Massachusetts Environmental and Land Use Alert

BEVERIDGE & DIAMOND PC

Massachusetts Office
15 Walnut Street
Suite 400
Wellesley, MA 02481
(781) 416-5700

Authors

Marc J. Goldstein
mgoldstein@bdlaw.com

Jeanine L.G. Grachuk
jgrachuk@bdlaw.com

Aladdine D. Joroff
ajoroff@bdlaw.com

Brian C. Levey
blevey@bdlaw.com

Stephen M. Richmond
srichmond@bdlaw.com

For more information about our firm, please visit www.bdlaw.com

If you do not wish to receive future Massachusetts Environmental and Land Use Alerts, please send an e-mail to: jmilitano@bdlaw.com

November 2012

Massachusetts Environmental Developments

MassDEP Continues Efforts at Regulatory Reform Affecting Nearly All Agency Programs

MassDEP has conducted an extensive review of its regulations and programs searching for opportunities to improve its efficiency.

MassDEP Receives First Year Funding for Information Technology Transformation Initiative

The Massachusetts Department of Environmental Protection's regulatory reform efforts reported elsewhere in this e-alert issue include an Information Technology Transformation Initiative in which MassDEP plans to update its self-described outdated and "siloed" IT system.

First Deadline Approaches for Submittal of Applications for New Massachusetts Hazardous Material Processing Permits

Arising from several chemical explosions in Massachusetts in recent years, the state Board of Fire Prevention has adopted rules requiring numerous hazardous material handlers to obtain permits which vary in their stringency dependent upon the amount of risk posed by the chemicals that are processed.

U.S. EPA Proposes to Add Two Sites in Massachusetts to the Superfund List

On September 18, 2012, U.S. EPA proposed to list two sites to the National Priorities List, also known as the Superfund list.

U.S. EPA and MassDEP enter into Record $366 Million Settlement with AVX Corp. for Cleanup of New Bedford Harbor

On October 10, 2012, U.S. EPA announced that AVX Corp. had agreed to pay $366 million to EPA and MassDEP to fund a new remedy for the New Bedford Harbor Superfund Site PCB cleanup.

Sewer Connection Charges are (Sometimes) Allowable Fees and Not Impermissable Taxes

As more communities undertake costly efforts to upgrade their sewage collection and treatment systems, the Massachusetts Supreme Judicial Court (SJC) recently held that, at least in some circumstances, municipalities may assess fees related to such work on developers seeking new connections to a community's sewer system.

Massachusetts Land Use Developments

Appellate Courts Toughens Standard for Developers Obtaining Summary Dismissal of Zoning Appeals

Two recent cases, 81 *Spooner Road, LLC v. Zoning Board of Appeals of Brookline*, 461 Mass. 692 (2012) and *O'Connell v. Vainisi*, 82 Mass. App. Ct. 688 (2012), recalibrate the evidence that the defendant/developer must produce in order to rebut successfully the presumption of standing of the project opponent and secure a summary judgment dismissing a zoning appeal.

Massachusetts High Court Set to Review Decision Whether Untimely Recorded Variance Saved by Substantial Reliance

A previous edition of the *Massachusetts Environmental & Land Use Alert* reported on *Grady v. Langone, et al.*, 2011 Mass. LCR Lexis 77, in which the Land Court held that a variance is effective even if it is recorded outside the statutory one-year period so long as there has been substantial reliance on the variance.

National Developments

RCRA's Hazardous Waste Manifest System Enters the Electronic Age

On October 5, President Obama signed into law an amendment to the Resource Conservation and Recovery Act that will establish an electronic hazardous waste manifest system.

FTC Issues Revised Green Guides for Environmental Marketing

On October 1, 2012, the Federal Trade Commission (FTC) issued final revisions to the Guides for the Use of Environmental Marketing Claims, known as the Green Guides.

Court Enjoins City of Dallas from Enforcing Flow-Control Ordinance

On October 16, 2012, the U.S. District Court for the Northern District of Texas granted a request for a permanent injunction enjoining the City of Dallas from enforcing a flow-control ordinance that would have required all solid waste collected within the City to be disposed at a City-owned landfill or transfer station.

Two State Courts Allow Greenhouse Gas Claims to Proceed on Public Trust Theory

In a new wave of climate change litigation that could pave the way for state-level regulation of greenhouse gas emissions, at least two courts have extended the "public trust" doctrine to include protection of the air and atmosphere.

Firm News & Events

Beveridge & Diamond Again Named a Top National Environmental and Litigation Firm by U.S. News/Best Lawyers

Washington, DC - 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 2012 Best Law Firms list.

Twelve Beveridge & Diamond, P.C. Attorneys Named to Best Lawyers® for 2013

Beveridge & Diamond, P.C. is proud to announce that 12 of its attorneys have been named to the 2013 edition of Best Lawyers®, the "oldest and most respected peer-review publication in the legal profession."

Back to Top

Massachusetts Environmental Developments

MassDEP Continues Efforts at Regulatory Reform Affecting Nearly All Agency Programs

MassDEP has conducted an extensive review of its regulations and programs searching for opportunities to improve its efficiency. During the spring, MassDEP sought public input on which specific changes should be made. During October, MassDEP published an update on its progress, located at http://www.mass.gov/dep/about/priorities/regreform/1012update.htm. Here is a brief summary of the proposed reforms, based on the recent update:

Many of the reforms require regulatory change, and MassDEP is drafting regulations to effect these changes. MassDEP anticipates release of the draft regulations for public comment and public hearings during Fall 2012. A few require statutory changes. The remainder only require policy changes or internal process changes, and are near implementation or have been implemented. We briefly describe all of these below, by issue.

Air

Reforms requiring regulatory changes:

- Streamline asbestos abatement practices, operation and maintenance procedures, and homeowner requirements.
- Harmonize MassDEP asbestos regulations with those of the state Department of Labor Standards and U.S. EPA.

Chapter 91

Reforms requiring regulatory changes:

- Streamline application review time by allowing MassDEP to begin reviewing a Chapter 91 application while the Massachusetts Environmental Policy Act (MEPA) process is ongoing.
- Create a simplified permitting pathway for test-scale innovative technology, including clean energy.
- Establish a “general license” for non-commercial, small-scale docks, piers and other similar structures.
- Create a consolidated dredging permit to address Chapter 91, Water Quality Certification and wetlands requirements.
- Clarify the timing for when a Wetlands Order of Conditions is required.
- Clarify the public hearing timeline.

Other reforms:

- Draft a policy establishing expected license terms for Chapter 91 licenses; previously, such terms were individually negotiated.

Site Cleanup

Reforms requiring regulatory changes:

- Eliminate the numeric ranking system and existing permitting system.
- Allow sites with active, on-going treatment systems to achieve a permanent solution by obtaining a permit containing treatment system operation and maintenance requirements.
- Streamline deed restrictions, known as activity and use limitations.
- Simplify requirements relating to historic fill and gardening in urban areas.

Back to Top

Solid Waste

Reforms requiring regulatory changes:

- Allow landfill owners and operators to use certified third parties to verify compliance.
- Streamline permitting for new and modified transfer stations, siting of solar photovoltaic arrays on property "not containing buried trash or landfill-related equipment but within the boundaries of a designated landfill," and management of certain material as special wastes.
- Increase the maximum term for permits to land-apply sludge and septage residuals and simplify renewal.

Wastewater

Reforms requiring statutory changes: Note, this change was made in August 2012.

- Modify the Massachusetts Clean Waters Act to remove public notice requirements for permit renewals where no substantive change to the activity is occurring.

Reforms requiring regulatory changes:

- Eliminate the requirement for a state permit for connections to and extensions of local sewer collection systems where duplicative of a local permit.
- Improve operational requirements for wastewater treatment plants relating to sewer line infiltration and sewer overflows.
- Harmonize state surface water discharge permit notice requirements with federal requirements. Eliminate public notice via newspaper at the draft permit stage for other discharge permits.
- Delegate review of innovative and alternative septic systems under Title 5 to a certified third party, and eliminate many MassDEP Title 5 approvals.

Other reforms:

- Require holders of sanitary groundwater discharge permits, as a permit condition, to hire a certified professional to conduct periodic assessments based on new standardized review and inspection protocols, subject to MassDEP audit.
- Focus inspection activities based on discharge monitoring data and complaints.

Wetlands

Reforms requiring statutory changes: Note, these changes were made in August 2012.

- Streamline regulatory requirements for maintenance and repair of sewer lines;
- Simplify abutter notification requirements for long linear projects and certain water-bound or water-abutting projects;
- Simplify promulgation of emergency regulations for road clearing and debris removal after storm events.

Reforms requiring regulatory changes:

- Streamline review of permitting of access roadways for development of renewable energy projects by allowing such projects to qualify as a "Limited Project."
- Exempt certain minor activities in the buffer zone from permitting, including highway safety operation and maintenance work and utility work.
- Limit when a storm water management system may become a wetlands resource.
- Create a simplified permitting pathway for test-scale innovative technology, including clean energy.
- Expedited reviews for eco-restoration projects.
- Create a consolidated dredging permit to address Chapter 91, Water Quality Certification and wetlands requirements.

Back to Top

Other reforms:

- Prioritize MassDEP Wetlands Protection Act activities to concentrate on projects with significant resource area impacts. This change was implemented in August 2012.

We anticipate publication of the proposed draft regulatory changes very soon, and will provide an update when that occurs. For further information on these programs or MassDEP, please contact Jeanine Grachuk at jgrachuk@bdlaw.com or Stephen Richmond at srichmond@bdlaw.com.

MassDEP Receives First Year Funding for Information Technology Transformation Initiative

The Massachusetts Department of Environmental Protection's regulatory reform efforts reported elsewhere in this e-alert issue include an Information Technology ("IT") Transformation Initiative in which MassDEP plans to update its self-described outdated and "siloed" IT system. MassDEP's objectives include: (i) developing a paperless, online permitting system; (ii) making it easier for citizens and businesses to obtain environmental information online on a 24/7 basis; and (iii) enhancing the agency's enforcement capabilities through the use of new technologies, such as remote sensors and automated analysis of facility discharge and other environmental monitoring data. The agency anticipates that new IT systems and tools will enhance its ability to perform timely, predictable, and cost-effective permitting, make MassDEP's data sets more transparent and accessible to the public, and pursue data-driven enforcement strategies.

In early 2012, MassDEP issued an "actionable roadmap," titled the Environmental Information and Public Access Study, outlining steps necessary to meet the goals of the IT Transformation Initiative. This will include phasing out approximately 100 data management systems, which are often program-specific, and replacing them with an enterprise-wide system. This is expected to support the provision of new services, such as:

- Enhanced capacity for concurrent review of submissions by multiple state agencies;
- Improved online assistance and model templates to guide project proponents through permitting and other regulatory requirements;
- Easy, online tools for public review and comment on draft permits and proposed regulations;
- Remote sensing and real-time submittal of monitoring data;
- Creation of mobile applications for citizen reporting of potential violations; and
- Improving MassDEP's agility to upgrade its databases and digital tools.

Achieving these goals will require substantial multi-year capital funding and MassDEP recently announced it has received approval from Governor Deval Patrick for the first year of that funding. MassDEP's Commissioner Kenneth Kimmell also announced that the U.S. Environmental Protection Agency and various states are reviewing the initiative as a potential model.

For further information on the IT initiative , please contact Aladdine Joroff (ajoroff@bdlaw.com) or Marc J. Goldstein (mgoldstein@bdlaw.com).

First Deadline Approaches for Submittal of Applications for New Massachusetts Hazardous Material Processing Permits

Arising from several chemical explosions in Massachusetts in recent years, the state Board of Fire Prevention has adopted rules requiring numerous hazardous material handlers to obtain permits which vary in their stringency dependent upon the amount of risk posed by the chemicals that are processed. Application deadlines for these permits are staggered, with applications for the highest risk facilities due first, by January 1, 2013. The first applications are due from facilities that qualify under the rule and that are

Back to Top

subject to either the OSHA process safety management (PSM) rule, 29 CFR ¶1910.129, or the EPA Risk Management Program (RMP) rule at 40 CFR Part 68.

The new rules arose from a task force assembled by the Board of Fire Prevention to study the aftermath of three chemical explosions, the first in Leominster, Massachusetts in 2005, the second in Danvers, Massachusetts in 2006, and the third in Middleton, Massachusetts in 2011. The purpose of the rules is to require facilities managing hazardous materials to have emergency response procedures and prevention measures in place at a level appropriate to the risks posed, such as hazard communication programs, chemical hygiene plans, hazard analyses and emergency response plans, and to ensure that emergency responders have certain information available in the event there are fires or explosions. Requirements for prevention and response programs become more stringent based upon the level of risk posed by the chemicals that are being processed.

The rules apply to both new and existing facilities that process hazardous materials.

Processing is defined broadly to include a "sequence of operations in which the sequence can be inclusive of physical operations such as heating, cooling, mixing, distilling, compressing, and pressurizing, and chemical operations, such as polymerization, oxidation, reduction, and other chemical reaction processes. The sequence can involve but is not limited to: preparation, separation, combination, purification, or any actions that cause a change in state, energy content, or chemical composition." 527 CMR ¶33.02.

Hazardous Materials are defined as chemicals or substances that are a physical hazard or health hazard.

A physical hazard exists where "there is evidence that [a chemical] is a combustible liquid, compressed gas, cryogenic, explosive, flammable gas, flammable liquid, flammable solid, organic peroxide, oxidizer, pyrophoric or unstable (reactive) or water-reactive material." 527 CMR ¶33.02. Many of these categories are further defined in the rule.

A health hazard exists where "there is statistically significant evidence that acute or chronic health effects are capable of occurring in exposed persons. The term Health Hazard includes chemicals that are toxic or highly toxic, and corrosive." 527 CMR 33.02. These categories include chemicals with specified median lethal doses (LDs) or lethal concentrations (LCs) to rats, or that are corrosive to living tissue. ¶527 CMR 33.02.

There are many exceptions to the new rules, and for any facility that appears to qualify for permitting, the exceptions should be reviewed carefully to ensure permits are required. Examples of exemptions include: premixed products; products labeled and packaged for retail sale to consumers; refrigeration systems that employ a refrigerant other than ammonia or LPG; the processing or treatment of potable water and sanitary waste water; the storage of materials in atmospheric vessels maintained below the normal boiling point of the stored material without chilling, refrigeration or heat; and hazardous waste activities regulated under Mass DEP's hazardous waste rules.

Facilities that qualify for permitting are divided into five categories (Categories 1 – 5), depending upon the risks presented by the chemicals that are processed. Thresholds for chemical processing which trigger rule requirements are quite low: as examples, for Category 1 facilities, the rule applies where a process involves a hazardous material in a vessel with a capacity that is less than or equal to 2.5 gallons; for Category 2 facilities, the threshold is any amount greater than 2.5 gallons. 527 CMR ¶33.03.

The rule prohibits the processing of any hazardous material in a Category 2 – 5 facility unless the facility has submitted an application for a permit to the local fire department in accordance with the schedule in the rule. 527 CMR ¶33.04. The schedule for submittal of applications is as follows:

Back to Top

Category	Application Due Date
Category 5	January 1, 2013
Category 4	June 1, 2013
Categories 2 and 3	January 1, 2014
Category 1	No Permit Required

Where a fire department has concerns about a facility which has applied for a permit, for Category 3 and 4 facilities the application may be denied and the fire department may require the facility to hire a process hazard/process safety expert to prepare a report for the fire department describing findings and recommendations relating to whether the facility is operating in compliance with the rules. Presumably this option does not exist for Category 5 facilities because those facilities are subject to OSHA PSM or EPA RMP requirements and are therefore deemed to be adequately regulated on the federal level. ¶527 CMR 33.04.

All categories of facilities subject to the rule are subject to specific documentation and process safety procedure requirements, which are increasingly stringent in relation to the risks posed by the category of facility. ¶527 CMR 33.05.

For further information about the new chemical processing rules, please contact Stephen Richmond at srichmond@bdlaw.com.

U.S. EPA Proposes to Add Two Sites in Massachusetts to the Superfund List

On September 18, 2012, U.S. EPA proposed to list two sites to the National Priorities List, also known as the Superfund list.

The first site is the former Walton & Lonsbury, Inc. facility located in Attleboro. Chrome plating occurred at the site, and contaminants of concern are chromium including hexavalent chromium, lead and volatile organic compounds. MassDEP and EPA have conducted site assessment and removal work, and have determined that contaminants have moved beyond the facility boundaries. According to EPA's press release, MassDEP concurred with listing because the contamination is serious and there is no private source of funding for the cleanup.

The second site is the former Creese & Cook Tannery located in Danvers. The site located along the Crane River was formerly a tannery, and part of the site is now residential. Contaminants of concern are arsenic, chromium including hexavalent chromium, and dioxin. MassDEP concurred with the listing.

For further information on these sites or Superfund, please contact Jeanine Grachuk at jgrachuk@bdlaw.com.

U.S. EPA and MassDEP enter into Record $366 Million Settlement with AVX Corp. for Cleanup of New Bedford Harbor

On October 10, 2012, U.S. EPA announced that AVX Corp. had agreed to pay $366 million to EPA and MassDEP to fund a new remedy for the New Bedford Harbor Superfund Site PCB cleanup. AVX historically operated an electrical capacitor manufacturing facility, which allegedly contaminated New Bedford harbor with PCBs. EPA stated that, with the additional funding, cleanup will involve dredging and landfilling PCB-contaminated sediment and will be completed within five to seven years. Without this funding, the cleanup would take an additional 40 years.

This is not your typical Superfund settlement. Not only has EPA indicated that the settlement is the largest cash payout in Superfund history, but this is not the first settlement by AVX for future response costs. In 1992, AVX agreed to pay $66 million for past and future response costs and natural resource damages relating to the superfund

Back to Top

site. The 1992 settlement included a "reopener" clause allowing EPA to seek additional response costs from AVX if the total remedial costs exceeded $130.5 million. Earlier in 2012, EPA asserted that this threshold had been exceeded, and issued an enforcement order to AVX requiring it to implement an expedited cleanup. According to the proposed consent decree, AVX and EPA agreed to the settlement to avoid litigation over EPA's ability to reopen the original settlement. The proposed consent decree also eliminates the reopener clause that allowed EPA to seek additional funding.

Comments may be made on the proposed consent decree until November 16, 2012.

For further information on this settlement or on Superfund, please contact Jeanine Grachuk at jgrachuk@bdlaw.com.

Sewer Connection Charges are (Sometimes) Allowable Fees and not Impermissible Taxes

As more communities undertake costly efforts to upgrade their sewage collection and treatment systems, the Massachusetts Supreme Judicial Court (SJC) recently held that, at least in some circumstances, municipalities may assess fees related to such work on developers seeking new connections to a community's sewer system.

At issue in *Denver Street LLC v. Saugus*, 462 Mass 651 (2012), was whether a $670,460 inflow and infiltration (I/I) reduction contribution assessed by the Town of Saugus on a developer of new single- and multiple-family homes was a legal fee or impermissible tax. The SJC overturned lower court decisions and concluded that the charge was a permissible fee, dealing a blow to developers, although the reasoning of the case may mean it has somewhat limited applicability.

The assessment in question was intended to help compensate Saugus for repairs to its sewer system that were required by an Administrative Consent Order (ACO) that the town entered with the Massachusetts Department of Environmental Protection in 2005. In evaluating the legality of the I/I reduction contribution, the SJC utilized the test it developed in *Emerson College v. Boston*, 391 Mass. 415 (1984) for distinguishing fees from taxes. This test includes three inquiries:

1. Is the contribution charged in exchange for a particular government service which benefits the party paying in a manner that is not shared by other members of society (known as a sufficiently particularized benefit)?

2. Is the contribution paid by choice? (i.e., can the paying party choose to avoid the charge by not utilizing the service); and

3. Is the contribution collected to compensate the government entity providing the services for its expenses, as opposed to the purpose of general fundraising?

In analyzing whether the connection charge was a "sufficiently particularized benefit," the SJC criticized the lower court's failure to focus on the impact of the ACO, which created a moratorium on any new connections to the town's sewer system until the system's I/I problem was addressed. To avoid a complete moratorium while the town took incremental steps to address I/I issues, the ACO allowed the town to set up a sewer bank, which permits new flow based upon I/I reductions at varying but greater than one-to-one ratios. Saugus developed a policy for new connections in which developers could connect to the system upon a payment calculated by the amount of I/I (at up to a 10-to-1 ratio) that would be required to be removed in order to accommodate the new development.

As the SJC viewed it, had the sewer bank not been created by the town, the developer would have been subject to the ACO's moratorium on new connections and unable to occupy or sell its homes. Thus, by paying the I/I charge, the developer gained immediate access to the sewer system and avoided the moratorium, a benefit particular to that developer that satisfied the first Emerson criteria. The SJC also determined that

Back to Top

the I/I charge was designed to compensate the town for its expenses rather than raise revenue, another hallmark of a fee versus a tax under Emerson. As a result, the SJC concluded that the

However, the decision in *Denver Street LLC* does not mean that all sewer connection charges will constitute fees rather than taxes. The SJC's analysis made clear that it thought that the existence of the ACO made this a different case than other circumstances in which sewer connection fees are imposed. However, in light of a string of enforcement actions against municipalities arising from their storm water and sewage systems and citizen suits compelling such upgrades, more municipalities may be investing in sewer upgrades under consent orders and/or utilizing sewer banks and attempting to pass along some of those costs. These towns and cities may find means for recouping some of these costs from developers under the SJC's thinking in this case.

For further information, please contact Marc J. Goldstein (mgoldstein@bdlaw.com) or Aladdine Joroff (ajoroff@bdlaw.com).

Massachusetts Land Use Developments

Appellate Courts Toughen Standard for Developers Obtaining Summary Dismissal of Zoning Appeals

Two recent cases, 81 *Spooner Road, LLC v. Zoning Board of Appeals of Brookline*, 461 Mass. 692 (2012) and *O'Connell v. Vainisi*, 82 Mass. App. Ct. 688 (2012), recalibrate the evidence that the defendant/developer must produce in order to rebut successfully the presumption of standing of the project opponent and secure a summary judgment dismissing a zoning appeal.

First, in *81 Spooner Road, LLC, supra*, George Fogg and his mother, Frances Fogg, lived in single-family homes abutting either side of 81 Spooner Road. In 2004, a developer purchased 81 Spooner and its existing single-family home. The lot far exceeded the zoning district's residential minimum lot size and the home fell well below the maximum floor-to-area ratio (FAR). The developer secured the Planning Board's "approval not required" endorsement, dividing 81 Spooner into two lots and sold the lot with the existing single-family home to a third party. The developer retained the newly-created lot at 71 Spooner Road and obtained a building permit to construct a two-story, single-family home.

The Foggs objected and requested that the Building Commissioner rescind the building permit because, absent the property at 71 Spooner, the existing home at 81 Spooner exceeded the FAR. The Building Commissioner denied the Foggs' request; however, on appeal, the Zoning Board of Appeals (Board), found that disputed floor area in an attic must be counted as habitable space for the purpose of calculating the FAR thereby pushing the home over the maximum FAR. The Board agreed with the Foggs and rescinded the building permit.

The developer and the Foggs each appealed the Board's decision to the Land Court and filed competing summary judgment motions on the issue of standing; that is, whether the Foggs were "aggrieved" persons within the meaning of G. L. c. 40A, § 17. Both parties relied heavily on the Foggs' deposition testimony. The Land Court denied the developer's and granted the Foggs' motion for summary judgment finding that while the evidentiary record was "thin," the issue was not whether the Foggs had presented enough evidence, but, rather, whether the developer had presented sufficient evidence to rebut their presumption of standing. The judge concluded that by merely pointing out deficiencies in the Foggs' claims of aggrievement, the developer had failed to do so. After trial, the judge affirmed the Board's decision finding the disputed attic space habitable, thus rendering the home noncompliant with the FAR. He affirmed the rescission of the building permit.

The Court reasserted that the defendant/developer can rebut the presumption of

Back to Top

standing by "showing that, as a matter of law, the claims of aggrievement raised by an abutter, either in the complaint or during discovery, are not interests that the Zoning Act is intended to protect." Further, even if the alleged harm is protected by the zoning laws, a defendant/developer "can rebut the presumption of standing by coming forward with credible affirmative evidence that refutes the presumption…. For example, the defendant may present affidavits of experts establishing that an abutter's allegations of harm are unfounded or *de minimus*. "

While reaffirming that the developer need not necessarily present affirmative evidence to refute a plaintiff's basis for standing, the Court, in practice, left few occasions for a developer to refrain from doing so. Here, the Court found that the unsupported allegations raised by the Foggs in their deposition testimony – that the new home results in "financial[] and esthetic[]" damages; a house "crowded in and not [in] keeping with the other houses on the street;" a home that is "too big… on too small a lot;" which "spoils [the] view" and "causes traffic" – was enough to trigger the affirmative obligation of the developer to disprove these claims. Absent the rare case where the project opponents essentially admit to having "no factual basis for their claim of harm," the developer must come forward with affirmative evidence to disprove deposition statements that are susceptible to interpretation of a claim of harm.

In *O'Connell, supra*, the Appeals Court dealt with same question. Here, the Vainisis constructed a stone retaining wall along the border of the parties' lots. They filled in the area between the retaining wall and their house and placed cobblestones on top of the fill. They also built a wooden fence on top of the retaining wall. All of these features – the retaining wall, fence, and cobblestone patio – were within the setback area. When the O'Connell registered their objections to the Building Commissioner, he found that the work fell with an exception of the zoning bylaw. The Zoning Board largely reversed this decision and ordered the removal of the fence and lowering of the wall to six feet to meet the zoning bylaw. The O'Connells appealed and the Vainisis challenged their standing.

Citing *81 Spooner*, the *O'Connell Court* concluded that the abutter's contentions at his deposition of a "massive" new structure "imposing" on his property and "looming over our garden" addressed a protected interest of the zoning bylaw – crowding – and not simply considerations of "privacy or aesthetics." The Vainisis' reliance on the deposition testimony was not enough to overcome the presumption of standing. The case was remanded to the Board to interpret whether the stone wall fell within the category of structure exempt from the setback requirement.

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

Massachusetts High Court Set to Review Decision Whether Untimely Recorded Variance Saved by Substantial Reliance

A previous edition of the *Massachusetts Environmental & Land Use Alert* reported on *Grady v. Langone, et al.*, 2011 Mass. LCR Lexis 77, in which the Land Court held that a variance is effective even if it is recorded outside the statutory one-year period so long as there has been substantial reliance on the variance. In *Grady*, the trial court rejected drawing a "hard and fast 'one year' rule" similar to that adopted for the 20-day appeal period from the decisions of permit- or special-permit granting authorities under Chapter 40A, § 17. Instead, even though the permittee recorded the variance a few days outside the one-year statutory period, the trial court upheld the validity of the variance where the developer had hired a general contractor, applied for and received a building permit, hired an architect to review the work progress and prepare reports, obtained a construction loan and granted a mortgage to a credit union, drew substantial funds from the loan, and began clearing the site, all within one year of the grant of the variance.

The case was appealed to the Appeals Court. Now, the Massachusetts Supreme Judicial Court has reached down and placed the case on its own docket. Although no precise date has been set, oral argument before the Commonwealth's highest court is

Back to Top

scheduled for some time during December, 2012.

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

National Developments

RCRA's Hazardous Waste Manifest System Enters the Electronic Age

On October 5, President Obama signed into law an amendment to the Resource Conservation and Recovery Act (RCRA) that will establish an electronic hazardous waste manifest system. The electronic system will replace the current paper-based manifest system, which requires hazardous waste handlers to file multiple paper copies of hazardous waste manifests.

The bill, known as the Hazardous Waste Electronic Manifest Establishment Act, passed both chambers of Congress by unanimous consent and enjoys support from both industry and NGOs. Sen. John Thune (R-S.D.), the bill's author, stated that the current manifest system costs regulated parties between $200 million and $500 million per year. EPA testified earlier this year that an electronic manifest system could save agencies and regulated parties more than $75 million per year.

The bill requires EPA to establish user fees to fund the e-manifest system by promulgating regulations in the next year. The system itself would be operational within three years.

EPA originally proposed an optional paperless hazardous waste manifest system in 2001, but the system was never implemented. The agency noted in subsequent years that there remained "a fairly broad consensus" in favor of an electronic system but that implementation of the system depended on increased funding or the authority to collect user fees. With this Act, Congress has authorized EPA to collect user fees, and hazardous waste generators, transporters, and treatment, storage, and disposal facilities will soon be able to manage the hazardous waste manifest system electronically. Precisely how the e-manifest system will be implemented, including how the user fees will be collected, will be set forth in a proposed rule from EPA.

For more information please contact Elizabeth Richardson, 202-789-6066, ERichardson@bdlaw.com; Bethany French, 202-789-6042, BFrench@bdlaw.com; or Ryan Carra, 202-789-6059, RCarra@bdlaw.com.

FTC Issues Revised Green Guides for Environmental Marketing

On October 1, 2012, the Federal Trade Commission (FTC) issued final revisions to the Guides for the Use of Environmental Marketing Claims, known as the Green Guides. The Green Guides inform marketers and others of how the FTC applies Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive acts, to environmental marketing claims. The long-awaited revision provides important new and modified guidance to companies making or planning marketing claims related to the environmental attributes of their products or services.

The FTC's announcement marks the first revision of the Green Guides since 1998. The changes were proposed in 2010 (see our Oct. 7, 2010 Alert). The final version of the Green Guides generally adheres to the 2010 proposal, with some changes in response to the 340 unique comments received by the FTC. The October 11, 2012 Federal Register notice announcing the final updates to the Guides is available here. A four-page summary of the Green Guides is available here. A detailed discussion of the comments and the FTC responses is available here.

The final revised Green Guides contain new sections on certifications and seals of approval, "free-of" claims, "non-toxic" claims, "made with renewable energy" claims, "made with renewable materials" claims, and carbon offset claims. They also clarify the

Back to Top

FTC's guidance on several existing sections, including those related to claims of general environmental benefits, "compostable" claims, "degradable" claims, and "recyclable" claims.

Background

First adopted in 1992, the Green Guides apply to claims about the environmental attributes of a product, package, or service in connection with the marketing or sale of the product or service. Generally, they require marketers to possess competent and reliable scientific evidence that substantiates an environmental claim that appears in a label, advertisement, promotional materials, or other marketing media. The Guides apply to both express and implied claims, including those made through symbols, logos, depictions, brand names, and other means.

The Guides apply to business-to-business marketing as well as to marketing that targets individual consumers. Depending upon the circumstances, the Green Guides may apply to manufacturers, certifiers, auditors, wholesale and retail sellers, and their advertising companies, any of whom may be held liable under Section 5 of the FTC Act for making or disseminating deceptive claims.

The Guides are in the form of interpretive regulations, 16 C.F.R. Part 260. They are not independently enforceable regulations, but the FTC may consider practices that are inconsistent with the Green Guides to be violations of the FTC Act, subjecting violators to enforcement.

New Additions to the Green Guides

The revised Green Guides add new sections to provide guidance on environmental claims that were not common when last revised in 1998.

- Certifications and Seals of Approval. The Green Guides now provide that it is deceptive to misrepresent that a product or service has been endorsed or certified by an independent third party. The 1998 version included a single example related to environmental certifications and seals of approval, which illustrated that the use of certifications and seals may constitute a claim that a product is environmentally superior to other, uncertified products. In 2010, the FTC proposed adding a new section on environmental certifications and seals of approval, which the final Green Guides largely adopted. The final Green Guides (1) emphasize that certifications and seals may be considered endorsements that are subject to the FTC's Endorsement Guides, 16 C.F.R. Part 255; (2) caution marketers that they must disclose any material connection between the marketer and the certifying body that might affect the weight or credibility of an endorsement, unless the seal or certification does not convey that the certifier is independent; (3) advise marketers to qualify environmental certifications or seals that convey general environmental benefit claims because marketers are unlikely to be able to substantiate such general claims; and (4) direct marketers to clearly and prominently qualify seals and certifications that apply only to specific and limited benefits.

  The final Green Guides also clarify two situations that were not clearly addressed in the 2010 proposal. First, the Guides now advise marketers on how to qualify general environmental claims conveyed by a certification that is based upon broad-based multi-attribute standards that cannot practically and effectively be communicated to consumers in labels or marketing materials. Second, the Guides clarify that marketers remain responsible for substantiating claims conveyed by any certification, including government certifications.

- "Free-of" Claims. According to the updated Green Guides, an otherwise truthful claim that a product is "free of" a specified substance may be deceptive if the product contains or uses other substances that pose the same or similar environmental risk or if the substance never has been associated with the given product category. "Free-of" claims may be permissible, however, where a product

contains a de minimis or trace amount of a substance if the claim passes a three-part test. The test is that (1) the amount of the substance is no more than that which would be found as a background level; (2) the substance's presence does not cause material harm that consumers typically associate with that substance; and (3) the substance has not been added intentionally to the product. The FTC indicated that these changes were designed in part to more closely align the Guides with the International Organization for Standardization (ISO) standard 14021 (Environmental labels and declarations – Self-declared environmental claims).

- "Non-toxic" Claims. The final Green Guides provide that it is deceptive to misrepresent that a product is non-toxic. The FTC noted that consumers are likely to interpret a non-toxic claim to mean that a product is non-toxic for both humans and the environment. The Green Guides therefore advise marketers to qualify non-toxic claims as necessary to avoid deception. In the final Green Guides, the FTC clarified that a claim that a product is "non-toxic" should not be made if there is trace toxicity. In other words, unlike for "free-of" claims, the Green Guides do not make any allowance for trace or de minimis levels of toxicity in a product.

- Renewable Energy Claims. Under the 2012 revision, it is deceptive to misrepresent that a product is made with renewable energy or that a service uses renewable energy. The final revision provides guidance on several issues related to renewable energy. First, the Guides advise marketers not to make unqualified "made with renewable energy" claims if the power used to manufacture the item was derived from fossil fuel, unless the marketer has purchased renewable energy certificates (RECs) to match their energy use. Second, the Guides warn marketers to qualify renewable energy claims to minimize the risk of misinterpretation by consumers, for example, by disclosing the source of renewable energy. Third, the Guides advise that marketers should not make unqualified claims that a product is "made with renewable energy" unless all or virtually all of the manufacturing processes used to make the product were powered by renewable energy or non-renewable energy matched with RECs. Next, the Guides caution marketers that host a renewable energy facility that it is deceptive to make unqualified renewable energy claims if the marketer has sold all of the renewable attributes of the energy it produced or hosted. The FTC declined to issue guidance on claims based upon legally-required renewable energy sources in the current revision, but noted its concern that such claims may deceive consumers and pledged to continue to monitor the issue.

- Renewable Materials Claims. In the final Green Guides, the FTC also added a provision stating that it is deceptive to misrepresent that a product or package is made with renewable materials. The Guides caution marketers to qualify any "made with renewable materials" claim as needed to avoid deception. For example, marketers may minimize the risk of unintended implied claims by identifying the material used and explaining why it is renewable.

- Carbon Offset Claims. Some marketers assert that their product or service offsets its carbon emissions through emissions reductions elsewhere. In its 2010 proposal and the final revised Green Guides, the FTC advised marketers to (1) use competent and reliable scientific and accounting methods to quantify emission reductions and ensure that a given reduction is sold only once; (2) avoid deceptive practices related to the timing of when an emissions reduction will occur by disclosing if an offset represents emission reductions that will not occur for two years or longer; and (3) avoid express or implied claims that a carbon offset represents an additional emission reduction if the reduction or activity that caused the reduction was required by law. The FTC declined to offer more extensive guidance on carbon offset claims, noting limitations on the extent of its authority, low consumer awareness of carbon offset products, and ongoing policy debates about substantiation of offset claims.

Revisions to Existing Sections of the Green Guides

The final Green Guides also revise previous guidance related to several aspects of environmental marketing claims.

- General Environmental Benefit Claims. Earlier versions of the Green Guides cautioned marketers against making general environmental benefit claims, such as "environmentally friendly," because it is nearly impossible to substantiate all reasonable interpretations of such claims. In the 2010 proposal, the FTC proposed additional guidance on how to qualify and substantiate general environmental benefit claims and sought comment on related issues. Like the proposal, the final Guides advise marketers not to make broad, unqualified general environmental benefit claims that cannot be substantiated. They advise, however, that marketers may be able to qualify such claims with clear and prominent language that focuses consumers on specific claims or limited environmental benefits that can be substantiated. The final Guides also caution marketers against implying that any specific benefit is significant if it is, in fact, negligible. Finally, where a claim implies a net environmental benefit, the final Guides direct marketers to analyze environmental trade-offs resulting from the change or product attribute to determine whether there is support for the purported net benefit.

  The FTC also provided guidance on when a life cycle assessment might be needed to substantiate a general environmental claim. It advised that a life cycle assessment might be appropriate in the context of general environmental claims that are coupled with a change in a product or process. For example, if a marketer claims that its packaging is "greener" because it uses less plastic, the FTC would require the marketer to both substantiate the source reduction claim ("uses less plastic") and the claim that the change in packaging results in a net environmental benefit ("is greener"). If the new packaging changes other environmental attributes in a product's life cycle (e.g., requires the use of more energy during manufacturing or the use of a different kind of plastic), evaluating the general environmental benefit claim likely would require the marketer to assess more comprehensively any trade-offs made to determine if the net benefit claim is supported.

  The FTC indicated that it would evaluate whether a life cycle assessment is conducted in an objective manner by qualified individuals, whether the analysis is generally accepted in the profession to be accurate and reliable, and whether the assessment is sufficient to substantiate that each of the marketer's claims is true. Beyond this guidance, the FTC declined to issue additional guidance regarding when a life cycle assessment is required or which particular methods or standards marketers should utilize.

- "Compostable" Claims. The 1998 version of the Guides stated that a compostable claim should be substantiated by competent and reliable scientific evidence that the entire item will break down into, or otherwise become part of, usable compost in a safe and timely manner. In 2010, the FTC proposed a revision to clarify the meaning of "timely manner" by adding that the product should break down in approximately the same time as the materials with which it is composted. The FTC adopted this proposed change without revision in the final Guides.

- "Degradable" Claims. According to the 1998 version of the Guides, a claim that items entering the solid waste stream are "degradable" must be qualified unless the entire item will break down within a "reasonably short period of time." The final revised Green Guides adopt the FTC's 2010 proposal clarifying that "break down within a reasonably short period of time" means that the entire item will fully decompose within one year after customary disposal. The updated Guides also clarify that unqualified degradable claims are inappropriate for items destined for landfills, incinerators, or recycling facilities in which the items will not degrade within a year.

- "Recyclable" Claims. The 1998 Green Guides included a three-tiered approach to analyzing recyclability claims: (1) unqualified claims were permitted if recycling facilities were available to a "substantial majority" of consumers or communities where the item was sold; (2) claims of recyclability were permissible where facilities were available to a "significant percentage" of communities or the population, but

not a substantial majority, if the claim was also qualified by a statement such as "this product may not be recyclable in your area" or that identified the approximate availability of recycling programs (e.g., as a percentage of communities or the population); and (3) when recycling facilities were available to less than a "significant percentage" of communities or the population, marketers could either disclose that the product was recyclable only in the few communities with recycling facilities available for the particular product or state the number of communities, the percentage of communities, or the percentage of the population where programs were available to recycle the product.

The 2010 proposal retained the tiered structure but proposed to clarify that "substantial majority" means at least 60 percent. The final Green Guides adopt the 60 percent threshold for defining what constitutes a "substantial majority," but modify the recyclable claims analysis from a three-tiered to a two-tiered framework by eliminating the "significant percentage" threshold. Under the final Green Guides, marketers may make unqualified claims for products that at least 60 percent of consumers or communities can recycle, or they may make qualified claims for products that do not meet the 60 percent threshold. Statements qualifying the availability of recycling facilities for a product should be proportionate to the level of access actually available. Where there is less access to appropriate facilities, the marketer should more strongly emphasize the limited availability of recycling for the product.

Claims Not Addressed in the Final Green Guides

Beyond the revisions and additions described above, the FTC declined to address a handful of categories of claims. Specifically, it did not address the use of the terms "natural," "organic," or "sustainable" in the final Green Guides. The FTC explained that it lacks a sufficient basis to provide meaningful guidance or wants to avoid proposing guidance that duplicates or contradicts rules or guidance of other agencies. With respect to the term "sustainable," the FTC noted that there is the potential for confusion and that it would continue to monitor the use of the term in marketing materials. The FTC advised marketers using the term to test any claim to be sure the marketer can substantiate any express or implied environmental claim the marketer makes.

Additional Guidance and Clarifications

Marketers may want to be aware of the additional clarifications that the FTC made in discussing the final Green Guides or in the Green Guides themselves.

- Business-to-Business Claims. The FTC added new language to the final Guides clarifying that they apply to business-to-business marketing claims. In addition, the final Guides incorporate an example of a business-to-business claim that was newly proposed in the 2010 revisions. The FTC noted that marketers must understand who their customers are and how their claims will be interpreted by those customers. It further cautioned marketers to be aware that business-to-business claims may be passed on to individual customers and that marketers should be careful not to provide other businesses with the means and instrumentalities to engage in deceptive conduct.

- Sophisticated Audiences. In response to several comments recommending that the final Guides focus on more sophisticated "green consumers," the FTC emphasized that the Green Guides are based on marketing to a general audience. However, it noted that when a marketer targets a particular segment of consumers, such as those who are particularly knowledgeable about the environment, the FTC will examine how reasonable members of that group interpret the advertisement. It cautioned, however, that more sophisticated consumers may not view claims differently than less sophisticated consumers.

- Auditors, Certifiers, Retailers, and Other Entities. In response to a request from several commenters for clarification as to whether the Guides apply to entities other

than manufacturers, the FTC noted that entities such as certifiers, auditors, and retailers may be liable under Section 5 of the FTC Act. The FTC further noted that outside of the environmental context, courts have held advertising agencies, catalog marketers, retailers, infomercial producers, and home shopping companies liable for their roles in making or disseminating deceptive claims.

- Website Disclosures. Despite evidence that some consumers use smartphones and other devices to access product information at the point of sale, the FTC reiterated that websites cannot be used to qualify otherwise misleading claims that appear at the point of sale. Of course, if the point of sale is online, the FTC confirmed that a marketer may make any necessary disclosure or qualification online, provided the disclosure is clear and conspicuous and in close proximity to the claim the marketer is qualifying.

- State and Local Laws. In the final Green Guides, the FTC made several adjustments to its 2010 proposed revisions in response to comments regarding overlap or conflict with state and local laws. For example, the FTC revised an example in the section for "non-toxic" claims so that it refers to a cleaning product rather than a pesticide, since Environmental Protection Agency regulations prohibit non-toxic claims for pesticide products. The FTC reminded marketers to follow the strictest law or regulation applicable to their products. It further noted that the Green Guides, as administrative interpretations of Section 5, are not regulations and do not preempt other laws. Thus, even if a claim is not deceptive under the Guides, a marketer should not make the claim if another law proscribes it.

Beveridge & Diamond actively counsels clients on environmental marketing. For further information on this topic, please contact Mark Duvall (mduvall@bdlaw.com) or Lauren Hopkins (lhopkins@bdlaw.com).

Court Enjoins City of Dallas from Enforcing Flow-Control Ordinance

On October 16, 2012, the U.S. District Court for the Northern District of Texas granted a request for a permanent injunction enjoining the City of Dallas from enforcing a flow-control ordinance (Dallas City Ordinance No. 28427) that would have required all solid waste collected within the City to be disposed at a City-owned landfill or transfer station.

The lawsuit was brought by several businesses that collect solid waste under franchise agreements with the City (most of whom also operate a landfill or recycling facility) as well as two industry groups and a landfill operator. Plaintiffs sued in November 2011 in order to prevent the ordinance from going into effect as scheduled on January 2, 2012.

The court granted a preliminary injunction on January 31, 2012, finding that in enacting the ordinance the City had violated the Contract Clause of the U.S. Constitution. To arrive at this result, the court first concluded that the franchise agreements gave the franchisees "the contractual right to dispose of solid waste collected within the City at any location legally authorized, or permitted, to operate as a disposal, collection, or processing facility." It then found that the ordinance "substantially impaired" the franchisees' rights under those agreements because it would eliminate their ability to dispose of waste at their own facilities and significantly increase their operating costs. Finally, the court held that the ordinance was enacted as a revenue-raising measure and that the City's desire to raise revenue through the ordinance was not "a significant and legitimate public purpose" necessary to justify the substantial impairment of the franchisees' rights.

In granting the permanent injunction, the court reaffirmed its holding on the Contract Clause violation. For similar reasons, it also found that the City violated the Due Course of Law Clause of the Texas Constitution, holding that the City had unreasonably exercised its police powers by enacting the ordinance "to raise revenue to advance its economic and proprietary interests at the expense of the Franchisees' rights." The court also held that the City had violated the Dallas City Charter because it did not provide the franchisees a fair hearing on the ordinance, but dismissed that claim as moot in light of

its holding that the ordinance was unconstitutional.

The case is *National Solid Wastes Management Association v. City of Dallas*, N.D. Tex., No. 3:11-cv-3200-O. The court's opinion granting the permanent injunction is available here; its order granting the preliminary injunction is available here.

Jimmy Slaughter and Bryan Moore from Beveridge & Diamond's Washington and Texas offices represent amicus curiae American Forest & Paper Association. For more information, contact Jimmy Slaughter at jslaughter@bdlaw.com or Bryan Moore at bmoore@bdlaw.com.

Two State Courts Allow Greenhouse Gas Claims to Proceed on Public Trust Theory

In a new wave of climate change litigation that could pave the way for state-level regulation of greenhouse gas emissions, at least two courts have extended the "public trust" doctrine to include protection of the air and atmosphere. In a series of cases filed in various states within the past year, plaintiffs are arguing (with varying degrees of success) that the atmosphere, like groundwater and surface water, is a natural resource held in trust for the benefit of the public, which imposes a duty upon state governments, as trustees of such resources, to protect the atmosphere for the public good. The plaintiffs in these cases seek injunctive relief in the form of more stringent regulation of greenhouse gas emissions.

In *Bonser-Lain v. Texas Commission on Environmental Quality*, No. D-1-GN-11-002194 (Tex. Dist. Ct. July 9, 2012) (mem.), available at www.bdlaw.com/assets/attachments/Bonser.pdf, for example, the Texas Environmental Law Center sued the state's lead environmental agency, Texas Commission on Environmental Quality ("TCEQ"), asserting that the state, as a common law trustee of public resources—here, the air and atmosphere—had a fiduciary duty to reduce greenhouse gas emissions. Plaintiffs argued that the air and atmosphere are "valued resources of the natural environment, vital to both the continued use and enjoyment of the natural environment and vital to the health of the human population" and therefore an asset of the public trust. Pl's Pet. ¶ 37. Plaintiffs also alleged that the atmosphere must be protected under the public trust doctrine because of its impact on other trust assets including waterways and coastlands. *Id.* at ¶ 38. Although the court deferred to the state agency's decision to deny plaintiff's petition for GHG rulemaking at this time, the Court held that that the public trust doctrine is not exclusively limited to the conservation of water; rather, the "doctrine includes all natural resources of the State." Bonser-Lain, mem. op. at 1. In addition, the Court determined that the public trust doctrine was incorporated into the Texas constitution, and that the state agency had authority to act "to protect against adverse effects including global warming." *Id.*

Just days later, a New Mexico state trial court, in *Sanders-Reed v. Martinez*, No. D-101-CV-2011-1514 (N.M. Dist. Ct. July 14, 2012), available at www.bdlaw.com/assets/attachments/Sanders-Reed.pdf, denied defendant's motion to dismiss allowing plaintiffs' public trust doctrine claim to proceed on its merits. Akilah Sanders-Reed and WildEarth Guardians sued the state seeking to compel it to recognize the application of the public trust doctrine to greenhouse gas emissions and to take actions to reduce those emissions. In denying defendant's motion to dismiss, the court held that plaintiffs made a "substantive allegation that notwithstanding statutes enacted by the New Mexico Legislature which enable the state to set state air quality standards, the process has gone astray and the state is ignoring the atmosphere with respect to greenhouse gas emissions." *Sanders-Reed*, slip op. at 2.

These decisions highlight the resolve of environmentalists—and the willingness of some courts—to rely upon state common law theories, such as the public trust doctrine, to regulate greenhouse gas emissions.

Firm News & Events

Beveridge & Diamond Again Named a Top National Environmental and Litigation Firm by U.S. News/Best Lawyers

Washington, DC - 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 2012 Best Law Firms list. With nearly 100 lawyers in offices in six states and the District of Columbia, the firm helps clients from a range of industries solve complex environmental and natural resource challenges across the U.S. and internationally.

The Firm's practice in Washington, D.C. was recognized with Tier 1 rankings for environmental law and litigation, and the San Francisco office with a Tier 1 ranking for environmental law. The Firm's Boston office was recognized for its land use practice.

"We thank U.S. News and Best Lawyers for again recognizing our firm's focused depth and strength of expertise that we bring to bear across the U.S. and indeed the world. Our clients and our lawyers make our success possible, and I want to thank and honor them for this recognition," said Benjamin F. Wilson, Beveridge & Diamond's Managing Principal.

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

About Beveridge & Diamond, P.C.

With nearly 100 attorneys in six offices across the United States, Beveridge & Diamond offers concentrated experience in all areas of environmental and natural resource law to help clients address current challenges and prepare for the future.

Twelve Beveridge & Diamond, P.C. Attorneys Named to Best Lawyers® for 2013

Beveridge & Diamond, P.C. is proud to announce that 12 of its attorneys have been named to the 2013 edition of Best Lawyers®, the "oldest and most respected peer-review publication in the legal profession."

- **Environmental Law**
  Karl S. Bourdeau (Washington, DC)
  Holly Cannon (Washington, DC)
  Henry L. Diamond (Washington, DC)
  Mark Duvall (Washington, DC)
  Paul E. Hagen (Washington, DC)
  Bryan J. Moore (Austin, TX)
  Gary J. Smith (San Francisco, CA)

- **Litigation - Environmental**
  Henry L. Diamond (Washington, DC)
  John N. Hanson (Washington, DC
  Gary J. Smith (San Francisco, CA)
  Kathryn E. Szmuszkovicz (Washington, DC)

- **Land Use & Zoning Law**
  Brian C. Levey (Wellesley, MA)

- **Arbitration**
  Benjamin F. Wilson (Washington, DC)

- **Commercial Litigation**
  Robert Brager (Baltimore, MD)

First published in 1983, Best Lawyers is based on an exhaustive annual peer-review survey. Corporate Counsel magazine has called Best Lawyers “the most respected referral list of attorneys in practice.”

Office Locations:

Washington, DC

Texas

New York

New Jersey

Massachusetts

Maryland

California