Massachusetts Environmental, Land Use and Real Estate Alert

Beveridge & Diamond PC

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Massachusetts Developments

Draft Ocean Management Plan Issued for Public Comment

On May 28, 2008, Massachusetts enacted the first in the nation Ocean Management Act into law. *See* Chapter 114 of the Acts of 2008 (the "Act"). The legislation requires the development of a comprehensive management plan for virtually all of the state-controlled waters of Massachusetts by December 31, 2009. On June 30, 2009, the Executive Office of Energy and Environmental Affairs ("EEA") issued its first draft Ocean Management Plan, a copy of which is available online at http://www.mass.gov/eea/mop. The draft OMP is quite comprehensive and if approved could have a significant impact on the way commercial, recreational and other activities are conducted in the OMP area. *(full article)*

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"Check-the-Box" Equals More Taxes For Many Condominium Associations

With the adoption of "An Act Relative to Tax Fairness and Business Competitiveness" (the Act), for tax years beginning on or after January 1, 2009, Massachusetts will conform with the Federal Business Entity Classification, so-called "Check-the-Box" rules. St. 2008, c. 173. As a consequence, unincorporated homeowners associations and condominium trusts may be required to pay the minimum Massachusetts corporate tax of $456, if they elect to be taxed as corporations for federal tax purposes. This is unwelcome news for smaller condominiums with minimal income, that prior to now, may have escaped tax free. (*full article*)

National Developments

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Second Circuit Rules Parties May Bring Climate Change Nuisance Actions

On September 21, 2009, the Second Circuit issued a long delayed climate change decision, *Connecticut v. Am. Elec. Power Co*., holding that public nuisance actions can be brought against private emitters of greenhouse gasses. *(full article)*

OSHA Launches Pilot PSM National Emphasis Program for Chemical Facilities

On July 27, 2009, the Occupational Safety and Health Administration ("OSHA") launched its much-anticipated National Emphasis Program ("NEP") for chemical facilities. The Chemical NEP establishes an inspection program to ensure compliance with OSHA's standard on Process Safety Management of Highly Hazardous Chemicals ("PSM"). *(full article)*

Plastic or Wood? Packaging Wars Break Out at APHIS

Who knew that simple wooden packaging materials, like pallets and crates, could create controversies over ozone depletion, brominated flame retardants, and forest destruction by insects? A new regulatory initiative raises the prospect of possible wholesale changes in how America ships goods, and in doing so has fueled a vigorous dispute over the respective merits of plastic and wooden packaging. *(full article)*

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

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Formal public hearings were held in September and public comments on the draft OMP will be accepted until 5:00 pm on **Monday, November 23, 2009**. Comments may be submitted in writing to:

> Massachusetts Office of Coastal Zone Management
> Re: Draft Ocean Management Plan
> 251 Causeway Street, Suite 800
> Boston, MA 02114

Or by providing comments online through the Ocean Plan Public Input Portal comments page at http://commpres.env.state.ma.us/mop/commentonline.aspx.

According to the draft OMP, because the ocean is a public trust resource, the OMP must address the fundamental issue of effectively managing the protection and use of the Commonwealth's waters on behalf of the public for the benefit of current and future generations. To accomplish that goal, the draft OMP:

- Sets forth the Commonwealth's goals, siting priorities and standards to ensure the effective stewardship of its ocean waters;
- Identifies and protects critical resources;
- Supports the development of sustainable uses, renewable energy, and necessary infrastructure;
- Establishes measures that minimize conflict between existing uses and new uses; and
- Provides a foundation for ongoing study and evolving management of the ocean environment.

Draft Massachusetts Ocean Management Plan - Volume I, Executive Summary, p.i.

The draft OMP consists of two volumes and a series of figures and maps. The draft OMP both designates management areas and establishes performance based management of the OMP area. Three management areas are designated: Prohibited, Renewable Energy and Multi-Use. *Id.* at p. iv. The Prohibited Area encompasses the area located within the Cape Cod Ocean Sanctuary. Uses, activities and facilities that are prohibited by the Oceans Sanctuary Act, as amended by the Oceans Management Act, are prohibited under the draft OMP. *Id*. at 4-2.

Renewable Energy Areas are areas designated for commercial wind energy facilities. Although other renewable energy technologies are allowed in these areas, the draft OMP finds that current technology does not support commercial-scale wave or tidal energy projects in these areas. The two proposed designated Wind Energy Areas are located in the vicinity of the southern end of the Elizabeth Islands and southwest of Nomans Land. Federal waters adjacent to these areas are recognized in the draft OMP as potentially appropriate locations for commercial wind energy facilities, but are not within the jurisdictional waters of Massachusetts. *Id*. at 4-2 through 4-5.

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The Multi-Use Area includes the remainder of the ocean planning area and is the largest area designated in the draft OMP. In this area, uses, activities and facilities allowed by the Ocean Sanctuaries Act, except commercial-scale wind energy facilities (11 or more turbines), are to be managed based on siting and performance standards. Management in the Multi-use Area is intended to establish a higher level of protection for "special, sensitive or unique resources" by modifying the Massachusetts Environmental Protection Act ("MEPA") standard and providing baseline information. *Id*. at 4-8. For existing water-dependent uses, the Multi-use Area maintains the existing MEPA standard of "avoid, minimize or mitigate" but establishes a higher level of review through use of the baseline information and by requiring that potential impacts and mitigation be addressed during the MEPA review with the participation of impacted parties. *Id*. The Multi-use Area also allows sustainable uses, renewable energy, and necessary infrastructure and reviews these uses on a project-specific basis. The goal being to direct these uses away from impacts to the most significant resources and human activities, while still allowing flexibility in their location and the level of regulatory review. *Id*.

In the Multi-use Area, the draft OMP seeks "to balance the protection of significant existing uses and important environmental resources with the flexibility needed to allow the development of necessary infrastructure, sustainable uses, and new technologies like renewable energy in the context of the limitations of existing data." *Id*. The draft OMP describes in detail how individual uses will be reviewed and what factors will be considered in siting decisions. Commercial, recreational users and other parties with an interest in the OMP area should carefully review the draft plan.

The preparation of the draft OMP was a mammoth undertaking and was completed as required in a short amount of time. All stakeholders should review the draft carefully. Comments are due on or before November 23, 2009. The final OMP is expected to be issued by December 31, 2009.

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

Massachusetts Finalizes Air Permit Streamlining Changes

On July 24, 2009, the Massachusetts Department of Environmental Protection (MassDEP) finalized changes to its plan approval requirements which are intended to streamline air permitting. These changes implement recommendations made by the 2007 Air Permit Streamlining Study.

Raise the threshold for requiring a Comprehensive Plan Approval. MassDEP has modified the applicability criteria for Limited and Comprehensive Plan Approvals to shift projects that emit more than 5 tons per year (tpy) but less than or equal to 10 tpy of an air contaminant to the Limited Plan Approval category. According to MassDEP, BACT would continue to apply, but the application process would be less complex and have a shorter review timeline.

Describe "Pathways" Available for Proposing BACT. BACT is required for all Limited and Comprehensive Plan Approvals. MassDEP has modified its rules to specify that the applicant may propose BACT based on any of the following: (a) top-down BACT analysis; (b) "the most recent plan approval or other action" by DEP; or (c) a combination of pollution prevention and best management practices if proposed allowable emissions are less than 18 tpy VOCs and HOCs (combined), less than 18 tpy total HAPs, and less than 10 tpy any single HAP.

As noted in the background materials to the rule, the study suggested that MassDEP update its guidance on Top-Down BACT and post on the web its BACT determinations for various process and equipment types. Based on our review, these are not yet available on the MassDEP website.

A Condition of Air Pollution. MassDEP has codified a requirement that emission limitations in plan approvals must be sufficient to "eliminate the potential to cause a condition of air pollution, even if said emission limitation is more stringent than [BACT]."

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310 CMR 7.02(8)(a)(7).

Consolidation of Plan Approvals. At 310 CMR 7.02(12), MassDEP has added a process to allow a facility to apply for consolidation of its plan approvals in order to streamline recordkeeping, reporting and monitoring requirements. This provision does not apply to facilities subject to Title V permitting requirements.

Allow for Administrative Amendments. At 310 CMR 7.02(13), MassDEP has added a process for making minor changes to plan approvals, such as for a change in address, change in ownership, to correct typographical errors, an increase in monitoring frequency, and "other changes [MassDEP] determines are necessary for the effective administration" of the air permit program. Either MassDEP or the owner or operator of the facility may propose the amendment. The amendment will take effect 30 days after receipt unless MassDEP disapproves the change or the owner or operator contests the amendment. This process is not available for facilities subject to Title V permitting requirements.

The regulations are available at: www.mass.gov/dep/service/regulations/newregs.htm#recent. For further information, please contact Steve Richmond at srichmond@bdlaw.com or Jeanine Grachuk at jgrachuk@bdlaw.com.

Massachusetts Proposes Amending State Ambient Air Quality Standards for Lead, Ozone and Fine Particles

On July 10, 2009, the Massachusetts Department of Environmental Protection (MassDEP) proposed amendments to the state's ambient air quality standards, 310 CMR 6.00, to conform to changes in the national ambient air quality standards (NAAQs) for particulate matter, ozone and lead. MassDEP also proposed related amendments to its air pollution control rules, 310 CMR 7.00.

Particulate Matter. The U.S. Environmental Protection Agency (EPA) last revised the primary and secondary PM2.5 standards in 2006, lowering the 24-hour standard to 35 ug/m^3 and keeping the annual standard at 15 ug/m^3. EPA is currently reviewing these standards as a result of court challenges. MassDEP proposes adopting these standards at this time.

MassDEP also proposes changing definitions relating to particulate matter in 310 CMR 7.00, including in 310 CMR 7.54 Large Combustion Emission Units and Appendix A Emission Offset and Nonattainment Review. Additionally, MassDEP proposes adding a significance level for $PM_{2.5}$ to 310 CMR 7.54 Large Combustion Emission Units, as follows: "10 tpy of $PM_{2.5}$ emissions; 40 tpy of sulfur dioxide emissions; 40 tpy of nitrogen oxide emissions, unless demonstrated not to be a $PM_{2.5}$ precursor." No change would be made to the existing significance levels for PM and PM_{10}.

In 2006, EPA revoked the annual standard for PM_{10}. MassDEP proposes to also revoke this standard.

Ozone. In 2008, EPA lowered the primary and secondary ozone standards to 0.075 ppm averaged over eight hours and in 2005 revoked the 1-hour ozone standard. MassDEP proposes to adopt these same changes.

Lead. In 2008, EPA lowered the primary and secondary lead standards to 0.15 ug/m^3 measured over a rolling three month period. MassDEP proposes to adopt these same changes.

The proposed regulations are available at: http://www.mass.gov/dep/public/publiche.htm. The public comment period has closed. For further information, please contact Steve Richmond at srichmond@bdlaw.com or Jeanine Grachuk at jgrachuk@bdlaw.com.

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Massachusetts Proposes Adoption of the Federal Land Disposal Restriction Program and other Amendments to its Hazardous Waste Rules

On May 29, 2009, the Massachusetts Department of Environmental Protection (MassDEP) proposed amendments to the state's hazardous waste rules. This proposal includes adoption of the federal Land Disposal Restriction (LDR) program, as well as revisions to several other hazardous waste provisions to ensure consistency with the federal program.

Most of the LDR program would be incorporated by reference, except where delegation is prohibited or where the state has opted to adopt more stringent provisions. Examples of more stringent requirements proposed 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 is also proposing to not adopt 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."

The proposed regulations are available at: http://www.mass.gov/dep/public/publiche.htm. The public comment period has closed. For further information, please contact Steve Richmond at srichmond@bdlaw.com or Jeanine Grachuk at jgrachuk@bdlaw.com.

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The Ground Water Rule (GWR). This proposal would adopt the federal GWR. The purpose of the GWR is to provide for increased protection against microbial pathogens in public water systems that use ground water sources, especially fecal contamination. MassDEP proposed adding a new section, 310 CMR 22.26, to adopt this rule. The rule would require in some cases additional monitoring, treatment and compliance monitoring demonstrating the effectiveness of treatment. Specific sampling and analytical techniques would be mandatory. Reporting, public notification, and recordkeeping requirements would apply. The proposed compliance date for this rule is December 1, 2009.

The Lead and Copper Rule (LCR). This amendment would incorporate changes made to the federal LCR in 2007. The purpose of the LCR, 310 CMR 22.06B, is to control lead and copper entering drinking water primarily through plumbing materials. Essentially, the LCR requires systems to monitor drinking water at consumer taps for lead and copper and undertake specified activities if action levels are exceeded. MassDEP's proposed changes would: (a) require consumer notice of lead and copper test results even if no action level is exceeded; (b) re-write the public education requirements; (c) explain the timing for required sampling and how much sampling is required for smaller systems; and (d) require MassDEP approval before adding a new source of water or making a long-term change in water treatment.

Other Revisions and Corrections. MassDEP's proposed changes would, among other things: (a) add definitions for "running annual average" and "treatment technique"; (b) provide that a Zone I radius cannot be less than 100 feet; (c) affect analytical methods;

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(d) require notification to DEP of certain exceedances within 24 hours; and (e) require all suppliers of water to develop, update and maintain maps of their water system distribution facilities. These revisions would affect 310 CMR 22.01-.05, 22.07E-.07F, 22.11B, 22.15-.17, 22.19-20C, 22.20G, 22.22 and 22.24.

The proposed regulations are available at: http://www.mass.gov/dep/public/publiche.htm. The public comment period has closed. For further information, please contact Steve Richmond at srichmond@bdlaw.com or Jeanine Grachuk at jgrachuk@bdlaw.com.

Massachusetts SJC Clarifies Steps Necessary to Avoid Lapse of Variance

The Supreme Judicial Court ("SJC") has ruled that a variance must be both (1) recorded in the registry of deeds and (2) "exercised" within one year of its grant in order to avoid lapsing, absent an extension.

In *Cornell v. Board of Appeals of Dracut*, SJC-10307 (May 22, 2009), a property owner sought to divide a property into two parcels and build a house on the smaller parcel. He secured a variance for the smaller parcel because its frontage was 25 feet less than that required by the zoning bylaw, but he did not record that variance at the time. The property owner later sought approvals from the planning board, board of health, and conservation commission, all of which were prerequisites to issuance of a building permit.

After securing an ANR endorsement, an order of conditions, and board of health approval of a septic plan, the property owner applied for a building permit and was denied on the basis that the variance had lapsed due to his failure to apply for the building permit within one year of the grant of the variance. The property owner's subsequent applications for a variance extension and new variance application were denied.

The property owner then recorded the original variance nearly two years after its issuance.

The SJC ruled that the property owner had not exercised his variance under G.L. c. 40A, § 10 within one year of issuance. The Court found that the statutory language governing variances necessitates that a variance be recorded (which allows it to "take effect" under Chapter 40A, § 10) before a variance can be "exercised." The Court concluded that in order to exercise the variance, in addition to recording it, the property owner needed to obtain a building permit or convey one of the lots in reliance on the variance.

The Court held that although circumstances may make obtaining a building permit within a year impossible and therefore toll the one-year period, "reasonably avoidable impediments to obtaining a building permit" will preclude tolling.

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Massachusetts Appeals Court Finds Abutter Standing Based on Impacts to Street Parking and Rejects "Separate Identity" Exception to Merger Doctrine

In *Hoffman v. Board of Zoning Appeal of Cambridge*, Appeals Court No. 07-P-1853 (Aug. 10, 2009), the Appeals Court addressed two separate appeals involving standing and merger issues at the same property. In the first, which focused on the standing of the abutter bringing the appeal, the Court ruled on the validity of a variance issued to the owner of two adjacent parcels necessary to allow construction of two units of housing on a parcel currently used for parking. The second appeal involved the status of those two adjacent parcels under the merger doctrine.

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The cases involved two parcels located in Cambridge that first came into common ownership in 1950. From 1950 through 2000, one parcel held a building with four housing units and the other parcel was used for commercial parking. The two parcels were separated by a fence. In 2000, the current owner purchased the two parcels and took title through a single deed, planning to construct two housing units on the vacant parcel. He secured building permits in 2000. After construction was complete, the property owner secured certificates of occupancy.

In 2003, the Building Commissioner rescinded the certificates of occupancy based on a determination that the two parcels had merged into a single lot for zoning purposes. If the two parcels were considered a single lot, the newly constructed two units would be in violation of the Cambridge zoning ordinance's minimum lot area per dwelling unit requirement. The property owner appealed the rescission to the Zoning Board of Appeal ("ZBA"), which affirmed, and then to the Superior Court.

The property owner subsequently applied to the ZBA for a variance to legalize the two newly constructed units, and the ZBA granted that variance. An abutter residing across the street from the parcels appealed that decision to the Land Court. Both appeals were consolidated in the Land Court and heard in a single trial.

As to the abutter appeal of the variance, the Land Court ruled the abutter lacked standing to pursue the appeal. The Appeals Court reversed this ruling, finding that impacts to on-street parking near the abutter's residence was dispositive as to standing. Both parties presented testimony from traffic experts on the question of the impact of two additional housing units on the availability of on-street permit parking. The Appeals Court noted that in a prior instance, the Supreme Judicial Court found that even a diminution in on-street parking that would leave adequate parking available was sufficient to confer standing. In this case, the abutter put forth credible evidence that if the two additional dwelling units were occupied, her ability to park on her block would be diminished or even extinguished due to the limited amount of street parking currently available on the block. This was sufficient to establish a particularized injury for the purposes of standing.

Reaching the merits of the variance decision, the Appeals Court found the decision granting the variance was insufficient as a matter of law where it did not address all of the statutory prerequisites of G.L. c. 40A, § 10, including whether the variance could be granted without causing substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the ordinance.

Without the variance, the two housing units would be unlawful under the zoning ordinance if the two parcels had in fact merged for zoning purposes as found by the Land Court. Under the merger doctrine, adjacent nonconforming lots generally merge for zoning purposes when they come into common ownership. In this case, the property owner asserted that because the lots retained their "separate identity," they had not merged. The Appeals Court acknowledged that previously it had suggested that lots retaining separate identities may not be subject to the merger doctrine. However, in this case, the Court concluded that there was no basis for such a rule and, in fact, adjacent nonconforming lots that retain their separate identities are not exempt from the merger doctrine.

In this case, therefore, the lots would be considered merged unless Cambridge had adopted a more generous ordinance overriding the common-law merger doctrine and allowing adjacent nonconforming lots coming into common ownership to be treated as separate lots for zoning purposes. The Appeals Court remanded the case so that the ZBA could fully consider the zoning ordinance and whether it provided such relief to the property owner in this case.

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Massachusetts Superior Court Rejects Mitigation Fee Imposed on Developer of Retirement Community to Fund Town Senior Center

In *Barberry Homes, Inc. v. Rodenhiser*, 25 Mass. L. Rep. 254 (Mass. Super. Ct., 2008), the developer of an 86-unit adult retirement community appealed pursuant to G.L. 40A, § 17, a special permit that included a requirement that the developer make a $108,000 mitigation payment to the Town of Medway to support construction of an addition to the town's senior center. The Superior Court invalidated the mitigation payment requirement because it found (1) the developer did not agree to it in exchange for some concession from the Planning Board and (2) the payment constituted an impermissible tax rather than a fee.

The Court considered whether the fee constituted an illegal tax. The Court noted the mitigation payment was to fund construction of a senior center that would serve all senior members of the community, not merely those residents of the project. While the developer had the choice not to pay the fee by not constructing the project, the Court found the mitigation payment was a revenue-raising device to fund construction of an expanded senior center rather than a means of compensating the town for providing a special service to seniors residing at the project. Therefore, the Court concluded the fee was a legally untenable tax.

Even if the Board could impose such a mitigation fee, the Court found in this instance, the payment was unreasonable, whimsical, capricious, and arbitrary where the Board made no individualized determination of the nexus between the proposed development and the impact on the senior center, or relating the amount of the mitigation payment imposed to impacts to the senior center. The Board calculated the fee on a per-unit basis based on what a prior developer had voluntarily offered to pay the town.

No appeal was filed.

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"Check-the-Box" Equals More Taxes For Many Condominium Associations

With the adoption of "An Act Relative to Tax Fairness and Business Competitiveness" (the Act), for tax years beginning on or after January 1, 2009, Massachusetts will conform with the Federal Business Entity Classification, so-called "Check-the-Box" rules. St. 2008, c. 173. As a consequence, unincorporated homeowners associations and condominium trusts may be required to pay the minimum Massachusetts corporate tax of $456, if they elect to be taxed as corporations for federal tax purposes. This is unwelcome news for smaller condominiums with minimal income, that prior to now, may have escaped tax free.

Businesses can be legally organized in different ways e.g. as corporations, limited liability companies (LLCs), partnerships, business trusts, among others. How a business is legally organized may determine how it is treated for tax purposes. Generally, the entity either pays the tax on its income itself, or the income is treated as belonging to the owners, who are responsible for paying the tax. Up until now, Massachusetts has treated some business entities differently than the federal government. In the mid-1990s, the differences were accentuated with the adoption of the so-called federal "check-the-box" rules. For federal tax purposes, check-the-box rules allow many unincorporated businesses to elect whether to be taxed as corporations, partnerships, or in some cases, treated as the equivalent of the sole owner.

For tax years beginning on or after January 1, 2009, the filing status for business entities in Massachusetts must be consistent with their filing status for federal tax purposes. The practical effect is that some homeowners associations or condominium trusts that did not pay state taxes previously, may now be required to pay the minimum tax of $465

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assessed on a Massachusetts corporation. Such organizations should consult with their tax advisors to determine what additional obligations they may have under the new law.

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

National Developments

EPA Issues Mandatory GHG Reporting Rule

On Tuesday, September 22, 2009, the U.S. Environmental Protection Agency ("EPA") announced the issuance of a final rule establishing the first comprehensive national system for reporting emissions of carbon dioxide and other greenhouse gases ("GHG") produced by major emission sources in the United States. In press releases accompanying the announcement, EPA stated that the "new reporting system will provide a better understanding of where GHGs are coming from and will guide development of the best possible policies and programs to reduce emissions" and that "[t]his comprehensive, nationwide emissions data will help in the fight against climate change."[i]

Under the final rule, facilities with production processes that fall into certain industrial source categories such as petroleum refiners and petrochemical companies, suppliers of fossil fuels or industrial greenhouse gases, manufacturers of vehicles and engines outside of the light-duty sector, and facilities that contain boilers and process heaters with an aggregate combustion unit capacity of at least 30 mmBtu/hr and emit 25,000 or more metric tons per year of CO_2e (CO_2 or another GHG equivalent in global warming potential) will be required to submit annual GHG emission reports to EPA.

The rule directs reporting facilities to begin collecting data on January 1, 2010, and to submit their first annual reports for calendar year 2010 by March 31, 2011. The gases covered by the rule are the same as those covered under the United Nations Framework Convention on Climate Change (UNFCCC): carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFC), perfluorocarbons (PFC), and sulfur hexafluoride (SF_6). In addition, the rule requires reporting of certain other fluorinated gases including nitrogen trifluoride (NF_3) and hydrofluorinated ethers (HFE). Vehicle and engine manufacturers will report CO_2 for all mobile source categories outside of the light-duty sector beginning with model year 2011 and other GHGs in subsequent model years.[ii]

EPA issued the final rule in response to direction from Congress in the Fiscal Year 2008 Consolidated Appropriations Act (H.R. 2764; Public Law 110-161). The Act tasked EPA with instituting mandatory reporting of GHGs using the Agency's existing authority under the Clean Air Act.

The final rule has not yet been published in the Federal Register, but once published, it will be effective 60 days later. A pre-publication copy of the final rule and supporting information is available at http://www.epa.gov/climatechange/emissions/ghgrulemaking.html. Below, http://www.bdlaw.com/news-670.html we discuss who is affected and what information must be reported, followed by an analysis of changes EPA made from the proposed rule.

Who is affected?

The final rule establishes four categories under which a facility or company will be subject to GHG reporting requirements. Under the first category are facilities that include any of the following source categories onsite. These facilities will be required to report annual GHG emissions facility-wide and, except where noted, regardless of the amount of GHG they emit:

- Adipic acid production
- Aluminum production

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- Ammonia manufacturing
- Cement production
- Electricity generating facilities that are subject to the Acid Rain Program under the Clean Air Act
- HCFC-22 Production
- HFC-23 Destruction facilities that are not collocated with a HCFC-22 production facility and that destroy more than 2.14 metric tons of HFC-23 per year.
- Lime manufacturing
- Manure management systems with combined CH_4 and N_2O emissions in amounts equivalent to 25,000 metric tons CO_2e or more per year
- Municipal landfills that generate CH_4 in amounts equivalent to 25,000 metric tons CO_2e or more per year
- Nitric acid production
- Petrochemical production
- Petroleum refineries
- Phosphoric acid production
- Silicon carbide production
- Soda ash manufacturing
- Titanium dioxide production

A second category of facilities would also be subject to facility-wide reporting, but only if the combined total emissions from the following source categories at the site, plus emissions from the facility's stationary fuel combustion units and miscellaneous uses of carbonate, meet or exceed 25,000 metric tons of CO_2e in any calendar year starting in 2010. (Note that 25,000 metric tons of CO_2e is a relatively small amount, roughly equal to the annual emissions of 4,500 cars or a medium-sized industrial boiler.)

- Ferroalloy production
- Glass production
- Hydrogen production
- Iron and steel production
- Lead production
- Pulp and paper manufacturing
- Zinc production

The third category of facilities subject to reporting includes any facility not encompassed in the above categories and that (1) has stationary fuel combustion units[iii] with an aggregate maximum rated heat input capacity of 30 mmBtu/hr or greater, and (2) emits 25,000 metric tons CO_2e or more in any calendar year starting in 2010 from all stationary fuel combustion sources. The term "facility" is defined broadly in the rule, and includes any physical property, plant, building, structure, source or stationary equipment that (i) is located on one or more contiguous or adjacent properties in actual physical contact or separated solely by a public roadway or other public right-of-way, (ii) is under common ownership or common control, and (iii) emits, or may emit, any greenhouse gas. For the third category of reporting facilities, only GHG emissions from the stationary fuel combustion sources will have to be monitored and reported.

In addition to the above three categories of facilities subject to reporting of direct GHG emissions, the final rule also creates a fourth category aimed at suppliers of fossil fuels (suppliers of coal-based liquid fuels, petroleum products, natural gas, and natural gas liquids) and industrial GHGs (fluorinated gases, nitrous oxide, carbon dioxide). This "supplier" category encompasses producers, importers, and exporters. Suppliers will have to report on the amount of fuel or quantities of each gas supplied into the economy each year and the emissions associated with their complete oxidation or release.

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What information must be reported?

How and what GHG data a facility or supplier must submit varies by source category. EPA has established a section in the final rule for each source category listed above. A single facility may be subject to more than one category for reporting purposes. For example, a typical petroleum refinery would be subject to the reporting requirements of several source categories in addition to the general petroleum refinery category, *e.g.*, general combustion units, hydrogen production, and suppliers of petroleum products. While the methods for monitoring GHG emissions vary by source category, in general, facilities already equipped with CEMS for other pollutants will have to use CEMS for purposes of GHG reporting.

How does the Final Rule differ from the Proposed Rule?

EPA received approximately 16,800 written comments on the proposed rule during the public comment period. Among the comments EPA declined to incorporate were requests to: extend the proposed 2010 start date, adjust the March 31 annual reporting deadline, modify the thresholds triggering reporting, include a de minimis cutoff, eliminate alleged duplicative reporting in some sectors by both downstream and upstream sources, simplify calculation methods into a general monitoring approach, or modify the verification method. However, EPA made the following key changes from the proposal:

Listed Source Categories: EPA excluded the following eleven source categories originally listed in the proposed rule from reporting requirements.: electronics manufacturing, ethanol production, fluorinated GHG production,[iv] food processing, magnesium production, oil and natural gas systems, SF_6 from electrical equipment, underground coal mines, industrial land fills, wastewater treatment, and suppliers of coal. EPA stated that it plans to carefully review public comments and other relevant information as it considers next steps for these source categories.

"Once In, Always In": EPA added a mechanism for facilities to cease annual reporting by reducing their GHG emissions. A facility may cease reporting after five consecutive years of emissions below 25,000 metric tons CO_2e/year; cease reporting after three consecutive years of emissions below 15,000 metric tons CO_2e/year; or cease reporting if the GHG-emitting processes or operations are shut down. Under EPA's proposed rule, once a facility was subject to GHG reporting, it would continue to submit annual reports even if it fell below the reporting thresholds in future years.

Implementation of Monitoring Methods: Because the final rule will go into effect less than three months before monitoring of emissions begins on January 1, 2010, EPA will allow the use of best available data in lieu of the required monitoring methods for January through March 2010. Facilities must still use the calculation methodologies and equations in the "Calculating GHG Emissions" sections of each relevant subpart of the rule, but may use the best available monitoring method for any parameter for which it is not reasonably feasible to acquire, install, and operate a required piece of monitoring equipment by January 1, 2010. Facilities may request that this deadline be extended beyond March, 2010 by submitting a request no later than 30 days after the effective date of the rule, but EPA will not approve any requests for an extension beyond 2010. EPA states that it is requiring reporting of calendar year 2010 emissions because the data are crucial to the timely development of future GHG policy and regulatory programs.

Confidential Business Information (CBI): EPA plans to go through a notice and comment process to establish those data elements in the reporting of GHG emissions that are "emissions data" and therefore will not be afforded the protections of CBI. As part of that process, EPA may identify classes of information that are CBI. EPA plans to initiate this effort later this year, or in early 2010.

Designated Representative: EPA revised the requirements associated with the "designated representative" who must sign the annual GHG emissions reports.

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Specifically, the final rule provides that owners and operators may choose any individual, employee, or non-employee to be the designated representative, and clarifies that each facility and each supplier must identify one and only one designated representative who is responsible for certifying, signing, and submitting all submissions to EPA. Each covered facility or supplier may also identify one alternate designated representative to act in lieu of the designated representative. A designated representative or alternate designated representative may also delegate the submission of information to one or more "agents." The agent can make electronic submissions to EPA, but is not allowed to certify or sign a submission. The final rule does not specify who must prepare reports, but does specify who must certify, sign, and submit them.

Certificate of Representation: The final rule provides that a designated representative must submit a certificate of representation that identifies the owners and operators of the facility or supplier, the designated representative, any alternate designated representative, and other required information. EPA notes that the electronic data reporting system will provide the means to electronically submit both the initial and any subsequent certificate of representation. Certificates of representation are due at least 60 days before the deadline for the initial GHG report, and the final rule allows facilities up to 90 days to submit a revised certificate of representation when a change in owners or operators occurs.

Facilities Required to Correct Errors in Reports: EPA added a provision that requires facilities to submit a revised annual GHG report within 45 days of discovering or being notified by EPA of errors in an annual GHG report.

Records Retention: In order to reduce the recordkeeping burden, EPA changed the general records retention period from five years to three years.

Monitoring: EPA added to the rule's General Provisions an accuracy specification of plus or minus five percent for the calibration of flow meters used to collect data for emissions calculations. In some cases, EPA also modified the specific monitoring methods for a source category based on public comments (*e.g.*, clarification of when Continuous Emissions Monitors (CEMS) and CEMS upgrades are required.)

Potential for Duplicative Reporting: EPA clarified that facilities subject to one of the source category subparts and also to the general stationary fuel combustion subpart should report stationary fuel combustion emissions under the stationary fuel combustion subpart only (40 CFR part 98, subpart C), and report process GHG emissions under the respective source category subparts.

Recordkeeping: EPA clarified the contents of the monitoring plan, and noted that the plan can rely on references to existing corporate documents. The final rule also contains a provision for updating the monitoring plan.

Exemptions: EPA revised the final rule to exclude research and development activities from reporting.

Monitoring Equipment: In several source category subparts, EPA added monitoring options, changed monitoring locations, or allowed engineering calculations to reduce the need for installing new monitors.

Sampling Frequency: For fuel combustion and some other source categories, EPA reduced the required frequency for sampling and analysis.

Verification: In several source category subparts, EPA required more data to be reported rather than kept as records to allow EPA to verify reported emissions.

Combustion Sources: The final rule added exemptions for unconventional fuels, flares, hazardous wastes, and emergency equipment, thereby reducing the need for mass flow monitors for some units or fuels. The final rule also allows more facilities to aggregate reporting of emissions from smaller units rather than report emissions for each individual unit.

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How does the Final Rule affect other GHG reporting programs?

The final rule does not preempt any of the voluntary or mandatory GHG emissions reporting programs that currently exist at the federal, regional, or state level and under which many companies already report GHG emissions. EPA's reporting rule is in addition to these programs and, in effect, adds a new scope and level of detail to the variety of reporting programs already in place. For example:

Companies in the Climate Leaders program annually report corporate-wide emissions, but the final rule requires facility and process-level reporting.

The Climate Registry's General Reporting Protocol contains procedures for reporting emissions of the six internationally-recognized GHGs, but EPA's final rule covers other fluorinated gases including nitrogen trifluoride (NF_3) and hydrofluorinated ethers (HFE).

At least seventeen states have developed or are in the process of developing mandatory GHG reporting rules, and these rules differ with regard to the type of facilities that must report (*e.g.*, Title V, large Electricity Generating Units, or threshold emitters), the gases reported (*e.g.*, all six internationally recognized GHGs, or CO_2 only), and the level of specificity regarding GHG monitoring and calculation methods (*e.g.*, CEMS or AP-42).

Can the Final Rule be challenged?

Under section 307(b)(1) of the Clean Air Act, a challenge to the rule must be made through a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit within 60 days after the rule is published in the Federal Register. Any petition must be based on an objection to the final rule that was raised with reasonable specificity during the public comment period. For issues in the final rule on which it was impracticable to raise objections during the public comment period or if the grounds for an objection arose after the public comment period, one may consider filing an administrative petition for reconsideration. A petition for reconsideration must set forth why any objection is of central relevance to the outcome of the final rule and must occur within the time specified for judicial review, but it will not affect the finality of such rule nor extend the time within which a petition for judicial review may be filed. Considering the number of source categories covered, the sheer volume of comments filed, and the short time EPA had to digest and respond to comments, it is likely that some companies will feel that EPA has not responded appropriately to their comments. EPA responses to comments received on the proposed rule are available at http://www.epa.gov/climatechange/emissions/responses.html.

What resources has EPA made available to assist with implementing the Final Rule?

EPA has developed information sheets for each sector, made a variety of guidance documents available on its website, http://www.epa.gov/climatechange/emissions/ghgrulemaking.html, and will host a number of in-person and internet-based training sessions for people involved with reporting under the final rule. EPA is also operating a hotline (1-877-GHG-1188 or email GHGMRR@epa.gov) for general and administrative questions about the rule. Finally, EPA has designed an "Applicability Tool" and other guidance to help companies assess whether they are subject to the rule. See EPA Applicability Tool, http://www.epa.gov/climatechange/emissions/GHG-calculator/index.html.

* * * *

The impact and implementation of this rule will vary considerably depending on the industry sector and even the characteristics of a particular facility. Experience with analogous reporting requirements under the Clean Air Act and related climate change programs will help to ensure timely and effective compliance. Please contact us if we can assist you in evaluating challenges to or your compliance with the rule.

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For more information or if you have any questions, please contact David Friedland at dfriedland@bdlaw.com, (202) 789-6047; Russ LaMotte at rlamotte@bdlaw.com, (202) 789-6080; Tom Richichi at trichichi@bdlaw.com, (202) 789-6026; or Stephen Richmond at srichmond@bdlaw.com, (781) 416-5710.

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[i] EPA Final Mandatory Reporting of Greenhouse Gases Rule, http://www.epa.gov/climatechange/emissions/ghgrulemaking.html (last visited Sept. 24, 2009).

[ii] For aircraft engine manufacturers, the reporting requirements will apply to the engine models in production in 2011.

[iii] The term "stationary fuel combustion devices" is defined to include boilers and process heaters, and exclude, for example, portable equipment and emergency generators.

[iv] Note that only fluorinated gas production is excluded from the rule at this time; suppliers of fluorinated GHGs must report.

Second Circuit Rules Parties May Bring Climate Change Nuisance Actions

On September 21, 2009, the Second Circuit issued a long delayed climate change decision, *Connecticut v. Am. Elec. Power Co.*, holding that public nuisance actions can be brought against private emitters of greenhouse gasses. As discussed below, this is a major decision. The immediate impacts are likely to include:

- A flood of similar nuisance actions against greenhouse gas emitters (and possibly others, as the standing logic may apply equally well in other environmental cases);
- Major proof problems for the plaintiffs in this and similar cases should they reach trial; and
- A boost for the prospects of Congress adopting comprehensive federal climate change legislation which would preempt such claims.

The Second Circuit's decision overturned a 2005 district court decision, *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005), which had dismissed the claims on the ground that they presented a non-justiciable political question. The Court of Appeals took up the case in 2006, but remained silent until yesterday. The Court, consisting of one judge appointed by President George H.W. Bush and one by President George W. Bush, sided with the eight states, one city, and three environmental groups that brought the suit. Relying heavily though not exclusively on the U.S. Supreme Court's 2007 decision in *Massachusetts v. EPA,* 549 U.S. 497, the two-judge panel rejected all of the arguments put forth by the five power company defendants, holding that:

- The claims do not present non-justiciable political questions;
- All of the plaintiffs have standing to bring their claims;
- Current federal statutes do not "displace" the claims; and,
- The claims were rightly brought under the common law doctrine of nuisance.

As a result of the decision, the case was remanded to the district court. A link to the opinion can be accessed here.

It is likely that all of the electric utility defendants will petition the Second Circuit to review the decision en banc. To win en banc review, they need only a majority of the circuit judges in regular active service and who are not disqualified to recognize that this case "involves a question of exceptional importance." (Fed. R. App. Pro. Rule 35(a)(2).)

If en banc review should be denied or if the en banc panel should uphold the decision, then it is likely that the plaintiffs would file certiorari petitions to the U.S. Supreme Court. If the Supreme Court decides to hear the case, it is not clear what role Justice Sotomayor will play. Justice Sotomayor was the presiding Second Circuit judge on the case when it was argued in June 2006, but the panel's opinion expressly states that she was not involved in the determination of the matter in the three years since. Neither was she replaced by a third judge, however, which is why the case was decided by a two-judge

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panel instead of three. In the event that Sotomayor recuses herself, the defendants' chances for success will increase greatly. In the only other climate change case decided by the Supreme Court to date, *Massachusetts v. EPA*, the Court ruled 5-4 in favor of the Massachusetts and a similar coalition of states and environmental groups, holding that greenhouse gasses are subject to regulation under the Clean Air Act. Justice Souter, now retired, sided with the majority in that case. If his replacement, Justice Sotomayor, recuses herself, Justice Kennedy likely will find himself in the familiar role of casting the decisive swing vote. A 4-4 split leaves the Second Circuit decision intact, whereas he could make it 5-3 to overturn it. As the Second Circuit's decision expands significantly upon the *Massachusetts v. EPA* decision, the plaintiffs cannot be very certain of prevailing on appeal.

The Second Circuit expanded the definition of climate change standing articulated in *Massachusetts v. EPA*, which found State standing under the parens patriae doctrine. The Court here, while recognizing parens patriae, also found that all of the plaintiffs had standing under traditional standing principles in the context of environmental law, relying on *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and its progeny. Thus, states, local governments and especially environmental groups are likely to bring similar lawsuits. Indeed, it is possible that the Second Circuit opinion, if left unchanged by the Supreme Court, will open the floodgates to nuisance lawsuits against all types of greenhouse gas emitters. The power generation, transportation, manufacturing and agricultural industries are potential targets for these nuisance suits. It is important to note, however, that although the Second Circuit's may pave the way for many lawsuits, it will be difficult for plaintiffs to prove causation given the global and indirect nature of climate change impacts. In addition, proving at trial potential future impacts that are based on scientific modeling, no matter how good they are, is a far different matter than generating the scientific support needed to promulgate regulations. Nonetheless, the specter of proliferating nuisance litigation, no matter how unlikely it may be that the cases will succeed on the merits, may well change the legal landscape of climate change.

In addition to prompting new lawsuits, the ruling may influence other climate change nuisance actions that are pending. One case pending in district court in San Francisco, *Kivalina v. ExxonMobil Corp., et al*., No. CV-08-1138 (N.D. Cal. 2008), was filed by the Inuit village of Kivalina, Alaska against over twenty oil and power generation companies. While the prospects for the Kivalina plaintiffs were uncertain prior to the Second Circuit's ruling, the Second Circuit's decision may have breathed new life into the case. Another case is pending before the Fifth Circuit Court of Appeals. That case, *Comer v. Murphy Oil USA, Inc, et al*., No. 05-CV-436LG (S.D. Miss. 2007), was filed by a group of property owners on the Gulf Coast against energy companies for their alleged contribution to climate change. The plaintiffs argued that climate change increased the intensity of Hurricane Katrina, which in turn damaged their property. The district court found that the plaintiffs did not have standing and that the case raised non-justiciable political questions. The plaintiffs appealed and the Fifth Circuit heard oral arguments in November of 2008 but has yet to issue a decision. (A final case, *California v. General Motors, et. al*., 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. 2007), was on appeal before the Ninth Circuit after the district court ruled that it too raised non-justiciable political questions, but in June this year the State of California voluntarily dismissed the appeal, citing the Obama Administration's increase in fuel economy standards for vehicles and the EPA's endangerment finding for greenhouse gases.)

If EPA regulates greenhouse gasses, or if Congress adopts comprehensive climate change legislation, it is likely that federal climate change nuisance lawsuits will be "displaced" (*i.e*., preempted.). The Second Circuit notes that EPA's existing greenhouse gas regulations are only proposed — and only apply to mobile sources in any event —and thus nuisance actions against stationary sources like power plants are not "displaced." The Court's ruling means that until the EPA actually regulates specific sources of greenhouse gasses, nuisance actions against those sources will not be preempted. The reverse also is true: actual EPA regulation would preempt such nuisance suits, and the same likely would hold true for comprehensive federal legislation such as that now being considered in the U.S. Senate. For many this presents a Hobson's choice,

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and some may decide to support Congressional action as the lesser of two evils.

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OSHA Launches Pilot PSM National Emphasis Program for Chemical Facilities

On July 27, 2009, the Occupational Safety and Health Administration ("OSHA") launched its much-anticipated National Emphasis Program ("NEP") for chemical facilities. The Chemical NEP establishes an inspection program to ensure compliance with OSHA's standard on Process Safety Management of Highly Hazardous Chemicals ("PSM").[1] The NEP will operate as a one-year pilot program with programmed inspections targeting Regions I, VII, and X, and with unprogrammed inspections in all regions. After one year, OSHA will evaluate the NEP and consider renewal and expansion of the program to other regions.

1. Background: The PSM Standard and Refinery NEP

OSHA developed the PSM standard in 1992 following a number of catastrophic incidents at refinery and chemical facilities. The standard is intended to prevent or minimize the consequences of a catastrophic release of toxic, reactive, flammable or explosive highly hazardous chemicals ("HHCs") by requiring a comprehensive management program integrating technologies, procedures, and management practices. In 1994, OSHA released a guidance document that established Program Quality Verifications ("PQVs") as the primary enforcement mechanism for the PSM standard.[2] However, due to the resource-intensive nature of PQV inspections, the guidance acknowledged that OSHA would perform only a limited number of such inspections each year. A recurrence of substantial incidents in the petroleum refining industry after the standard went into effect, most notably the 2005 incident at BP's Texas City, Texas refinery, led OSHA to recognize the need for more effective enforcement of the PSM standard.

Through NEPs, OSHA has identified industries or hazards deserving priority attention from its national, regional, and area offices as well as states that choose to implement similar programs.[3] OSHA unveiled in 2007 an NEP for petroleum refineries that established a comprehensive inspection strategy for refineries considered at greatest risk of catastrophic accident.[4] Under the refinery NEP, OSHA has issued a large number of serious, willful, and repeat citations of the PSM standard.[5] Patrick Kapust, a safety and health specialist in OSHA's Enforcement Directorate, noted that the program turned up "more violations than [OSHA] expected" and significantly taxed the agency's inspection resources.[6] Plans to extend the refinery NEP to chemical facilities were announced in 2008; however, the agency delayed the effort for over a year because of several significant accident investigations. The long-awaited Chemical NEP attempts to build on the refinery NEP while committing limited agency resources to chemical facility selection and inspection.

2. The Chemical NEP's Targeted Approach

The Chemical NEP mandates a high volume of narrowly-focused, relatively low-resource inspections. As a pilot program, it is limited to Regions I (Connecticut, Maine, New Hampshire, Rhode Island, and Vermont, although Vermont has a state plan covering private sector employees), VII (Iowa, Kansas, Missouri, and Nebraska; Iowa also has a state plan covering private sector employees), and X (Alaska, Washington, Oregon, and Idaho). These regions are not known for their chemical facilities. In contrast, Region II (which includes New Jersey) and Region VI (which includes Louisiana and Texas) were not included in the pilot. Regions I, VII, and X do have facilities where ammonia, chlorine, or other HHCs are used, and, as indicated below, that might be enough to include those facilities within the pilot program.

Facilities that may be subject to programmed (*i.e.*, planned) inspections will be identified

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through the coordinated development of a "master list." The OSHA Directorate of Enforcement Programs ("DEP") and the Office of Statistics are required to develop a list targeting the following facilities:

- OSHA PSM facilities that are covered by EPA's Risk Management Program as RMP Program 3 sites;
- explosive manufacturers; and
- facilities that have been previously cited for PSM violations.

Facilities identified in each master list will be divided into three categories: (1) facilities likely to have ammonia used for refrigeration as the only HHC; (2) facilities likely to have chlorine used for water treatment as the only HHC; and (3) facilities likely to have both ammonia and chlorine, ammonia or chlorine used for other than refrigeration or water treatment, or HHCs other than ammonia or chlorine.

Facilities that are participants in OSHA's Voluntary Protection Program or Safety and Health Achievement Recognition Program, as well as facilities that have received a comprehensive PSM inspection within the previous two years, will not be included in the national list.

The Chemical NEP mandates between five and ten programmed inspections in each Area Office. Sites will be randomly selected but should consist of 50% from the Category 3 master list, 25% from the Category 2 master list, and 25% from the Category 1 master list. The agency will conduct unprogrammed inspections (targeting facilities that have received a complaint or referral or that have had a catastrophic incident) at chemical facilities in all OSHA regions. In addition, some facilities may be selected for inspection pursuant to the current Site-Specific Targeting Plan.

3. Building on the Experience of the Refinery NEP

OSHA inspections under the Chemical NEP will employ a "dynamic list" of Inspection Priority Items to review PSM compliance similar to the list employed in the refinery NEP. This approach differs from the broad and open-ended PQV process in that it relies on specific, investigative questions designed to gather facts related to the PSM requirements. DEP will develop the dynamic list questions in five substantive categories:

(1) PSM general; (2) ammonia refrigeration; (3) water and/or wastewater treatment; (4) storage; and (5) chemical processing. Periodically, DEP will revise the questions on the dynamic lists.

4. Inspection Procedures

The Chemical NEP inspections will follow the procedures outlined in Chapter 3 of OSHA's Field Operations Manual[7] with several modifications as outlined in the NEP. Each inspection will consist of: (1) an opening conference; (2) a facility-led overview of the site's PSM programs; (3) an initial walkaround; (4) a compliance evaluation of a selected PSM-covered unit within the facility; (5) an inspection of contractors working on or adjacent to the selected unit; and (6) issuance of citations for any alleged PSM violations.

Inspections must be staffed by at least one "Level 1" qualified Compliance and Safety Health Officer ("CSHO", i.e., inspector).[8] The CSHO will select a PSM-covered process to evaluate for purposes of PSM compliance. Approximately fifteen questions will be drawn from the applicable dynamic list for each evaluation of a selected unit (ten questions from the applicable chemical process dynamic list and five questions from the PSM general dynamic list). The NEP also identifies a list of general and process-related documents that the CSHO is to consult during the inspection, including documents beyond what are required by the PSM standard, such as a list of all PSM-covered process units or a summary description of the facility's PSM program. If an inspection reveals deficiencies outside of the dynamic list questions, the scope of the inspection may be expanded after consultation with the Area Director. The CSHO may also recommend citations for hazardous conditions or violations of OSHA standards

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regardless of whether they are specifically addressed by the dynamic list.

5. NEP Evaluation and Next Steps

The pilot will be effective for one year. The program will be evaluated using data collected from case files and reports submitted to OSHA headquarters by each Area Office. OSHA has indicated that it will consider renewal of the NEP and expansion of the programmed inspections to other regions following the conclusion of the pilot program. No formal timeline for that expansion has yet been announced.

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[1] 29 C.F.R. § 1910.119.

[2] CPL-02-02-045, Process Safety Management of Highly Hazardous Chemicals – Compliance Guidelines and Enforcement Procedures (Sept. 13, 1994), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1558.

[3] In addition to the chemical and refinery NEPs, OSHA currently operates NEPs for combustible dust, buttered flavored popcorn, lead, silica, amputations, trenching, and shipbreaking operations. Others, such as one on injury and illness recordkeeping, are under development.

[4] CPL 03-00-004, Petroleum Refinery Process Safety Management National Emphasis Program (June 7, 2007); Statement of Richard Fairfax, Director of Enforcement Programs, OSHA, Before the Subcommittee on Oversight and Investigations Committee on Energy and Commerce, U.S. House of Representatives (May 16, 2008), available at http://archives.energycommerce.house.gov/cmte_mtgs/110-oi-hrg.051607.Fairfax-Testimony.pdf.

[5] Katherine Torres, "Fairfax: OSHA Plans PSM Inspections for Chemical Plants," EHS Today (Apr. 9, 2008), available at http://ehstoday.com/safety/chemical/ehs_imp_79656/.

[6] Bureau of National Affairs, OSHA Official Confirms Emphasis Program Will Be Extended to Chemical Facilities, 39 Occupational Safety & Health Reporter 567 (July 9, 2009).

[7] OSHA Instruction CPL 02-00-148, Field Operations Manual (2009), available at http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-148.pdf.

[8] The NEP classifies inspection team personnel according to the training and experience he or she has received. Level 1 personnel generally must have completed specified OSHA training courses and must have prior experience with chemical industry safety.

Plastic or Wood? Packaging Wars Break Out at APHIS

Who knew that simple wooden packaging materials, like pallets and crates, could create controversies over ozone depletion, brominated flame retardants, and forest destruction by insects? A new regulatory initiative raises the prospect of possible wholesale changes in how America ships goods, and in doing so has fueled a vigorous dispute over the respective merits of plastic and wooden packaging.

On August 27, 2009, the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) held a public meeting and published an advance notice of proposed rulemaking (ANPR) soliciting public comment on potential regulatory options for wood packaging materials (WPM) such as pallets, crates, cargo braces, and large spools, aiming to reduce the interstate spread of destructive pests such as the emerald ash borer and the Asian longhorned beetle.[1] WPM is currently regulated under a combination of uniform international treatment standards and domestic quarantines. APHIS also announced its intent to prepare an environmental impact statement (EIS) on the potential pest mitigation measures. These actions mark major steps in APHIS's long-standing efforts to address invasive species. They stand to greatly impact the intensely competitive debate between suppliers of wood and plastic pallets. Because WPM is so ubiquitous in the commerce stream, a very wide variety of businesses may be directly impacted. Among the options for new regulations are uniform domestic treatment standards, alternative materials, and even new business models, all of which could impact the practice and cost of domestic shipping.

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Background

When it comes to shipping goods, wood is currently king. In its ANPR, APHIS cited industry data indicating that 1.2 billion wood pallets are in circulation in the United States, with 93 percent of all goods moving on those pallets. WPM accompanies nearly all types of domestically shipped commodities. Yet WPM is subject to numerous restrictions. One set of restrictions arises from the Lacey Act, which aims to prevent illegal logging.[2] The substantive prohibition on illegally sourced wood (including wood used for WPM) has been in effect and enforceable since May 22, 2008; enforcement of the Lacey Act import declaration requirements for most WPM is being phased in over the next year.[3] APHIS also regulates WPM to prevent the spread of insect infestation.

The spread of pests like the emerald ash borer, pine shoot beetle, Asian longhorned beetle, and others poses a substantial and increasing threat to the environment, agriculture, and forestry. To reduce pest risks, WPM is regulated internationally under the International Plant Protection Convention's International Standards for Phytosanitary Measures (ISPM), specifically the ISPM-15 Guidelines. Under the Plant Protection Act,[4] APHIS has comprehensive regulations concerning imported unmanufactured wood articles.[5] Those regulations were amended in 2004 to incorporate ISPM-15.[6] Under the 2004 regulations, WPM may be imported under a general permit if it has been either heat treated to specifications or fumigated with methyl bromide, a regulated ozone-depleting chemical. It must also be marked with a certification of compliance and country and producer codes.

Domestically, WPM is subject to a number of pest-specific regional APHIS quarantines under 7 C.F.R. Part 301. For example, the federal emerald ash borer quarantine affects the Midwest and Mid-Atlantic, and the Asian longhorned beetle is quarantined in parts of New York and New Jersey. The quarantines place various conditions on the interstate movement of regulated articles from quarantined areas, creating confusion and compliance challenges for businesses. California, for example, has had dozens of interceptions of infested WPM from other states in recent years, according to APHIS.

Despite these regulations, in the ANPR APHIS expressed "a high level of concern that WPM may serve as a vehicle for human assisted long-distance movement of various plant pests." Part of the problem may be the regulatory program itself. The ANPR admits that "the variety of requirements creates a regulatory framework that may create confusion and present challenges to industry and stakeholder compliance."

Plastic packaging materials and pallets have arisen as a pest-free alternative to WPM. Plastic pallets may be equipped with radio frequency identification (RFID) tags for tracking. However, they are significantly more expensive than WPM, and they typically contain brominated flame retardants. The relatively rapid growth of the market for plastic pallets has led to furious debates over the materials' relative advantages, with wood and plastic packaging materials suppliers each claiming the other's products are more toxic and otherwise hazardous.[7] A plastic pallet supplier recently asked FDA to investigate the hazards of using WPM for transporting food.[8]

ANPR, Public Meeting, and EIS Scoping

To address the issues of plant pests and regulatory confusion, APHIS announced in the ANPR that "we are exploring the development of uniform measures to govern interstate movement of all WPM in order to provide greater ease of comprehension and compliance." The ANPR asks questions that implicate the future use of WPM for shipping goods in the United States. Among the options under consideration are the following:

Implementing the ISPM 15 Guidelines for the domestic movement of WPM as well as for imported wood. This option would likely increase the cost of domestically-produced WPM, but it is generally supported by WPM industry groups (with some potential changes) to reduce regulatory confusion.

Pallet pooling, wherein pallet companies would retain ownership of individual pallets

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throughout a pallet's lifecycle through rigorous inventory tracking and management, by leasing pallets to companies engaged in interstate commodity movement. This business model would necessitate the use of higher quality wooden pallets than those generally in use, or alternative construction materials (plastics or resin, or combined wood and plastics). These alternative materials are generally more expensive than traditional wooden pallets.

Minimizing use of methyl bromide as a fumigant. Although it is considered an ozone-depleting substance, methyl bromide is often considerably less expensive than heat treatment, so any phase-out of its use could raise costs for shippers and their clients.

At the August 27, 2009 public meeting in Washington, D.C., Paul Chaloux, the APHIS Emerald Ash Borer Program coordinator, spoke to attendees about APHIS's broad requests for public input on options for preventing the spread of pests in WPM shipped domestically. At this time, APHIS is most interested in comments on imposing a uniform national standard.

Under any option, the stated goal is "to maximize protection of U.S. agriculture and forests against plant pests associated with WPM without unduly affecting domestic trade or the environment."[9] In its ANPR and the accompanying notice of intent to prepare an EIS on the rulemaking options, APHIS enumerated more than a dozen questions on which comment is sought, including the impacts of different alternatives on pollutant emissions (including greenhouse gas emissions); who should be responsible for ensuring that WPM moving interstate meets any requirements that are imposed; the projected costs of various regulatory options; and the actual magnitude of the pest risks associated with WPM moving interstate.

Public statements at the meeting vividly illustrated the diverging viewpoints on the control of pests in packaging materials. A number of speakers expressed support for a shift to plastic packaging materials because of concerns about wood-treating chemicals, waste, and deforestation as well as pest control. On the other hand, speakers from the National Wooden Pallet & Container Association (NWPCA) and from WPM suppliers praised the environmental and cost benefits of WPM, even noting its potential use for biofuels. They also contested whether WPM is a prominent vector for pests at all, saying the risks were more from interstate transport of firewood. Supporters of both wood and plastic packaging materials referred to competing life-cycle analyses of their preferred products, indicating that APHIS will need to take a hard look at the science and economics behind any proposed rule. The Nature Conservancy expressed general support for domestic adoption of the ISPM-15 Guidelines, and another speaker noted that the methyl bromide option under ISPM-15 could be made more environmentally friendly with certain chemical conversion technologies. Ultimately, it seems there is wide agreement that some national standard is needed and perhaps inevitable, but the parameters of that standard will be quite contentious.

Implications

The potential regulation will directly impact shipping companies and packaging suppliers, but the direction APHIS takes in its pest control efforts will also impact a broad range of other industry sectors. This is especially true since it is, at this early stage, unclear which entities along the supply chain would be legally responsible for ensuring compliance. A move toward pallet pooling could pose the biggest change to how companies ship goods in America. Stakeholders should consider commenting on the potential economic, practical, and legal impacts of the various options for shipping regulations.

The August 27, 2009 public meeting in Washington, D.C. was only the first of a series. A subsequent public meeting on the topic was held in Portland, Oregon on September 2, and others will be held in Houston, Texas on September 15 and in Grand Rapids, Michigan on September 29.[10] Written comments on the ANPR and on the scope of the EIS may also be submitted to Docket APHIS-2009-0016 through October 26, 2009.

For more information, please contact Mark Duvall, mduvall@bdlaw.com, or Laura

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[1] 74 Fed. Reg. 41368 (Aug. 17, 2009) (notice of public meetings), http://edocket.access.gpo.gov/2009/pdf/E9-19643.pdf; 74 Fed. Reg. 43,643 (Aug. 27, 2009) (ANPR), http://edocket.access.gpo.gov/2009/pdf/E9-20708.pdf.

[2] See Beveridge & Diamond, P.C., "Update on the Lacey Act Import Declaration Enforcement Schedule" (Apr. 3, 2009), http://www.bdlaw.com/news-532.html; "Lacey Act Amendments Update" (Mar. 9, 2009), http://www.bdlaw.com/news-news-516.html; "Lacey Act Amendments Impact Wood Products" (Mar. 6, 2009), http://www.bdlaw.com/news-511.html; "Upcoming Deadlines Under Lacey Act Amendments" (Nov. 25, 2008), http://www.bdlaw.com/news-418.html.

[3] 74 Fed. Reg. 45415 (Sept. 2, 2009), http://edocket.access.gpo.gov/2009/pdf/E9-21216.pdf.

[4] 114 Stat. 438, 106 Pub. L. 224 (2000), codified at 7 U.S.C. §§ 7701-7772.

[5] 7 C.F.R. Part 319, Subpart - Logs, Lumber, and Other Unmanufactured Wood Articles.

[6] 7 C.F.R. § 319.40-3(b).

[7] See, e.g., National Wooden Pallet and Container Association, "Plastic Pallets: From Fire Hazard to Toxic Platform?", http://www.reuters.com/article/pressRelease/idUS140381+14-Apr-2009+PRN20090414; Intelligent Global Pooling Systems, "What the Wooden Pallet Industry Does Not Want You to Know", http://www.igps.net/fact_sheet1.php.

[8] Press Release, Intelligent Global Packaging Systems, "iGPS Calls for FDA Investigation of Wood Pallets and Risks to Food Safety: America's Food Supply at Risk from Bacteria and Formaldehyde-Laden Pallets" (Aug. 11, 2009), http://igps.net/about/press.php?id=57.

[9] 74 Fed. Reg. at 43,644.

[10] 74 Fed. Reg. 41,368 (Aug. 17, 2009), http://edocket.access.gpo.gov/2009/pdf/E9-19643.pdf.

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