the permit would be valid." On the contrary, the district court explained, the Supreme Court in Rapanos contemplated that ditches, such as those covered under the general permit, could be jurisdictional waters under the CWA even if the statute includes them in its definition of "point source." Thus, the district court held, while certain upland ditches may not qualify as waters of the United States under the CWA, it could not be said that these features are categorically beyond the Corps' regulatory authority under the statute. Accordingly, the court granted summary judgment to the Corps.

The most recent *National Association of Home Builders* decision adds another layer of uncertainty to the scope of CWA jurisdiction over non-navigable waters and wetlands. In the wake of *Rapanos*, the Corps and the Environmental Protection Agency issued joint guidance, *see* http://www.bdlaw.com/news-438.html, stating that "ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water generally are not waters of the United States . . . ." In light of the court's ruling, this policy – and landowners' associated permitting requirements under the Clean Water Act – now may be subject to further refinement. As is all too often the case with the Section 404 program, confusion and uncertainty reign.

For more information about the impact of this decision, please contact Fred Wagner (fwagner@bdlaw.com, 202-789-6041) or Parker Moore (pmoore@bdlaw.com, 202-789-6028).

Other News

Beveridge & Diamond Makes PAR's "The Best" List for Advancing Women Lawyers in New Partner Classes

We are pleased to announce that Beveridge & Diamond, P.C. has made "The Best" list in the Project for Attorney Retention's (PAR) New Partner Report.

The survey released by PAR found that in 2010 many law firms made significant advances in retaining and promoting their women lawyers. Beveridge & Diamond made "The Best" list with 60% of our 2010 Partner class being female.

To view the PAR results, go to http://www.bdlaw.com/assets/attachments/PAR%20New%20Partners%20Release.pdf, or visit www.pardc.org. To review Beveridge & Diamond's Diversity & Inclusion information, please visit http://www.bdlaw.com/firm-diversity.html.

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