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Massachusetts Environmental and Land Use Alert

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MASSACHUSETTS ENVIRONMENTAL DEVELOPMENTS

Supreme Judicial Court Orders the Massachusetts Department of Environmental Protection to Expand Greenhouse Gas Regulation

Authors: Stephen M. Richmond and Brook J. Detterman

More greenhouse gas regulation is on the horizon as a result of the Massachusetts' top court's decision in *Kain v. MassDEP*. The Massachusetts Supreme Judicial Court ordered the Massachusetts Department of Environmental Protection ("MassDEP") to expand its regulation of greenhouse gas ("GHG") emissions in May and the full impact of this decision is unlikely to play out overnight. The case has broad implications for MassDEP's future interpretation and application of environmental laws in Massachusetts.

The case involved a challenge to MassDEP's compliance with the Commonwealth's Global Warming Solutions Act (the "GWS Act"). Among other things, the GWS Act required MassDEP to promulgate regulations that establish declining annual aggregate limits for GHG emissions. M.G.L. c. 21N, § 3(d). MassDEP was to issue those regulations no later than January 1, 2012, to take effect on January 1, 2013, and expire on December 31, 2020. MassDEP did not issue these regulations and in August, 2014, several citizens advocacy groups and individuals sued MassDEP in Superior Court, alleging that MassDEP had failed to carry out a clear statutory obligation to promulgate regulations by the date specified in the GWS Act (Suffolk Superior Court Civ. Action No. 14-02551).

The Superior Court that first heard the case sided with MassDEP, which argued that other greenhouse gas rulemakings the agency had completed fulfilled its statutory obligation under the GWS Act. The Massachusetts Attorney General somewhat incredibly argued that the mandate in Section 3(d) of the GWS Act should be interpreted as only requiring MassDEP to set "aspirational target levels" that would "help the secretary and the Department keep the state on track to meet the required 2020 reduction level." While this novel argument did not carry the day, the Superior Court did grant an extreme degree of deference to MassDEP, ruling that the agency "has fulfilled the essential mandate of §3(d)." In reaching this

conclusion, the Superior Court departed from the traditional two-step deference analysis that is applied to statutory interpretation by agencies, which first requires ambiguity in a statute before a court will assess whether an agency has reasonably interpreted that statute. The Superior Court never assessed the ambiguity of the GWS Act, instead simply deferred to MassDEP while observing that "[t]his court should be extremely wary of entering into controversies where we would find ourselves telling a coequal branch of government how to conduct its business."

On appeal, the Supreme Judicial Court sharply disagreed and reversed the Superior Court decision. The Supreme Judicial Court applied the traditional statutory analytical framework, finding that when "the words in a statute are clear and unambiguous," no deference is afforded to an agency interpretation that conflicts with the legislative intent expressed in the statute. Where the trial court had been "extremely wary of … telling a coequal branch of government how to conduct its business," the Supreme Judicial Court asserted that "this court will not hesitate to overrule agency interpretations of statutes or rules when those interpretations are arbitrary or unreasonable." The court went on to find that the GWS Act unambiguously imposes an obligation on MassDEP to promulgate firm GHG emissions limits (as opposed to the soft "targets" the agency advocated). After considering additional language in Section 3(d) of the GWS Act, the Court held that the statute requires MassDEP to:

- Issue regulations that address "multiple sources" of GHG emissions;
- Limit GHG emissions "that may be released" by these sources;
- Limit aggregate GHG emissions from each group or category of regulated sources; and
- Set GHG emissions limits for each year that decline on an annual basis.

While this case commands headlines because the Court ordered MassDEP to issue greenhouse gas regulations, an equally compelling legal impact of *Kain v. MassDEP* is the clear instruction from the state's highest court to state administrative agencies that they must implement statutory directives as enacted. The Supreme Judicial Court indicated that it simply will not grant deference to administrative agencies when the Legislature's intent is clear. In conducting its analysis, the Court also stated a willingness to look beyond the language of the statute by considering its "development, progression through the legislative body, the history of the times, prior legislation, contemporary customs and conditions and the system of positive law of which they are a part." This broad set of factors may lend support to litigants who challenge agency interpretations of Massachusetts statutes. Time will tell how far *Kain v. MassDEP* tips the deference scale, but the case is a good reminder that when the legislature speaks clearly, an agency cannot simply call the Legislature's mandate "aspirational" and adopt its own interpretation instead.

Kain requires MassDEP to undertake a round of rulemaking to set GHG emissions limits for yet-to-be-determined source categories. Importantly, the GWS Act does not identify (i) specific GHG reduction targets or (ii) *which* sectors or source categories are subject to those limits. As a result, MassDEP still retains some flexibility in crafting its GHG regulations under the GWS Act. But as *Kain v. MassDEP* clearly indicates, "the plain language of the statute requires the department set actual limits for sources or categories of sources that emit greenhouse gases through the promulgation of regulations." Advocacy organizations are watching those efforts closely, as is the Massachusetts legislature, whose Senate Committee on Global Warming and Climate Change has already held an oversight hearing to consider the impact of *Kain* and how the state should proceed. Marty Suuberg, the Commissioner of MassDEP, testified at that hearing and indicated he intended to fully comply with the *Kain* decision and that all options were on the table, including the imposition of a carbon tax.

Whether MassDEP will limit its rulemaking to a few industry sectors or pursue a more economy-wide approach is unclear at this stage. On the one hand, MassDEP may choose to target a few "high emitting" sectors, as the state did when it joined the Regional Greenhouse Gas Initiative ("RGGI"), with its focus on GHG emissions from power plants, and as the Legislature did when it mandated GHG reductions under RGGI pursuant to G.L. c. 21A, § 22. On the other hand, MassDEP may choose to follow the state of California, which is currently engaged in its own efforts to implement economy-wide GHG reductions through a variety of programs, including a multi-sector cap-and-trade program. Market-based

regulatory approaches have been created both in the Northeast and California, mandating reductions in GHG emissions while attempting to offer alternatives that reduce compliance costs by leveraging private markets, carbon offsets, allowance buffer pools, and a variety of other mechanisms, and it is distinctly possible that MassDEP will seek to follow this strategy. Should MassDEP wish to pursue a carbon tax, it would certainly require additional statutory authority. At least one bill is currently pending in the Legislature to accomplish this.

Many industries across Massachusetts will undoubtedly watch closely both the statutory and regulatory development processes and will want to participate in opportunities to comment and shape the proposals as they proceed.

For more information about Kain v. MassDEP or greenhouse gas regulation, please contact Stephen M. Richmond or Brook J. Detterman.

Massachusetts Moves To Assume Control of CWA Program as EPA issues Disputed MS4 Permit

Authors: Marc J. Goldstein and Jeanine L.G. Grachuk

Massachusetts' status as one of only four states not in control of the Clean Water Act program within its boundaries may change as the state begins the process of applying to U.S. EPA for delegation of that program. Delegation won't happen quickly and not soon enough to provide relief to municipalities that must meet the requirements of EPA's recently issued General Permit for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems in Massachusetts (known as MS4 systems).

The Commonwealth is in the first stages of the delegation process: legislation has been filed with the Massachusetts legislature to bring certain elements of state law into conformance with EPA requirements and MassDEP has engaged in extensive discussions with EPA. Delegation would require negotiation of a Memorandum of Agreement between EPA and MassDEP, new regulations implementing the program, and more manpower and money for an agency that has lost both over the past decade. The current estimate is for an increase in $4.7 million for Fiscal Year 2018, $3.2 million of which is to be dedicated to 40 new MassDEP employees and $1.5 million to be dedicated to contractual support. Over time, MassDEP would assume responsibility for issuance of NPDES permits (nearly half of which are currently expired) and other aspects of the Clean Water Act program.

The close timing of EPA's issuance of the MS4 permit in April and the Commonwealth's announcement that it would pursue delegation in May, combined with a very unusual and public dissent by the MassDEP to the MS4 permit, raised questions about whether the issuance of that permit was the primary driver for beginning the delegation process. However, concerns about the MS4 permit played no role in Massachusetts' efforts to assume control of the Clean Water Act program within the Commonwealth, according to Bethany Card, MassDEP Deputy Commissioner for Policy and Planning, in a discussion at the Boston Bar Association on June 14. Indeed, Card confirmed that the multi-year process of applying to EPA for delegation of the Clean Water Act program will not be fast enough to address issues arising out of the current permit, at least for some years.

In its letter agreeing to co-issue the permit, MassDEP remained concerned with the administrative burdens and costs the permit would potentially impose on municipalities. EPA had stated that it would go ahead with issuance of the permit whether MassDEP agreed to co-issue or not, and MassDEP ultimately decided it would rather be part of the implementation of the permit rather than participate from the sidelines. MassDEP cited some changes to the permit as a result of its discussions with EPA, including extension of the effective date to July 1, 2017 to provide municipalities more time in light of their budgetary cycles to plan for the financial and resource demands of the new permit.

However, the new permit, which reflects modifications to the 2014 draft permit released for comment on September 30, 2014 and replaces the long-expired 2003 permit within the Commonwealth, is drawing concern not only from municipalities but from private developers and property owners due to new requirements for newly built or renovated facilities that disturb an acre or more and discharge into an MS4 system to retain stormwater on-site or greatly reduce sediment and nutrient runoff from their land:

- Newly developed properties must include stormwater management systems designed to retain one inch of rainfall from a single storm event and/or reduce runoff of total suspended solids from the property by 90 percent and phosphorus runoff by 60 percent.
- Redeveloped properties must choose between a 0.8-inch retention mandate, or reducing suspended solids by 80 percent and phosphorus by 50 percent.

These provisions will apply to private parties through local programs, presumably bylaws and regulations, developed and enforced by MS4 permittees.

Among other criticisms, stakeholders have argued that EPA cannot implement these requirements through a permit and must promulgate regulations instead. In its response to comments, EPA rejected this critique and argued that the Clean Water Act and existing stormwater rules place "substantial discretion with the permitting agency to determine what controls are necessary, including controls such as the retention requirements at issue here."

Also in April, EPA published notice that the draft NPDES Construction General Permit is available for public comment. Because Massachusetts has not been delegated authority to issue NPDES permits under the Clean Water Act as discussed above, this permit will be effective in Massachusetts.

The most significant changes are the following:

- Requiring implementation of controls to minimize exposure to PCB-containing building materials to stormwater when demolishing a structure with at least 10,000 square feet of floor space that was built prior to January 1, 1980.
- Requiring posted signs to include information on how to contact EPA if a member of the public observes stormwater pollution.
- Amendments to provisions implementing the effluent limitation guidelines for the construction and development point source category that were finalized by EPA in March 2014 by clarifying the requirements to control erosion caused by discharges, where buffers are required, and soil stabilization requirements.

In addition, EPA specifically requested comment on seven specific issues, including requiring multiple operators of a site to develop a group SWPPP, imposing an earlier stabilization deadline, and frequency of inspections of snowmelt runoff.

The public comment period on the draft permit closed on May 26, 2016; however, EPA has not foreclosed reviewing late-filed comments. On its web page for the draft permit, EPA states that "a party may decide to submit late comments. If a party comments after the close of the comment period, EPA may consider such comments. When considering whether to take late comments, EPA will take into account the need to issue the final permit in a timely manner, prior to expiration of the current CGP."

For more information about MS4 and stormwater permitting, please contact Marc J. Goldstein and Jeanine L.G. Grachuk.

Gasoline with Lead is not Subject to the Petroleum Exemption in Massachusetts Clean-Up Statute Says Top Mass. Court

Author: Jeanine L.G. Grachuk

In a decision that has broad implications, gasoline with additives such as lead is not included in the exemption under the Massachusetts remediation statute, Chapter 21E, for oil releases located in certain drinking water areas according to the Supreme Judicial Court's decision upholding an interpretation by the MassDEP.

Under the state cleanup law, releases of oil in certain potential drinking water sources are subject to fewer requirements than releases of hazardous materials. MassDEP has interpreted this oil exemption to be limited to oil or gasoline without additives and not to include gasoline containing additives such as lead. An oil company, which was conducting cleanup of a leaded gasoline release, claimed the oil exemption on the basis that the definition of "oil" in M.G.L. c. 21E includes

gasoline with additives. The decision by the top Massachusetts court on June 6, 2016, in *Peterborough Oil Company, Inc. v. MassDEP* could have broad implications for clean-ups that involve gasoline with other additives, such as MTBE.

The Court started with Chapter 21E's definition of oil and concluded that the definition is ambiguous when the petroleum hydrocarbons are mixed with a hazardous material, such as lead. Having found that reference to CERCLA's petroleum exclusion was of little help, the Court looked at the intent of the legislature to give MassDEP broad power to promulgate regulations to address sites and to compel the cleanup of sites, finding that interpreting "oil" when used in this exemption to include leaded gasoline would "eviscerate the legislative purpose." Finally, the Court stated that MassDEP has consistently interpreted the oil exemption in this way. As such, the Court deferred to MassDEP's interpretation of the oil exemption, holding that it is limited to petroleum hydrocarbons not mixed with hazardous materials such as lead.

The language of the decision raises broader concerns regarding the scope of the so-called petroleum exclusion under Chapter 21E, which provides more limited liability for releases of oil as compared to releases of hazardous materials. It has been well understood in Massachusetts that releases of gasoline are subject to the petroleum exclusion consistent with the underlying facts in *Griffith v. New England Telephone & Telegraph Company*, 414 Mass. 824 (1993). However, to the extent the gasoline contains additives such as lead – or MTBE – this is less certain under the language in *Peterborough*: "we are unable to read into the statutory language a plain indication that the Legislature meant to include leaded gasoline within the definition of 'oil,' where the definition also provides that lead is not an 'oil.'"

For more information regarding this case or remediation in Massachusetts, contact Jeanine L.G. Grachuk.

Governor Baker Approves First Major Overhaul of Massachusetts' Public Records Law

Authors: Marc J. Goldstein, Brook J. Detterman and Virginie K. Roveillo

Massachusetts has its first significant update of its Public Records Law since the 1970s with promises of swifter responses and real consequences including attorney's fees for failures to comply.

In August 2015, we reported on a proposed bill from a joint House-Senate Committee on State Administration and Regulatory Oversight targeted at revamping the Massachusetts Public Records Law, Chapter 66, Section 10. Less than a year later, a somewhat different bill, Bill. H.4333 (An Act to improve public records) was unanimously approved by the House and Senate and signed by Governor Charlie Baker in June. The bill's provisions become effective January 1, 2017.

Open records advocates have long bemoaned the lack of transparency, high fees, and untimeliness of Massachusetts agencies and municipalities. In November 2015, the Center for Public Integrity again issued Massachusetts an "F" grade for public access to information and ranked it 40th in the nation. But while open government advocates are applauding Bill H.4333 as a step forward in modernizing the state's Public Records Law, critics remain concerned that the bill's provisions are too strict and will be expensive and difficult to implement, particularly at the municipal level.

The bill amends the existing Public Records Law requirements across several categories, including stricter response timeframes, limits on the assessment of fees, and measures for the award of legal fees. Key provisions include:

- A 10-day timeframe for responding to public records with documents, with certain limited provisions for requesting extensions.
- No fees for the first four hours of time spent fulfilling a request.
- Fees for black and white copies capped at 5 cents per page.
- Creation of educational materials, forms, guidelines, and other similar references to assist the public in making public records requests.
- Designation of "records access officers" by state agencies and municipalities to coordinate and handle responses to public records requests.
- Delivery of documents in electronic format, where available.

- Posting of certain categories of public records on agency and municipal websites, including:
  - annual reports,
  - notices of hearings,
  - proposed regulations,
  - open meeting minutes, and
  - awards of government grants.
- A rebuttable presumption in favor of awarding attorney's fees and costs to requesters prevented from obtaining public records. If attorney's fees are not awarded, the court's decision must explain why the award was denied.
- Punitive damages of $1,000-$5,000 may be assessed against agencies and municipalities that unlawfully withhold requested records or fail to timely produce requested records in good faith. Punitive damages are to be paid into a new Public Records Assistance Fund.

While the new amended law addresses some of the concerns of open records advocates as to timing, fees, judicial relief, and streamlining of procedures, Bill H.4333 stops short of removing the existing exemptions that limit the applicability of the Public Records Law to the judicial and legislative branches. Instead, a special legislative commission would be organized to study the accessibility of information on the practices and procedures of the legislative process and the constitutionality and practicality of applying the Public Records Law to the legislature, Governor's Office, and the judicial branch. The special legislative commission is required to prepare a report by December 30, 2017 with recommendations on expanding and reforming the Public Records Law as it relates to the various branches of government. Thus, there may be continued efforts to expand and revamp open access to a broader swathe of government records.

For more information on the proposed updates to Massachusetts' Public Records Law, please contact Marc J. Goldstein, Brook J. Detterman, or Virginie K. Roveillo.

Comments Due August 15 on EPA Proposal to Remove Emergency Defense from Title V Operating Permit Regulations

Author: Jeanine L.G. Grachuk

On June 14, 2016, EPA proposed to remove the affirmative defense for emergency conditions from the Title V operating permit program regulations. Comments on this proposed rule are due by August 15, 2016.

The Title V operating permit program regulations for both state and federal programs contain an affirmative defense for noncompliance with technology-based emissions limits under emergency conditions. EPA included the affirmative defense in response to comments, stating that "EPA believes it is appropriate, consistent with the emphasis in the part 70 regulations on providing sources with adequate operational flexibility, to include such a provision in the final rule." EPA modeled it after the NPDES permit upset provision in 40 CFR 122.41, and cited several Clean Water Act cases. *See* 57 Fed. Reg. 32250, 279 (July 21, 1992). This defense was included in the initial Title V program regulations without subsequent change. As a result, this defense has been written into many state Title V permit regulations, and into hundreds of Title V permits throughout the nation.

EPA proposes to eliminate this provision based on the D.C. Circuit's decision in *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014), which vacated the affirmative defense for startup, shutdown and malfunction (SSM) events in certain National Emission Standards for Hazardous Air Pollutants (*e.g.*, for Portland cement plants) as outside the EPA's statutory authority. According to the court, under the structure of the Clean Air Act, EPA's role is to set administrative penalties and the court's role is to determine civil penalties. Because the SSM defense purported to impede the court's authority to make determinations as to what civil penalty is appropriate in any particular case, the court found it beyond EPA's authority.

Based on the reasoning of the *NRDC v. EPA* decision, EPA determined that the state implementation plans (SIPs) containing similar affirmative defense provisions were inconsistent with the Clean Air Act, as described in a supplement to a previously proposed SIP call. *See* 79 Fed. Reg. 55919 (Sept. 17, 2014). In finalizing the SIP call, EPA rejected arguments that its action was inconsistent with the Fifth Circuit's decision in *Luminant Generation Co.* v. EPA,

714 F.3d 841 (5th Cir. 2013) that upheld the EPA's authority to approve a SIP containing an affirmative defense for unplanned SSM events. EPA stated: "The Fifth Circuit did not determine that the EPA's interpretation … was the only or even the best permissible interpretation. It is clearly within EPA's legal authority to now revise its interpretation to a different, but still permissible, interpretation of the statute." *See* 80 Fed. Reg. 33851, 856 (June 12, 2015).

The June 14, 2016 proposed rule extends the reasoning of *NRDC v. EPA* to the Title V regulatory provisions authorizing an affirmative defense. As stated in the proposal, EPA has determined that this provision is likewise beyond its authority under the reasoning of the court, and now seeks to remove it from the regulations.

Once the affirmative defense provision is removed from its regulations, EPA expects states that have the affirmative defense in their Title V permit programs to remove it and submit these program revisions to EPA for approval. EPA is expecting this to occur within 12 months for most states. Once that occurs, EPA expects that new, renewed or modified Title V permits issued after the revision date would not include the affirmative defense provision. Of course, any state as a matter of state law could include a similar provision that applies to state-enforceable provisions of a permit.

If this proposal is finalized as proposed and the affirmative defense is removed from Title V permits, sources will no longer be able to demand application of the defense when its conditions are met, but instead must plead for enforcement discretion. On the upside, this will enable sources to more vigorously seek enforcement discretion in circumstances that do not exactly fit the affirmative defense. On the downside, sources are left to the mercy of the agency to exercise its enforcement discretion, which may not be exercised in the manner that the source would like and is not reviewable on appeal.

For more information on Title V permitting, please contact Jeanine L.G. Grachuk.

Massachusetts Attorney General Joins Multi-State Coalition Investigating Climate Change Disclosures

Authors: Heidi P. Knight and Leah A. Dundon

Massachusetts State Attorney General Maura Healey has joined a coalition of attorneys general from 15 other states and the Virgin Islands—the "AGs United for Clean Power" coalition—who, according to Attorney General Healey, are "working as quickly and as aggressively as we can to fight climate change" by investigating the adequacy of public companies' statements to their investors and the public about potential impacts of climate change on their businesses.

The coalition was convened by New York State Attorney General Eric Schneiderman and also includes state attorneys general from California, Connecticut, District of Columbia, Illinois, Iowa, Maine, Maryland, Minnesota, New Mexico, Oregon, Rhode Island, Virginia, Vermont, Washington, and the U.S. Virgin Islands.

Background

Federal securities laws and Securities and Exchange Commission ("SEC") regulations require publicly held companies to make certain disclosures in their SEC filings for the benefit of their investors. When a company is required to file a disclosure document with the SEC, the requisite form will largely refer to the disclosure requirements of Regulation S-K (17 CFR Part 229) and Regulation S-X (17 CFR Part 210). The SEC has promulgated rules that specifically address disclosure of environmental issues and which the SEC maintains may require disclosure regarding certain material risks associated with the impact of climate change. As an example, Item 303 of Regulation S-K requires disclosure of any "known trends or any known demands, commitments, events, or uncertainties . . . that are reasonably likely" to have a material effect on the financial condition or operating performance of the company. 17 CFR §§ 229.303 (a)(1) and (a)(3)(ii).

After pressure from investor advocacy groups, members of Congress, and others, in 2010, the SEC issued interpretive guidance on disclosing climate change risks. According to the guidance, when assessing potential disclosure obligations, a company should consider, and disclose when material, the risks or effects on its business of existing and pending federal and state legislation and regulation and international treaties related to climate change, indirect consequences of climate change related regulatory or business trends and the physical impacts of climate change (*e.g.*, flood or drought), among others. For some companies, the guidance claims that these developments of physical risks "could have a significant effect on operating and financial decisions."

During the March 2016 climate change press conference, Attorney General Healey remarked on the Commonwealth's commitment to clean energy, combatting climate change, and holding accountable companies who have purportedly misled the public. Healey has since issued a subpoena to at least one major oil and gas company seeking, among other information, marketing materials, publications, presentations, and other statements made by the company across many forums about climate change-related topics to its investors and the public, as well as the company's disclosures of climate-change related risks to its business.

Implications

The ongoing investigations by Attorney General Healey and the other state attorneys general could impact the SEC's review of companies' climate change risk disclosures. Indeed, following the climate change press conference, the SEC published a concept release—a precursor to a potential proposed rule—seeking public comment by July 21, 2016 on potential changes to certain business and financial disclosure obligations in Regulation S-K. (*See* B&D Alert, *Comment Period Closing July 21 on Possible Expansion of Environmental Sustainability Disclosure Requirements*.) Among other areas, the SEC specifically requested comment on the adequacy of existing disclosure requirements in eliciting information that would permit investors to evaluate material climate change risk. Companies may wish to consider closely monitoring these developments and commenting on the SEC's concept release by July 21. With this heightened attention by state attorneys general, companies should carefully evaluate the statements they make across different forums regarding climate change and climate-related risks.

For more information on climate change disclosures, please contact Heidi P. Knight and Leah A. Dundon.

Updates on the Site Cleanup Program in Massachusetts – TCE, Urban Fill and More

Author: Jeanine L.G. Grachuk

Trichloroethylene

A new MassDEP Technical Support Document confirms that the agency has screened almost 1,000 closed TCE sites and anticipates that about 200 sites require follow up due to the potential for human health impacts due to vapor intrusion into the air of overlying buildings. The document, entitled MassDEP Bureau of Waste Site Cleanup's Plan for Evaluating Potential Imminent Hazards from Trichloroethylene (TCE) Vapor Intrusion at Closed Sites, confirms the ongoing efforts first reported in the last edition of this newsletter. While MassDEP is prioritizing these sites and then contacting the landowners, MassDEP encourages potentially responsible parties to review site information to determine if action is warranted.

In addition, MassDEP is continuing to work on revising its Vapor Intrusion Guidance based on public comments received in February 2015, and expects to issue a revised draft for public review this Summer.

Emerging Contaminants

MassDEP has identified the ten chemicals or groups of chemicals as "priority emerging contaminants" during its most recent Waste Site Cleanup Advisory Committee meeting in May:

- perchlorate;
- 1,4 dioxane;

- tetrachloroethylene (PCE);
- trichloroethylene (TCE);
- royal (or research) demolition explosive (RDX);
- tungsten;
- cyanotoxins;
- nanoparticles;
- polybrominated diphenyl ethers (PBDEs); and
- personal pharmaceutical and care products (PPCP)

Emerging contaminants are given special consideration either because they are newly identified in the environment and therefore the fate, transport, and risks associated with the pollutant are not well understood, or because the scientific understanding of the pollutant has changed and therefore what is required to achieve cleanup may also change, affecting decisions at new sites as well as reopening cleaned up sites. C. Mark Smith, Director, Office of Research and Standards for MassDEP, also stated perfluorinated chemicals (PFCs), chlorate, and non-aroclor polychlorinated biphenyls (PCBs) may be added to this list.

MassDEP also indicated many of these chemicals were tested for in large public water supply systems as part of the third round of testing under the federal Unregulated Contaminant Rule, including PFOA (perfluorooctanoic acid), PFOS (perfluorooctane sulfonate), chlorate; and 1,4 dioxane, and that some of these contaminants have been identified in public water systems. For example, PFOA and PFOS were identified in the public water system in Hyannis, MA, and Smith explained that MassDEP worked with the village to develop treatment techniques to lower the levels of PFOA and PFOS to below the EPA drinking water health advisory level, which was recently revised to 70 ppt. The source of the PFOA and PFOS to the Hyannis water supply is not known, but MassDEP is working to identify the source or sources and require remediation of the contamination under the state cleanup law.

Urban Fill

In 2014, MassDEP modified the approach to urban fill sites through regulatory amendments that allow "downtown brown" sites to be closed without remediation or a deed restriction if certain criteria are met. The regulations raised questions as to how environmental remediation consultants would determine which sites qualify for these new provisions, as well as how the new rules would be implemented. Nearly two years later, MassDEP is issuing its first public review draft and is accepting comments on the proposed guidance until June 30, 2016.

The amended regulations expand the concept of "background" to include contaminated soils when the contamination is "attributable to Historic Fill." Historic Fill has a complex definition in the regulation but can be understood to be contaminated soil placed on a site prior to 1983 that contains relatively low levels of metals, hydrocarbons, and/or PAHs due to pervasive use and release of such materials at the time. Contamination that is identified as Historic Fill does not need to be addressed in a risk characterization and does not require remediation – because it is background. However, because "Historic Fill" may in fact pose some risk, ongoing requirements apply, which can be described in the closure report or in a deed restriction.

The key question not answered by the regulations is how does someone show a particular site contains Historic Fill? This is especially important in Massachusetts because environmental remediation consultants known as licensed site professionals (LSPs) make this decision subject to audit by MassDEP. The proposed draft guidance helps answer this question.

The draft guidance indicates that LSPs should use a "well-developed Conceptual Site Model" and "multiple lines of evidence" in drawing a conclusion that contaminated soil is Historic Fill. The multiple lines of evidence include site

history to confirm there is no on-site source and that the fill was put in place prior to 1983, and a subsurface investigation to characterize and delineate the fill. Additional evaluations to identify ash may be appropriate. While de minimis levels of contamination are consistent with Historic Fill, elevated levels may suggest an on-site source. As such, as a general matter, the higher the concentration of the contaminant, the more robust the evidence to demonstrate that the fill is Historic Fill.

For more information on site assessment and cleanup in Massachusetts, please contact Jeanine L.G. Grachuk.

Emerging Contaminants: PFOA and PFOS

Author: Jeanine L.G. Grachuk

On May 16, 2016, EPA issued final drinking water health advisories for PFOA (perfluorooctanoic acid) and PFOS (perfluorooctane sulfonate) which set the acceptable life-time level for these chemicals in drinking water at 70 parts per trillion (0.07 ug/L), combined, "to offer a margin of protection against adverse health effects to the most sensitive populations." PFOA and PFOS are found in a variety of consumer products and have industrial applications. These chemicals are stable, persistent and bioaccumulate in the food chain.

The EPA's health advisories are not drinking water standards nor cleanup goals. Instead, EPA describes them as "informal technical guidance" to assist governmental officials, managers of public water systems and others when spills occur or contamination is identified. While there is no federal standard for either PFOS or PFOA, some states have developed drinking water guideline values for PFOA or PFOS.

For more information about emerging contaminants, including PFOA and PFOS, please contact Jeanine L.G. Grachuk.

MASSACHUSETTS LAND USE DEVELOPMENTS

Massachusetts Appeals Court Imposes Higher Hurdle For Master Plan to Defeat 40B Project

Author: Brian C. Levey

In another setback to opponents of Chapter 40B affordable housing projects, the Massachusetts Appeals Court upheld the Housing Appeals Committee's (HAC) creation of a seemingly more rigorous four-part test that appears to place a tougher burden on municipalities seeking to deny 40B projects on the ground that their master plan is a local concern that trumps the need for affordable housing.

In *Eisai, Inc. v. Housing Appeals Committee*, 89 Mass.App.Ct. 604 (June 20, 2016), the developer filed a Comprehensive Permit application to build a 248-rental-unit project within an existing office and industrial park. The local zoning board of appeals denied the developer's application on the ground that the "proposed project is inconsistent with decades of municipal planning, economic development strategies, and planning with owners and tenants of the abutting industrial properties[,] . . . most notably, the rezoning of the locus and abutting properties to accommodate and develop a modern, competitive, and viable industrial park and industrial center." On appeal by the developer, the HAC reversed and ordered the local board to issue the Comprehensive Permit. The Superior Court affirmed.

On appeal, the Appeals Court first confirmed that the developer met its initial burden of proving that its proposal "complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern." The burden then shifted to the project opponents to prove "first, that there is a valid health, safety, environmental, design, open space, or other Local Concern which supports such denial, and then, that such Local Concern outweighs the Housing Need." Here, the local concern was the project's alleged "grave incompatibility" with the municipal master plan.

In weighing master plan considerations against housing needs, the HAC has employed a two-part analysis, first determining "whether the master plan was a legitimate local concern." The Appeals Court explained that the HAC had found that the master plan board had "passed…[this first] threshold test" since the town had "a solid history of planning... resulting in not only a bona fide master plan, but also in a community development plan and a housing plan, both

addressing affordable housing." The HAC also found that "the master plan… had been implemented throughout… [the town], including in the area of the project site. "

Turning to the second part of the analysis, the Court explained that the HAC, in resolving the question of whether a municipality's recognized planning interests outweigh its affordable housing needs, previously focused on two questions: "first, whether the affordable housing plan aspect of the master plan 'has actually shown results' in terms of the construction of affordable housing, and second, whether the proposed project is inconsistent with and would undermine the plan to a significant degree."

Rather than employ this test, the HAC sought "to clarify the standard we apply," by enunciating a flexible four-factor test under which the board must introduce enough evidence to cumulatively establish a local concern of sufficient weight to outweigh the regional need for affordable housing. Project opponents must now demonstrate the following:

1. The extent to which the proposed housing is in conflict with or undermines the specific planning interest.
2. The importance of the specific planning interest, under the facts presented, measured, to the extent possible, in quantitative terms . . . .
3. The quality . . . of the overall master plan (or other planning documents or efforts) and the extent to which it has been implemented. A very significant component of the master plan is the housing element of that plan (or any separate affordable housing plan). The housing element must not only promote affordable housing, but to be given significant weight, the Board must also show to what extent it is an effective planning tool. . . .
4. The amount [and type] of affordable housing that has resulted from affordable housing planning.

On its face, the reformulated test requires boards to provide a greater amount of more specific, higher quality information in order to tip the scale in favor of upholding the master plan and denying the 40B project. Faced with the new, reformulated test, not even a bona fide master plan with an affordable housing element that had been implemented both town-wide and at the project site was sufficient to stop the 40B project.

The Appeals Court squarely rejected, however, the contention that the HAC "moved the goalposts . . . inventing a new scheme . . . in a transparently outcome-driven four-part analysis." It opined that, "All four factors address the ultimate issue whether local concerns relating to municipal planning outweigh the local need for affordable housing." Besides, even if the HAC had raised the bar, the Court appeared unconcerned. It recited the "recognized principle of administrative law" that it is permissible for agencies to "adopt policies through adjudication as well as through rule-making."

For more information about affordable housing developments and Chapter 40B, please contact Brian C. Levey.

NATIONAL DEVELOPMENTS

TSCA Reform Becomes Law; Now the Clock Starts to Tick on Implementation

Authors: Mark N. Duvall, Tim M. Serie, Sarah A. Kettenmann, and Ryan J. Carra

On June 22, 2016, President Obama signed into law the Frank R. Lautenberg Chemical Safety for the 21st Century Act, H.R. 2576. This historic legislation overhauls the Toxic Substances Control Act (TSCA) for the first time in 40 years. It is the first major environmental law to be enacted in 25 years (since the Clean Air Act Amendments of 1990). A legislative effort that began in earnest in 2009 has resulted, seven years later, in a strengthened statute that gives EPA new authority to prioritize, evaluate, and regulate chemicals as appropriate, and gives stakeholders an important role in that process. Read the full article.

State Air Agency Group Issues Model Clean Power Plan Rule

Authors: David M. Friedland and Jessalee L. Landfried

Summary: The National Association for Clean Air Agencies ("NACAA") has released a **model Clean Power Plan ("CPP") rule** as a resource for state air agencies. The model rule highlights possible strategies for incorporating energy efficiency into state plans, and therefore provides valuable insight into the types of measures that companies can expect to face if the CPP moves forward. Read the full article.

EPA's Enforcement Focus on Refrigerants Continues With Another Multi-million Dollar Settlement

Authors: Laura M. Duncan and Kristin H. Gladd

The U.S. Environmental Protection Agency ("EPA" or "Agency") continues its enforcement focus on commercial refrigerant leaks from major retailers, keeping with the Agency's goals of reducing leaks of ozone depleting substances ("ODS") and greenhouse gas ("GHG") emissions. On June 21, 2016, Trader Joe's Company entered into a proposed settlement with the U.S. Department of Justice and U.S. Environmental Protection Agency ("EPA") to resolve claims that the company failed to comply with refrigerant leak repair and recordkeeping requirements in violation of Section 608 of the Clean Air Act and its implementing regulations. *United States v. Trader Joe's Co.*, N.D. Calif., No. 3:16-cv-03444 (June 21, 2016). This represents the third settlement in three years brought against a major grocery chain for alleged violations of the commercial refrigerant regulations. Under the terms of the settlement, Trader Joe's agreed to spend approximately $2 million dollars over the next three years to reduce leakage of ODS and GHG emissions and to improve its corporate compliance program. Trader Joe's will also pay a civil penalty of $500,000. We expect continued federal scrutiny and enforcement of companies' compliance with the refrigerant regulations, including those currently being promulgated by EPA proposing to extend the requirements to non-ODS refrigerants that have high global warming potential ("GWP"), such as hydrofluorocarbons ("HFCs"). Read the full article.

Maddie Kadas Outlines Trends in Latin American Environmental and Product Regulation and Enforcement for *Latinvex*

Author: Madeleine B. Kadas

Latinvex recently interviewed Latin American practice chair Maddie Kadas for a special feature story on environmental and product regulatory developments in Latin America. Earlier this year, *Latinvex* named Ms. Kadas for the third time as one of Latin America's top 100 female lawyers, and also ranked Beveridge & Diamond as one of the top 50 international law firms in Latin America. Read the full article.

FIRM NEWS & EVENTS

Chambers Names Beveridge & Diamond U.S. Environmental Law Firm of the Year

On May 26, Chambers and Partners awarded Beveridge & Diamond the Chambers USA Award for Excellence in environmental law at its annual awards dinner in New York City. Each year, Chambers recognizes one law firm's preeminence in environmental law based on the firm's outstanding work, impressive strategic growth and excellence in client service performed over the past 12 months. Read the full article.

***National Law Journal* Again Names Beveridge & Diamond to Its "Midsize Hot List"**

The *National Law Journal* has again included Beveridge & Diamond on its "Midsize Hot List." The list recognizes 20 law firms of between 50 and 150 lawyers that demonstrate creative strategies that keep them competitive against much larger law firms. 2016 marks the fifth time that Beveridge & Diamond has been so honored, having previously been recognized in 2011, 2012, 2013, and 2015. Read the full article.

Beveridge & Diamond Again Named a Top Tier Environmental Law Firm by The Legal 500

The Legal 500 again 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 2016 edition of *The Legal 500 United States*. Read the full article.