Massachusetts Environmental and Land Use Alert

October 2013

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Massachusetts Environmental Developments

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The Massachusetts Supreme Judicial Court ruled that a "willful" violation enforceable by MassDEP requires that the person "knew or, due to his experience or expertise, should have known the operative facts that made his actions a violation of the law." *(full article)*

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Aladdine Joroff, an associate in Beveridge & Diamond, P.C.'s Wellesley office, will chair a continuing legal education program about environmental due diligence as a tool to determine the scope of, and develop defenses to, environmental risks in real estate and corporate transactions. *(full article)*

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The Massachusetts Supreme Judicial has upheld the Land Court's ruling that a variance is effective even if it is recorded outside the statutory one-year period where there was substantial reliance on the variance, no harm to interested parties, and the variance was recorded less than two weeks after the one-year recording deadline. *(full article)*

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The recent Massachusetts Appeals Court decision in *Kelley v. Cambridge Historical Commission* is noteworthy less because of its novel legal findings as much as a documentation of the delays incumbent in the development process. *(full article)*

Brian Levey to Present on Affordable Housing Under Chapter 40B at ABX

Brian Levey, a shareholder in Beveridge & Diamond, P.C.'s Wellesley office, will be a presenter at New England's largest building industry tradeshow, ArchitectureBoston Expo (ABX), at the Boston Convention & Exhibition Center on Wednesday, November 20, 2013. *(full article)*

National Developments

Multi-Agency Chemical Advisory on Ammonium Nitrate Asserts EPA Jurisdiction Under the Clean Air Act's General Duty Clause

On August 30, 2013, the U.S. Environmental Protection Agency, the Occupational Safety and Health Administration and the Bureau of Alcohol, Tobacco, Firearms and Explosives issued a chemical advisory that provides information on the hazards of ammonium nitrate storage, handling and management, and catalogs provisions of various statutes and regulations that may apply to activities involving ammonium nitrate. *(full article)*

EPA Expected to Withdraw Direct Final Rule Approving Use of Revised ASTM E1527 Standard for Phase I Environmental Site Assessments

The U.S. Environmental Protection Agency is expected to withdraw its proposed direct final rule approval of the updated ASTM International E1527 standard for Phase I Environmental Site Assessments, the EPA-approved method for meeting the "All Appropriate Inquiry" component of several affirmative defenses to liability under the Comprehensive Environmental Response, Compensation and Liability Act. *(full article)*

Government Shutdown – Implications for Government Environmental Programs and Activities

While the current government shutdown may be coming to a close, likely looming deadlines this winter raise the specter of further such interruptions in government business. *(full article)*

Recycling Company Fined $4.5 Million for Illegal Export of Electronic Waste; Executives Receive Prison Sentences

Executive Recycling, Inc., a U.S. electronic waste recycling business, and two company executives were sentenced this month by U.S. District Court Judge William J. Martinez for defrauding customers and illegally shipping electronic waste ("e-waste") overseas. *(full article)*

Firm News

Former Department of the Interior Attorney John Cossa Joins Beveridge & Diamond's Natural Resources and Project Development Group

We are pleased to announce the expansion of our Natural Resources and Project Development practice with the arrival of John G. Cossa, who has joined the Firm as an Associate in our Washington, D.C. office. Mr. Cossa most recently served as an Attorney-Advisor at the U.S. Department of the Interior's Office of the Solicitor, after joining the Department as a Presidential Management Fellow. *(full article)*

Beveridge & Diamond, P.C. Receives Minority Corporate Counsel Association's Thomas L. Sager Award for Diversity Accomplishments

Citing the firm's leadership and accomplishments in hiring, promoting, and retaining diverse and women attorneys, the Minority Corporate Counsel Association (MCCA) awarded Beveridge & Diamond a 2013 Thomas L. Sager Award on July 15, 2013. *(full article)*

Beveridge & Diamond Obtains Affirmance of Dismissal of Challenge to Client's Solid Waste Facility Operating Agreement in New York Appellate Court

A panel of the New York State Appellate Division, Third Department has unanimously affirmed a trial court's dismissal of a petition seeking an annulment of a client's 25-year operating agreement with the Town of Colonie, New York. *(full article)*

Beveridge & Diamond Assists San Antonio Water System in Negotiating $1.1 billion Clean Water Act Settlement

On Tuesday, July 23, 2013, the U.S. Environmental Protection Agency (EPA), the U.S. Department of Justice (DOJ) and the State of Texas lodged in federal district court in San Antonio a proposed consent decree with the San Antonio Water System (SAWS) resolving claims regarding sanitary sewer overflows (SSOs). SAWS is a public utility owned by the City of San Antonio, providing sewage treatment and wastewater services to the city. *(full article)*

Henry L. Diamond Featured at Inaugural D.C. Bar "Legends of Environmental Law" Speaker Series

Henry L. Diamond was the first speaker in the "Legends of Environmental Law" speaker series organized by the District of Columbia Bar's Environment, Energy and Natural Resources Section. The program took place on Wednesday, September 25th from 12:15-1:30 p.m. at Beveridge & Diamond's Washington, D.C. offices. Rachel Jacobson, Acting Assistant Secretary for Fish and Wildlife and Parks at the U.S. Department of the Interior moderated the discussion. *(full article)*

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Massachusetts Environmental Developments

Massachusetts "Tailoring Rule" Adjusts Major Source Permitting But Ignores Expanded Minor Source Permitting for Greenhouse Gases

Massachusetts May be Most Restrictive State, Continuing to Regulate Sources with as Little as 1 Ton Per Year of Potential GHG Emissions

On August 2, 2013, the Massachusetts Department of Environmental Protection (MassDEP) published a final rule that "tailors" the requirements of its major source operating permit program, bringing the state's operating permit applicability threshold for greenhouse gas ("GHG") emissions into line with federal requirements.

MassDEP did not similarly "tailor" its plan approval applicability threshold for GHG emissions under its minor source permitting program, thus bringing many small process sources into the plan approval program on the basis of small quantities of GHG emissions. MassDEP's failure to tailor its minor source permitting program means that Massachusetts now has among the most restrictive GHG permitting programs in the country for process related GHG emissions, requiring an air permit for stationary sources with a potential to emit of just one ton per year of GHGs.

MassDEP's Title V Operating Permit Program

Under its new rule, MassDEP establishes the following operating permit applicability thresholds for GHG emissions:

1. 100 tons GHG mass basis, which is defined as the sum of the potential to emit (pte) in tons per year (tpy) of the six GHGs prior to multiplying each by its associated global warming potential as set forth in 40 CFR part 98; and

2. 100,000 tpy of carbon dioxide equivalent (CO_2e), which is computed by adding together the mass amount of emissions in tons per year for each of the six GHGs multiplied by the global warming potential for each gas as set forth in 40 CFR part 98.

These changes are consistent with a portion of the U.S. Environmental Protection Agency's ("EPA's") "tailoring rule," which increases the GHG emissions permitting thresholds for major sources regulated under the federal Clean Air Act ("CAA"). See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514 (June 3, 2010).

Without the changes in the federal rule, major source construction and operating permits would have been required for facilities that emit as low as 100 tpy of GHGs. Similarly, without the changes in the MassDEP rules, major source operating permits would be required for facilities in the Commonwealth that emit as low as 100 tpy of GHGs.

In tailoring its GHG emissions thresholds, EPA recognized that GHGs should be treated differently than other pollutants under the CAA's permitting programs and sought to avoid greatly increasing the number of required permits, and thus to avoid imposing undue costs on small sources, overwhelming the resources of permitting agencies, and severely impairing the function of air permitting programs. Specifically, EPA warned of "permitting gridlock" and invoked the judicial doctrines of "absurd results" and "administrative necessity" as rationales for adopting the 100,000 tpy threshold. Id., at 31517. EPA decided at that time to defer a decision on whether to reduce the threshold from 100,000 tpy to a future date.

EPA reconsidered the 100,000 tpy GHG threshold in a final rule published on July 12, 2012. *See* 77 Fed. Reg. 41051 (July 12, 2012). In that rule, EPA found that the states had made little progress in developing a GHG permitting infrastructure, nor had they developed the significant streamlining approaches that would be necessary to address the flood of applications that would ensue if the threshold were reduced below

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100,000 tpy. As an example, EPA estimated that reducing the threshold to 50,000 tpy of GHGs would increase the permitting burdens on states by 40% over the 100,000 tpy threshold and by 99% over the level that existed pre-GHG permitting. *Id.*, at 41057.

Additionally, and importantly, EPA determined that reducing the threshold significantly would not have a commensurate impact on reducing GHG emissions. EPA stated:

> Our analysis shows that as the thresholds go lower, the number of sources increases dramatically, but the volume of GHG emission emitted by each additional source gets smaller and smaller…. Thus, the additional reductions in GHG emissions from lowering the thresholds… would be small under any circumstances even if the thresholds were lowered to 50,000…tpy CO2e. This small amount of incremental environmental benefit from lowering the thresholds, coupled with the additional burden associated with permitting these sources…supports the reasonableness of our determination not to lower the thresholds…

Id., at 41058.

MassDEP's Minor Source Permitting Program

In contrast to EPA's decision to retain its 100,000 tpy permitting threshold and reject a 50,000 tpy threshold, the surprising aspect of MassDEP's "tailoring rule" is that it does not revise the state construction permitting threshold of 1 tpy for GHG emissions contained in the state's minor source permitting program. While many common smaller sources of criteria pollutant emissions in Massachusetts are exempt from minor source permitting on the basis of permitting exemptions, there are other common smaller sources of GHG emissions that do not appear to fit within the existing exemptions, and in Massachusetts the threshold for requiring a minor source permit for those activities is 1 ton of potential emissions.

Massachusetts' minor source permitting program applies to the construction, substantial reconstruction, alteration, or subsequent operation of facilities that emit contaminants to the ambient air. *See* 310 CMR 7.02. MassDEP rules require an air permit for any stationary source with a potential to emit of just one ton per year or more of any single criteria or non-criteria pollutant. Id. GHGs are regulated as a non-criteria pollutant. The permitting rules contain exemptions for a variety of common small emission sources, such as emergency generators, small boilers, biomass heaters, fuel dispensing facilities, paint spray booths, and welding, but these exemptions were not adopted with GHG emission sources in mind.

Small sources of GHG emissions that could now be subject to GHG permitting requirements in Massachusetts include a variety of agricultural activities (e.g., soils, livestock and manure management), composting activities, venting or leaking of natural gas from gas lines, dental and veterinary anesthesia activities, and even wastewater treatment (i.e., septic system) venting.

One ton of GHG emissions is exceedingly small. By way of comparison, EPA has calculated that the average household electricity consumption results in just under 7.3 tons of CO2 emissions in a year. This would be actual emissions – the potential emissions that MassDEP requires you to consider to determine if permitting is required would be far higher. Further, if a state permit is necessary, a source is required to adopt best available control technology ("BACT") to reduce GHG emissions. See 310 CMR 7.08.

Because MassDEP chose not to tailor the minor source permitting program applicability threshold for GHGs, in Massachusetts, some sources appear to be required to obtain permits and install BACT pollution controls if they have a very small potential to emit GHGs.

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Consequences of MassDEP's Limited Tailoring Rule

Massachusetts may well be the only state in the nation that imposes such a low GHG emissions threshold. By choosing not to tailor the minor source GHG applicability threshold, MassDEP has taken a path that is starkly different than the one EPA pursued in promulgating the federal "tailoring rule." MassDEP has taken an initial step to tailor its GHG permitting program, but has only applied its tailoring rule to major sources, consistent with the federal program. For minor sources, which EPA does not regulate, MassDEP has chosen not to limit applicability, and as a result there is the potential that some very small sources across the Commonwealth are now subject to new GHG permitting requirements.

It is not clear at this point just what the impact of this limited tailoring decision will be, nor is it clear what MassDEP will require small sources to adopt as BACT to control very small sources of GHG emissions. Permitting application forms have been revised to include BACT information but only over time will the effect of these requirements become known.

For further information on GHG permitting in Massachusetts or nationally, and for questions about MassDEP's new rule, please contact Steve Richmond at srichmond@bdlaw.com or Corinna McMackin at cmcmackin@bdlaw.com.

An Update on the "New" Site Cleanup Regulations in Massachusetts

As we identified in our March 2013 Massachusetts Environmental and Land Use Alert, the Massachusetts Department of Environmental Protection (MassDEP) proposed major changes to its site cleanup program under M.G.L. c. 21E and its regulations at 310 CMR 40 on February 28, 2013. The comment period ended May 17, 2013, and the waiting began. During a recent public event, representatives of MassDEP provided some insight on what the final regulations will include, when they will be finalized, and when they will become effective.

Timing. MassDEP is estimating that the regulations will be promulgated during November or December 2013 and will become effective two months after promulgation.

Changes to the Proposed Rules. MassDEP received dozens of letters commenting on the proposed regulations, including from individuals, interested non-profit organizations, and the regulated community. MassDEP has indicated that the following changes from the original draft are likely to be made:

- For potential vapor intrusion sites, the regulations will provide additional clarity on when a condition of substantial release migration exists as a result of vapor intrusion.
- For vapor intrusion sites that will be closed with an active exposure pathway mitigation measure in place, the regulations will require a deed restriction known as an Activity and Use Limitation (AUL), but not a permit. In addition, requirements for notifying affected parties when the system is shut down will be limited to shutdowns of more than 30 days.
- For sites with nonaqueous phase liquid (NAPL), changes to notification requirements will not be made and requirements for closure will be clarified.
- For sites with dense-NAPL, the regulations will not require as a condition of closure that concentrations in groundwater of dense-NAPL constituents be less than 1 percent of the solubility limit.
- For sites that require a deed restriction or AUL, the requirements for AULs will be streamlined by eliminating the AUL Opinion.

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- Proposed language regarding the effect of a violation of an AUL or other failure to maintain the requirements of a closure statement will not be included.

Finally, MassDEP announced that it will be developing additional guidance to assist the regulated community in understanding and meeting these new requirements in the areas of NAPL, vapor intrusion, and AULs as well as updating the existing Questions and Answers.

For further information on these regulatory changes, site cleanup, or MassDEP, please contact Jeanine Grachuk at jgrachuk@bdlaw.com.

EPA Issues Draft NPDES Stormwater Permit for Industrial Activity Covering Massachusetts and Very Few Other States

In nearly all states, stormwater discharges from industrial activities are regulated by permits issued by state agencies under an authorization from the U.S. Environmental Protection Agency ("EPA"). In Massachusetts, however, the Massachusetts Department of Environmental Protection ("MassDEP") has never sought authorization for a stormwater permitting program and therefore stormwater permits are issued directly by EPA.

Aside from Massachusetts, the only other states that do not have their own federally approved stormwater permitting programs are Idaho, New Hampshire and New Mexico.[1] In those few states where there is no state-authorized program, dischargers of stormwater from industrial activities are required to apply to EPA to obtain coverage under a multi-sector general permit ("MSGP").

EPA issued the current MSGP in 2008 with a five-year term, and the permit was set to expire on September 29, 2013. However, since EPA only just published a draft of the replacement permit for public comment, *see* 78 Fed. Reg. 59672 (Sept. 27, 2013), the 2008 MSGP has been administratively continued in accordance with 40 CFR 122.6 and will remain in effect until the new draft permit becomes final. EPA estimates that the new MSGP will reissue in the spring of 2014. Yet, those currently covered by the 2008 MSGP may recall that prior to 2008, stormwater dischargers operated under an MSGP that was issued in 2000 and had to be administratively continued for three years until a new permit could be finalized.

New facilities that begin discharging stormwater associated with industrial activity in the areas where EPA is the NPDES permitting authority will not be able to obtain general permit coverage until a new final MSGP is issued. Accordingly, EPA has published a memorandum providing a "no action assurance" for these new facilities, stating that EPA will not pursue administrative or civil judicial enforcement action for lack of permit coverage provided a newly-discharging facility (1) is eligible for coverage under the 2008 MSGP, (2) notifies EPA of its operator status and intention to operate prior to discharge, and (3) complies with the obligations of the 2008 MSGP.[2]

There are 29 different industrial sectors which are covered by the MSGP. Compliance requirements vary by sector and are tailored to address specific stormwater issues encountered in each sector.

The draft permit proposes several interesting changes to the current MSGP requirements. Among those are the following:

- EPA proposes to require that each permit holder make a copy of its Stormwater Pollution Prevent Plan ("SWPPP") publicly available, either by identifying a URL link on the notice of intent ("NOI") that is filed with EPA to apply for the permit and then posting the SWPPP on the internet or by providing substantive stormwater management information in the NOI itself.
- EPA proposes to require electronic submission of each NOI, notice of termination,

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annual report, and all monitoring data, unless a waiver is granted. Waivers would be limited to individual reporting events.

- EPA proposes to require that all annual reports submitted under the new MSGP include a summary of the routine inspections and assessments conducted at the facility throughout the previous year.

- EPA proposes to prohibit the discharge of pavement wash waters directly to any surface water or storm drain inlet, unless the facility has implemented control measures or subjected the waste water runoff to treatment prior to discharge.

- As with the 2008 MSGP, dischargers to impaired waters (i.e., waters of the U.S. that do not meet an applicable water quality standard), must monitor for all pollutants for which the waters are impaired. However, EPA proposes to clarify that one is considered a discharger to an impaired water if the discharge flows directly to the water, including if the discharge enters a stormwater collection system that discharges to an impaired water.

- EPA proposes to substantially tighten up language associated with the conduct of corrective actions. These actions are currently required under a limited set of circumstances and the proposed permit expands the conditions under which corrective actions will be required, and imposes specific deadlines for completing these actions, including immediate actions on the day of discovery to address conditions that require corrective action.

Those subject to the 2008 MSGP should carefully review the general requirements in the draft permit as well as the sector-specific requirements that apply to their sites, to ensure they understand the changes to their stormwater program that will become effective if the draft permit is finalized as adopted.

EPA is accepting comments on the draft MSGP through November 26, 2013. If you have any questions about the draft MSGP, please contact Stephen Richmond at srichmond@bdlaw.com or Corinna McMackin at cmcmackin@bdlaw.com

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[1] EPA also issues federal stormwater permits on Indian lands, and in several territories and commonwealths such as American Samoa, the Island of Guam, the Commonwealth of the Northern Mariana Islands, and the Commonwealth of Puerto Rico, and in certain areas where there is a federal agency as facility operator.

[2] EPA's no action assurance terminates on March 30, 2014, or 30 days after the issuance of the new MSGP, whichever comes first.

Top Massachusetts Court Clarifies MassDEP's Authority to Assess a Penalty Without First Issuing a Notice of Violation

The Massachusetts Supreme Judicial Court ruled that a "willful" violation enforceable by the Massachusetts Department of Environmental Protection (MassDEP) requires that the person "knew or, due to his experience or expertise, should have known the operative facts that made his actions a violation of the law." Willful violations "not the result of error" do not require a Notice of Violation and an opportunity to cure before an administrative penalty can be assessed by MassDEP. The SJC's decision in *Franklin Office Park Realty Corp. v. Commission of Dep't of Envt'l Protection*, 466 Mass. 454 (2013) rejected interpretations proposed by both MassDEP and the entity against whom the penalty had been assessed.

The underlying violation alleged by MassDEP was the failure to handle asbestos containing roof shingles consistent with law. Franklin Office Park Realty Corp. (Franklin) discovered a leak in the roof of a three-family home that it owned. Franklin asked an employee of a related company to hire a roofing company to undertake repairs. This employee hired and supervised the roofing company. The roofing company removed

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shingles from the roof and apparently sent them as construction and demolition debris to a recycling company. The recycling company suspected the shingles may contain asbestos and returned them. In an inspection of the site by MassDEP, MassDEP found shingles containing friable asbestos in an unsealed container. MassDEP determined that Franklin had failed to meet the requirements of environmental regulations because it did not notify MassDEP of the project involving asbestos containing materials, failed to properly seal and label the container, and contracted to dispose of the material with a company not authorized to do so. MassDEP assessed a penalty of $18,225 without issuing a Notice of Violation with an opportunity to cure.

Before the SJC, MassDEP defended its assessment of a penalty without first issuing a Notice of Violation on the basis that the violations were intentional acts, and therefore willful, regardless of whether Franklin knew the operative facts (i.e., that the shingles contained asbestos) that made the conduct illegal. Franklin argued that an action is only willful if the person knew the act was illegal at the time the act occurred. The Court disagreed with both interpretations and held that an act is willful under this statutory provision only when the person "knew or, due to his experience or expertise, should have known the operative facts that made his actions a violation of the law." Therefore, the Court determined that the judgment of the Superior Court should be vacated and the matter remanded to Superior Court. However, because the hearing officer had found based on substantial evidence that Franklin, through its agents, knew or should have known that the shingles could contain asbestos, the Court determined that this standard had been met and the penalty assessed by MassDEP should stand.

For further information on penalties assessed by MassDEP, please contact Jeanine Grachuk at jgrachuk@bdlaw.com.

Jeanine Grachuk to Chair Program on Green Remediation in Site Cleanup under Proposed Changes to the Massachusetts Contingency Plan

Jeanine Grachuk, of counsel in Beveridge & Diamond, P.C.'s Wellesley office, will chair a panel discussion regarding the implications for "green remediation" in Massachusetts under proposed changes to the Massachusetts Contingency Plan (MCP). The program is sponsored by the Environmental Business Council of New England's Site Remediation & Redevelopment Committee and will include:

- Thomas M. Potter, Chief, Clean Energy Development Coordinator, MassDEP Bureau of Waste Site Cleanup
- J. Andrew Irwin, P.E., LSP, President, IRWIN Engineers, Inc.
- Michael E. MIller, Ph.D., Principal Environmental Chemist, CDM Smith
- James Doherty, Ph.D., P.E., LSP, Senior Project Manager, Nobis Engineering, Inc.

The event is scheduled for Wednesday, October 16, 2013 from 7:30 to 10:30 am at E.L. Harvey & Sons, 68 Hopkinton Road, Westborough, Massachusetts. For more information and registration, please click this link or contact Jeanine directly at jgrachuk@bdlaw.com.

Aladdine Joroff to Co-Chair Program on Environmental Due Diligence and Allocating Risks

Aladdine Joroff, an associate in Beveridge & Diamond, P.C.'s Wellesley office, will chair a continuing legal education program about environmental due diligence as a tool to determine the scope of, and develop defenses to, environmental risks in real estate and corporate transactions. The panel will also address strategies for allocating and managing potential liabilities associated with risks discovered during due diligence. The program is sponsored by the Boston Bar Association.

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The event is scheduled for Wednesday, October 23, 2013 from 3:00 – 6:00 p.m. at the Boston Bar Association, 16 Beacon Street, Boston Massachusetts. For more information and registration, please visit https://www.bostonbar.org/membership/events/event-details?ID=14152, or contact Aladdine directly at ajoroff@bdlaw.com.

Massachusetts Land Use Developments

Massachusetts Supreme Judicial Court Affirms Validity of Late-Recorded Variance

The Massachusetts Supreme Judicial has upheld the Land Court's ruling that a variance is effective even if it is recorded outside the statutory one-year period where there was substantial reliance on the variance, no harm to interested parties, and the variance was recorded less than two weeks after the one-year recording deadline. *Grady v. Zoning Board of Appeals of Peabody*, 465 Mass. 725 (2013).

The Zoning Act provides that "If the rights authorized by a variance are not exercised within one year of the date of grant of such variance such rights shall lapse…." M.G.L. c. 40A, § 10. Further, it states that, "No variance…shall take effect until a copy of the decision…is recorded in the registry of deeds…." M.G.L. c. 40A, § 11. In short, "a variance does not take effect until it is recorded and...the recording of a variance within one year of its grant is necessary to exercise it." *Cornell v. Bd. of Appeals of Dracut*, 453 Mass. 888, 891 (2009). However, the *Cornell* Court also noted that, "We leave for another day whether the failure to record a variance may void a variance on which a variance holder substantially has relied." *Id*. at 891 & n.7. Based on the facts in Grady, the SJC answered this question in the negative.

The Stefanidis obtained a frontage variance in order to construct a two-family house in Peabody. No appeal was taken and a Certificate of No Appeal was issued by the Town Clerk in July, 2008. Although the Stefanidis failed to record the variance within the one-year period, they had hired a general contractor, applied for and received a building permit, employed an architect to review the work progress and prepare reports, obtained a construction loan secured by a mortgage, drew substantial funds from the loan, and began clearing the site, all within this period. Shortly after the recording deadline, an abutter requested that the Building Inspector revoke the building permit due to the failure to timely record the variance. Learning of this appeal, the Stefanidis recorded the variance eleven (11) days after the one-year period expired. The Building Inspector denied the revocation request and the Zoning Board of Appeals upheld his decision. The abutter appealed to Land Court which, in turn, upheld the Zoning Board. The SJC took the case on its own motion.

The SJC held that the variance became effective in the "unusual circumstances here" consisting of (1) the performance of "substantial steps within the one year period" in reliance upon the variance, (2) the absence of "harm to any interested parties, including the plaintiff, other than any harm resulting from the original, uncontested grant of the variance," and (3) the recording of the variance "less than two weeks" after the one-year period. In a footnote, the SJC further ruled that Chapter 40A does not "mandate that actions taken to exercise a variance, such as obtaining a building permit… must be undertaken only after the variance has been recorded." Reciting the purpose of the variance recording requirement – ensuring timely recording and notice to subsequent purchasers and others of a limited right to deviate from the requirements of the zoning code – the SJC found nothing in the record suggesting that the plaintiff, other abutters, or any potential purchasers, were prejudiced by this "*de minimis* recording delay."

The SJC affirmed the Land Court's decision upholding the ZBA's ruling not to revoke the building permit.

For further information, please contact Brian C. Levey at blevey@bdlaw.com or Marc J. Goldstein at mgoldstein@bdlaw.com.

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Challenge to Redevelopment of Church Site in Cambridge Demonstrates Delays in Development Even from Inartful Opponents.

The recent Massachusetts Appeals Court decision in *Kelley v. Cambridge Historical Commission* is noteworthy less because of its novel legal findings as much as a documentation of the delays incumbent in the development process.

Developer Oak Tree Development, LLC acquired property adjacent to a historic church in North Cambridge with the intention of working with the church to develop both its and part of the church's property. The church, its outbuildings, and a park/garden on the property are of historical significance and over the years were protected by restrictions entered into by the church with the Massachusetts Historical Commission (MHC) and a written agreement with the Cambridge Historical Commission (CHC) governing how any development of the property could proceed. With the church and its property in disrepair and in need of financial support to maintain the historic structure, the church agreed to allow redevelopment of part of its property in conjunction with the demolition of an adjacent car wash into 46 residential condominium units with retail space, a rebuilt parish hall, and a reconfigured garden area.

Several neighbors opposed the project, seeking designation of the church as a landmark. However, when the developer and the church supported the designation provided the project was allowed to move ahead and that proceeds from the project would fund maintenance and preservation of the church building from an endowment, the CHC recommended both the project and the landmark designation to the Cambridge City Council, which approved both. A modification to the project to relocate the entrance to the parking garage kicked off another round of complaints and ultimately a lawsuit challenging the project.

Despite some exasperation with the plaintiffs' inartfully drawn complaint, the court nonetheless demonstrated the judiciary's willingness to (re)interpret the challengers' claims. The court stated that,

> Before turning to the plaintiffs' individual claims, we frame the overall merits. The amended complaint is thirty-three pages long, and it incorporates several hundred pages of attachments. The complaint is written in a discursive, stream of consciousness style, it lacks any organizational coherence, and it is riddled with overblown language and inappropriate ad hominem attacks. As a result, the specific legal theories on which the plaintiffs purport to rely are not readily discernible. We appreciate the difficulties the motion judge faced as he diligently tried to make sense of the plaintiffs' alleged causes of action. We attempt to do the same, mindful that we should not provide the plaintiffs the undue benefit of arguments they did not fairly raise.

The Superior Court and ultimately the Appeals Court dismissed each of the plaintiffs' possible theories in turn:

- The plaintiffs lack standing to enforce the terms of a preservation restriction entered into between the church and the MHC. The Appeals Court distinguished the Court's holding in *Rosenfeld v. Zoning Bd. of Mendon*, 78 Mass. App. Ct. 677 (2011) that held that "an owner of land that adjoins the restricted land is entitled to enforce a deed restriction, whether or not the instrument imposing the restriction contains an express statement that the adjoining land is intended to benefit from the restriction." The Appeals Court noted the different statutory schemes, the narrowness of the issue in Rosenfeld, and the fact that the plaintiffs are not even adjacent to the church site. However, the Appeals Court noted that it remains unresolved (and the plaintiffs fail to raise here) what whether a party lacks a right to seek judicial review of an administrative decision made by the holder of the restriction just because it lacks the right to enforce the government-held restriction itself.

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- The property is not in a Historic District under Chapter 40C and the "plaintiffs' suggestion that the area is a 'de facto Historic District' relies on a concept that the law does not recognize." As a result, the "adverse effect" standard of M.G.L. c. 40C, § 27C plays no role.

- The plaintiffs cannot demonstrate as a matter of law that they are intended third-party beneficiaries of the agreement between CHC and the developer and the church regarding development of the property. However, the Appeals Court noted again a lost potential opportunity for the plaintiffs, acknowledging that where "a government body enters into a contract in lieu of utilizing available regulatory vehicles, such a regulatory agreement implicates more than mere contract law, and the modification of such an agreement may not be immune from all judicial review." However, the Court said that the plaintiffs lost their chance because the plaintiffs never filed a timely action seeking review of the 2010 certificate of appropriateness (the means taken by the CHC to effectuate its decision).

The Appeals Court affirmed the lower court's dismissal, demonstrating the difficulties and pitfalls for developers and challengers in effectively litigating appeals of decisions in project development.

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

Brian Levey to Present on Affordable Housing Under Chapter 40B at ABX

Brian Levey, a shareholder in Beveridge & Diamond, P.C.'s Wellesley office, will be a presenter at New England's largest building industry tradeshow, ArchitectureBoston Expo (ABX), at the Boston Convention & Exhibition Center on Wednesday, November 20, 2013 at 9:00 a.m. His program, "Chapter 40B Fundamentals: Demystifying Affordable Multifamily Development," will first explain "the basics" of permitting a multifamily project under Chapter 40B, the state's affordable housing statute.

The program will explore the fundamental differences – both benefits and detriments – of permitting an affordable versus a market rate multifamily project including reduced permit time-frames and the waiver of local zoning and other rules and regulations. The second part of the presentation will focus on the key component parts of the affordable process: site eligibility letters, local permitting, appeals and project changes.

You can register for this program at http://www.abexpo.com/register/. After inputting your personal information, look for program B07 and save 15% on this session by using VIP promo code SDB07. You can contact Brian directly at blevey@bdlaw.com.

National Developments

Multi-Agency Chemical Advisory on Ammonium Nitrate Asserts EPA Jurisdiction Under the Clean Air Act's General Duty Clause

On August 30, 2013, the U.S. Environmental Protection Agency ("EPA"), the Occupational Safety and Health Administration ("OSHA") and the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") (collectively, the "Agencies") issued a chemical advisory (the "Advisory") that provides information on the hazards of ammonium nitrate storage, handling and management, and catalogs provisions of various statutes and regulations that may apply to activities involving ammonium nitrate. The Advisory follows President Obama's August 1, 2013, Executive Order: Improving Chemical Facility Safety and Security, issued in response to the tragic West Fertilizer

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Company ammonium nitrate explosion that occurred in West, Texas on April 17, 2013.

The Advisory summarizes the Agencies' conclusions on lessons learned from past ammonium nitrate accidents, hazard information, hazard reduction, community emergency planning, and emergency response measures. These conclusions are drawn from a wide range of legal authorities and non-binding sources. The regulatory authorities cited as "applicable to the manufacture of or processes involving ammonium nitrate" are

- the Clean Air Act, Section 112(r) (i.e., the "CAA General Duty Clause" (Section 112(r)(1)), EPA's Risk Management Program, and OSHA's Process Safety Management Standard;
- the Emergency Planning and Community Right-to-Know Act (administered by EPA);
- the OSHA Explosives and Blasting Agents Standards;
- the OSHA Hazard Communication Standard;
- the Chemical Facility Anti-Terrorism Standards (administered by the Department of Homeland Security, "DHS");
- the Department of Transportation ("DOT") Hazardous Materials Regulations; and
- the ATF Explosives Regulations.

The Advisory additionally provides what is, in effect, an ammonium nitrate research outline listing a total of 28 different design, construction and operational codes, standards and general references, including a series of guidance documents issued by the European Fertilizer Manufacturers Association. While noting that the "codes and standards are not binding," the Advisory indicates that they "may be adopted by reference into laws or regulations" and that "[u]sers of the codes and standards should consult applicable federal, state and local laws and regulations."

The long list of codes, standards and references creates ambiguity for facilities that handle ammonium nitrate, particularly related to how they should interpret their legal obligations and the weight they should place on the varied domestic and international standards. Moreover, the many laws and regulations cited in the Advisory are administered by a total of five different federal agencies (i.e., EPA, OSHA, DHS, DOT, and ATF), in addition to any state, local and tribal agencies whose authority may be invoked in particular cases, creating a significant potential for confusion.

Among the various regulatory authorities cited, EPA's role under the Clean Air Act may present the greatest potential for expansion of existing oversight and legal obligations. While the authorities of OSHA, DHS, DOT and ATF to regulate the management of ammonium nitrate are relatively well-defined, EPA's General Duty Clause authority under Section 112(r)(1) of the Clean Air Act is much less clear, and the agency has only recently begun to exercise this authority through enforcement activity.

The CAA General Duty Clause applies to a broad category of chemicals, both listed substances under Clean Air Act regulations and "extremely hazardous substances," a term that is not specifically defined. Interestingly, while ammonium nitrate is not a listed substance under Clean Air Act regulations, the Agencies assert in the Advisory that it "may be considered extremely hazardous under certain circumstances." This suggests that EPA would consider ammonium nitrate to be regulated by the CAA General Duty Clause in some circumstances but not in others.

The CAA General Duty Clause requires those who produce, process, handle or store such substances, "in the same manner and to the same extent as section 654, title 29 of the United States Code [i.e., the "OSHA General Duty Clause"], to identify hazards which may result from such releases using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent

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releases, and to minimize the consequences of accidental releases which do occur." 42 U.S.C. § 7412(r)(1) (emphasis added).

The OSHA qualifier in the CAA General Duty Clause is very important to evaluate in determining Clean Air Act applicability, as the separate OSHA General Duty Clause has been interpreted by both the courts and the Occupational Health and Safety Review Commission to apply only in limited circumstances, most importantly, in those circumstances where an employer has the ability to foresee a hazard and it is feasible to reduce or eliminate the hazard. See, e.g., *Fabi Constr. Co. v. Sec. of Labor*, 508 F.3d 1077 (D.C. Cir. 2007).

Consequently, following the West Fertilizer incident, the publication of the Advisory may be viewed by the Agencies under the Clean Air Act as a notice to the regulated community that specific types of accidents are foreseeable when managing ammonium nitrate, and that many rules, codes and standards, both domestic and foreign, identify methods and design parameters which can reduce or eliminate those hazards. Should there be future ammonium nitrate incidents, it would not be surprising to see EPA seeking to enforce allegations of CAA General Duty Clause violations, using the Advisory as evidence both that certain types of accidents were foreseeable and that risk reduction techniques described in the many cited rules, codes and standards were feasible.

For more information on the Clean Air Act General Duty Clause, please contact Stephen Richmond at srichmond@bdlaw.com or Russell Fraker at rfraker@bdlaw.com.

EPA Expected to Withdraw Direct Final Rule Approving Use of Revised ASTM E1527 Standard for Phase I Environmental Site Assessments

The U.S. Environmental Protection Agency is expected to withdraw its proposed direct final rule approval of the updated ASTM International E1527 standard for Phase I Environmental Site Assessments ("ESAs"), the EPA-approved method for meeting the "All Appropriate Inquiry" ("AAI") component of several affirmative defenses to liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). EPA will instead proceed with a traditional rule process. This change was necessitated by EPA receiving comments on the proposed direct final rule, including criticism of the agency's decision to allow parties to use either the current or updated version of the E1527 standard to meet AAI requirements.

The ASTM International "E1527-05 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" has been a tool for complying with EPA's AAI requirements since November 2006. The codification of the ASTM standard at 40 CFR Part 312 confirmed that the ASTM standard could be used for performing environmental due diligence by purchasers seeking to establish the innocent purchaser or bona fide prospective purchaser defenses under CERCLA. ASTM International's bylaws require standards to be updated and re-issued every eight years; after a three-year process, the organization recently revised the 2005 standard for Phase I ESAs and presented E1527-13 to EPA for approval as a tool to meet the AAI obligations.

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

- Clarified definitions of RECs and Historical RECs;
- Addition of the concept of "Controlled RECs," situations in which previous releases at a property that underwent risk-based closures were addressed, but contaminants were allowed to remain in place under certain restrictions or

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conditions, such as Activity and Use Limitations;

- Addition of vapor migration as a potential migration pathway that must be evaluated; and

- A presumption that consultants should review agency files (as opposed to treating this as an additional task subject to an additional fee) or explain why such review is not necessary.

EPA determined that the new E1527-13 standard is compliant with the AAI requirements and proposed adding it to the AAI regulations at 40 CFR Part 312. However, EPA did not address the status of the current E1527-05 standard, which would leave it as a continued option for satisfying AAI. Thus, parties could choose which Phase I ESA standard to use to satisfy their AAI requirements.

On August 15, 2013, EPA published a direct final rule to endorse the new ASTM standard; a direct final rule would have allowed EPA's decision to go into effect without further notice in three months if no adverse comments were submitted to the agency. However, because EPA received several adverse comments, it will instead proceed with the proposed rule to approve the E1527-13 standard that the agency simultaneously published on August 15, 2013. EPA has stated that it does not plan to accept additional comments on the proposed rule.

Negative comments on EPA's direct rule criticized both (i) the terms of the new ASTM Phase I ESA standard and (ii) EPA's proposal to allow users to rely on either the 2005 or the 2013 versions of the E1527 standard when performing Phase I assessments. Commenters worried that the concurrent ability of the 2005 and 2013 versions of the E1527 standard to satisfy CERCLA's AAI requirements will create uncertainty and fail to establish a system in which one standard practice applies to all transactions. These critics worry that (i) because the 2013 standard will likely be more expensive to implement, lenders, who account for a large portion of Phase I ESA assessments, will continue to use the 2005 standard, thus rendering the revised standard largely moot and (ii) use of two standards will create confusion and inconsistencies in the market place and may increase the difficulty of qualifying for CERCLA liability protections.

The option to continue using the existing 1527-05 standard to satisfy AAI requirements is also a feature of EPA's proposed rule, and EPA is expected to address the comments in its final rulemaking. One option for EPA would be to limit the time period in which parties could use either the 2005 or 2013 version of the E1527 standard to a defined transition period. EPA's direct rule was intended to become effective November 13, 2013, however, it is not clear if the agency will be able to issue a final rule by that date.

For more information, please contact Aladdine Joroff at ajoroff@bdlaw.com or Jeanine Grachuk at jgrachuk@bdlaw.com.

Government Shutdown – Implications for Government Environmental Programs and Activities

While the current government shutdown may be coming to a close, likely looming deadlines this winter raise the specter of further such interruptions in government business. As described below, most government activities will stop during the federal government shutdown.[1] To give a sense of scale, an Agency like EPA has furloughed all but about 5% of its staff of 16,000 during the shutdown, and that number will decline over time if the shutdown continues. As discussed below, various activities, such as decisions on many types of permits, licenses, and registrations, as well as government (and government contractor) engagement relative to non-emergency Superfund sites, are likely to be suspended until after the shutdown.

Shutdown rules allow certain "essential" activities to continue irrespective of whether there are resources presently available to fund the activity.[2] The most commonly referenced essential activities are those that address "emergencies involving the safety

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of human life or the protection of property." 31 U.S.C. § 1342 (2012). The reference to "safety" in this passage has been narrowly construed, and the reference to "property" has generally been construed as limited to *government* property – "federal lands, buildings, equipment, research property, and other property owned by the United States."[3]

In addition to these public safety and property-protection activities, Agencies also have the discretion to treat additional activities as exempt when there are carry-over resources available from prior appropriations to fund them or when there are trust fund resources available (e.g., Superfund and the Leaking Underground Storage Tank trust fund); however, this discretionary authority is sparingly used because of the difficulty in drawing lines between competing priorities, the perceived value of treating Agency personnel in equitable fashion, and the need to avoid the appearance of significant operations during a period in which the government is supposed to be shut down. With indications that the government may not reopen quickly,[4] here is generally what you can expect from several key Agencies and Departments as the shutdown continues.

1. EPA's Shutdown Activities

- **EPA Will Maintain Emergency Preparedness Capacity and Will Continue Work on Imminent Hazard Sites[5]:** EPA will deploy staff to address imminent threats to human health under the Superfund and leaking underground storage tank programs.[6] EPA may also service some non-emergency ongoing Superfund projects that are not dependent on federal funding.[7]

- **EPA Will Generally Not Award New Contracts and Grants and Will Suspend Payment on Most Contracts and Grants:** EPA will not award most contracts or Fiscal Year 2014 grants unless necessary to support the essential activities described above.[8] Contractors with existing contracts pertaining to non-essential work will likely be directed to stop work.[9] EPA will not pay most contractors while the government is shutdown.[10] Grant recipients may generally continue work during the shutdown, unless EPA involvement or approval is required in order for work under the grant to proceed.[11]

- **EPA Rulemaking Activities and Administrative Appeals Will Generally Stop:** Work on most federal rulemaking may be deferred until the shutdown ends.[12] For example, EPA has already postponed publishing a Federal Register Notice extending the comment period for a NPDES Electronic Reporting Rule[13] and is poised to cancel a stakeholder conference for radon emission standard rulemaking.[14] The Environmental Appeals Board is closed and will not process filings or consider extension motions until the government reopens.[15]

- **Most Other EPA Regulatory Activities Will Be Delayed:** The shutdown will affect most other EPA notice, permitting, and registration activities. EPA has indicated, for example, that it is extending review periods for TSCA section 5 Premanufacture Notices, Significant New Use Notices, Microbial Commercial Activity Notices, and exemption notices submitted before October 1, 2013.[16] As a general rule, air and water permits and FIFRA registrations will be similarly delayed.

2. DOI's Shutdown Activities

- **DOI May Process Offshore Drilling Permits, But Not Other Permits:** DOI will continue permitting offshore drilling and may review offshore drilling permit modifications.[17] However, DOI will stop onshore and offshore renewable energy activities.[18] DOI will not process or review most onshore oil, gas, coal, and mineral permits or leases.[19] DOI's Bureau of Land Management will stop work on all resource management plans.[20] Additionally, DOI will not permit or consult concerning the Endangered Species Act, Gold and Bald Eagle Protection Act, or Lacey Act. [21]

- **DOI May Continue Other Operations:** DOI's Bureau of Safety and Environmental

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Enforcement will continue preparing ongoing NEPA compliance documents,[22] but DOI's Bureau of Oceans Energy Management will stop NEPA work.[23] DOI will maintain emergency response programs and programs with carry-over appropriations.[24] DOI may also continue inspecting offshore drilling operations and onshore oil, gas, coal, and mineral leases.[25]

3. Federal Court and DOJ Shutdown Activities

- **Federal Courts Are Open – For Now**: The federal court system has indicated that it has sufficient carry-over resources to remain open after October 1 for approximately 10 days.[26] If the government remains shutdown as of October 15, the court system will issue new guidance that will likely prioritize cases meeting the essentiality test for continued work during a shutdown, while also ensuring basic functionality in the offices of the clerks of court.[27] Federal court filing deadlines are still in effect. [28]

- **DOJ is Requesting Stays in Most Matters, But Litigation May Continue:** DOJ will continue to service litigation throughout the shutdown, [29] but is taking affirmative action to scale down its activities. For the most part, the shutdown will not interrupt criminal litigation.[30] With respect to civil litigation, DOJ is requesting stays in active cases.[31] If a stay request is denied, DOJ will service the litigation.[32] EPA, DOI, and other agencies are expected to support DOJ litigation as necessary.[33] However, most Agency staff needed for litigation support have been furloughed, subject to being recalled for purposes of meeting litigation needs.

- **DOJ Will Seek Extensions With Respect to Deadlines Secured by Consent Decree:** During the shutdown, Agencies will generally not deploy staff to work on rulemakings or other actions compelled by consent decrees in deadline cases; rather, DOJ will file motions to extend timelines commensurate with the shutdown. Likewise, Agencies will not service settlement agreement obligations until after the shutdown.

4. Other Federal Agency Shutdown Activities

Other Agencies are Curtailing Activities, But Some Will Continue: FDA's continuing activities include emergency consumer protection services, high risk recalls, public health issues, and import entry review.[34] DOT is still enforcing hazardous material safety requirements, inspecting pipelines, and responding to hazardous material accidents.[35] FERC will maintain minimal oversight of energy markets and the bulk power system.[36]

5. State and Local Government Implications

- **The Shutdown May Also Affect State and Local Government Activities:** Grants and loans to state and local governments will be deferred until after the shutdown. This could impair environmental program activity for states relying on federal programmatic grants.[37] For local governments, state revolving fund money for wastewater or drinking water plant construction and upgrades will be unavailable until after the shutdown.[38]

Although the federal government is closed, our Washington, D.C. and nationwide offices remain available to assist our clients with their ongoing activities. A group of Beveridge & Diamond professionals, including former U.S. EPA General Counsel Scott Fulton, is monitoring the government shutdown's implications for your business and will update this alert as appropriate.

For more information please contact Scott Fulton at (202) 789-6030, sfulton@bdlaw.com, Steve Herman at (202) 789-6060, sherman@bdlaw.com, Peter Schaumberg at (202) 789-6043, pschaumberg@bdlaw.com, or Nadira Clarke at (202) 789-6069, nclarke@bdlaw.com.

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[1] Office of Mgmt. & Budget, M-13-22, *Planning for Agency Operations during a Potential Lapse in*

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Appropriations 3 (2013), http://www.whitehouse.gov/omb/memoranda_default.

[2] *Id.*

[3] EPA, *EPA Contingency Plan for Shutdown* 5 (2013), http://www.epa.gov/lapse/resources/epa-contingency-plan-2013.pdf.

[4] Karen Tumulty, Lori Montgomery & Debbi Wilgoren, *Washington Braces for Prolonged Budget Battle as Obama Cancels Part of Asia Trip*, Wash. Post, Oct. 2, 2013, http://www.washingtonpost.com/politics/obama-cancels-part-of-asia-trip-washington-braces-for-prolonged-budget-battle/2013/10/02/e035be98-2b4b-11e3-8ade-a1f23cda135e_story.html.

[5] EPA, *EPA Contingency Plan* 2.

[6] *Id.* at 6.

[7] *Id.* at 8.

[8] *Id.* at 10.

[9] *Id.*; *Government Shutdown Has Broad Effect Curtailing Activities at EPA*, InsideEPA (Daily News), Oct. 1, 2013.

[10] EPA, *EPA Contingency Plan* 10 (2013), http://www.epa.gov/lapse/resources/epa-contingency-plan-2013.pdf.

[11] *Id.*; *Frequently Asked Questions & Answers – Potential Government Shutdown* 16 (2013), http://www.epa.gov/lapse/.

[12] Stephen Lee, *OIRA Work Would Come to a Standstill During Shutdown, Shelanski Tells Pane*l, BNA (190 DEN A-15), Sept. 30, 2013.

[13] *Proposed NPDES Electronic Reporting Rule*, EPA, http://www2.epa.gov/compliance/proposed-npdes-electronic-reporting-rule (last visited Oct. 2, 2013).

[14] *Radiation Protection: Subpart W Rulemaking Activity*, EPA, http://www.epa.gov/radiation/neshaps/subpartw/rulemaking-activity.html (last visited Oct. 2, 2013).

[15] *EPA Environmental Appeals Board*, EPA, http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/ (last visited Oct. 2, 2013).

[16] *EPA Office of Pollution Prevention and Toxics*, http://www.epa.gov/opptintr/index.html (last visited Oct 2, 2013).

[17] U.S. Dep't of Interior, *Bureau of Safety and Environmental Enforcement (BSEE) Contingency Plan Fact Sheet* (2013), http://www.doi.gov/shutdown/index.cfm.

[18] U.S. Dep't of Interior, *Bureau of Ocean Energy Management Contingency Plan Fact Sheet* (2013), http://www.doi.gov/shutdown/index.cfm; U.S. Dep't of Interior, Bureau of Land Management Contingency Plan Fact Sheet (2013), http://www.doi.gov/shutdown/index.cfm.

[19] U.S. Dep't of Interior, *Bureau of Land Management Contingency Plan Fact Sheet* (2013), http://www.doi.gov/shutdown/index.cfm.

[20] *Id.*

[21] *Id.*; U.S. Dep't of Interior, *Fish and Wildlife Service Contingency Plan Fact Sheet* (2013), http://www.doi.gov/shutdown/index.cfm.

[22] U.S. Dep't of Interior, *Bureau of Safety and Environmental Enforcement (BSEE) Contingency Plan Fact Sheet* (2013), http://www.doi.gov/shutdown/index.cfm.

[23] U.S. Dep't of Interior, *Bureau of Ocean Energy Management Contingency Plan Fact Sheet* (2013), http://www.doi.gov/shutdown/index.cfm.

[24] U.S. Dep't of Interior, *Department of the Interior Contingency Plan for Operations in the Absence of FY 2014 Appropriations* 2 (2013), http://www.doi.gov/shutdown/index.cfm.

[25] Dep't of Interior, *Bureau of Land Management Contingency Plan Fact Sheet* (2013), http://www.doi.gov/shutdown/index.cfm; *U.S. Dep't of Interior, Bureau of Safety and Environmental Enforcement (BSEE) Contingency Plan Fact Sheet* (2013), http://www.doi.gov/shutdown/index.cfm.

[26] United States Courts, *Judiciary to Remain Open If Government Shuts Down*, http://news.uscourts.gov/judiciary-remain-open-if-government-shuts-down (last visited Oct. 2, 2013).

[27] *Id.*

[28] *Id.*

[29] U.S. Dep't of Justice, *U.S. Department of Justice FY 2014 Contingency Plan* 2-3 (2013), http://www.justice.gov/jmd/publications/doj-contingency-plan.pdf.

[30] *Id.* at 3

[31] *Id.*; *Government Shutdown Has Broad Effect Curtailing Activities At EPA*, InsideEPA (Daily News), Oct. 1, 2013.

[32] *Id.*

[33] U.S. Dep't of Interior, *Solicitor's Office Contingency Plan* 1-2 (2013), http://www.doi.gov/shutdown/index.cfm; EPA, *EPA Contingency Plan* 7 (2013), http://www.epa.gov/lapse/resources/epa-contingency-plan-2013.pdf.

[34] U.S. Dep't of Health and Human Servs., *Contingency Staffing Plan for Operations in the Absence of Enacted Annual Appropriations* 2 (2013), http://www.hhs.gov/budget/fy2014/fy2014contingency_staffing_plan-rev2.pdf.

[35] U.S. Dep't of Transp., *Operations During a Lapse in Annual Appropriations: Plans by Operating Administration* 17 (2013), http://www.dot.gov/sites/dot.dev/files/docs/DOT%202014%20Plan%20for%20

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[36] U.S. Federal Energy Regulatory Commission, *Plan for Operating in the Event of a Lapse in Appropriations* 2-3 (2013), http://www.ferc.gov/about/strat-docs/contingency-plan.pdf.

[37] *Government Shutdown Has Broad Effect Curtailing Activities At EPA*, InsideEPA (Daily News), Oct. 1, 2013.

[38] *Id.*

Recycling Company Fined $4.5 Million for Illegal Export of Electronic Waste; Executives Receive Prison Sentences

Executive Recycling, Inc., a U.S. electronic waste recycling business, and two company executives were sentenced this month by U.S. District Court Judge William J. Martinez for defrauding customers and illegally shipping electronic waste ("e-waste") overseas. The corporation was fined $4.5 million and sentenced to 3 years on probation. CEO and owner Brandon Richter was ordered to serve 30 months in federal prison, followed by 3 years on supervised release. Judge Martinez also ordered Richter to pay approximately $77,000 in fines and restitution and to forfeit over $140,000 in assets. Richter and Executive Recycling received their sentences one week after the corporation's Vice President of Operations, Tor Olson, was sentenced to 14 months in prison and fined $20,000.

After an 11-day jury trial, which began December 21, 2012, defendants were convicted on multiple criminal counts, including seven counts of wire fraud, the illegal export of hazardous waste to developing countries, smuggling, and obstruction of justice. Defendants induced businesses and government entities to enter into contracts or agreements under materially false and fraudulent pretenses. Specifically, while defendants represented to customers that they would dispose of e-waste "properly, right here in the U.S," defendants instead engaged in the unauthorized export of that e-waste to foreign countries, often receiving payments directly from foreign buyers. Since these misrepresentations and scheme were advanced through the mail and email, the federal government had jurisdiction to bring the mail and wire fraud charges in addition to the environmental crimes.

According to the government, the company received $1.8 million during the four year period in question. Between 2005 and 2008, Executive Recycling was the exporter of record for more than 300 exports from the United States, including the export of over 100,000 cathode ray tubes ("CRTs") containing lead. CRT disposal is regulated in the United States under the Resource Conservation and Recovery Act ("RCRA"). The single obstruction count arose from an alleged effort to destroy or conceal the export records.

Statements by EPA and DOJ officials suggest that this conviction is part of a growing enforcement trend regarding e-waste and exports. Jeff Martinez, the special agent in charge of EPA's criminal enforcement office in Colorado, emphasized: "Pollution and greed respect no boundaries and EPA is committed to combatting the illegal traffic of e-waste, which poses particularly significant environmental health risks in developing countries." According to U.S. Attorney John Walsh, this case demonstrates that "federal investigators and the U.S. Attorney's Office can and will reach beyond our country's borders to investigate crime and prosecute wrongdoers."

Companies managing e-waste would be wise to carefully review their disposal practices, including the practices of any entities retained to handle the recycling of e-waste. Electronics recyclers should be careful to identify and comply with all applicable federal waste export laws, any applicable state laws, and the requirements of importing countries, many of which more stringently regulate the trans-boundary movement of e-waste for recycling than the United States. In addition, recyclers should be alert to bills and legislative proposals in the United States and abroad that may expand upon existing prohibitions on e-waste exports. For example, on July 24th, 2013, the Responsible Electronics Recycling Act ("RERA") was introduced in the 113th Congress. If passed, RERA will prohibit the export of certain toxic electronic scraps and require responsible domestic recycling.

For more background on the Executive Recycling case, click here. For information on another recent enforcement action against an e-waste recycler for the illegal and fraudulent export of e-waste, click here.

For more information about Beveridge & Diamond's e-waste-related litigation and compliance practice, contact leaders of the firm's White Collar Practice Group, Nadira Clarke at (202) 789-6069, Lily Chinn at (415) 262-4012, and Pete Anderson (704) 372-7370, or leaders of the firm's work with clients in the electronics sector, Paul Hagen at (202) 789-6022 and Dan Eisenberg at (202)789-6046.

Firm News

Former Department of the Interior Attorney John Cossa Joins Beveridge & Diamond's Natural Resources and Project Development Group

We are pleased to announce the expansion of our Natural Resources and Project Development practice with the arrival of John G. Cossa, who has joined the Firm as an Associate in our Washington, D.C. office. Mr. Cossa most recently served as an Attorney-Advisor at the U.S. Department of the Interior's (DOI) Office of the Solicitor, after joining the Department as a Presidential Management Fellow. While at the Solicitor's Office, Mr. Cossa was lead counsel for the Bureau of Ocean Energy Management's (BOEM) offshore renewable energy program, and also provided legal advice to the Department's offshore and onshore oil and gas programs. Prior to joining the Solicitor's Office, Mr. Cossa served as advisor to the Assistant Secretary for Land and Minerals Management on Bureau of Land Management energy and land use issues.

Mr. Cossa's practice focuses on issues related to the development of energy and mineral resources on federally-managed lands. He advises clients on matters related to the leasing and development of oil and gas, wind, solar, and mineral resources both onshore and on the Outer Continental Shelf.

"John is a wonderful addition to the Firm. His experience with DOI energy, regulatory, and environmental programs will provide great value to our clients," said Peter Schaumberg, Co-Chair of the Firm's Natural Resources and Project Development practice and former DOI Deputy Associate Solicitor for Mineral Resources.

During his DOI tenure, Mr. Cossa received the Secretary's Commendation for Outstanding Service for his role in implementing the U.S. offshore renewable energy leasing program. He also received the Solicitor's Excellence Award in 2011 for outstanding contributions in the wake of the Deepwater Horizon oil spill.

Mr. Cossa, 39, is a graduate of Syracuse University and a former art dealer. He received his J.D. in 2007 from American University's Washington College of Law.

About Beveridge & Diamond, P.C.

Beveridge & Diamond's 100 lawyers in 7 offices across the U.S. focus on environmental and natural resource law, litigation, and alternative dispute resolution. The Firm helps clients around the world resolve critical environmental and sustainability issues relating to their facilities, products, and operations.

Beveridge & Diamond, P.C. Receives Minority Corporate Counsel Association's Thomas L. Sager Award for Diversity Accomplishments

Citing the firm's leadership and accomplishments in hiring, promoting, and retaining diverse and women attorneys, the Minority Corporate Counsel Association (MCCA) awarded Beveridge & Diamond a 2013 Thomas L. Sager Award on July 15, 2013.

"We are deeply honored to receive this recognition from MCCA," said Paula J. Schauwecker, Beveridge & Diamond's Diversity Principal. "We strive to enhance diversity and inclusion in our firm, and in collaboration with our clients and advocates like MCCA."

Benjamin F. Wilson, Beveridge & Diamond's Managing Principal added, "Diversity is firmly ensconced as a business imperative, as well as a social cause. Law firms and their clients have a unique opportunity to reach underserved populations, address immense social challenges, and achieve greater commercial success in doing so. As we thank MCCA for this great honor, we look forward to continuing our work with MCCA, our clients and colleagues on these issues."

Each year, MCCA awards the Thomas L. Sager Award to five law firms across the nation that exemplify diversity and inclusion by improving their hiring, retention, and promotion of minority attorneys. The award is named for MCCA board member and DuPont Company Senior Vice President and General Counsel Thomas L. Sager.

Among the accomplishments that contributed to Beveridge & Diamond's receipt of a Sager Award:

- Founding the Thurgood Marshall Opportunity Program with the Maryland Office of the Attorney General, a program that provides internships to diverse first year law students.
- Founding and maintaining the DC Diverse Partners Network that has now grown to include several other diverse lawyer groups nationwide.
- 33% of our Principals are women as compared with a national average of 18%.
- 56% of our Associates are women.
- 50% of our entry level lawyers in the fall associate class of 2012 were African-American women.
- Every year since 2008, at least half of our Associates and Of Counsel promoted to Principal were women or minority attorneys. In 2011 the figure was 80% women, and the 2011 Principal class also included two minority attorneys.
- 88% of respondents to an internal survey conducted in December 2012 agree or strongly agree that diversity & inclusion efforts make the firm a better place to work.

The Sager Award marks the second time in 2013 that Beveridge & Diamond has been recognized for its leadership on diversity and inclusion. In January 2013, the Firm received an AT&T Legal Department Diversity Award.

For more information, please contact Paula J. Schauwecker, Chair of our Diversity & Inclusion Committee at pschauwecker@bdlaw.com, (212) 702-5407.

About Beveridge & Diamond

Beveridge & Diamond's 100 lawyers in 7 offices across the U.S. focus on environmental and natural resource law, litigation, and alternative dispute resolution. The Firm helps clients around the world resolve critical environmental issues relating to their facilities, products, and operations. Working together with clients and the community, the Firm maintains significant initiatives aimed at expanding and promoting diversity and inclusion within the legal profession.

Beveridge & Diamond Obtains Affirmance of Dismissal of Challenge to Client's Solid Waste Facility Operating Agreement in New York Appellate Court

A panel of the New York State Appellate Division, Third Department has unanimously

affirmed a trial court's dismissal of a petition seeking an annulment of a client's 25-year operating agreement with the Town of Colonie, New York. *Conners v. Town of Colonie,* __ A.D.2d __, 2013 N.Y. App. Div. Lexis 4944 (3d Dept. July 3, 2013). Michael Murphy, a Principal in Beveridge & Diamond's New York Office, represented the client in the trial court and on appeal. The published decision establishes important law in New York that landfill operating agreements are not leases and are therefore not subject to state permissive referendum requirements, allowing municipalities greater flexibility for solid waste management planning.

The agreement upheld by the decision was the culmination of a thorough RFP process that was undertaken pursuant to NYS General Municipal Law ("GML") §120-w and sought proposals from qualified waste management companies to manage and operate the Town's solid waste management facilities, including an active landfill.

The petitioners claimed that the agreement was the functional equivalent of a lease, and therefore subject to NYS Town Law permissive referendum requirements. The trial court assumed, for purposes of deciding several motions to dismiss, that the Colonie agreement was a lease, but then rejected the petition on several grounds. First, the trial court found that there was a conflict between the two statutes that must be resolved in favor of the more specific statute – GML, and that the Colonie agreement therefore was not subject to the Town Law's permissive referendum requirements. Second, the trial court ruled that the petitioners' challenge did not fall within the permitted bases to challenge an agreement entered into pursued to GML § 120-w.

On appeal, the Third Department tackled the threshold issue and was swayed by our client's argument that the operating agreement could not be construed as a lease: "In view of the significant restrictions on [the company's] authority and control of the landfill and the rights and powers retained by the Town, the agreement does not convey 'absolute control and possession' to [the company] and is not a lease as a matter of law."

A copy of the appellate court's decision may be found here. To read the lower court's decision, please click here. Press coverage of the decision includes this article in Albany Times Union.

Mr. Murphy was assisted by associates Nicole Weinstein and John Paul and by James Slaughter, a Principal in the Firm's Washington office. For more information, please contact Michael Murphy at mmurphy@bdlaw.com.

Beveridge & Diamond Assists San Antonio Water System in Negotiating $1.1 billion Clean Water Act Settlement

On Tuesday, July 23, 2013, the U.S. Environmental Protection Agency (EPA), the U.S. Department of Justice (DOJ) and the State of Texas lodged in federal district court in San Antonio a proposed consent decree with the San Antonio Water System (SAWS) resolving claims regarding sanitary sewer overflows (SSOs). SAWS is a public utility owned by the City of San Antonio, providing sewage treatment and wastewater services to the city.

Karen M. Hansen, a Principal in Beveridge & Diamond's Texas office, led the Firm's team that represented SAWS. The team also included Washington office Principal and former EPA Assistant Administrator for Enforcement & Compliance Assurance, Steve Herman.

This negotiated Clean Water Act (CWA) Consent Decree represents the latest settlement in the federal government's longstanding "wet weather" enforcement initiative. SAWS will spend approximately $1 billion over the 12 year term of the consent decree on various SSO reduction measures including focused inspection, cleaning and testing of pipe in the sewer collection system and targeted capital programs focused on SSOs casued by verified condition and capacity issues. SAWS already has reduced its sewage spills by 30 percent since adopting a remediation plan more than two years ago. Read the SAWS statement here.

Beveridge & Diamond represents several municipal water systems nationwide on SSO and combined sewer overflow (CSO) matters, as well as other CWA enforcement and permitting issues. Read about our Municipal and Redevelopment Agencies experience here. The Firm's substantive experience with Clean Water Act regulation, combined with its enforcement and litigation experience before EPA and DOJ, uniquely position it to assist clients in this area. Read about our Clean Water Act experience here. For more information, please contact Ms. Hansen at khansen@bdlaw.com, (512) 391-8040.

Henry L. Diamond Featured at Inaugural D.C. Bar "Legends of Environmental Law" Speaker Series

Henry L. Diamond was the first speaker in the "Legends of Environmental Law" speaker series organized by the District of Columbia Bar's Environment, Energy and Natural Resources Section. The program took place on Wednesday, September 25th from 12:15-1:30 p.m. at Beveridge & Diamond's Washington, D.C. offices. Rachel Jacobson, Acting Assistant Secretary for Fish and Wildlife and Parks at the U.S. Department of the Interior moderated the discussion.

The "Legends of Environmental Law" speaker series provides an opportunity for conversations with renowned practitioners, academics and other legal professionals who have had a significant impact on environmental law.

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