Massachusetts Environmental, Land Use and Real Estate Alert

Beveridge & Diamond PC

May 2009

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Massachusetts Developments

Massachusetts Expands its Greenhouse Gas Reporting Rules

On April 17, 2009, the Massachusetts Department of Environment Protection (MassDEP) proposed amendments to the state's mandatory greenhouse gas reporting rules. These rules implement the Massachusetts Global Warming Solutions Act, Chapter 298 of the Acts of 2008. *(full article)*

Massachusetts Amends Hazardous Waste Rules to Clarify Regulation of Petroleum Distillates

The Massachusetts Department of Environment Protection (MassDEP) has amended the state hazardous waste rules to clarify that the rules require the management of certain petroleum distillates as waste oil. *(full article)*

Massachusetts SJC Rules on Availability of Eight-Year Zoning Freeze in Cases of Constructive Approval of Subdivision Plans

The Massachusetts Supreme Judicial Court has ruled that a definitive subdivision plan constructively approved due to the inaction of a planning board does not enjoy the protections of the eight-year zoning freeze provided by G.L. c. 40A, § 6, until the town clerk has issued the certificate of constructive approval. *(full article)*

Massachusetts SJC Rules on Availability of Process Zoning Freeze after Rescission of Constructive Approval

The Massachusetts Supreme Judicial Court in Krafchuk v. Planning Bd. of Ipswich, SJC-10224 (Ireland, J., April 7, 2009), held that where the deliberative process between a planning board and an applicant results in disapproval of a timely filed definitive subdivision plan, but progress continues in a continuous fashion in which the applicant (1) timely files an appeal from the board's decision and (2) submits within a reasonable time an amended plan that addresses the reasons for disapproval, the process freeze provision of G.L. c. 40A, § 6, continues to apply. *(full article)*

Sewer Banking Charges Found to Constitute an Unlawful Tax - Court Orders Return of "Fees" to Developers

A Massachusetts Superior Court judge has ruled that the an Inflow and Infiltration Reduction Contribution ("I/I Contribution") imposed by the Town of Saugus (the "Town") on new development as part of its Sewer Banking program constituted an unlawful tax. *(full article)*

Recent Land Court Decision Invalidates Foreclosures

In a decision overturning what had been a common practice, Judge Long of the Land Court invalidated two out of three foreclosures and questioned a Massachusetts Real Estate Bar Association ("REBA") Title Standard long relied upon by practitioners. *(full article)*

Hertz et al. v. Secretary of EOEEA: No Standing to Challenge Boston Harbor Plan Amendment

In a victory for the developers of a Boston project, the Appeals Court dismissed an appeal by private property owners challenging the approval by the Secretary of the Executive Office of Energy and Environmental Affairs ("Secretary") of an amendment to the Boston Harbor Plan. *(full article)*

Land Court Revised Guidelines Issued

The long awaited Land Court Guidelines, revising those originally released in 2000, were issued on February 27, 2009 ("Guidelines"). The purpose of the Guidelines is to assist registry personnel and users in determining the suitability of documents presented for filing and affecting registered land and to provide consistency among the different registries. Although only applicable to registered land, the Guidelines are also instructive for the recording of documents related to unregistered land. *(full article)*

National Developments

EPA Proposes New Renewable Fuel Standard Regulations Using Lifecycle Greenhouse Gas Analysis

The U.S. Environmental Protection Agency proposed regulations on May 5 to implement significant changes to the federal Renewable Fuel Standard program ("RFS-2"). *(full article)*

Burlington Northern v. United States: CERCLA Arranger Liability Requires Intent to Dispose of Hazardous Substances

On May 4, 2009, the United States Supreme Court issued the Court's most recent statement on the scope of liability and the apportionment of damages under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. *Burlington N & S.F. R. Co. v. United States*, No. 07-1601 (May 4, 2009). *(full article)*

Chemical Plant Security: Where We've Been, Where We Are, Where We're Going

The legislation that supports the Department of Homeland Security's Chemical Facility Anti-Terrorism Standards ("CFATS") program is due to expire in October. The battle for reauthorization is already underway, with a key issue being whether to include a mandate to consider, or to adopt, inherently safer technology ("IST"). *(full article)*

Rules Finalized for Offshore Renewable Energy Projects

The Department of the Interior's Minerals Management Service ("MMS") has issued final regulations for the development of wind, wave and other renewable energy projects on the U.S. Outer Continental Shelf ("OCS") beyond state waters. *(full article)*

Firm News & Events

Beveridge & Diamond, P.C. to Receive Two Major Civil Rights Awards from Washington Lawyers Committee for Civil Rights Under Law

We are proud to announce that Benjamin F. Wilson, Managing Principal of Beveridge & Diamond, P.C., and separately, the Firm itself will be receiving awards for outstanding achievement in civil rights law by the Washington Lawyers Committee for Civil Rights Under Law at its annual awards lunch on June 16, 2009. *(full article)*

Product Stewardship Roundtable for Medical Device Manufacturers

Beveridge & Diamond, P.C. will host a Medical Device Product Stewardship Roundtable to be held on Thursday, June 18, 2009 at our Washington, D.C. offices. *(full article)*

Previous Issues of the Massachusetts Environmental, Land Use and Real Estate Alert

Massachusetts Developments

Massachusetts Expands its Greenhouse Gas Reporting Rules

On April 17, 2009, the Massachusetts Department of Environment Protection (MassDEP) proposed amendments to the state's mandatory greenhouse gas reporting rules. These rules implement the Massachusetts Global Warming Solutions Act, Chapter 298 of the Acts of 2008. These rules require that certain facilities register with MassDEP by April 15, 2009, and report, certify, and verify emissions of greenhouse gases annually thereafter. Our summary of the existing reporting rule, which was issued in December, 2008, is available at http://www.bdlaw.com/news-483.html.

At the same time as MassDEP is proposing this rule change, the U.S. Environmental Protection Agency has proposed comprehensive greenhouse gas reporting rules that would require substantial additional reporting by sources of greenhouse gas emissions. That proposal is currently out for public comment and is briefly discussed at http://www.bdlaw.com/news-news-537.html. The following information concerns only the MassDEP proposal.

The proposed MassDEP amendments would add four significant elements to the existing rules: (a) the protocol for reporting greenhouse gas emissions; (b) requirements for certification, recordkeeping, and verification of emissions; (c) voluntary reporting; and (d) reporting of greenhouse gas emissions by retail sellers of electricity. In addition, some changes to the existing rule are proposed.

Protocol for Reporting Greenhouse Gas Emissions. The amendments would require that greenhouse gas emissions be reported separately for each stationary emission source at a facility and be quantified as carbon dioxide equivalents using the "Tier A" methodology in version 1.1 of the Climate Registry's General Reporting Protocol. Tier A generally requires use of direct emissions monitoring or measurement of a fuel's carbon content. "Tier B" or "Tier C" methodologies, which generally involve indirect calculation methods, may be used if the entity documents its justification for doing so. If an emission factor is used to calculate emissions, then information necessary to determine the correct emission factor and to calculate emissions must be reported. Finally, if an applicable methodology is not specified in the protocol, the entity must quantify emissions using existing industry best practice methods or internationally accepted best practices.

For calendar year 2009, reporting of emissions is limited to carbon dioxide resulting from combustion of fuels. For later years, reporting of carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride is required.

Certification and Recordkeeping. The amendments would require that the emission report be certified as to truth, accuracy and completeness, and that the report and supporting documents be retained for five years.

Verification of Emissions. The amendments would require that "an approved verification body verify the greenhouse gas emissions report" once every three years on a staggered schedule. Certain data would be exempt from the triennial verification requirement, such as data quantified, reported and verified under a state CO2 budget trading program.

An approved verification body would be defined as "a firm accredited by the American National Standards Institute to conduct GHG inventory verification services for members of The Climate Registry," and would conform to version 1.0 of The Climate Registry's General Verification Protocol. The verification process would require the verifier to inspect the facility and analyze the applicable records, and submit a verification form to DEP, among other things. If the verifier identified any errors, the reporting entity would be required to correct the errors in the reports submitted for that year and for the previous two years, and re-certify those reports.

This triennial requirement would apply to different facilities on a staggered schedule. For example, a facility required to report greenhouse gas emissions for calendar year

Back to Top

2009 would submit its report by April 15, 2010. If it reported emissions in excess of 25,000 tons during 2009, it would be required to verify its 2010 emissions, and its emissions every third year thereafter. Its report on its 2010 emissions would be due April 15, 2011, and its verification would be due December 31, 2011.

Voluntary Reporting. The proposed rule would allow voluntary reporting of greenhouse gas emissions for facilities locating in Massachusetts but only if all the requirements of the rule are met, including triennial verification.

In addition, facilities that are required to report greenhouse gas emissions would be able to report additional greenhouse gas emissions data (e.g., indirect emissions due to electricity consumption) that can be accommodated by the registry, if all the requirements of the rule are met, including triennial verification.

Reporting by Retail Sellers of Electricity. Retail sellers of electricity, including municipal light boards, would be required to report annually the number of megawatt hours sold and associated greenhouse gas emissions, with separate reporting of biogenic and non-biogenic emissions. Biogenic refers to the combustion of plant or animal material, excluding fossil fuels.

The amendments include specific requirements regarding the formula for calculating emissions and the source of megawatt data, as well as other requirements and options. Non-emitting megawatts may be eliminated from the report under specified circumstances.

Once-in Always-in. The amendments would require reporting of greenhouse gas emissions by any facility that was required to report such emissions in a past year. Essentially, this would be a “once-in-always-in” requirement that would prevent facilities from avoiding reporting by reducing emissions below the reporting threshold once they are first required to report.

For further information on climate change issues, please contact Steve Richmond at srichmond@bdlaw.com or Jeanine Grachuk at jgrachuk@bdlaw.com.

Massachusetts Amends Hazardous Waste Rules to Clarify Regulation of Petroleum Distillates

The Massachusetts Department of Environment Protection (MassDEP) has amended the state hazardous waste rules to clarify that the rules require the management of certain petroleum distillates as waste oil. Under existing MassDEP rules, waste oil must be managed as a hazardous waste.

Petroleum distillates such as mineral spirits and petroleum naphtha, are often used as a solvent for the cleaning of metal parts, and the regulation of spent petroleum distillates has been a subject of confusion in Massachusetts in the past, as it has not been clear whether these distillates constitute an oil that is subject to hazardous waste regulation or a petrochemical that would not necessarily be subject to these rules.

With the rule change, MassDEP has clarified that petroleum distillates with a flashpoint equal or greater than 140° F, including spent parts washer solvents, are regulated as waste oil under the hazardous waste rules if they are not otherwise regulated as a listed or characteristic hazardous waste under these rules.

For more information please contact Steve Richmond at srichmond@bdlaw.com or Jeanine Grachuk at jgrachuk@bdlaw.com.

Massachusetts SJC Rules on Availability of Eight-Year Zoning Freeze in Cases of Constructive Approval of Subdivision Plans

The Massachusetts Supreme Judicial Court has ruled that a definitive subdivision plan

Back to Top

constructively approved due to the inaction of a planning board does not enjoy the protections of the eight-year zoning freeze provided by G.L. c. 40A, § 6, until the town clerk has issued the certificate of constructive approval. In *Kitras v. Zoning Admin. of Aquinnah*, 453 Mass. 254 (2009), the Court ruled that the issuance of the certificate of approval is the "functional equivalent" of the planning board's endorsement of a subdivision plan and therefore a prerequisite to establishing zoning freeze protection.

In *Kitras*, the Aquinnah Planning Board voted to nominate the town as a "district of critical planning concern" ("DCPC") under the authority of the Martha's Vineyard Commission. As part of the DCPC process, the Town proposed to adopt changes to its zoning bylaw including limits on building heights and expanded frontage requirements.

In order to avoid application of these zoning changes to the property, the plaintiff property owner filed a preliminary subdivision plan with the Planning Board prior to the town adopting the changes to its zoning bylaw and a definitive subdivision plan less than seven months later. Under G.L. c. 40A, § 6, the filing of a definitive subdivision plan, or a preliminary plan followed within seven months by a definitive plan, "freezes" the zoning applicable to the land shown on the plan to that in effect at the time the plan is filed both during the review of that plan (the so-called "process freeze") and, if it is approved, for eight years from the date of the endorsement of the plan. By filing these subdivision plans, the property owner sought to secure both zoning freezes so its property would not be subject to the zoning changes adopted as part of the DCPC process – a so-called "process freeze" and an eight-year subdivision freeze.

In *Kitras*, however, the Planning Board did not act on the submitted subdivision plans within the time allowed by the Subdivision Control Law, G.L. c. 41, § 81U, so the Board did not "endorse" the plan. Rather, the property owner asserted that the subdivision plan had been constructively approved pursuant to G.L. c. 41, § 81V due to the Board's inaction. The town clerk, however, refused to issue a certificate of constructive approval, apparently believing the definitive plan had been rejected by the Planning Board. The property owner argued that the constructive approval took effect automatically and the property was subject to the zoning freeze despite the absence of the certificates.

In this case, the Court clarified when constructive approval of a definitive subdivision plan becomes final and when a developer is entitled to the eight-year zoning freeze. The Court noted that a constructive approval "becomes final" upon the expiration of a twenty-day appeal period or court decision resolving any appeal, and that the town clerk's certificate merely memorializes that finality. The "final action" is determined by the planning board.

However, while the constructive approval of the plaintiff's plan became final upon expiration of the twenty-day appeal period, the eight-year zoning freeze did not commence because the town clerk did not issue a certificate memorializing that final approval. Under G.L. c. 40A, § 6, the zoning freeze commences "from the date of the endorsement of such approval." The Court found that the issuance of the certificates by the town clerk is the "functional equivalent" of endorsement by the Planning Board. Therefore, without the certificate, there was no triggering event for the eight-year freeze.

In this case, the property owner could not secure the certificate because the Appeals Court ruled in a previous lawsuit that the property owner's attempt to secure a court order ordering the clerk to issue the certificate was untimely. Therefore, the plaintiff was left without a means of triggering the zoning freeze. In future cases, in order to secure a zoning freeze through constructive approval of a definite subdivision plan, property owners should seek certificates of constructive approval in a timely manner and, if a clerk refuses to issue such a certificate, not delay in filing a mandamus action with a court.

For further information, contact Brian C. Levey at blevey@bdlaw.com or Krista L. Hawley at khawley@bdlaw.com.

Massachusetts SJC Rules on Availability of Process Zoning Freeze after Rescission of Constructive Approval

The Massachusetts Supreme Judicial Court in *Krafchuk v. Planning Bd. of Ipswich*,

Back to Top

SJC-10224 (Ireland, J., April 7, 2009), held that where the deliberative process between a planning board and an applicant results in disapproval of a timely filed definitive subdivision plan, but progress continues in a continuous fashion in which the applicant (1) timely files an appeal from the board's decision and (2) submits within a reasonable time an amended plan that addresses the reasons for disapproval, the process freeze provision of G.L. c. 40A, § 6, continues to apply.

In *Krafchuk*, in order to avoid the application of amendments to the Ipswich zoning bylaw increasing relevant minimum lot size from one to two acres, the owners of a 23.5-acre parcel filed a preliminary subdivision plan in 2001 showing seven lots. The property owners filed a definitive plan less than seven months later in May 2002. Under the process freeze provision of G.L. c. 40A, § 6, the filing of a preliminary subdivision plan followed by the filing of a definitive plan less than seven months later freezes the zoning in place at the time of the filing of the preliminary subdivision plan.

After a lengthy public hearing process that lasted several months and included numerous plan revisions, the Planning Board voted in January 2003 to disapprove the amended plans and to grant waivers from strict compliance with several of the rules and regulations. The property owners asserted that the definitive subdivision plan filed in May 2002 had been constructively approved prior to the Planning Board's decision due to the Board's failure to take final action or file with the town clerk a notice of agreed extension within 90 days of the filing of the definitive plan. After the property owners claimed constructive approval, the Planning Board held a hearing on the issue and voted to both rescind any constructive approval and readopt its decision denying approval but granting several waivers.

After a change in Board membership, the property owners submitted a request to revoke the disapproval and approve the amended plan. The Board voted to approve that amended plan in December 2003. Neighboring property owners filed appeals of each of the Planning Board's decisions, appealing the grant of waivers and the December 2003 approval.

The lower court concluded the process freeze that commenced with the filing of the preliminary subdivision plan in 2001 ended when the Planning Board acted pursuant to G.L. c. 41, § 81W, to rescind the constructive approval. The lower court therefore reasoned that the two-acre minimum lot size contained in the current bylaw applied to the amended plan filed by the property owners in December 2003.

The Supreme Judicial Court disagreed, however, concluding that the Board's actions in rescinding the constructive approval and readopting its disapproval reinstated the "process" and, necessarily, the process freeze as well.

The Court stated that in order to preserve a process freeze, an applicant must take an appeal of a disapproval. Where the applicant also submits within a reasonable time an amended plan that addresses the reasons for disapproval, the process freeze provision of G.L. c. 40A, § 6, continues to apply.

For further information, please contact Brian C. Levey at blevey@bdlaw.com or Krista L. Hawley at khawley@bdlaw.com.

Sewer Banking Charges Found to Constitute an Unlawful Tax - Court Orders Return of "Fees" to Developers

A Massachusetts Superior Court judge has ruled that the an Inflow and Infiltration Reduction Contribution ("I/I Contribution") imposed by the Town of Saugus (the "Town") on new development as part of its Sewer Banking program constituted an unlawful tax. In *Denver Street LLC v. Town of Saugus*, Civil Action No. 2005-1938-A (Mass. Super. Ct., March 16, 2009) and three consolidated cases, the Court ruled that four developers were entitled to refunds of I/I Contributions of up to $244,200 where the "fee" imposed required new users of the sewer system to pay the Town at a rate 10 times an individual project's need, therefore generating revenue for the Town to address its preexisting

Back to Top

sewer system deficiencies.

In 2005, the Town entered into an Administrative Consent Order ("ACO") with the Department of Environmental Protection ("DEP") to address sanitary sewer overflow events that occurred during wet weather and caused overflow of sewage into residences and environmentally sensitive areas. The Town agreed to take certain actions to address the sewer overflow events, including the implementation of a "Sewer Bank." Under the ACO, the Town could add one gallon of flow to the Sewer Bank for every 10 gallons of infiltration and inflow ("I/I") removed from the sanitary sewer system. Infiltration is groundwater that leaks into a sewer system through defective pipes, pipe joints, and sewer connections. In-flow is extraneous water that enters a sewer system from public sources such as manhole covers and private sources such as roof drains and sump pumps.

The Sewer Bank operated by requiring sewer connection applicants to "purchase" gallows of flow from the Sewer Bank by making an I/I Contribution in order to discharge new flow to the sanitary sewer system. The I/I Contribution was imposed by the Town and not required by DEP. The ACO merely stated that no new connections would be allowed unless sufficient gallons in the Sewer Bank existed.

At the time plaintiffs applied for a sewer connection permit, the I/I Contribution was the number of gallons of proposed new flow multiplied by a factor of 10, then multiplied $3.00. The $3.00 fee was the estimated cost to repair leaks sufficient to remove one gallon of I/I from the system. As applied to a multi-family project containing 74 bedrooms, an I/I Contribution of $244,200 was imposed. The I/I Contribution was in addition to other fees including a building permit fee of $104,964 and plumbing fixture fee of $34,000. At the time the developer paid the $244,200 fee, there were sufficient gallons of credit in the Sewer Bank to allow for that connection under the ACO.

The developers challenged the I/I Contribution as an impermissible tax. A local government can only collected a tax if it is legislatively authorized. A "fee" requires no such authorization. Therefore, the Town argued the I/I Contribution was a permissible fee and not an unauthorized tax.

The distinction between a tax and a fee is based on three factors: (1) whether the fees charged are in exchange for a particular governmental service which benefits the party paying the fee, (2) the fees are paid by choice and are therefore voluntary and not tax-like, and (3) if the charges are collected to compensate the governmental entity providing services for its expenses and not as a means of raising revenues. *Emerson College v. City of Boston*, 391 Mass. 415 (1984).

While the Town argued the "particularized service" provided by the fee was the ability to build new developments in Saugus, the Court found the true "service" was the Town's generation and banking of credited gallons in the Sewer Bank.

The Court noted there was no relationship between the amount of the calculated I/I Contribution and the costs to the Town to make the physical connection to the sewer system. The actual cost of a sewer connection was paid by the property owner through a separate fee. In addition, the Town had a "Sewer Enterprise Fund," funded through payments by sewer uses generally. While I/I Contributions were deposited in a separate account, the Town had transferred funds from the I/I fund to the Sewer Enterprise Fund for general repairs, for example, for the repair of a sewer line on Route 1 and Main Street or repairs to a pumping station, which was unrelated to the proposed projects. The Court found such repairs using I/I funds did not provide any "particularized" benefits to new ratepayers.

The Court also noted the Town's sewer system was capable of serving all of its users and new users if there was no introduction of I/I into the pipes, or if I/I was eliminated. Because under the ACO the Town was obligated to reduce I/I whether new users were added to the system or not, the Court found the I/I and sewer overflow problems existed independently of new users.

Back to Top

The Court was particularly troubled by the 10:1 ratio utilized by the Town in calculating the fee. While the Court posited that requiring new users of an antiquated system to pay gallon for gallon for the creation of credits for the new flow which their new developments required could be seen as reasonable, obligating those new users to pay for that gallonage multiplied by a factor of 10 overcompensated the Town.

Based on the fact that the contribution was made not in favor of any "particularized benefit" and that the developers were required to compensate the Town at a rate 10 times their own need, generating revenue for the Town to address its existing I/I problem, the Court ruled the I/I Contribution was an illegal tax and ordered its return to the plaintiffs.

For further information, contact Brian C. Levey at blevey@bdlaw.com or Krista L. Hawley at khawley@bdlaw.com.

Recent Land Court Decision Invalidates Foreclosures

In a decision issued relative to three cases before the Land Court on similar issues, Judge Long invalidated two out of three foreclosures and questioned Massachusetts Real Estate Bar Association ("REBA") Title Standard No. 58. The three cases[1] were brought to remove a cloud on the title of three separate properties located in Springfield, Massachusetts. The issue that raises the most concern in the case is whether a notice that named the plaintiffs as the foreclosing parties even though they had no record interest in the properties at the time was sufficient under the statute. One of the plaintiffs held an unrecorded interest at the time of the foreclosure notice. U.S. Bank National Association, Trustee, at p.2.

Addressing this issue, the court invalidated the two foreclosures where the notice did not name the current mortgage holder, but named two entities that did not have any interest in the property at the time of the notice. Both of these entities were later assigned an interest in the property many months after the foreclosure sales had taken place. *Id*. at p.17. The court distinguished and upheld the foreclosure where the notice named the entity that held an unrecorded interest in the foreclosed property at the time of the notice. The court's rationale was that this entity was the holder of the mortgage even though the interest was unrecorded. *Id*.

As a basis for its decision, the court reasoned that the statute governing foreclosures is largely a consumer protection statute that must be strictly complied with. The purpose of publication is to ensure that a sufficient number of likely bidders learn of the sale so that there will be competition resulting in the highest price. Obtaining the highest price is for the benefit of the mortgagor (property owner) who will lose his equity interest in the property and who may have personal liability for the full amount of any deficiency. The statute requires that the notice identify the holder of the mortgage. Failure to do so renders the sale void as a matter of law. Therefore, naming a party other than the current mortgage holder in the foreclosure notice creates a cloud on title that may chill the competitive bidding thereby harming the mortgagor's interests. *Id*. at p. 9. The court also held that REBA Title Standard No. 58, relied upon by the plaintiffs, misconstrued prior case law as support for the standard. *Id*. at p.16.

A motion to vacate the judgment has been filed. This decision could raise serious questions for past foreclosures if applied retroactively. We will keep you informed of further developments in these cases.

For more information, please contact Deborah Eliason at deliason@bdlaw.com.

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[1] *US Bank National Association, Trustee v. Antonio Ibanez*, Mass. Land Court Misc. Case No. 384283 (KCL); *Lasalle Bank National Association, Trustee v. Freddy Rossario*, Mass. Land Court Misc. Case No. 386018 (KCL); *WellsFargo Bank, N.A. Trustee v. Mark A. Larace and Tammy L. Larace*, Mass. Land Court Misc. Case No. 386755 (KCL).

Back to Top

Hertz et al. v. Secretary of EOEEA: No Standing to Challenge Boston Harbor Plan Amendment

On February 27, 2009, the Appeals Court dismissed an appeal by private property owners challenging the approval by the Secretary of the Executive Office of Energy and Environmental Affairs ("Secretary") of an amendment to the Boston Harbor Plan. *Hertz v. Secretary of the Executive Office of Energy and Environmental Affairs*, 73 Mass. App. Ct. 770 (2009). The court held that the plaintiffs lacked standing to challenge the approval on the basis of protecting clean air and water, aesthetic interests and harm to their private property resulting from development in accordance with the amended plan. The court further held that granting standing would subject almost all municipal harbor projects to litigation and confer rights beyond those envisioned by the harbor plan regulations.

The plaintiffs are unit owners or residents of Strada 234 Condominium on Causeway Street in Boston. The 2006 amendment to the Harbor Plan would allow the development of Lovejoy Wharf (which abuts the plaintiffs' property) and two buildings. The plaintiffs claim that the allowed development would block the light, air and visual benefits of their property, reduce their access to the waterfront, as well as create traffic, noise and pollution problems for their property.

The Appeals Court held that the plaintiffs did not have a right of action based upon those claims. To the extent the plaintiffs made claims relative to blocking private views, traffic and parking problems, and their special status as abutters, the court held that the claims must fail because the harbor plan regulations do not provide any protection for these claims. With regard to the plaintiffs' other claims of diminished use of and access to the waterfront and increased noise and pollution, the court held that the harbor plan regulations do not create a private right of action in the plaintiffs to redress those injuries. *Hertz* at 774.

In its decision, the court stated, the harbor plan regulations provide only for "public hearing, public comments and a reconsideration process." *Id*. at 775. Although the regulations allow the plaintiffs to play a role in the process, they are not entitled to challenge the Secretary's decision. The court found that granting standing to the plaintiffs would subject almost all municipal harbor projects to litigation and confer rights upon the plaintiffs beyond those provided for in the harbor plan regulations. *Id*. at 776.

For more information, please contact Deborah Eliason at deliason@bdlaw.com.

Land Court Revised Guidelines Issued

On February 27, 2009 the Land Court issued guidelines revising those originally released in 2000 ("Guidelines"). The purpose of the Guidelines is to assist registry personnel and users in determining the suitability of documents presented for filing and affecting registered land. The intent is to provide consistency among the different registries, but the rules are not mandatory and are not intended to eliminate the use of sound judgment by registry personnel. The Guidelines are also instructive for the recording of documents related to unregistered land.

There are a total of sixty-three Guidelines, ten of which are new and twenty-one of which are revisions of original guidelines. One original guideline was deleted. Some highlights of the revisions follows:

Guideline 1. Acknowledgment: Requirements. This guideline has been updated to comport with the requirements of Executive Order Revised No. 455 (03-13) 2004, but makes it clear that documents that do not comply with the new form will still be accepted, provided they would have been accepted prior to the promulgation of the Executive Order. This Guideline also lists documents that require an acknowledgement.

Guideline 9. Condominiums: First Unit Deeds. A form of condominium deed is included in this Guideline. If this form is used, or a similar form, the first unit deed may

Back to Top

be accepted for registration without prior approval of the Land Court.

Guideline 57. Condominiums: Approval of Condominium Documents. This is a new guideline that details the Land Court approval process for condominium documents to be filed with regard to registered land.

Guideline 58. Conveyance by Cities and Towns. This new guideline requires a municipal clerk's certificate reciting or giving evidence of the authority by which the municipal grant is made. It also requires a recitation in the deed that the provisions of G.L.c. 44, §63A relative to a payment in lieu of taxes have been complied with.

Guidelines 63. Voluntary Withdrawal (G.L.c. 185, § 52); and 64. Withdrawal From Registration (G.L.c. 183A, §16). These guidelines has been added to address in detail the process to be followed when voluntarily withdrawing land from the registration system. Guideline 63 addresses registered land generally and Guideline 64 applies to condominiums.

The updated Guidelines should prove to be a valuable resource for conveyancing attorneys, as well as the land development community.

For more information please contact Deborah Eliason at deliason@bdlaw.com.

National Developments

EPA Proposes New Renewable Fuel Standard Regulations Using Lifecycle Greenhouse Gas Analysis

The U.S. Environmental Protection Agency ("EPA") proposed regulations on May 5 to implement significant changes to the federal Renewable Fuel Standard program (known as "RFS-2"). In what may have implications for regional and international efforts to regulate renewable fuels – as well for broader climate change and energy regulation now being considered by Congress and the Obama Administration – the RFS-2 proposal represents the EPA's first-ever use of lifecycle analysis of greenhouse gas ("GHG") emissions in a regulatory program.

Required by the Energy Independence and Security Act of 2007 ("EISA") to have the new rules in place by December 19, 2008, EPA's proposal was delayed in large part due to the complexity of adding lifecycle assessments to the eligibility determination for renewable fuels. However, unlike California's recently adopted Low-Carbon Fuel Standard (LCFS), which concluded that indirect land-use changes associated with most corn ethanol contribute to a "carbon intensity" that is comparable to or greater than that of conventional gasoline,[1] EPA's proposal does not determine whether corn-based ethanol or other biofuels will ultimately qualify as "renewable fuel" under the RFS.

Instead, the proposal lays out two possible options for assessing GHG emission impacts over both a 30- and 100-year time period, reflecting the Agency's assessment that the displacement of petroleum by biofuels over time can in some instances "pay back" earlier land use emission impacts.

EPA's lifecycle emissions analysis will now be subject to formal peer review and a public workshop, in addition to a 60-day public comment period on the full proposal upon its publication in the Federal Register. Background documents, including a pre-publication version of the 549-page RFS-2 proposal, are available at: http://www.epa.gov/OMS/renewablefuels/#regulations.

For more information about the new proposal, or renewable fuel or climate change regulation more generally, please contact Russ LaMotte at rlamotte@bdlaw.com or Alan Sachs at asachs@bdlaw.com.

A. General Requirements and New Changes to the RFS Program

Under the RFS program, EPA sets an annual benchmark representing the amount of

Back to Top

renewable fuel that must be used by each fuel refiner, blender, or importer ("obligated parties"). The RFS program, initiated in 2007, includes registration, recordkeeping and reporting requirements for all renewable fuel producers and obligated parties, and established a trading market in renewable fuel credits, known as Renewable Identification Numbers ("RINs").

As required by the EISA, changes under EPA's new proposal to the existing RFS program include:

- Significant expansion of the escalating volumes of renewable fuel required each year (to reach 36 billion gallons by 2022);
- Separation of the volume requirements into four categories of renewable fuel ("conventional biofuel," "advanced biofuel," "biomass-based diesel," and "cellulosic biofuel");
- Important changes to the definition of renewable fuel (including a new requirement that crops used to produce qualifying renewable fuels be harvested from agricultural land cleared or cultivated prior to December 2007);
- Expansion of the types of fuels subject to the standards to include diesel and certain nonroad fuels;[2] and
- Inclusion of specific types of waivers and EPA-generated credits for cellulosic biofuels.

EPA's proposed changes are intended to become effective on January 1, 2010. Obligated parties will remain subject to the Agency's existing RFS regulations until the new regulations are finalized.

In order to implement the RFS-2 program, parties that generate, own, transfer or use RINs will need to re-register under the RFS-2 provisions and modify their compliance approaches to accommodate the proposed changes. Regulated parties will also need to establish new contractual relationships to cover the different types of renewable fuel required under RFS-2. In addition, newly regulated parties (for example, diesel producers or importers) may now need to develop compliance systems for the RFS program for the first time.

B. New GHG Lifecycle Emissions Analysis

The 2007 EISA introduced a new eligibility requirement for corn ethanol from plants constructed after December 2007, which must now release at least 20 percent less lifecycle GHG emissions when compared to average emissions from petroleum fuels in order to qualify as a renewable fuel under the statute.[3] In addition, lifecycle GHG emissions must be at least 40 to 44 percent less than baseline lifecycle GHG emissions to qualify as an advanced biofuel, 50 percent less than baseline lifecycle GHG emissions to qualify as a biomass-based diesel, and 60 percent less than baseline lifecycle GHG emissions to qualify as a cellulosic biofuel.

Lifecycle GHG emissions are defined by the EISA to mean the aggregate quantity of GHGs related to the full fuel cycle -- from feedstock generation and extraction through distribution and delivery and use of the finished fuel. In its proposal, EPA indicates that compliance with the EISA mandate makes it necessary to assess direct and indirect impacts of petroleum-based and renewable fuels that occur both within the United States and in other countries. For biofuels, this includes evaluating significant emissions from indirect land use changes that occur in other countries as a result of the increased production and importation of biofuels in the United States.[4]

Importantly, EPA notes that although biofuel-induced land use change can produce significant near-term GHG emissions, the displacement of petroleum by biofuels over time can "pay back" earlier land conversion impacts. As a result, EPA's proposal includes two options for assessing future GHG emission impacts: a 30-year time period

Back to Top

that values equally all emission impacts, regardless of time of emission impact; and a 100-year time period that discounts future emissions at two percent annually.

For example, assuming 100 years of corn ethanol produced in a basic dry mill ethanol production facility and using a two percent discount rate, corn ethanol represents a 16 percent reduction in GHG emissions compared to the 2005 baseline gasoline assumed to be replaced. By contrast, assuming 30 years of corn ethanol production and use and no discounting of the GHG emission impacts, EPA predicts that corn ethanol will have a five percent increase in GHG emissions compared to petroleum gasoline. EPA's proposed regulations rely on the 100-year model, identifying eight different production pathways (for example, natural gas or biomass-heated ethanol plants) under which ethanol may qualify toward an obligated party's RFS obligations. Specific types of biodiesel, cellulosic biodiesel, non-ester renewable diesel and cellulosic gasoline are also expected to meet or exceed eligibility requirements for renewable fuels under the 100-year model.

The California Air Resources Board ("CARB") has specifically noted that its recently adopted LCFS is intended to "complement" the federal RFS, which according to CARB's analysis will achieve only about 30 percent of the LCFS's anticipated GHG benefits. Unlike the California LCFS, the RFS program does not prescribe specific GHG controls on transportation fuels. Instead, it requires that obligated parties use specified volumes of renewable fuels that meet the program's lifecycle GHG reduction thresholds.

Moreover, the two programs rely on different models and assumptions to determine lifecycle GHG values, meaning that fuels qualifying under the federal RFS will not necessarily qualify under the California program. While EPA notes in its proposal that it will continue to coordinate with California on the biofuels lifecycle GHG analysis work in particular, these different models raise broader policy questions that may be further complicated by the possible adoption of a national low-carbon fuel standard or other regional mandates.

C. Additional Renewable Fuel Initiatives

On the same day EPA released its proposed regulations, President Obama signed a directive establishing a Biofuels Interagency Working Group ("BIWG"), which will be jointly chaired by the EPA Administrator and the secretaries of Agriculture and Energy. The BIWG is tasked with developing a "comprehensive" market development program, coordinating fuel infrastructure policies, and developing policies to reduce the overall environmental footprint of growing biofuel crops.

In addition, the President ordered the U.S. Department of Agriculture ("USDA") to more quickly increase distribution of federal loan guarantees and grants in the biofuels sector, while the U.S. Department of Energy ("DOE") announced that it will begin making available more than $786 million from the American Recovery and Reinvestment Act for advanced biofuels research, development and test projects.

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[1] See Beveridge & Diamond, P.C., "California Adopts First Low-Carbon Fuel Standard," available at: http://bdlaw.com/news-562.html.

[2] While EPA is proposing that fossil-based heating oil and jet fuel will not be included in the fuel used by a refiner or importer to calculate its renewable fuel volume obligation, renewable fuels used as or in heating oil and jet fuel may generate RINs for credit purposes.

[3] In its proposal, EPA has interpreted this "grandfathering" provision to exclude ethanol produced following an expansion of an existing ethanol facility beyond the plant's inherent capacity.

[4] EPA's proposal suggests that land use impacts of petroleum production would not have an appreciable impact on the 2005 baseline GHG emissions assessment, but the Agency notes that it will "more carefully consider potential land use impacts of petroleum-based fuel production for the final rule" and expressly invites comments that would support such an analysis.

Burlington Northern v. United States: CERCLA Arranger Liability Requires Intent to Dispose of Hazardous Substances

On May 4, 2009, the United States Supreme Court issued the Court's most recent

Back to Top

statement on the scope of liability and the apportionment of damages under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). *Burlington N & S.F. R. Co. v. United States*, No. 07-1601 (May 4, 2009). With respect to scope of CERCLA liability, the Court held that an entity that sells a product has not "arranged for disposal" of that product for CERCLA purposes unless the entity intended that at least a portion of the product be disposed of during the transfer process by one or more of the methods described in 42 U.S.C. § 9607(a)(3). On the issue of apportionment, the Court upheld as reasonable the trial court's method for dividing damages among multiple defendants.

In *Burlington Northern*, the Supreme Court addressed whether Shell Oil was potentially responsible as an "arranger" under CERCLA where it sold a product and knew that the product would spill or leak during the transfer of the product from buyer to seller. The Court concluded that because "arrange" implies action directed to a specific purpose, "under the plain language of the statute, an entity may qualify as an arranger under §9607(a)(3) when it take intentional steps to dispose of a hazardous substance." Consequently, "Shell's mere knowledge that spills and leaks [occurred during the transfer process] is insufficient grounds for concluding that Shell 'arranged for' the disposal" of a hazardous substance within the meaning of §9607(a)(3).

In its discussion of apportionment, the Court observed that CERCLA does not mandate joint and several liability in every cost recovery case. Citing the Restatement (Second) of Torts, the Court noted that "apportionment is proper when 'there is a reasonable basis for determining the contribution of each cause to a single harm.'" CERCLA defendants seeking to avoid joint and several liability must establish that a reasonable basis for apportionment exists. Although none of the parties before the trial court attempted to establish that the damages were subject to apportionment, the trial court itself concluded that the case "was a classic 'divisible in terms of degree' case." The trial court apportioned 9% of the damages to two railroad defendants, ultimately leaving the government to absorb the remaining 91% of the total damages. The trial court based its apportionment on the percentages of land area owned by the respective defendants, the time of ownership, and the types of hazardous substances used by the defendants in their relation to the contamination at the site. In *Burlington Northern*, the Supreme Court upheld the trial court's basis for apportionment as reasonable, even though it was inexact and at least somewhat based on estimates rather than empirical evidence.

For more information about the impact of this decision, please contact Rob Brager (rbrager@bdlaw.com, (410) 230-1310)) or Timothy M. Sullivan (tsullivan@bdlaw.com, (410) 230-1355)).

Chemical Plant Security: Where We've Been, Where We Are, Where We're Going

The legislation that supports the Department of Homeland Security's Chemical Facility Anti-Terrorism Standards ("CFATS") program is due to expire in October. The battle for reauthorization is already underway, with a key issue being whether to include a mandate to consider, or to adopt, inherently safer technology ("IST"). The attached client alert, also available at http://www.bdlaw.com/news-559.html, provides background on IST, then recounts how we got to where we are today and where we may be going with this important legislation.

For more information, please contact Mark Duvall at mduvall@bdlaw.com. This alert was prepared with the assistance of Russell Fraker.

Rules Finalized for Offshore Renewable Energy Projects

The Department of the Interior's Minerals Management Service ("MMS") has issued final regulations for the development of wind, wave and other renewable energy projects on the U.S. Outer Continental Shelf ("OCS") beyond state waters. These long-awaited

Back to Top

rules establish a process for granting leases, easements, and rights-of-way for renewable energy development on the OCS and also establish a method for sharing revenues generated from these projects with adjacent coastal States.

MMS made a number of changes to the final rules based on hundreds of comments submitted in response to the proposed rule, which was published last July. MMS also plans to publish a guidance document that will support the regulations and describe the type of information the agency will look for in a plan submittal.

Congress provided the MMS with the authority to develop a renewable energy OCS program in the Energy Policy Act of 2005. The finalization of regulations was delayed, in part, due to a jurisdictional dispute between MMS and the Federal Energy Regulatory Commission ("FERC") over which agency had authority to regulate hydrokinetic (e.g., wave and current) projects on the OCS. This jurisdictional uncertainty was resolved on April 9, 2009 in a Memorandum of Understanding ("MOU") signed by the agencies. Under the MOU, MMS has exclusive jurisdiction over offshore wind and solar projects and has exclusive jurisdiction to issue leases for hydrokinetic projects on the OCS. FERC has exclusive jurisdiction to grant licenses for OCS hydrokinetic projects once they have first obtained a lease from MMS.

The new rules are a critical step forward for the development of offshore renewable energy projects in federal waters and were published in the Federal Register on April 29, 2009 and will be effective 60 days after publication.

For more information, please contact Peter Schaumberg (pschaumberg@bdlaw.com), Fred Wagner (fwagner@bdlaw.com), or Anne Finken (afinken@bdlaw.com).

Firm News & Events

Beveridge & Diamond, P.C. to Receive Two Major Civil Rights Awards from *Washington Lawyers Committee for Civil Rights Under Law*

We are proud to announce that Benjamin F. Wilson, Managing Principal of Beveridge & Diamond, P.C. and separately, the Firm itself will be receiving awards for outstanding achievement in civil rights law by the *Washington Lawyers Committee for Civil Rights Under Law* at its annual awards lunch on June 16, 2009.

Mr. Wilson, along with Congressman John Lewis of Georgia, will be receiving the Wiley Branton Award, which is given to a member of the legal community whose lifetime efforts on behalf of civil rights advocacy exemplify civil rights lawyer Wiley Branton's deep commitment to civil rights issues. It is a major award in the civil rights community and reflects not only Mr. Wilson's long standing commitment to pro bono work, but his hands on undertaking of such work for many years.

Separately, Beveridge & Diamond is receiving an award for our work and highly successful outcome in which we sued the City of Manassas in connection with its unlawful efforts to drive immigrant residents from the City. The suit resulted in a settlement providing for major legal reform in the City and damages to our clients, the Equal Rights Center and 11 individual plaintiffs.

These two awards reflect Ben Wilson's and our firm's long standing commitment to pro bono work and our many achievements in our civil rights cases. For additional information about the pro bono program at Beveridge & Diamond, please see: http://www.bdlaw.com/practices-probono.html.

Product Stewardship Roundtable for Medical Device Manufacturers

Beveridge & Diamond, P.C. will host a Medical Device Product Stewardship Roundtable to be held on Thursday, June 18, 2009 at our Washington, D.C. offices. Topics to be

covered include:

- Overview of Global Product Regulatory Trends
- EU RoHS Directive Primer and 2010 Restrictions
- California RoHS and Proposed U.S. RoHS Legislation
- International Initiatives Targeting Chemicals in Products
- Product Take-Back and Recycling Mandates
- Product Stewardship in Latin America
- Restrictions on Exports for Refurbishment and Recycling

The Roundtable will explore these and other developments impacting product stewardship, market access, material restrictions and the end-of-life management of medical devices in the U.S. and in key markets world-wide. The meeting will also further an exchange of information on compliance approaches and possible advocacy strategies for medical device manufacturers. As part of the discussion, former EPA General Counsel Jonathan Z. Cannon will provide an update on the environmental priorities of the Obama Administration. For more information, please contact Janine Militano at jmilitano@bdlaw.com, or Paul Hagen at phagen@bdlaw.com.

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