

BURAK & ANDERSON MELLONI PLC

VERMONT ENVIRONMENTAL LAW FORUM

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Firm News

In early 2009 Burak Anderson & Melloni, PLC welcomed Member Michael B. Rosenberg back to active practice. Michael leads the Firm in the areas of antitrust and trade regulation, franchise disputes, public contracts and construction claims. He represents numerous automobile dealers throughout the state, including advising dealers on the impact and effect of the recent bankruptcies of Chrysler and General Motors. The only Vermont-based member of the National Association of Dealer Counsel, a nationwide professional organization of attorneys who represent automobile dealers, Michael has been invited to lecture on franchise law at the September Annual Meeting of the Vermont Automobile Dealers Association.

On February 23, 2009, in *Fab-Tech, Inc. v. E.I. du Pont de Nemours & Co.*, 311 Fed. Appx. 443, 2009 U.S. App. LEXIS 3545, 2009 WL 427363 (2d Cir. 2009), the United States Court of Appeals for the Second Circuit affirmed a Vermont jury's award of \$1.3 million for DuPont's breach of contract to Fab-Tech, Inc., which was represented by Members Michael L. Burak and W. Scott Fewell. While affirming one of the largest jury awards in Vermont in recent years, the appellate court simultaneously limited the availability of punitive damages under Fab-Tech's claim for breach of the covenant of good faith and fair dealing because of a lack of demonstrable malice or ill will on the defendant's part.

The Firm continues to actively represent issuers, underwriters and other participants as part of tax exempt offerings both within and outside of the State of Vermont, including serving as underwriter's counsel in multiple hospital debt offerings and serving as letter of credit bank counsel in providing financing to numerous Vermont institutions. The Firm recently served as Bond Counsel to the City of Burlington on the successful issuance of \$20,000,000 of bonds for its electric department.

Burak Anderson & Melloni, PLC was also recently named to the 2009 Martindale-Hubbell Bar Register of Pre-Eminent Lawyers, a designation awarded to

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fewer than 5% of all law firms in America. Several attorneys from the law firm have also recently been honored for their legal credentials by respected national publications.

Super Lawyers Magazine named Michael L. Burak a Super Lawyer in the State of Vermont. Only five percent of the lawyers in New England are named by Super Lawyers and the selections are made after a rigorous multi-phase selection process that includes a statewide survey of lawyers, independent evaluation of candidates by Super Lawyers, staff, a peer review of candidates by practice area, and a good-standing and disciplinary check.

Jon T. Anderson and Thomas R. Melloni have been selected by their peers for inclusion in The Best Lawyers in America. Jon, whose practice includes complex real estate projects, transactions and litigation, was selected for the field of environmental law. Thomas, who heads up Burak Anderson & Melloni's Finance and Corporate Practices, was selected in the field of Banking Law. Best Lawyers is based on an exhaustive peer-review survey in which more than 32,000 leading attorneys cast more than 2.5 million votes on the legal abilities of other lawyers in their specialties.

In 2009 Shane W. McCormack and Anja Freiburg were also named "Rising Stars" by Super Lawyers Maga-

zine. This designation is limited to no more than 2.5% of the attorneys in Vermont.

In addition to their busy practices, the Firm's attorneys regularly lectured to business and professional groups regarding aspects of their practice. Jon Anderson presented three National Business Institute lectures on Land Use and Zoning Law, Title Law and Real Estate Closings in early 2009. Jon also spoke to the Vermont Association of Commercial Real Estate Brokers regarding Trends in Water Regulation and to the Lamoille County Realtors on real estate and land use permitting. On May 18, 2009, W. Scott Fewell presented a National Business Institute seminar entitled "Employment Laws Made Simple," which was streamed live to a national audience.

On January 26, 2009, the Firm welcomed Devon Hulme as a legal assistant to Thomas R. Melloni and Shane W. McCormack. Devon joined the Firm after working for Lane Press, Inc. in South Burlington, Vermont.

On May 26, 2009, Burak Anderson & Melloni launched a redesign of the Firm's website. Please visit www.vtlaw1.com for the latest news and updates.

Mission Statement of Burak Anderson & Melloni PLC

Our mission at Burak Anderson & Melloni is to provide the highest quality legal services for our clients commensurate with those provided by the finest law firms in the region and the country. At all times we will respond to our clients' needs promptly and economically. We recognize both the significance of providing a living for our members and employees, and the needs of our community and society. Within our firm we foster mutual trust, respect and caring.

any decision of the Agency of Natural Resources, an appeal shall be made to the Environmental Court pursuant to 10 V.S.A. § 8503.

Finally, the Act grandfathers existing licensed junkyard operations until the expiration of their license and provides that all municipal, state or other regulations that reference junkyards shall also apply to salvage yards. Moreover, all junkyard regulations should be transferred from the Agency of Transportation to the Agency of Natural Resources, and all references to the Agency of Transportation in those regulations are deemed to refer to the Agency of Natural Resources. Furthermore, the Agency of Natural Resources is directed to report to certain legislative committees on the regulation and permitting of salvage yards, recommended environmental standards, the creation of a single Agency program for salvage yard regulation and other associated requirements for the safe and environmentally sound management of salvage yards.

The Energy Act also establishes Clean Energy Assessment Districts where municipal voters may decide to provide loans to property owners for renewable energy or efficiency projects that can be paid back as a special assessment on the residents' tax bills. The special assessment cannot extend for longer than the life expectancy of the renewable project and must be paid off in full prior to sale or transfer of the property. In addition, the total value of the loan cannot exceed 15% of the property's assessed value, and when combined with the outstanding mortgage obligations for the property, the assessment cannot exceed 90% of the property's assessed value.

Finally, Act 45 includes a provision that prevents a municipality by ordinance, regulation or other enactment from prohibiting, or having the effect of prohibiting, solar collectors, clothes lines or other renewable energy devices.

Act 56 – An act relating to salvage yards

Act 56 (S.47), which was signed by Governor Douglas on June 1, 2009, amends Title 24, Chapter 61 to provide for regulation of salvage yards by the Agency of Natural Resources, protecting their vital role as a recycling and resource recovery center while ensuring that Vermont's natural resources are protected and that its environmental laws are followed. The Act first redefines the definition of a "junkyard" in 24 V.S.A. § 2241 as a "salvage yard," and then requires all salvage yards to be certified by the Agency of Natural Resources. This certification requirement does not act as a certificate of compliance with applicable laws; rather, salvage yards continue to have an obligation to comply with existing state and federal laws.

Under the Act the Agency of Transportation and Secretary of Natural Resources are responsible for regulating of salvage yards, which includes promulgating regulations for screening and fencing, as well as compliance with regulations and rules of the United States Secretary of Transportation. The Act is clear that salvage yards are distinct from solid waste management facilities regulated under Chapter 159 of Title 10.

Act 56 requires salvage yards to obtain a certificate of approved location from the municipal selectboard or its designee. The location of the salvage yard must be in conformance with the municipality's zoning bylaws and subdivision regulations. The certificate of approved location process allows neighbors, including abutters, to comment on a salvage yard's application. The certification process also reviews other aspects of the salvage yard including its

legal ownership, the nature of surrounding properties, sufficiency of the surrounding roadway network and whether the salvage yard's location might create a nuisance. Through the certification process aesthetic, environmental and community welfare-related aspects are also evaluated, including, among other criteria, the acceptability of the road accessing the salvage yard, the availability of natural or artificial barriers protecting the salvage yard from view and the proximity of the salvage yard to tourist areas, neighboring residences, groundwater resources, surface waters, drinking water supplies and wetlands. The Act establishes detailed requirements for natural, vegetative and artificial screening to ensure that salvage yards are properly shielded from public view. These certificates are granted for five-year periods and may be renewed without a hearing, as long as the salvage yard is in compliance with its conditions of certification and other laws. If an application for a certification is denied, it may be appealed to the Environmental Court within 30 days of the denial.

In addition to the certificate of approved location, salvage yards must also obtain a certificate of registration from the Secretary of Natural Resources. The certificate of registration is to be applied for after obtaining the approved location certificate. The registration certificate will be granted provided the applicant has complied with the Agency of Natural Resources' salvage yard regulations and other rules. In addition, the applicant must satisfy the screening or fencing requirements.

The Act prohibits salvage yards from being located within 1,000 feet of an Interstate or primary highway or from being visible from such highway at any time of the year. Salvage yards are also prohibited from being located within 100 feet of a state or town right-of-way or a navigable water. These location prohibitions do not apply if the area within 1,000 feet of an Interstate or major highway or within 100 feet of a town highway, is zoned for industrial uses or if the United States Secretary of Transportation uses the area for industrial activities.

Act 56 also contains provisions providing for injunctive relief, either preliminary or permanent, from the Environmental Court if a salvage yard operates in violation of the municipal requirements or in violation of its certificate of approved location. If a salvage yard is not in compliance with a requirement of the Agency of Transportation, it may seek injunctive relief in Superior Court. Moreover if a salvage yard operator or owner has exhausted their administrative appeal rights that person may appeal the final administrative decision to Superior Court, which shall hear the appeal *de novo*. Similarly, if the appeal is related to

Acts of the 2009 Legislative Session

Act 6 – An act relating to wireless communication facilities and project approvals for municipal and cooperative utilities.

Act 6 (H.135) is a short enactment that amends 30 VSA § 248(n)(2) to exclude intra- and inter-utility communications equipment from the definition "wireless communications facilities," which would normally require a certificate of public good if placed on top of an electric transmission or generation facility. Act 6 also provides a summary approval procedure for that communications equipment by exempting municipal or cooperative-constructed electricity generation or natural gas facilities from the notice and hearing requirements for obtaining a certificate of public good if the Public Service Board hears no objection and finds that such facilities are of limited size and scope.

Act 22 – An act relating to underground storage tanks and the petroleum cleanup fund

Act 22 (H.83) was signed by Governor Douglas on May 15, 2009, and provides for state regulation of underground storage tanks ("USTs") for fuel oil installed at public buildings that are smaller than 1,100 gallons. The Act also extends the effective date for incurring costs to be reimbursed by the petroleum cleanup fund under 10 V.S.A. § 1941(b) until July 1, 2014. The maximum grant for closing, upgrading or replacing a farm or residential heating fuel tank for on-premises heating was also increased from \$1,000 to \$2,000 with a \$300,000 annual cap on assistance. Many of the deadlines for funding and closure of petroleum USTs were also extended from July 1, 2009 to July 1, 2014, including the licensing assessment for non-motor vehicle fuels and the petroleum tank assessment.

The Act creates an advisory committee to study whether and how to collect the fees assessed as part of the petroleum distributor licensing assessment, whether by the department of motor vehicles or the department of taxes. The committee also evaluates how disbursements from the petroleum cleanup fund are accomplished, particularly whether an UST owner or operator should be fully compensated for expenses related to remediation of spills near the UST that occurred prior to the latest remediation.

Lastly, Act 22 repeals the stage II vapor recovery rules for gasoline dispensers with annual gasoline throughputs over 400,000 gallons as of January 1, 2013. Prior to that date, gasoline dispensers that are replaced, rebuilt or repaired after May 1, 2009, to comply with the new triple data encryption standard (TDES) implemented by Visa, Inc. and other credit card issuers, are exempt from following the stage II vapor recovery rules. The reason the rules are repealed is because since 2000, all new vehicles are equipped with on-board canisters at the gas tank opening that capture gasoline vapors, which renders the Stage II vapor recovery rules redundant.

Act 31 – An act relating to wetlands protection

Governor Douglas signed Act 31 (H.447) on May 21, 2009, to allow the state's significant wetlands map to be updated more easily. Through the Act, the legislature also found that the rulemaking required by the Vermont Supreme Court's decision in *In re Lake Bomoseen Ass'n*, 2005 VT 79, 178 Vt. 375, 886 A.2d 355, for wetlands reclassification was inefficient and too costly. In light of this, the Act first creates specific definitions for Class I, II, and III wetlands in 10 V.S.A. § 902 and establishes the wetlands buffer for Class I wetlands as at least 100 feet, and for Class II wetlands, the buffer is at least 50 feet. It also gives the Department of Environmental Conservation the power to study and compile data to identify Class I wetlands, issue or deny permits based on the rules of the Water Resources Panel of the Natural Resources Board, issue wetlands determinations, issue wetland violation orders pursuant to 10 V.S.A. § 1272 and implement the wetlands rules.

The Act creates a new subchapter 4 to chapter 37 of Title 10 relating to wetlands determination and protection. That subchapter prohibits all activities in a significant wetland or buffer zone without either a permit, a conditional use determination or an order from the Secretary of Natural Resources. Permits are not required for activities in wetlands prior to the enactment of the Act because they are grandfathered, provided the wetlands were not identified on Vermont's significant wetlands map, the activities occurred in wetlands contiguous to those that were not identified on the state's map or occurred in the buffer zone to those unidentified wetlands. All activities in wetlands prior to February 23, 1992, are also exempt from the Act's permitting requirements.

The Act also sets out rules for wetlands determinations, either by petition or of the agency's own volition, based on the functions and values enumerated in 10 V.S.A.

§ 6025(d)(5)(A)-(K). As part of the wetlands determination, the Agency of Natural Resources may also set the necessary width of the buffer zone for such wetland. As part of the determination process, the Act requires that the classification of a Class I wetland, the reclassification of a Class I wetland as Class II or III, the reclassification of any Class II or III wetland as a Class I wetland or the modification of a buffer zone of a Class I wetland, shall be accomplished through a formal rulemaking by the Water Resources Panel pursuant to the Vermont Administrative Procedure Act. In conjunction with new wetlands determinations either by rulemaking or otherwise, the Water Resources Panel will revise the Vermont Significant Wetlands Inventory Maps.

Section 10 of the Act also provides certain provisions regarding the details of wetlands permitting. It provides that the failure to obtain or comply with a wetlands permit does not create an encumbrance or affect the marketability of record title to real estate. Also, if a wetland is the subject of a rulemaking proceeding to determine whether it is Class I or II, it is assumed that it is a significant wetland.

The Act requires the Agency of Natural Resources to issue an annual report on its progress in implementing the wetlands permitting requirements. Included in the report are details of the rules developed by the Water Resources Board, the number of enforcement actions initiated and any legal, administrative or technical issues that have arisen from the implementation and enforcement of the new wetlands permit program. Lastly, the most pertinent provisions of the Act relating to wetlands reclassifications and the wetlands permit program do not take effect until 45 days after the Water Resources Panel updates the significant wetlands inventory maps and promulgates an update to the Vermont wetland rules.

Act 37 – An act relating to encouraging biomass energy production

Act 37 (H.152) establishes a biomass energy development working group to enhance the growth and development of Vermont's biomass industry. Biomass energy means energy derived from trees, plants, grasses, leaves and other wood or vegetative products. The working group is tasked with reporting to the legislature over the next three years by detailing various fiscal and regulatory incentives for local biomass for energy production. The group should also recommend guidelines or standards for sustainability in biomass production, and guidelines for forest health, wood procurement and biomass procurement, including whether

uniform standards should be used to increase predictability in the permitting process and whether the collective demand for energy produced from biomass impairs long-term forest health. By November 15, 2011, the working group shall issue its final report to the legislature.

Act 41 – An act relating to composting

Governor Douglas signed Act 41 (H.145) on May 23, 2009, which authorizes the Secretary of Agriculture to establish rules for accepted composting practices for the management of composting in Vermont that will be administered by both the Secretary of Agriculture and the Secretary of Natural Resources. The rules may require the director of a small-scale composting facility to register with the Secretary of Agriculture, as opposed to obtaining a solid waste facility certification under 10 V.S.A. § 6605. The rules will also provide: standards for construction, alteration or operation of a composting facility; standards for product acceptance, vector management, odors, noise, traffic, litter control, contaminant management, operator training, recordkeeping and operator qualifications; standards for siting facilities and operation of compost storage, bagging and vehicular access; standards for the composting process including rotation, pile size and monitoring; standards for management of runoff and liquid and stormwater management in and around a facility; areas of the state where composting is prohibited, including designated downtowns and village growth areas; and definitions for the terms “small-scale composting facility,” “medium-scale composting facility” and “de minimis composting facility.”

The Act exempts small-scale composting facilities or agricultural composting facilities that follow accepted composting practices from having to obtain discharge permits for water pollution, solid waste facility certifications or air emissions permits, unless otherwise required by federal law or the Secretary of Natural Resources. Prior to finalizing the accepted composting practices rules discussed above, the Agency of Natural Resources must submit the proposed final rules for review by a number of legislative committees, who will provide comments or suggest amendments to the final rules. Moreover, a composting study committee is to be reconvened by the Agency of Natural Resources to review the applicability of Act 250 to composting facilities and to suggest areas of the state where composting should be prohibited.

Act 45 – An act relating to renewable energy

and energy efficiency

Without his signature, Governor Douglas allowed Act 45 (H.446), known as the Vermont Energy Act of 2009, to become law. The Act establishes utility rates up to six times higher than normal for energy generated by small scale renewable resources for the next 10 to 25 years through the Sustainably Priced Energy Enterprise Development (“SPEED”) program as laid out in 30 V.S.A. § 8005. The Act establishes initial rates to be paid to generators for different sources of renewable energy, including energy generated by wind, solar, hydro, and methane from an agricultural or landfill source. However, the Act allows the Public Service Board to modify such rates after September 15, 2009, if they are found to be unreasonable. Even if such rates are found to be reasonable, the Public Service Board is to review the rates biennially to determine if they are high enough to provide “sufficient incentive for the rapid development and commissioning” of renewable energy sources.

The Act requires electricity providers to purchase all electricity produced by renewable sources through the SPEED program, which purchasing is governed by a SPEED facilitator. It also provides credits to retail electricity providers for electricity generated by renewable sources based on their pro rata share of plant capacity up to a statewide 50 MW limit, which is the established ceiling for retail electricity providers to pay the initial rates for renewable electricity. Once statewide renewable generation capacity exceeds the 50 MW threshold, the initial rates will no longer be paid and rates for electricity generated by renewable sources will be set by the Public Service Board. The Act provides significant regulatory incentives for utilities seeking to construct renewable energy generation facilities, including allowing the costs of applying for certification and permits for a renewable facility, whether constructed or not, to be recovered in a regulated utility's rates.

The Vermont Energy Act establishes a new policy of permitting the development of wind energy generation on state lands. The construction of commercial-scale wind generation facilities is now allowed on state land provided there is no covenant or restriction prohibiting development of wind generation facilities on such land. Current state policy documents regarding the development of wind energy should not be seen as a prohibition on evaluating the feasibility of a particular facility on state land. In addition, the Agency of Natural Resources is directed to develop a report assessing whether the state's policy on wind should be amended or revised and to determine if there has been interest in developing a wind generation facility on state land.

The Act also amends the residential and commercial building energy standards by calling for rulemaking to bring the standards up to the 2009 International Energy Conservation Code of the International Code Council, or for commercial buildings, the ANSI/ASHRAE/IESNA standard 90.1-2007 by January 2011. The Commissioner of Public Service is directed to develop a plan for achieving compliance with the energy standards, with the goal of achieving 90% compliance with the standards for residential and commercial buildings by February 2017. The commercial standards shall be revised every three years, and an advisory committee made up of professionals in the construction and real estate industry will govern adoption of the standards.

The Energy Act also exempts certain facilities, particularly IBM's Essex Junction plant, from the state's energy-efficiency surcharge program. Instead, it allows transmission and industrial electric ratepayers to enter a three-year pilot project for a class of self-managed energy efficiency programs. There is a three-year minimum energy investment of \$1 million, and the investments shall be balanced across all types of energy or fuels without limitation. If the investment threshold is not met by the end of the third year, the applicant will have to pay the difference between the investment made while in the program and the applicable energy efficiency surcharge.

Furthermore, Act 45 establishes a Vermont Village Green Renewable Pilot Program. Its focus is to encourage communities to host energy generation that is renewable and efficiently utilized to provide heat and possibly power to groups of commercial, industrial or residential uses in a community. The Pilot Program was begun because recent volatility in energy prices have caused a significant amount of money to leave the state, and the price fluctuations have constituted a drain on Vermonters' incomes. The Program envisions that communities, particularly Montpelier and Randolph, will construct a combined heat and power (“CHP”) facility that does not use fossil fuels. If wood biomass is used, such CHP has to have at least a 50% efficiency rating. The facility must gain the support of a variety of entities prior to certification by the Department of Public Service, including the regional planning commission, the downtown development board, as well as a commitment that the facility will comply with the air quality standards of the Agency of Natural Resources and the United States Environmental Protection Agency. The Program also provides at least \$100,000 in incentives for connection to the CHP facility and allows for any excess electricity generated to be sold on the open market.