

Energy - Environmental

Beveridge & Diamond, P.C. has extensive experience in the field of alternative energy development, including siting, state and federal permitting, contracting, and operational compliance for a range of projects from solar cell production to waste-to-energy facilities to cogeneration units as well as biofuels, biosolids and carbon sequestration. Our experience in alternative energy is drawn from our core practice areas in environmental law, encompassing regulatory compliance, project development, real estate and land use, corporate and deal transactions, advocacy before state and federal agencies and, where necessary, litigation.

Our experience includes:

ALTERNATIVE ENERGY PRODUCTION

Energy Production on the Outer Continental Shelf (OCS). We have extensive experience with the Minerals Management Service's (MMS) regulatory program for energy leasing and development on the Federal OCS. Our attorneys are knowledgeable on topics such as rulemaking procedures, the framework of regulatory programs for resource development, and royalty collections and enforcement and are frequently called upon to share their experiences at professional and educational programs across the U.S. As MMS proceeds with developing its new regulatory program for alternative energy development and alternative use of facilities on the Federal OCS, our attorneys are well positioned to assist clients with the siting and operating of such projects.

Waste-to-Energy Facilities. The firm has provided long term representation to owners and developers of waste to energy facilities, which combust solid wastes and produce electricity and steam. Firm lawyers have experience with facility siting, host community negotiations, facility permitting (federal, state and local), waste supply contracting, and ongoing facility compliance support. The firm has also provided legal support to the national trade associations that work on behalf of waste to energy facilities.

Proposed Waste-to-Ethanol Facility, NY. We are currently representing a New York municipality in relation to a proposed waste-to-ethanol facility being pursued by a private developer. The developer proposes to utilize solid waste and sludge to produce ethanol. The scope of the representation includes contractual, regulatory and dispute resolution matters.

Proposed Waste/Biomass-to-Energy Facility, NY. We are currently representing another New York municipality in relation to a proposed waste/biomass-to-energy facility being pursued by a private developer. The developer proposes to utilize sorted and processed municipal solid waste, construction and demolition debris, and raw wood waste to produce a syngas, which will be used to generate electricity. The scope of the representation includes environmental review, zoning and permitting matters.

Waste-Fired Power Facility, Southern NY. We represented a private developer in the siting and proposed construction of a waste wood-fired power production facility at a former industrial site in Staten Island. The project included plans to import waste wood fuel by barge. Beveridge & Diamond was retained to develop an environmental and regulatory permitting strategy for the project. We reviewed existing

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Energy - Environmental, *continued*

environmental investigations, hired environmental consultants to perform site characterization and project design work, prepared all relevant environmental and land use applications, and represented the project sponsor in the relevant permit proceedings. We also represented the client in New York City Environmental Quality Review, Uniform Land Use Review Procedure, and SEQRA proceedings.

Cogeneration Facilities, NY. We represented a joint venture of the deregulated subsidiaries of major utilities in obtaining all necessary approvals and authorizations for cogeneration facilities at Kennedy International Airport and SUNY Stonybrook. Legal work included supervising the existing site cleanup, ensuring compliance with SEQRA, securing all necessary approvals to construct and operate from NYSDEC and the Port Authority of New York and New Jersey, and clearance from the involved New York City agencies.

LFGTE Facility, NJ. We have been representing and advising the owners of a landfill gas collection and control system (GCCS) and landfill gas-to-energy plant in relation to a number of complex enforcement matters relating to a closed landfill (owned by another entity) and a subsequent landfill expansion project (undertaken by yet another entity), which extended over the old landfill and impacted our clients' GCCS and their ability to comply with certain permit requirements.

Landfill and LFGTE Facility, NY. At a privately owned landfill in NY, we advised the landfill owner regarding numerous contractual and regulatory matters concerning the construction and operation of a landfill gas collection system and gas-to-energy plant. Matters addressed at the site have included:

- ◆ Compliance with landfill New Source Performance Standards (NSPS), Title V and state air permitting obligations, and state solid waste management regulations;
- ◆ Resolving Title V and New Source Review source definitions pertaining to separately owned landfill and gas-to-energy facilities;
- ◆ Resolving performance issues concerning the gas-to-energy plant and associated flares;
- ◆ Addressing petroleum contamination associated with the gas-to-energy plant; and
- ◆ Resolving contractual disputes between the landfill owner and the gas-to-energy plant owner/operator.

Materials Recycling Facility, MA. Represented recycling company in the state and local permitting and construction contracting for the 600 ton per day expansion of a waste recycling plant that will produce numerous recycling streams, including wood fuels for biomass combustion facilities. Filed and successfully resolved judicial appeals challenging conditions placed on local site assignment and permitting approvals.

Construction and Demolition Debris Facility, MA. Represented waste processor in the site assignment of a 1500 ton per day construction and demolition debris recycling facility located in the Devens Enterprise Zone, which produces wood fuels for biomass combustion facilities.

Energy - Environmental, *continued*

ALTERNATIVE ENERGY TECHNOLOGY & PRODUCTS

We counsel clients in the electronics, lighting, and other areas, with regard to important regulatory issues affecting their business. In many cases, regulatory impact assessments should be made early on, for example, when a business is developing their business plan or making key decisions regarding location, operations, and logistics.

Solar. We provide advice to a solar energy equipment manufacturer regarding product take back and recycling options, hazardous waste issues, and state specific advice affecting product positioning.

Wind. We are substantially involved in wind and other alternative energy development. We are active members of the principal industry organization representing a broad range of wind, wave and current energy developers. We assisted a major offshore wind energy developer with preparing comments on new proposed federal regulations for offshore alternative energy development, and are working with that company to prepare development proposals under both interim and new regulations, once they become effective. Beveridge & Diamond attorneys also recently helped organize, and participated in, a major marine law symposium focused exclusively on marine renewable energy development.

Energy Efficient Products. Energy efficiency, through technological innovation and demand reduction, is often key to any alternative energy program. We advise numerous electronics companies and trade associations on state, Federal, and international energy efficiency requirements. We also provide content for an industry website which tracks the latest developments in energy efficiency programs and proposed requirements domestically and world-wide.

BIOFUELS PRODUCTION AND REGULATION

We represent clients in the emerging biofuels market, providing advice on the registration and certification of new ethanol, biodiesel, renewable diesel, and other alternative fuel products, as well as rules relating to their importation into U.S. markets. We also advise clients on federal and state regulation of fuels and fuel additives, including new biofuel technologies, and we offer extensive experience in related environmental permitting and land-use issues. Our clients in this area include biofuel manufacturers, importers, and growers (farms) as well as corporations involved in the development of agrochemicals and food and agricultural biotechnology.

Fuel and Fuel Additive Registration. We have led ethanol, renewable diesel, and biodiesel manufacturers and distributors through EPA's fuel registration (40 CFR Part 79) and related fuel and fuel additive regulatory programs. This guidance frequently includes analyses of EPA's Renewable Fuel Standard requirements associated with RIN generation and RVOs, and, when applicable, FDA, TTB, and other agency requirements. We also advise clients regarding the regulatory pathways applicable to novel biofuel feedstocks and renewable biomass -- including synthetic diesel products generated from municipal solid waste (MSW) and algae. We have further provided assistance to clients seeking to develop new fuel pathway petitions and MSW separation plans under the Renewable Fuel Standard.

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Energy - Environmental, *continued*

Fuel Distribution. We regularly advise clients with Part 79 and Part 80 regulatory questions related to the production and distribution of all types of transportation fuels, including questions related to Ultra Low Sulfur Diesel (ULSD), reformulated blendstocks, and gasoline blending components, as well as the operation of EPA's "substantially similar" requirement for gasoline. We have also assessed the obligations of importers and exporters under the Renewable Fuel Standard.

Regulation of Novel Biofuel Technologies. We review the impact of Federal biotechnology regulations (USDA, EPA, and FDA) on the testing and release of novel biofuel technologies for biotech companies, including algae-based fuels and genetically modified biofuel feedstocks.

Legislative and Regulatory Developments. We regularly assess the impacts of current legislative and regulatory initiatives affecting biofuels, particularly as they relate to EPA's implementation of the Renewable Fuel Standard.

California's Low Carbon Fuel Standard. Attorneys in our California office advise clients on a range of issues relating to California's Low Carbon Fuel Standard (LCFS) program, a key component of the State's implementation of the Global Warming Solutions Act of 2006 (better known as "AB 32"). We assist companies seeking to import ethanol into California on how to comply with the LCFS program, advise oil companies on their obligations under the LCFS program, and, on behalf of a variety of clients, monitor the litigation challenging the LCFS program under the U.S. Constitution.

BIOMASS UTILIZATION

Biosolids. Beveridge & Diamond has many years of experience and success in defending all aspects of beneficial use of biosolids, both for large municipal clients and private contractors, for example, we assisted a client obtain approval for use of its pelletized biosolids as a fuel in cement kilns in two states. Examples of our cases and victories include:

- ◆ *City of Los Angeles v. Kern County*, 509 F. Supp. 2d 865 (C.D. Cal. 2007); 462 F. Supp. 2d 1105 (C.D. Cal. 2006). We successfully challenged and overturned a local biosolids ban, enacted by ballot initiative in California's largest agricultural county, as unconstitutional and preempted under federal and state law. We assembled a coalition of local government and private entities engaged in the land application of biosolids as fertilizer to raise feed crops for local dairies. The targeted ban and the political campaign for its passage threatened to shut down these biosolids recycling operations. We demonstrated to the court that the ban unconstitutionally discriminated against our clients' biosolids and frustrated state law promoting biosolids recycling over disposal. We first secured a preliminary injunction, and then a permanent injunction at summary judgment that invalidated the ban. We also established our clients' entitlement to a substantial attorney fee award under 42 U.S.C. § 1983 (and § 1988). The case is on appeal to the Ninth Circuit and continues to command significant attention nationally.
- ◆ *O'Brien v. Appomattox County*, 293 F. Supp. 2d 660 (W.D. Va. 2003); 213 F.Supp.2d 627 (W.D. Va.

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Energy - Environmental, *continued*

2002), *aff'd*, 2003 WL 21711347 (4th Cir. 2003). We secured a preliminary injunction against a county ordinance that blocked farmers' rights under state and federal law to use biosolids as fertilizer, and then secured a permanent injunction and a payment by the defendant county to our clients for attorneys fees for civil rights violations under 42 U.S.C. § 1983.

- ◆ *Synagro v. Rush Township*, 299 F. Supp. 2d 410 (M.D. Pa. 2003). We secured a ruling that state law largely preempted local restrictions on land application of biosolids, leading to a settlement in which the defendant paid much of our clients' attorneys fees for civil rights violations under 42 U.S.C. § 1983.

Toxic Tort Defense of Organic Materials. We also have significant experience defending biosolids against common law tort suits alleging personal injury, health risks, and nuisance. Many biomass materials are vulnerable to claims regarding pathogens and toxins in bioaerosols and odor impacts. We have successfully defended biosolids toxic tort cases in state courts across the country, including a wrongful death case. Currently we are defending a major toxic tort suit alleging that biosolids caused serious pulmonary injuries and nuisance conditions. *Wyatt v. Sussex Surry LLC*, 482 F. Supp. 2d 740 (E.D. Va. 2007); *Wyatt et al. v. Sussex Surry LLC*, 2007 Va. Cir. Lexis 182 (Surry Co., Va. Cir. Ct. November 2, 2007).

TRANSACTIONS AND PROJECT SUPPORT

Beveridge & Diamond offers many of the basic legal services essential to all alternative energy projects, such as wind and solar. The Firm has handled contractual issues related to the purchase, sale, banking, trading, creation and validation of GHG and other emissions credits in domestic and international forums, under voluntary and mandatory regulatory systems. For example, we have provided advice to the largest corporate purchaser of voluntary carbon offset credits in the United States to help the company manage the risks (reputational, brand, and transactional) associated with the voluntary carbon market. Our advice has encompassed both the details of purchase and sale agreements as well as novel issues associated with the taxation, accounting and securities law compliance issues associated with GHG trading and credits.

We counsel public and private companies, as well as joint ventures, partnerships, other business entities and individuals, on a wide variety of commercial transactions. We are regularly involved in transactions concerning the disposition or acquisition of corporate assets and stock, as well as other corporate reorganizations, mergers, leveraged buy-outs and public and private issuances of debt and equity. We act as counsel to start-up ventures and non-profit corporations. We also represent borrowers in obtaining both secured and unsecured credit arrangements, including industrial revenue bond financings. Due to our extensive environmental experience, we are often involved in transactions in which environmental issues are present.