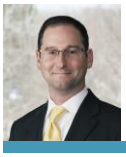
BEVERIDGE & DIAMOND PC
www.bdlaw.com

Massachusetts Environmental and Land Use Alert



Marc J. Goldstein
Principal
(781) 416-5715
mgoldstein@bdlaw.com

Jeanine L.G. Grachuk
Principal
(781) 416-5713
jgrachuk@bdlaw.com

Nancy Kaplan
Of Counsel
(781) 416-5755
nkaplan@bdlaw.com

Brian C. Levey
Principal
(781) 416-5733
blevey@bdlaw.com

Stephen M. Richmond
Principal
(781) 416-5710
srichmond@bdlaw.com

Brook J. Detterman
Associate
(781) 416-5745
bdetterman@bdlaw.com

Heidi P. Knight
Associate
(410) 230-1344
hknight@bdlaw.com

Virginie K. Roveillo
Associate
(781) 416-5726
vroveillo@bdlaw.com

November 2015

MASSACHUSETTS ENVIRONMENTAL DEVELOPMENTS

First Circuit Court of Appeals Clarifies Limited Deference to Surface Transportation Board Views on Railroad Preemption

Authors: Stephen Richmond and Marc Goldstein

In two companion decisions released in October, 2015, the U.S. Court of Appeals, First Circuit, considered the extent to which federal preemption of state and local laws applies to railroad operations involving the construction and operation of a proposed propane transload and storage, and a constructed wood pellet transload and production facility. *See Grosso v. Surface Transportation Board*, 2015 WL 6108060; and *Padgett v. Surface Transportation Board*, 2015 WL 6108047.

Questions relating to the extent of rail preemption have received substantial attention in the northeast in recent years due to questions that arise about the business operations of primarily short-line railroads which compete with non-railroad businesses in ancillary activities conducted at rail yards, in some cases without obtaining state and local environmental and zoning permits.

In the recent cases, Grafton & Upton Railroad Company (G&U), a short line railroad, proposed to build a propane transload and storage facility in Grafton, Massachusetts and a wood pellet transload and processing facility in Upton, Massachusetts, both adjacent to its rail line, without state or local environmental or zoning approvals.

Under the Interstate Commerce Commission Termination Act (ICCTA), the federal Surface Transportation Board (STB) has exclusive jurisdiction over activities that constitute "transportation by rail carrier," and state laws governing regulation of rail transportation are preempted. 49 U.S.C. §10501.

Upton Wood Pellet Facility – *Grosso v. STB*

Several neighbors to a rail yard operated by G&U petitioned the STB to institute a declaratory order proceeding in order to challenge the construction and operation of a wood pellet transload and processing facility that G&U constructed at a railyard in the Town of Upton. G&U had convinced the Town's Selectmen that its activities were preempted by ICCTA and that the Town's zoning bylaws therefore did not apply, including special permit requirements

and height limits. The petitioners argued that the facility was engaged in manufacturing and was therefore not "transportation by rail carrier" and also that the company that G&U hired to operate the facility was not a rail carrier and the facility was therefore not entitled to preemption.

The STB commenced a proceeding, but denied the petitioners the right to conduct discovery on the question of G&U's status. The STB then issued a declaratory order finding that the activities conducted at the facility were "transportation" and not manufacturing, and that the use of a non-rail carrier operator was not a sham to avoid state and local rules.

The petitioners appealed the decision to the First Circuit Court of Appeals. The first issue in contention was the extent of deference that the Court was required to give to the STB's decision on preemption. The STB, the U.S. Department of Justice and G&U all argued that the Court must provide substantial deference under the Supreme Court's seminal agency deference decision, *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). This is a critical argument because under the *Chevron* standard, federal courts will offer substantial deference to an agency to interpret a statutory or regulatory language when the language is not clear and the interpretation falls within the area of expertise of the agency. Court decisions in cases involving agency discretion are often determined on the question of whether *Chevron* deference is required.

Here, the Court emphatically refused to apply *Chevron* deference, indicating that such deference is not appropriate for STB determinations on preemption. Instead, in contravention of the arguments provided, the Court applied a much lesser form of deference, known as *Skidmore* deference, which merely allows the Court to defer to the agency's determination if the Court finds the interpretation provided by the agency to be persuasive. This leaves the Court with far more discretion than if *Chevron* deference were to apply. And indeed the decision in this case is a direct result of the application of this lower deference standard.

Turning to the primary substantive issue in the case, the Court then evaluated whether the activities to be conducted at the facility constituted traditional transloading or went beyond and constituted manufacturing. In its evaluation, the Court several times referred to STB precedent on transloading which Beveridge & Diamond participated in creating, in the case of *New England Transrail*, STB Finance Docket No. 34797 (STB June 29, 2007). Ultimately, after weighing the facts, and pointedly by not applying Chevron deference, the Court determined that the STB had not focused on a critical question – whether certain activities involving vacuuming, screening, bagging and palletizing wood pellets facilitated the physical movement of property and therefore constituted "transportation". Instead, the Court found that the STB had incorrectly focused on the cost efficiency of conducting these activities at the rail facility. In the Court's view, this "would result in a vast regulatory gap in which state and local regulation would be eliminated simply because the facilities were economically connected to rail transportation."

Using the STB's *New England Transrail* decision as guidance, the Court explained that the STB had in that case conducted the appropriate analysis, and had found that some activities – in that case the shredding of construction debris at a transload facility – would not be preempted because those activities were not necessary for the loading process and therefore were not properly considered "transportation" activities. In the Upton matter, the Court found that there had been no STB finding that the various vacuuming, screening, bagging and palletizing activities facilitated the transloading process. For this reason, the Court remanded the case to the STB to make this determination.

Grafton Propane Facility – *Padgett v. STB*

This case arose from a cease and desist order issued by the Town of Grafton in an attempt to force G&U to comply with its local permitting requirements when it began construction of a propane transload facility at its railyard. The Town issued the order and then filed a complaint in state trial court seeking an injunction. The state court enjoined further construction and directed G&U to file a petition with the STB.

Prior to filing its STB petition, G&U restructured its project by terminating its contracts with private parties to finance, construct and operate the facility. G&U then filed its petition with the STB, and the STB opened a declaratory order proceeding and issued a decision, concluding that G&U would hire staff with the necessary expertise to operate the

facility on its own, that the construction and operation of the facility - as reconfigured - did constitute transportation by rail carrier, and that the state permitting requirements and local zoning ordinances were therefore preempted. The STB also found that state fire safety and construction codes were not preempted as long as they were applied in a non-discriminatory manner.

The Town appealed the STB decision to the First Circuit Court of Appeals, on the basis of several arguments, none of which the Court found persuasive.

First, the Court found no merit to the argument that state law was preempted by ICCTA but local law was not. While the statute only identifies state law in its preemption language, courts have consistently held that the language is interpreted to include local law, and the First Circuit quickly dispensed with that issue.

Second, the Court found no basis to question the STB's finding that the facility would be operated by G&U rather than a private party. The Court indicated that it would typically defer to an agency's findings of fact, and that the facts stated by the STB established a basis on which the agency could conclude that G&U would operate the facility in the future.

Third, the Court refused to consider a new argument by the Town that it had not raised with the STB during the declaratory order proceeding, on the basis that the failure to raise an argument with an agency constitutes a waiver of that argument upon judicial review of the agency's final action. Therefore, the Court did not consider the Town's belated challenge to preemption on the basis that preemption would not apply to health and safety regulations. There is case law that supports the proposition asserted by the Town, and the facts of the case suggest that this would have been an interesting question for the Court to evaluate, but it was not considered due to the Town's late introduction of the issue.

Conclusion

Questions of when state and local law apply to activities at rail yards and along rail lines, and which laws may apply under certain circumstances, continue to draw attention and in some cases raise controversy. This is a fascinating area, and the status of the law remains somewhat unsettled. As a result, the scope of ICCTA preemption continues to evolve through litigation, on a case by case basis. For more information on these case developments, please contact Steve Richmond or Marc Goldstein.

Auto and Appliance Shredding and Recycling Companies Settle with Mass AG over Allegations of Air, Hazardous Waste, and Mercury Management Violations

Authors: Jeanine Grachuk and Virginie Roveillo

Two shredding and metals recycling companies recently settled a complaint brought by the Massachusetts Attorney General (Mass AG) and the Massachusetts Department of Environmental Protection (MassDEP) for alleged violations of the laws and rules governing air emissions, hazardous and solid waste, and mercury management. The companies settling with the government, Prolerized New England Company, LLC (PNE) and Metals Recycling, LLC (Metals Recycling), both doing business as Schnitzer Northeast, operate three Massachusetts facilities located in Attleboro, Everett and Worcester.

The Consent Judgment was approved by the Superior Court on September 24, 2015, and incorporates a civil penalty assessment of up to $900,000, two Supplemental Environmental Projects, installation of best available control technology (BACT), sampling requirements for shredder residue destined for use as landfill cover material, and a control plan for particulate matter (PM).

The Mass AG and MassDEP alleged a panoply of violations at the Massachusetts facilities, including that PNE and Metals Recycling improperly stored hazardous waste; improperly handled and disposed of mercury-containing components by failing to obtain proof that mercury-added vehicle switches were removed from vehicles prior to shredding; failed to register as a major source of air pollution prior to installing and using a shredder; failed to properly manage shredder residue, samples of which from one facility allegedly showed levels of lead and PCBs over permissible limits; improperly

handled asbestos; and failed to control particulate matter (PM) and VOC emissions from the shredder.

The Consent Judgment requires an upfront civil penalty payment of $450,000, with the remaining $450,000 to be incrementally suspended upon PNE's achieving specified compliance milestones. With this settlement, Mass AG and MassDEP continue their efforts to use enforcement cases to fund specific projects that are languishing without public funds. As part of the settlement, PNE and Metals Recycling also agreed to complete a Tire Pile Removal project at a cost of $300,000, removing accumulated waste tires at three locations in Middleton, Massachusetts, and a Mercury reduction project at a cost of $50,000, providing funding for the Product Stewardship Institute to help improve the handling of mercury-containing consumer products.

The Consent Judgment's compliance requirements are significant. PNE must submit a detailed Particulate Matter Control Plan to the MassDEP, identifying in detail all sources of PM-generating activities at the company's Everett facility and describing the PM control measures to be implemented to control and mitigate PM emissions. The Plan must address the remediation of "dust nuisance conditions" at the facility, including a schedule specifying the actions and targeted completion dates of each action.

Further, PNE must submit to MassDEP an air permit application for the shredder, including installation of the following BACT emissions control technologies:

- A pollutant capture system enclosing the shredder;
- A regenerative thermal oxidizer, with a temperature monitoring system, to control VOC emissions (98% destruction efficiency);
- A wet scrubber to control acid gases (98% destruction efficiency);
- A PM pre-treatment device and wet scrubber for PM emissions (99% destruction efficiency);
- A temporary continuing emissions monitoring system for VOCs during source testing;
- A gas flow monitoring system; and
- A data recording system.

Finally, the Consent Judgment imposes stricter testing and sampling protocols than previously required for shredder residue destined for use as landfill cover material. The sampling plan requires (1) bi-monthly sampling for lead, cadmium, and mercury; total PCBs; and Total Petroleum Hydrocarbons; and (2) annual sampling of a larger range of metals.

These settlements continue a lengthy history of compliance and enforcement negotiations with the metal shredding sector in Massachusetts, which began with the original conditional declassification of shredder residue and consent orders issued by MassDEP in 1989.

For further information on compliance with Massachusetts environmental regulations, please contact Jeanine Grachuk or Virginie Roveillo.

MassDEP Agrees to Settlements with Financial Institutions to Resolve Alleged Violations of Massachusetts Environmental Laws at Bank Owned Properties

Author: Heidi Knight

The Massachusetts Department of Environmental Protection ("MassDEP") recently entered into consent orders with two financial institutions to resolve alleged Massachusetts environmental law violations occurring at two bank owned properties.

Long Beach Mortgage Loan Trust ("Long Beach") entered into a consent order in September 2015 with MassDEP to resolve Massachusetts Wetland Protection Act violations that allegedly occurred at a lender-owned property in Haverhill.

In April 2012, MassDEP executed a consent order with the owner (at that time) of the property for unauthorized filling and alterations made to 10,000 square feet of bordering vegetated wetlands, and for unauthorized activity in the buffer zone; that order required full restoration. Long Beach took ownership of the property by foreclosure in July 2013 prior to any restoration work being done. Long Beach agreed to restore all of the altered area, including re-vegetation, by June 30, 2016, and to pay a $105,000 penalty, of which $30,000 will be paid immediately and $75,000 will be suspended provided a wetlands scientist submits documentation demonstrating the restored area has been maintained for five consecutive growing seasons through October 31, 2020.

In October 2015, Wells Fargo Bank, N.A. ("Wells Fargo") entered into a consent order with MassDEP to resolve allegations of noncompliance associated with a release of heating oil in the basement of a two-family house located in Fitchburg, Massachusetts. MassDEP found that the bank failed to take timely action to address the release, and failed to submit to MassDEP the required documentation addressing the spill, in violation of Massachusetts oil and hazardous materials cleanup regulations. MassDEP was first notified of the release in December 2013 by the Fitchburg Board of Health, but was unable to successfully make contact with Wells Fargo. MassDEP initiated a state-funded cleanup of the oil spill and issued a written request to Wells Fargo to provide notification and acknowledge continuation of cleanup actions at the site. However, according to MassDEP, Wells Fargo failed to perform response actions as required, to submit the required documentation, and to respond to a subsequent written notice of noncompliance.

Wells Fargo agreed to pay a $38,190 penalty, to perform all necessary cleanup actions, to establish a point of contact for environmental matters within the Commonwealth and to provide that person's contact information to all of its real estate brokers for its properties within the Commonwealth, including providing the brokers with instructions in the event of a future release of oil or hazardous materials.

These consent orders are a good reminder to financial institutions to identify and evaluate actual and potential environmental liabilities before purchasing or foreclosing on a property, and to conduct routine inspections of their properties to identify potential hazards and to implement appropriate measures to minimize those hazards.

For further information on evaluating environmental risks and liabilities to support informed decision making, and on complying with Massachusetts environmental regulations, please contact Heidi Knight.

Massachusetts Supreme Judicial Court to Hear Appeal of Challenge to MassDEP's Implementation of Global Warming Solutions Act

Author: Stephen Richmond

In April of 2015, we reported on an interesting Massachusetts Superior Court decision, *Kain v. MassDEP*, upholding the actions to date of the Massachusetts Department of Environmental Protection ("MassDEP") under the Global Warming Solutions Act to enact regulations establishing declining annual emission limits for greenhouse gases ("GHGs"). As we discussed at that time, MassDEP's actions were challenged as inadequate, and the trial court upheld the agency's steps to date, in the process granting an unusual amount of deference to MassDEP in rendering its decision. To review that article and to access a copy of the trial court's decision, click here. In October of 2015, the Massachusetts Supreme Judicial Court agreed to hear a challenge to the trial court's decision brought by the Conservation Law Foundation ("CLF").

In a press release, CLF claims that MassDEP has failed to implement the GHG reduction requirements in the Global Warming Solutions Act. By filing its appeal, CLF seeks to force MassDEP to issue regulations that will accomplish a steady pace of specific declining GHG emission limits on a broad category of emissions sources in Massachusetts in order to achieve a 25% GHG emission reduction by 2020 and an 80% GHG emission reduction by 2050, as mandated by the Act. At the trial court level, the MassDEP and the state Attorney General's office had argued that the Act's GHG reduction provisions were merely "aspirational" and were not directives.

This appeal raises two fascinating issues. First, the Trial Court conducted a truncated review of the statute for purposes

of establishing to what extent it would defer to the agency's position, and seemed to default to a conclusion that it must defer to MassDEP on its interpretation of the Act. This seemingly ignored substantial administrative law and statutory construction precedent and provided the foundation on which the Court upheld MassDEP's actions. It will be interesting to see how the Supreme Judicial Court addresses the statutory construction question, and whether it is willing to agree that MassDEP is in fact entitled to substantial deference. All the more interesting, this review occurs at the same time when the similar federal statutory construction framework is being questioned in a series of cases, with many observers speculating that the U.S. Supreme Court is moving towards changing the established precedent and limiting the amount of discretion that is customarily afforded to federal agencies, most notably the U.S. Environmental Protection Agency.

Second, there is the substantive question of what the Global Warming Solutions Act actually requires of MassDEP, and how comprehensive its GHG reduction rules must be. The Plaintiffs argued to the Trial Court that the Act was very specific, imposing a mandate on MassDEP to establish rules that adopt declining annual aggregate GHG limits (and not merely reduction targets) on GHG sources or categories of sources. MassDEP argued that the Act only imposed "aspirational" or "target" emissions goals. The Trial Court sided mostly with MassDEP, holding that the Act provided general guidance, leaving much to the discretion of MassDEP, and that the regulatory actions MassDEP had adopted to date were reasonable and not an abuse of its discretion. To the Trial Court, MassDEP had "substantially satisfied" the requirements of the Act, and that was sufficient.

Whether the Supreme Judicial Court will agree that MassDEP has substantial discretion in this area is not yet known, If the Trial Court's position is upheld on appeal, MassDEP's incremental approach to adopting GHG controls will continue. If the Trial Court's position is overturned, it is likely that MassDEP will be ordered to adopt regulations that contain more aggressive annual GHG reduction limits. This will certainly be a very interesting case to watch as it continues to unfold. For more information, please contact Steve Richmond.

Updates on the Site Cleanup Program in Massachusetts: TCE, LNAPL and More

Author: Jeanine Grachuk

The Massachusetts Department of Environmental Protection ("MassDEP") has been updating its policy and guidance to address improvements in scientific understanding as well as its experience in addressing site contaminants. As we previously reported, significant changes to the Massachusetts site cleanup regulations, known locally as the Massachusetts Contingency Plan ("MCP"), became effective June 20, 2014. These changes substantially revised numeric standards and closure requirements and modified the assessment and remediation of sites with vapor intrusion, historic fill, and light nonaqueous phase liquid ("LNAPL"). Today, we provide an update on recent activities.

TCE Sites

Trichloroethylene or TCE is a volatile organic compound that at some sites seeps from soil or groundwater into the air of overlying buildings. This is referred to as vapor intrusion. The 2014 changes to the MCP made the site closure standard more strict for sites with TCE in groundwater to address concerns regarding vapor intrusion. In addition, the MCP amendments substantially changed the approach to vapor intrusion sites placing greater emphasis on indoor air testing, among other things. Guidance regarding these changes is still being drafted by MassDEP.

But what of the sites with TCE in groundwater that were closed prior to the recent changes to the MCP? MassDEP discussed this question at the October 22, 2015 Waste Site Cleanup Advisory Committee meeting. MassDEP indicated that a fairly large number of sites (at least 700) have been closed out under previous versions of the MCP that allowed site closure under a less strict standard. Further, MassDEP indicated that some of these sites may pose an "imminent hazard" because the existing science on the toxicology of TCE indicates that TCE can cause harm to a fetus *in utero* over a fairly short time frame and at low concentrations in indoor air.

While it is not clear today how MassDEP is going to evaluate these sites and on what timeframe, it is clear that MassDEP believes that some number of these sites must be reopened to address a current public health risk, and MassDEP will be evaluating closed TCE sites to identify which must be reopened.

LNAPL Guidance

On November 1, 2015, MassDEP issued a second public review draft of its proposed LNAPL guidance entitled: "Light Nonaqueous Phase Liquid and the MCP: Guidance for Site Assessment and Closure." The first public review draft was issued in July 2014 and its informal public comment period ended October 20, 2014. Over 100 pages of comments from seven individuals or organizations were submitted to MassDEP.

Based on our review of the revised draft, the essential elements have not changed, but the guidance has been rewritten to provide a clearer and more developed description of the underlying science, how specific lines of evidence can be utilized to develop a site-specific conceptual site model, and how to use these lines of evidence to comply with the MCP. The guidance continues to provide as an option for petroleum sites a simplified approach that is presumptively compliant with the MCP.

MassDEP has opened an informal public comment period on the revised LNAPL guidance that ends on December 18, 2015.

Other MCP Guidance

Since the MCP was revised in June 2014, MassDEP has been developing guidance materials to assist with implementation. These include the Greener Cleanups Guidance, which has been finalized, and the LNAPL guidance, discussed above. In addition, MassDEP hopes to finalize policies on notices of activity and use limitations and vapor intrusion during the fall of 2015 and plans to issue draft guidance on historic fill for informal public comment during the fall of 2015.

For more information on site remediation in Massachusetts, please contact Jeanine Grachuk.

MASSACHUSETTS LAND USE DEVELOPMENTS

Affordable Housing Permit Revoked by Massachusetts Appeals Court

Authors: Marc Goldstein and Brian Levey

Local Regulation Improperly Waived in the Face of Evidence of Threat to Public Health

In a recent ruling sure to embolden municipalities seeking to block affordable housing projects, the Massachusetts Appeals Court revoked the approval of a Comprehensive Permit issued under the Anti-Snob Zoning Act, G.L. c.40B, §§ 20–23(Act) on the grounds that the local board of appeals erred in waiving certain waste disposal limitations in a local bylaw where there was evidence that the proposed project's waste disposal system would have caused elevated nitrogen levels in the private wells on the abutting properties. *Reynolds v. Zoning Board of Appeals of Stow*, 88 Mass. App. Ct. 339 (2015).

Affordable Housing in Stow

The Town of Stow and the region in general have a need for affordable elderly housing. Stow's subsidized housing stock is roughly six percent of its total housing stock. Stow Elderly Housing Corporation (SEHC) is a nonprofit owner, operator and developer of affordable housing. In 1983, SEHC obtained a Comprehensive Permit from the Stow Zoning Board of Appeals (Board) to construct Plantation Apartments I (Plantation I), a 55-unit low-income senior apartment complex. More recently, SEHC sought and received a Comprehensive Permit for "Plantation II," 37 units of low and moderate income elderly housing on a two-acre parcel (locus) in a residential zoning district. Eighty percent of the locus is also situated in the local water resource overlay protection district (WRPD) intended "to protect, preserve and maintain the existing and potential ground water supply and ground water recharge areas within the town…"

The plaintiff, whose home abuts the locus, appealed the Board's Plantation II decision to the Superior Court (Trial Court). His property and those of his neighbors are served by private drinking water wells and private septic systems located on their properties.

Comprehensive Permit for the Project

The Board, in granting the Comprehensive Permit, approved of the project being serviced by a private, on-site sewage disposal system located in the WRPD. This was made possible by the grant of waivers by the Board from local regulations governing sewage disposal in the WRPD. Stow's regulations, which are more stringent than those of the Massachusetts Department of Environmental Protection's (DEP), prohibit uses generating "on-site sewage disposal exceeding 110 gallons per day per 10,000 square feet of lot area."

On appeal from the Board's decision, the Trial Court found that the proposed project will generate, on a daily basis, six times the level of sewage and other wastewater allowed in the WRPD under the local regulation. On the strength of plaintiff's evidence, the Trial Court also found it "more likely than not" that the project will cause excessive nitrogen levels at the neighboring drinking water wells. Nonetheless, the Trial Court concluded, the Comprehensive Permit was properly granted since the sewage disposal system will meet all applicable State regulations, which do not, in these circumstances, require proof that adjacent wells will not have elevated nitrogen levels as a result.

Noncompliance with State Regulation Dooms Waiver of Local Regulation

Turning to the Board's decision to waive the local regulation, the Appeals Court assumed for purposes of its decision that the DEP's more restrictive limitations on discharges for septic systems in nitrogen sensitive areas did not apply to the locus and went on to address the question whether it was reasonable for the Board to waive the local bylaw provision.

As is often the case under c. 40B, the Board relied on the proposition that because the waste disposal system will comply with DEP regulations, it was lawful to issue the Comprehensive Permit. The Trial Court agreed. After acknowledging that "in many instances, a condition that requires the developer to meet State waste removal system standards is sufficient to protect local concerns," the *Reynolds* Court cautioned that this "is not necessarily the end of the inquiry." Citing earlier c. 40B case law, the Court "made clear that it was open to the board to justify denying an application for a comprehensive permit by identifying a health or other local concern that (i) supports the denial, (ii) is not adequately addressed by compliance with State standards, and (iii) outweighs the regional housing need."

In *Reynolds*, the plaintiff not only demonstrated that the project violated the local bylaw, but also presented evidence and persuaded the Trial Court that "it is more likely than not" that the project will cause excessive nitrogen levels at the plaintiff's neighbor's well. For his part, SEHC's expert testified that he did not investigate whether the proposed system would result in elevated nitrogen in the groundwater reaching abutting wells. Instead, he relied on the presumption that if a septic system is designed in conformance with State standards, the facility is presumed to protect public health.

The Court found this argument fatally flawed where the plaintiff had presented evidence rebutting any such presumption. In other words, "The judge's finding that the system would contaminate the groundwater such that unacceptable levels of nitrogen would reach an abutter's well demonstrates that compliance with the State standards… are insufficient to protect the groundwater from being contaminated by the proposed project." Thus, the plaintiff has identified a local health issue – maintenance of clean groundwater servicing local private wells – not adequately protected by compliance with a State standard.

Weighing the local concern of elevated nitrogen levels in the groundwater reaching an abutter's well, against the local need for affordable housing, the Court noted it was unaware of any instance of a project approval that would cause nitrogen levels or other contaminants in a neighboring private well to exceed DEP recommendations. The Court concluded that, "When faced with evidence that one or more adjacent private wells will have elevated nitrogen levels and there is no public water source in the area and no proposal to provide the abutter with clean water, it is unreasonable to conclude that the local need for affordable housing outweighs the health concerns of existing abutters. In these circumstances, the board's waiver of the bylaw provision limiting the flow into waste disposal systems within the WRPD was unreasonable."

The Comprehensive Permit was revoked and, as of this writing, an application for further appellate review is pending before the Massachusetts Supreme Judicial Court.

For more information about the development of affordable housing projects please contact Brian Levey or Marc Goldstein.

NATIONAL DEVELOPMENTS

EPA Publishes Clean Power Plan And Initiates Concerted Attempt to Reduce GHG Emissions from Fossil Fuel Fired Power Plants

Authors: Stephen Richmond and Jessalee Landfried

On October 23, 2015, the U.S. Environmental Protection Agency ("EPA") published its final Clean Power Plan, seeking to reduce greenhouse gas ("GHG") emissions from fossil fuel fired power plants throughout the country. The 300+ page final rule can be accessed here. 80 Fed. Reg. 64662. The final rule becomes effective December 22, 2015, although challengers to the rule have requested an immediate stay.

The Clean Power Plan is one of the most intensely scrutinized and debated rules in EPA's history. The proposed rule, published in June of 2014, generated 4.3 million individual comments. The final rule was immediately challenged in 15 separate appeals, including by 26 states in various coalitions and a number of industry parties. Numerous state, municipal and industry parties have also petitioned to intervene on behalf of EPA, including, a coalition of 18 states and several cities which includes all of the states that currently maintain GHG emission trading programs and/or have state-imposed GHG emissions reduction mandates. All of the petitions for review have been consolidated into a single case. Read the full article.

EPA Proposes Revisions to Hazardous Waste Import-Export Rules

Authors: Aaron Goldberg, Paul Hagen, and Ryan Carra

On October 19, 2015, the United States Environmental Protection Agency (EPA) proposed significant modifications to rules governing the export and import of hazardous waste. The proposal would affect transboundary shipments currently subject to 40 C.F.R. Part 262 Subpart H (regulating hazardous waste shipments for recovery between the United States and countries that are members of the Organisation for Economic Co-operation and Development (OECD) other than Mexico and Canada) as well as shipments subject to Subparts E and F (regulating all other hazardous waste imports and exports). The proposal would make certain substantive changes to the requirements of Subpart H, as well as expand the scope of the subpart to cover transboundary shipments currently subject to Subparts E and F. Stakeholder comments on the proposed modifications will be accepted until December 18, 2015. EPA expects the rulemaking to be finalized in Fall 2016 and to be effective by December 31, 2016. Read the full article

FTC Backs Off Green Guides Biodegradability Standard

Authors: Mark Duvall and Ryan Carra

On October 20, 2015, the U.S. Federal Trade Commission (FTC) issued an opinion and order holding that ECM BioFilms, Inc., a manufacturer of plastic additives, had made false or misleading claims about the biodegradability of plastics containing the additive, but the opinion and order also appeared to retreat from Green Guides standards for biodegradability claims put in place in 2012. In October 2012, the Green Guides, which function as FTC's non-bonding enforcement guidance for environmental marketing claims, underwent significant revisions, adding a statement that companies making unqualified "degradable" or "biodegradable" claims about a product should be able to substantiate that the entire product will break down after customary disposal within a "reasonably short period of time," which FTC defined as one year. In the order, however, FTC forbade ECM BioFilms from making unqualified biodegradable claims for plastics that would not break down within five years of customary disposal. Although the order does not amend the Green Guides, it may signal that FTC enforcement officials will be somewhat less likely to apply the one-year standard

going forward. Read the full article.

Prudence Prevails: Fifth Circuit Supports Narrow Reading of Liability under the Migratory Bird Treaty Act

Authors: Parker Moore, Jamie Auslander, John Cossa, and Maryam Mujahid

The U.S. Court of the Appeals for the Fifth Circuit recently ruled that the criminal prohibition on killing or injuring birds under the Migratory Bird Treaty Act ("MBTA") "only prohibits intentional acts (not omissions) that directly (not indirectly or accidentally) kill migratory birds." The appellate court reversed a criminal conviction under the MBTA for the deaths of migratory birds that had become trapped in uncovered equalization tanks containing oil and wastewater. In so doing, the Fifth Circuit solidified the split among federal courts over the appropriate interpretation of an unlawful "taking" under the MBTA when commercial operations inadvertently impact birds. In the process, it significantly increased the likelihood of the Supreme Court taking up the issue in the not-too-distant future. And it further cast doubt on a recently-announced regulatory initiative of the U.S. Fish & Wildlife Service ("FWS") to create "incidental take permits" under the MBTA covering commercial operations' impacts on migratory birds. Read the full article.

EPA Issues New Residual Risk and Technology Rule for Petroleum Refineries

Authors: David Friedland, Maddie Kadas, Kristin Gladd, and Hilary Jacobs

On September 29, 2015, the U.S. Environmental Protection Agency ("EPA" or the "Agency") promulgated its final Petroleum Refinery Sector Risk and Technology Review ("RTR") and New Source Performance Standards ("NSPS") rule[1] ("final rule" or "rule") for petroleum refineries that qualify as major sources. This rule fulfills EPA's obligations to evaluate residual risks and technological developments under sections 112(f) and 112(d)(6) of the Clean Air Act ("CAA"), respectively, for the petroleum refinery National Emission Standards for Hazardous Air Pollutants ("NESHAP") from Petroleum Refineries, 40 C.F.R. Part 63, Subparts CC and UUU (2015) (the latter of which applies to Catalytic Cracking Units, Catalytic Reforming Units, and Sulfur Recovery Units). Affected existing sources will be required to comply with the new requirements no later than 2018. However, some existing sources must comply with certain provisions earlier than 2018, depending on the provision and the date the refinery was constructed. New sources have 60 days from the rule's publication in the Federal Register to comply with all provisions. Read the full article.

FIRM NEWS & EVENTS

Beveridge & Diamond's Massachusetts Office Named Top Environmental, Land Use, and Litigation Practice by U.S. News/Best Lawyers

U.S. News Media Group and *Best Lawyers* have once again awarded Beveridge & Diamond's environmental and litigation practices a Tier 1 nationwide ranking in the 2016 Best Law Firms list. In addition, the firm's Massachusetts office is recognized as a Tier 1 practice in three areas: Environmental Law, Environmental Litigation, and Land Use & Zoning Law. Beveridge & Diamond's full 2016 Best Law Firms rankings include:

TIER 1

- ***National***
  Environmental Law
  Litigation - Environmental
- ***Austin***
  Environmental Law
- ***Boston***
  Environmental Law
  Litigation - Environmental
  Land Use & Zoning Law

- ***San Francisco***
  Litigation - Environmental
- ***Washington, DC***
  Environmental Law
  Litigation - Environmental

TIER 2

- ***National***
  Land Use & Zoning Law
- ***Baltimore***
  Commercial Litigation
- ***San Francisco***
  Environmental Law

TIER 3

- ***Washington, DC***
  Arbitration

"We thank U.S. News and Best Lawyers for continuing to recognize our firm's strength in the environmental practice area. Our clients and our lawyers make our success possible, and I want to thank them again this year for achieving this recognition of our preeminent national practices," said Benjamin F. Wilson, Beveridge & Diamond's Managing Principal.

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

Henry Diamond Receives ELI Environmental Achievement Award

On October 20, 2015, Beveridge & Diamond founder and senior counsel, Henry Diamond, received the Environmental Law Institute's (ELI) 2015 Environmental Achievement Award at the ELI Annual Dinner.

The award recognizes Henry's lifelong commitment to advancing land and water conservation. Henry's work on the Outdoor Recreation Resources Commission under President Kennedy laid the foundation for the creation of the Land and Water Conservation Fund (LWCF) and our national system of protecting wilderness areas and wild and scenic rivers. He later served as the first Commissioner of New York's Department of Environmental Conservation and later joined the nascent environmental firm that became Beveridge & Diamond. Read more about Henry's career here.

With assistance from some of Henry's "contemporaries and collaborators," we produced a brief tribute video that debuted at the ELI award dinner after warm introductory remarks from former U.S. Park Service Superintendent Bob Stanton. We invite you to view and share the tribute video.

Our firm has flourished because of Henry's mentorship of many in the environmental bar and the trust our clients place in Henry's vision of a firm that focuses on helping businesses resolve their most challenging environmental regulatory and litigation matters around the world. We strive to uphold the high standards Henry set for the firm, and we thank our clients and friends for the opportunities we have to collaborate with you.

As Pat Noonan, founder and Chairman Emeritus of The Conservation Fund, said in the video, "*Henry Diamond embodies the values of public service, political insight, and private sector activity. He has blended all of those into his life's work in a remarkable mosaic that has led to the conservation field, the environmental field, and sustainability that we now have today. It's a remarkable legacy.*"

On behalf of everyone at Beveridge & Diamond, thank you, Henry, for your lifetime of achievement in the environmental

field, and congratulations on this well-deserved recognition.

Video footage from the event that includes Bob Stanton's remarks and Henry's acceptance speech is also available.

Beveridge & Diamond Participates, Sponsors Association of Corporate Counsel Annual Meeting

As part of its 2015 sponsorship of the Association of Corporate Counsel's (ACC) Environmental & Sustainability Committee, Beveridge & Diamond proudly sponsored the 2015 ACC Annual Meeting that took place in Boston on October 18 – 21. ACC's Annual Meeting is the world's largest gathering of in-house counsel, offering a variety of programs on all aspects of in-house practice. Marc Goldstein, Nancy Kaplan and Brian Levey of Beveridge & Diamond's Wellesley, Massachusetts office attended along with several attorneys from our nationwide network of offices.

On October 19, Nancy Kaplan (Of Counsel, Wellesley) spoke during a session titled "What to Do When You're The Lawyer in the Room: Responding to Spills, Product Recalls and Facility Emergencies." Marc Goldstein (Principal, Wellesley) also spoke during a session titled "Environmental Toolkit for the Corporate Generalist/Small Law Department: Red Flags and Major Issues."

ACC's Environmental & Sustainability Committee helps ACC members effectively represent their clients on environmental, natural resource, and sustainability matters and develop in-house environmental programs.

Beveridge & Diamond Named Environmental Law Firm of the Year by Legal 500

On October 14, 2015, *The Legal 500 United States* recognized Beveridge & Diamond as law firm winner in the environmental practice area at its 2015 Awards Dinner in New York City. Acknowledging the firm as "Environment Team of the Year," *Legal 500* said that "2014 saw Beveridge & Diamond, P.C. acting in some precedent-setting cases regarding biosolids: it gained a favorable decision from the Washington Court of Appeals disallowing a county ban on the application of biosolids to farmland, representing the amicus curiae in support of the Washington State Department of Ecology."

The event took place at the Loeb Boathouse in New York's Central Park. John Kazanjian, Managing Principal of Beveridge & Diamond's New York Office, attended on behalf of the firm.

Earlier this year, *Legal 500* ranked Beveridge & Diamond as a top tier firm in the environment - transactional and regulatory category, and as a leading firm in the environmental litigation category in its 2015 edition of *Legal 500 United States*.

Legal 500 does not rank individuals, but recognized six Beveridge & Diamond Principals as "key lawyers" in its write-up of the firm:

- Karen Hansen (Austin, TX)
- Donald Patterson (Washington, DC)
- Stephen Richmond (Wellesley, MA)
- James Slaughter (Washington, DC)
- Harold Segall (Washington, DC)
- Fred Wagner (Washington, DC)

The *Legal 500 United States* provides in-depth, comprehensive analysis of law firms across the U.S. For more information, please contact Janine Militano at jmilitano@bdlaw.com.

Beveridge & Diamond Receives DRI's Law Firm Diversity Award

Citing the firm's "significant commitment to diversity" the Defense Research Institute (DRI) named Beveridge & Diamond

the winner of its 2015 Law Firm Diversity Award. DRI presented the award on October 8, during its 2015 Annual Meeting in Washington, DC.

"We are deeply honored to receive this recognition from DRI," said Paula Schauwecker, Beveridge & Diamond's Diversity Principal. " We are committed to enhancing diversity and inclusion (D&I) within our firm. and to working with our clients and organizations such as DRI to support D&I efforts throughout the legal community."

DRI is the nation's leading organization of defense attorneys and in-house counsel. As part of its robust environmental and toxic tort litigation and dispute resolution practice, Beveridge & Diamond participates regularly in DRI programs, including the annual DRI Toxic Torts and Environmental Law Conference and the DRI Diversity for Success Seminar and Diversity Expo.