Texas Environmental Update

BEVERIDGE & DIAMOND PC

January 2010

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Texas Developments

TCEQ Revises Air Pollutant Watch List

The Texas Commission on Environmental Quality ("TCEQ") has removed selected air contaminants from certain agency Air Pollutant Watch Lists ("APWLs") based upon monitoring that shows reduced levels of those air contaminants in areas where levels had previously been measured at levels of concern. Specifically, benzene has been removed from the Lynchburg Ferry, Beaumont and Corpus Christi APWLs. Acrolein, butyraldehyde, and valeraldehyde have been removed from the Texas City APWL.

The APWL is a list of geographic areas in Texas for which TCEQ has determined that specific air contaminants have been measured at levels that exceed the effects screening level ("ESL") for that compound. An ESL is a measured level at which no health effects would be expected. Readings above an ESL trigger further investigation by TCEQ. The APWL serves a number of purposes, including to heighten awareness of such areas for interested persons (including TCEQ personnel, industry representatives and private citizens), and to encourage efforts and focus resources to reduce emissions in these areas.

The updated APWL is available at http://www.tceq.state.tx.us/implementation/tox/index.html#do.

TCEQ Issues Toxicological Evaluation of 2008 Houston Area Air Monitoring

On January 11, 2010, TCEQ's Toxicology Division issued a memorandum regarding its health effects review of ambient air monitoring data collected in the Houston area (TCEQ Region 12) during 2008. TCEQ reports that such monitoring data showed a number of reductions in levels of air contaminant concentrations, including reduced benzene concentrations at the Lynchburg Ferry and Galena Park sites, and a reduced 2008 average 1,3--butadiene concentration at the Milby Park site. The memorandum also notes hourly levels of several volatile organic compounds ("VOCs") at levels above ESL odor thresholds, including perceptible levels of styrene in the Lynchburg Ferry and Milby Park areas. Details regarding these and other aspects of the Region 12 toxicological evaluation are included in TCEQ's January 11, 2010 memorandum, which is available at http://www.tceq.state.tx.us/implementation/tox.

TCEQ Releases Results of Air Emissions Study in Barnett Shale

TCEQ has released the results of an intensive air monitoring effort covering 94 oil and gas monitoring sites in the Barnett Shale area of North Texas. The study, which focused on benzene emissions, found that at a majority of the monitoring sites, chemicals were either not detected or were detected below levels of health concern. At two sites, TCEQ did find levels of benzene at a sufficient level to trigger facility repairs to reduce those emissions. At nineteen additional sites, benzene was measured at elevated levels that did not require immediate action.

The study was conducted at various sites in Denton, Wise, Parker, Hood, Johnson and Tarrant Counties. It covered multiple emission source types, including well-heads,

condensate and product storage tank batteries, compressor stations, saltwater disposal wells, natural gas processing facilities, and operations associated with drilling and fracturing. Another survey covering the same area is scheduled during the spring. Additional information about the results of the study and current TCEQ activities related to the Barnett Shale is found at http://www.tceq.state.tx.us/goto/barnettshale.

3rd Court of Appeals Rules on "Effective Date" in *City of Austin v. Tex. Comm'n on Envtl. Quality*

On December 31, 2009, the Third Court of Appeals issued its ruling in *City of Austin v. Tex. Comm'n on Envtl. Quality*, 2009 Tex. App. LEXIS 9861 (Tex. App.—Austin Dec. 31, 2009), addressing the applicable deadline to file a judicial challenge to a decision issued by the TCEQ executive director. The court held in its opinion that the City of Austin's suit challenging the executive director's decision approving a party's water pollution abatement plan must be filed within 30 days of the executive director's signing and issuance of the decision. Because the plaintiff failed to file suit within 30 days, the court of appeals found the district court had no jurisdiction over the plaintiff's suit, and therefore dismissed the suit for want of jurisdiction.

The suit arose from the City of Austin's challenge to TCEQ's approval of a water pollution abatement plan (WPAP) filed by KBDJ, L.P., relating to KBDJ's proposed construction of a limestone quarry pit in Hays county. The executive director approved KBDJ's WPAP application on October 28, 2005. On November 21, 2005, the City filed a motion to overturn the executive director's decision with the Commission pursuant to 30 TAC §50.139(b). On February 3, 2006, the Commission denied the motion. The City filed subsequently suit against the Commission in district court on February 23, 2006. On November 13, 2007, the district court affirmed the Commission's decision.

The City appealed the decision of the district court to the court of appeals on substantive and procedural grounds. In its response, KBDJ and the Commission asserted that the City failed to timely seek judicial review of the Commission's decision and, therefore, the City's lawsuit should be dismissed for lack of jurisdiction. Specifically, KBDJ and the Commission contended that Section 5.351(b) of the Texas Water Code, which states that "[a] person affected by a ruling, order, or decision of the Commission must file his petition [for judicial review] within 30 days after the effective date of the ruling, order or decision," required that the suit be filed within 30 days of executive director's October 28, 2005 decision. The City argued the executive director's decision was not "effective" until the Commission overruled the City's motion to overturn, which the City had timely filed with the Commission.

The court began its evaluation by noting that the rules the executive director was acting under in this case, Chapter 213 of the Commission's rules (relating to "activities having the potential for polluting the Edwards Aquifer"), did not separately identify when an executive director's decision was "effective." In reviewing chapter 213, however, the court determined that it was the executive director's approval, instead of the Commission's approval, that was the relevant trigger governing the applicant's subsequent obligations and deadlines. The court thus concluded that a decision under chapter 213 became "effective" upon the executive director's action and not some subsequent Commission action. While the court noted that chapter 213 authorizes a motion to the Commission to overturn the executive director's decision, that motion is limited by 30 TAC 50.139(d), which states that "[a]n action of the executive director . . . is not affected by a motion to overturn filed under this section unless expressly ordered by the Commission." In this case the Commission had issued no such order.

The City argued in the alternative that even if the executive director's decision was effective on the date it was issued, the court had independent jurisdiction over the City's appeal of the Commission's denial of the City's motion for reconsideration. Rejecting that argument, the court found that the Commission's refusal to overturn or otherwise modify the executive director's decision did not separately impose an obligation on the City, which is required for an order to be final and appealable (*See Texas-New Mexico Power Co. v. Texas Indus. Energy Consumers*, 806 S.W. 2d 230, 232 (Tex. 1991). As the court stated, "The denial of the motions to overturn does not fix the legal relationship between the Commission and

KBDJ, but rather, at most, declines to alter the manner in which the executive director's decision fixed the legal relationship."

The *City of Austin v. Tex. Comm'n on Envtl. Quality* suit and others that preceded it (*See, e.g., West v. TCEQ*, 260 S.W. 3d 256 (Tex. App.—Austin July 31, 2008) and *Texas Commission on Environmental Quality v. Kelsoe*, 286 S.W.3d 91 (Tex. App.—Austin April 30, 2009)) prompted the Commission to review the issue last year. Specifically, the Commission set out to consider whether the TCEQ implementing statutes and regulations generated confusion on the "effective date" issue and, if so, to determine what corrective action the Commission should take in response. At its September 18, 2009 work session, the Commissioners undertook a "discussion and consideration of statutes, rules, and agency policies and procedures, relating to the effective date of orders of the Commission and Executive Director" (*See* Commissioners' Work Session, Marked Agenda, September 18, 2009, Item 2). The Commissioners conducted an overview discussion of the issue, concluding the discussion with a request for input from interested parties. Several parties subsequently submitted briefs to the Commission. The Commission took up the issue again at its December 4, 2009 work session. Following a short discussion, during which two of the Commissioners commented that the work session process had served to bring some clarity to the issue, the Commissioners chose to take no further action on the item. The Commissioners did not indicate if or when they would revisit the issue.

TCEQ Commissioners Challenge EPA Proposed Ozone Standards

TCEQ has gone on record strongly opposing recent federal standards that propose to reduce the ozone 8-hour primary standard from 0.075 ppm to a range of 0.060 to 0.070 ppm, available at http://www.epa.gov/ozonepollution/actions.html. In a media interview, Chairman Bryan Shaw criticized the scientific data EPA used to support the proposed standards and claimed that the reductions might not provide meaningful benefits. The Chairman also underscored the significance of the economic impacts that the additional reductions, if passed, would cause. Responding to questions regarding the Agency's strategy, the Chairman stated that the Agency planned to submit comments on the proposed rule during the public comment period and that a lawsuit challenging the rules was not out of the question. The press release is available at: http://www.tceq.state.tx.us/agency/ozone_proposal.html

TCEQ to Consider CAIR Revisions & CAMR Rule Repeal

On February 10, 2010, the TCEQ Commissioners are scheduled to consider the Executive Director's recommended revisions to the Clean Air Interstate Rule ("CAIR") state implementation plan ("SIP") and rule. The SIP revision would implement five revisions that EPA has made to the federal CAIR rule since May 12, 2005, and revisions addressing Senate Bill ("SB") 1672, 80th Texas Legislature, Regular Session. On the same date, the Commissioners are scheduled to consider repeal of the Texas Clean Air Mercury Rule ("CAMR") and withdrawal of the Texas State Plan for Mercury, based upon the U.S. Court of Appeals District of Columbia Circuit's February 8, 2008 vacatur of the federal CAMR rule. Documents relating to these proposals are available on TCEQ's "Clean Air Interstate Rule and Clean Air Mercury Rule" home page at http://www.tceq.state.tx.us/implementation/air/sip/caircamr.html.

TCEQ Announces Upcoming TERP Rebate Program

TCEQ's Texas Emissions Reduction Plan (TERP) Program recently announced a new upcoming American Recovery and Reinvestment Act (ARRA) Rebate Grants Program. Once the application period for this grant program opens, applications will be accepted on a first-come-first-served basis until April 30, 2010. TCEQ has indicated the application period will be opening soon. A final application form will be available when the grant round officially opens. TCEQ has stated that applicants should not use the application forms from previous programs.

As with other TERP Rebate Programs, applications will be received from persons who

own and operate selected types of on-road heavy-duty diesel vehicles and non-road diesel equipment in the nonattainment and near-nonattainment areas of Texas (Houston-Galveston-Brazoria; Dallas-Fort Worth; Beaumont-Port Arthur; Tyler-Longview; Austin; and San Antonio). The funding is available for activities that will reduce emissions of NOx in those areas. A portion of the funding will be reserved for small businesses.

The Rebate Grants Program is intended to provide a simplified first-come- first-served grant program. It offers the advantage of a shorter application form and eligible reimbursement amounts that are predetermined based on default usage rates (miles/hours). Once an application is determined complete and eligible, the grant is awarded and a contract issued, without review, ranking, or selection.

More information on the Rebate Grants Program can be found at http://www.tceq.state.tx.us/implementation/air/terp/rebate_notice.html.

Victoria County Proposed SIP Revision

On January 13, 2010, TCEQ proposed a State Implementation Plan (SIP) revision for the Victoria County attainment area for the 1997 eight-hour ozone standard. The proposed SIP revision contains an amended contingency measures section of the 2007 Victoria Maintenance Plan SIP Revision. As required by EPA, the amended contingency measure section provides a list of rules the TCEQ may adopt and implement upon violation of the 1997 eight-hour ozone standard. The rules considered include, but are not limited to: the 30 Texas Administrative Code Chapter 114 rule for Texas Low Emission Diesel; the Chapter 115 volatile organic compound rules; and the Chapter 117 nitrogen oxides rules.

EPA requires States to submit a ten-year maintenance plan for the 1997 eight-hour standard for those areas designated attainment for both the one-hour ozone standard and the 1997 eight-hour ozone standard. EPA redesignated Victoria County as attainment for the one-hour ozone standard on March 7, 1995; and it designated Victoria County as attainment for the 1997 eight-hour ozone NAAQS on April 30, 2004 (with an effective date of June 15, 2004). TCEQ approved the subsequent 2007 Victoria Maintenance Plan SIP Revision on March 7, 2007.

The public comment period on the proposed SIP revision opened on January 20, 2010 and closes on March 1, 2010. TCEQ will hold a public hearing in Victoria on February 23, 2010.

More information on the proposed SIP revision can be found at http://www.tceq.state.tx.us/implementation/air/sip/vic.html.

Upcoming TCEQ Meetings and Events

- TCEQ will host **Petroleum Storage Tank Compliance Workshops** on February 12, March 23 and March 24 in the Houston, Abilene, and Lubbock areas. Note that the Beaumont Workshop on February 12 and the Houston Workshop on February 11 are full. These free workshops are hosted by TCEQ's Small Business and Local Government Assistance Section. Online registration is required. Additional information is available at http://www.tceq.state.tx.us/assistance/sblga/pst_wkshp.html.

- TCEQ will hold two **Dam Safety Workshops**: in New Braunfels on February 11, 2010 and in Decatur on February 25, 2010. The registration deadline for the New Braunfels workshop is February 4, and the registration deadline for the Decatur workshop is Febraury 18. Additional information is available at http://www.tceq.state.tx.us/assistance/events/dam-safety.html.

- TCEQ will host a series of **Risk Assessment Workshops**, beginning in March. The first workshop will be presented by the Alliance for Risk Assessment in Austin on March 16–18, 2010. Additional information is available at http://www.tceq.state.tx.us/assistance/events/dam-safety.html.

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TCEQ Enforcement Orders

TCEQ announcements for enforcement orders adopted in January can be found on the TCEQ website at http://www.tceq.state.tx.us/comm_exec/communication/media/011310CommissionAgenda and http://www.tceq.state.tx.us/comm_exec/communication/media/012710Agenda

Recent Texas Rules Updates

For information on recent TCEQ rule developments, please see the TCEQ website at http://www.tceq.state.tx.us/rules/whatsnew.html.

National Developments

SEC Votes to Issue Guidance on Climate Change Disclosure Requirements

In a public meeting held January 27, 2010, the Securities and Exchange Commission ("SEC") voted 3-2, along party lines, to issue guidance clarifying that existing SEC rules require publicly-held companies to disclose material climate-related information. The guidance, which the SEC indicated will be issued in the form of an "interpretive release," is not expected to create new legal requirements or modify existing requirements. Instead, based on the discussion at the public meeting, the guidance is expected to underscore the provisions of existing reporting rules that make it necessary for SEC-reporting companies to assess whether climate-related risks or opportunities have a material impact requiring disclosure. The decision to issue guidance marks the SEC's first formal recognition that companies must specifically consider climate-related information in public disclosures.

While the guidance has not yet been released, SEC Chairman Mary Schapiro's statement on the forthcoming guidance is available at http://www.sec.gov/news/speech/2010/spch012710mls-climate.htm. B&D will post the guidance and an analysis of the same as soon as it is released. In the interim, a webcast of the January 27, 2010 meeting may be viewed at http://www.connectlive.com/events/secopenmeetings/.

Background

The SEC action stems in part from a 2007 investor petition and recent supplement requesting the SEC to require companies to address climate-related risks when reporting other financial risks. The petition proposed three "key elements" for inclusion in the interpretive release: (1) disclosure of physical risks associated with climate change; (2) disclosure of financial risks associated with present or probable regulation of GHG emissions; and (3) disclosure of legal proceedings relating to climate change. Additional background relating to the 2007 petition and related activity is available at http://www.bdlaw.com/news-776.html.

Discussion at January 27 Meeting

Statements made during the public meeting on January 27 indicate that SEC guidance may closely track the proposed elements of climate-related disclosure set forth in the 2007 investor petition. For example, Chairman Schapiro stated that existing, long-standing rules require a company to disclose significant effects caused by severe weather (a potential physical impact of climate change). Chairman Schapiro also noted that companies must consider whether potential legislation concerning climate change is likely to occur, and if so, companies must evaluate the impact of such legislation on a company's liquidity, capital resources, or results of operations.

The SEC made clear that the guidance will not draw conclusions regarding the facts of climate change or whether climate change is occurring. In her statement during the public meeting, Chairman Schapiro emphasized that the SEC is "not making any kind of statement regarding the facts as they relate to climate change" and is not "opining on whether the

world's climate is changing; at what pace it might be changing; or due to what causes." As a result, the SEC guidance is not expected to resolve the question of whether climate change and its potential effects, including increased severe weather events and sea-level rise, constitute "known trends" within the meaning of existing SEC reporting rules.

For more information, please contact Holly Cannon at (202) 789-6029, dcannon@bdlaw.com, or Lauren Hopkins at (202) 789-6081, lhopkins@bdlaw.com.

EPA Issues ANPRM Identifying Additional Industries That Could Be Subjected to CERCLA Section 108(b) Financial Responsibility Requirements

On January 6, 2010, the United States Environmental Protection Agency ("EPA") or ("the Agency") issued an advance notice of proposed rulemaking ("ANPRM") that identifies classes of facilities within three industries - the Chemical Manufacturing Industry (NAICS 325), the Petroleum and Coal Products Manufacturing Industry (NAICS 324), and the Electric Power Generation, Transmission and Distribution Industry (NAICS 2211) - as those for which EPA plans to develop, as necessary, a proposed regulation identifying appropriate financial responsibility requirements under Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). This ANPRM follows EPA's July 28, 2009 notice of proposed rulemaking where EPA identified classes of facilities within the Hardrock Mining Industry as those for which the Agency will first develop financial responsibility requirements under CERCLA Section 108(b). In the January 6 ANPRM, EPA also identifies the Waste Management and Remediation Services Industry (NAICS 562), the Wood Products Manufacturing Industry (NAICS 321), the Fabricated Metals Product Industry (NAICS 332), and the Electronics and Electrical Equipment Manufacturing Industry (NAICS 334 and 335), as well as facilities engaged in the recycling of materials containing CERCLA hazardous substances, as requiring further study for EPA to decide whether to begin development of proposed financial responsibility requirements for those sectors.

EPA will be taking comment on this ANPRM through February 5, 2010. While it is expressly not seeking comment on its methodology for identifying the three industries that are the subject of the ANPRM, it is seeking comment on several other issues. With respect to the classes of facilities within the three industries, EPA requests information to assist it in determining the risks associated with those facilities and whether financial responsibility mechanisms would be effective in reducing those risks. It requests information on existing financial responsibility obligations within the industries, specifically seeking input and advice from the insurance and surety industries. EPA also seeks guidance from other regulators on their experience in developing an effective environmental financial responsibility program.

Background

As adopted in 1980, Section 108(b) of CERCLA requires that EPA adopt financial responsibility requiring classes of facilities to establish and maintain evidence of financial responsibility "consistent with the degree and duration of risk associated with the production, transportation, treatment, storage or disposal of hazardous substances." As of early 2008, EPA had not taken any regulatory action under Section 108(b), despite a statutory deadline requiring it do so in the 1980s and subsequent EPA and GAO studies focusing attention on EPA's failure to take such action.

In March 2008, environmental groups sued EPA in the U.S. District Court for the Northern District of California to compel EPA action. On February 25, 2009, the court ordered EPA to publish a priority notice identifying those classes of facilities for which EPA would first develop regulations under Section 108(b). In order to comply with the Court's order, EPA published the July 28, 2009 Hardrock Mining notice, in which it identified that industry as its priority for the development of financial responsibility requirements. In that notice, EPA stated it would continue to gather and analyze data on additional classes of facilities, and would consider them for possible development of Section 108(b) requirements. The recent January 6, 2010 ANPRM identifies those additional classes of facilities.

EPA identified the January 6, 2010 industry sectors using information related to sites listed

on the National Priorities List ("NPL"), data on hazardous waste generation from the 2007 Resource Conservation and Recovery Act ("RCRA") Biennial Report, and data from the Toxics Release Inventory ("TRI"). In selecting the Chemical Manufacturing Industry, EPA noted that it considered the large scale of the industry, its release of large quantities of CERCLA hazardous substances and generation of substantial quantities of hazardous waste, and the large number of industry facilities on the NPL. It also noted the number of bankruptcies in the industry that resulted in or will likely require significant Federal responses. The Petroleum and Coal Products Manufacturing industry (dominated by the petroleum refining business) was selected based on its high TRI numbers, the significant quantities of hazardous waste generated (second only to the Chemical Manufacturing Industry), the high costs associated with the cleanup of those NPL sites, and the large number of active facilities and potential for ongoing releases. In selecting the Electric Power Generation, Transmission, and Distribution Industry, EPA particularly noted the industry's generation of large quantities of solid waste, including coal combustion residuals. The Agency highlighted the recent release of coal ash from the Tennessee Valley Authority's Kingston plant and the resulting remediation expense -- estimated to range from $933 million to $1.2 billion according to EPA estimates.

Issues and Next Steps

The contours of the Section 108(b) financial responsibility program that will ultimately be adopted by EPA are far from clear. As stated above, Section 108(b) requires that the standards (1) be consistent with the degree and duration of risk, that is posed by certain activities - production, transportation, treatment, storage and disposal, and (2) be developed with regard to the risks posed by these management activities as they relate to "hazardous substances." Potentially, this program could be far broader than the RCRA Subtitle C financial responsibility requirements, which are tied to the far more limited class of "hazardous wastes" and are not required for risks associated with production or transportation. CERCLA also provides that EPA should cooperate and seek advice from the commercial insurance industry in developing these financial responsibility requirements. In addition, CERCLA sets forth the types of financial mechanisms that could be used to meet the financial responsibility requirements - insurance, guarantee, surety bond, letter of credit, or qualifications as a self-insurer - but adds that EPA can specify which contract or policy terms are necessary and which may be unacceptable.

Of particular concern in the subsequent rulemaking is the potential that EPA will severely restrict or disallow the use of certain forms of financial responsibility, particularly any financial test mechanism. That mechanism, which is the least expensive form of financial responsibility (and the least cumbersome to satisfy), has been the subject of increasing scrutiny. The restriction or removal of the financial test mechanism or similar limitations, which are acceptable under the RCRA financial responsibility program, could result in substantial and unnecessary cost to industry.

EPA has announced that in developing these regulations, it will canvass and evaluate other existing state and federal sources of financial responsibility requirements, including those established under RCRA, with the goal of not adopting duplicative requirements. Moreover, EPA has also stated that it will consider the issue of state delegation, which CERCLA is silent on.

EPA plans on publishing a proposed Hardrock Mining Rule in Spring 2011. For the classes of facilities identified in the final rule subsequent to the January 6, 2010 ANPRM, EPA will propose a rule in late Summer 2011. It has not indicated when it will take further action on the classes of facilities within the five additional sectors it identified for further study. In the ANPRM, EPA cautions that in identifying classes of facilities within these industries in the notice, the Agency does not intend to indicate that other classes in other industry sectors are no longer being considered for future rulemaking.

If you have questions regarding EPA Section 108(b) financial responsibility rulemaking, please contact Don Patterson at (202) 789-6032 or dpatterson@bdlaw.com, or Peter Gregg at (512) 391-8030 or pgregg@bdlaw.com.

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EPA Proposes Freshwater Nutrient Criteria for Florida, Other States May Follow

On January 15, 2010, the Environmental Protection Agency ("EPA") released proposed freshwater nutrient water quality criteria for Florida. A pre-publication copy is available from EPA at http://www.epa.gov/waterscience/standards/rules/florida/. The proposal represents EPA's first effort to establish numeric nutrient criteria for any state under Section 303 of the Clean Water Act ("CWA"). It is not expected to be the last, however.

EPA's proposal is designed to meet the terms of an August 2009 phased consent decree reached with the Florida Wildlife Federation, which challenged the narrative pollutant standards currently in place in Florida. *See Florida Wildlife Federation v. Johnson*, No. 4:08-cv-324 (N.D. Fla. Nov. 16, 2009). The Agency determined that those narrative standards, which articulate acceptable levels of phosphorus and nitrogen based on visible algal blooming, are inadequate for protecting water quality within the state. As a result, EPA committed to establishing numeric nutrient criteria for Florida's lakes and flowing waters by October 2010 and for the state's estuarine and coastal waters by October 2011.

The proposed freshwater nutrient criteria are intended to address the first of these commitments. The draft rule, which EPA developed in collaboration with the state of Florida, would establish a series of numeric concentrations for phosphorus and nitrogen in four freshwater body types: lakes, rivers and streams, springs and clear streams, and canals. Each water body type would be assigned its own water quality criterion based on EPA's analysis of nutrient concentrations in representative waters within the state. The proposed criteria thus represent EPA's assessment of the ambient nitrogen and phosphorus levels that are necessary in order to achieve the water quality objectives (designated uses) in each type of fresh water system.

The draft nutrient criteria for each designated body type are complicated and highly controversial:

- **Lakes** - EPA proposes to divide Florida's lakes into three groups – colored, clear/alkaline, and clear/acidic – and to assign total nitrogen ("TN"), total phosphorus ("TP"), and chlorophyll-a criteria to each group. These classifications reflect the Agency's understanding that lake color and alkalinity play a significant role in the extent to which TN and TP concentrations result in a "biological response," such as an elevated level of chlorophyll-a, in the lake. Thus, the criteria will account for the biological response to TN and TP levels in the state's lakes. If sufficient data exist for a particular lake, however, the proposal would allow that lake's TN and TP levels to be adjusted within a designated range as long as its chlorophyll-a criteria still would be met.

- **Rivers and Streams** - For Florida rivers and streams, EPA proposes to divide the state into four separate watershed-based regions, each with its own TN and TP standards. The Agency developed numeric nutrient criteria for each of these regions by evaluating biological information and data on the distribution of nutrients in healthy streams within the respective regions. It then created criteria that the Agency believes are capable of protecting downstream lake and estuary water quality standards. The proposal would allow the TP criteria to be adjusted if needed to better protect downstream lakes and the TN criteria to be adjusted to maximize protection of estuaries.

- **Springs and Clear Streams** - The proposed criteria for springs and clear streams are similarly complicated. For these waters, EPA favors a nitrate-nitrite criterion based on the Florida Department of Environmental Protection's ("DEP") "experimental laboratory data" and field evaluations documenting the response of species of nuisance algae to nitrate-nitrite concentrations. In addition, EPA will apply the same TN and TP criteria to clear streams that it developed for rivers and streams in the same watershed, while foregoing setting TP criteria for springs due to the historical presence of phosphorus in those waters. The Agency is not proposing a chlorophyll-a criterion for springs and clear streams due to the lack of available data for this response variable in spring systems.

- **Canals** - EPA's approach for Florida canals is similar to that for rivers and streams. The Agency intends to divide the state into four regions and impose TN and TP criteria based on the concentrations of those nutrients in canals that are meeting their designated uses. EPA also favors a chlorophyll-a criterion for canals because, unlike streams, the Agency believes that chlorophyll-a is an appropriate indicator of nutrient impairment in canals and is therefore suitable for regulation.

In addition to proposing these specific numeric nutrient criteria, EPA is proposing new "restoration water quality standards" for impaired waters in Florida. According to the Agency, this regulatory mechanism would allow the state to set "enforceable incremental water quality targets (designated uses and criteria)" for nutrients, while retaining existing criteria for all other parameters. Employing such standards would permit the state to set progressively more stringent designated uses and pollutant criteria over time to help restore a water body to its full designated use. Thus, the state could work to meet interim milestones for impaired waters that are expected to take a long time to achieve full designation, and the interim less-stringent designated uses and criteria could be used to establish enforceable requirements while they are in effect.

The Agency believes that some states would prefer to use the step-wise approach of its proposed restoration standards instead of the traditional method of adopting a stricter standard at the outset only to later allow variances upon demonstration that a water body fails to meet the established standard. This new mechanism, EPA explains, would allow Florida to rely on a flexible combination of limits for end-of-pipe, or point source, discharges and limits for nonpoint source runoff to achieve water quality standards in the long term.

On the state level, Florida DEP recently initiated a review of designated uses and has proposed revisions to the state's surface water classification system. A copy of the proposed rule revisions is available at http://www.dep.state.fl.us/secretary/designateduse.htm. The Department is accepting public comments and intends to present the proposed rule revisions to the Florida Environmental Regulation Commission in either April or May, 2010. In addition, the Department initiated its own development of numeric nutrient criteria for estuarine waters and has recently asked members of the scientific community in Florida for assistance in gathering and synthesizing relevant data and studies. The State intends to provide this information to EPA by July, 2010 as a means of participating in the Agency's effort to establish criteria for estuarine and coastal waters.

The implications of EPA's proposed numeric nutrient criteria and restoration standards for Florida are far-reaching. Many stakeholders are following the development of the draft criteria very closely. Industrial and agriculture groups have registered concerns, noting in particular the novel scientific methods used by EPA to derive the proposed criteria and the fact that technology to treat nutrients in accordance with the new numeric criteria does not exist for many categories of dischargers. These groups are concerned that these factors will make EPA's proposal tremendously expensive, raising the issue of the significant costs that will be necessary to try to achieve the new criteria, with potentially marginal water quality benefits. In addition, the proposed restoration standards present a new set of uncertainties for potentially affected dischargers. While the incremental approach allows the regulated community more time to attain the requirements by imposing more achievable interim standards, the gradual increase in obligations may culminate with an excessively burdensome standard, one made possible primarily by the procedural mechanism and not necessarily reflecting sound science.

It is anticipated that similar nutrient criteria and restoration standards will begin to appear in many other states, even as the Florida regulation winds a slow path through EPA's rulemaking process and then through the litigation that is sure to follow. Meanwhile, the Agency plans to move forward with plans to propose its nutrient criteria for Florida's estuarine and coastal waters by January 2011 and finalize these additional standards by October 2011.

EPA has submitted the proposed Florida freshwater nutrient criteria and restoration standards for publication in the Federal Register. Upon publication, a 60-day public comment period on the proposal will begin.

For more information about EPA's new nutrient criteria initiative and its implications, please contact Karen Hansen at (202) 789-6056 (khansen@bdlaw.com) or Richard Davis at (202) 789-6025 (rdavis@bdlaw.com). This summary was prepared with the assistance of W. Parker Moore and Geoffrey R. Goode of Beveridge & Diamond, P.C.

EPA Seeks Comments on Proposal to Expand Stormwater Regulation at Newly Developed and Redeveloped Sites

The U.S. Environmental Protection Agency ("EPA") recently announced its intention to establish regulations governing stormwater from newly developed and redeveloped properties that could impose significant new requirements on a broad group of stakeholders. EPA has thus far taken two actions to meet its goal of finalizing this new rule by November 2012. First, EPA solicited comments on an Information Collection Request ("ICR") to be sent to all owners, operators, developers, and contractors of developed sites, owners and operators of municipal separate storm sewer systems (MS4s), and states and U.S. territories (*see* http://www.epa.gov/npdes/pubs/icr_fedreg.pdf). That comment period closed on December 29, 2009. In a second Federal Register notice (http://www.epa.gov/npdes/regulations/fedreg_swmanagement.pdf) on December 28, 2009, EPA articulated and solicited comments on five specific regulatory initiatives under consideration, with written comments due on February 26, 2010, and at several public listening sessions to be held in January 2010. Several of the listening sessions have already been held, but additional sessions will be held over the next few weeks in Denver, CO, Dallas, TX, and Washington, DC. A virtual listening session will be held on February 3, 2010. Go to http://cfpub.epa.gov/npdes/stormwater/rulemaking.cfm#stakeholder for more information.

The new rule, permit, or both that emerges from this initiative could affect a substantial number of entities, including entities not primarily engaged in construction. EPA proposes to send the stormwater ICR to establishments that construct residential, industrial, or commercial buildings; construct highway, streets, or bridges; and other heavy and civil engineering construction firms. *See* 74 Fed. Reg. 56191 at 56192, available at http://www.epa.gov/npdes/pubs/icr_fedreg.pdf. Because EPA has stated that the proposed stormwater ICR could be sent to any entity that develops or redevelops sites, and because the Agency has historically sought to impose controls on both construction contractors and the owners for which they work, the final stormwater rule could cover a wide range of activities and array of entities, including those not primarily or exclusively engaged in construction.

The five specific initiatives that EPA is considering and on which it has solicited public comment suggest an ambitious agenda. First, EPA is considering establishing specific nationally-uniform requirements such as standards to control stormwater from newly developed and redeveloped areas. These requirements may include an obligation to ensure that post-construction runoff hydrology mimics pre-construction hydrology. Second, the Agency seeks comments on an expanded scope of regulation that would also require the retrofitting of existing developed property. Third, the Agency is considering upgrading the regulatory requirements for Phase II Municipal Separate Storm Sewer Systems (MS4s) to make the program for small systems more rigorous and, probably, better able to implement any new substantive requirements. Fourth, EPA is considering expanding coverage of the federal stormwater program to areas beyond the boundaries of Census urbanized areas. That is, the Agency is considering a geographical expansion of MS4s to include areas that are subject to rapid development, as well as those that have already been largely developed. And, finally, EPA is soliciting comments on other potential changes to the current regulatory program, including a new requirement to require National Pollution Discharge Elimination System (NPDES) permits for stormwater runoff from developed or re-developed (and possibly existing developed) sites. Taken together, these regulatory initiatives would expand EPA's NPDES program into new areas including, for the first time, the control of runoff management issues that currently are addressed as an element of local land use planning.

More information about this stormwater initiative, including links to the cited Federal Register notices, is available at: http://cfpub.epa.gov/npdes/stormwater/rulemaking.cfm. For more information, please contact Richard Davis at (202) 789-6025 (rdavis@bdlaw.com) or Ami Grace-Tardy at (202) 789-6076 (agrace@bdlaw.com).

BEVERIDGE & DIAMOND PC

EPA Petitioned to Set Water Quality Criteria for Endocrine-Disrupting Effects of Certain Pesticides, Pharmaceuticals, and Personal-Care Products

On January 11, 2010, the Center for Biological Diversity ("CBD") petitioned the U.S. Environmental Protection Agency ("EPA") to establish water quality criteria under Section 304 of the Clean Water Act ("CWA") for specific substances found in certain pesticides, pharmaceuticals, and personal-care products. The petition is noteworthy because it alleges that the 56 targeted substances are endocrine-disruptors and requests that EPA establish water quality criteria specifically to address what CBD asserts are scientifically known threats posed by the endocrine-disrupting effects of the targeted substances.

Under Section 304 of the CWA, EPA has authority to develop and "from time to time thereafter" revise water quality criteria that "accurately reflect the latest scientific knowledge" about the health and environmental effects of regulated pollutants. 33 U.S.C. § 1314(a)(1). CWA Section 304 also authorizes EPA to develop and revise information on various factors relevant to protecting water quality. 33 U.S.C. § 1314(a)(2). The CBD petition argues that EPA has a non-discretionary duty to establish updated and new water quality criteria and information for the 56 targeted substances.

CBD's petition suggests specific numeric criteria that EPA should adopt for many of the targeted substances. Water quality criteria established under Section 304 may consist of numeric pollutant concentrations, and the criteria provide guidance for states and tribes to use in adopting water quality standards for specific water bodies. States and tribes may either adopt EPA's criteria or establish criteria based on other scientifically-defensible methods.

To date, EPA has developed water quality criteria under the CWA for approximately 150 pollutants, including seventeen of the substances listed in the CBD petition. The CBD petition argues, however, that the existing criteria for these seventeen substances are not stringent enough because they do not take into account the latest scientific knowledge available regarding the alleged endocrine-disrupting effects of these specific substances. The CBD petition argues that EPA must revise the existing criteria because they were not designed to protect against any endocrine-disruptor effects. The CBD petition also asserts that EPA must establish new water quality criteria for an additional thirty-nine pesticides, pharmaceuticals and personal care product substances, with a focus on any endocrine-disrupting effects.

Several of the pesticides, pharmaceuticals, and personal care product substances identified in the CBD petition are already being evaluated by EPA under other laws. Eight of the substances in the petition are included on EPA's Contaminant Candidate List 3 ("CCL 3"), which is a list of substances under consideration for monitoring and possible regulation under the Safe Drinking Water Act. There is also overlap between the petition and EPA's Endocrine Disruptor Screening Program ("EDSP") under the Federal Food, Drug and Cosmetic Act . Eleven of the substances in the CBD petition have been identified by EPA as a Tier 1 chemical for screening in the EDSP. Additionally, as noted above, EPA has already established water quality criteria for seventeen of the substances listed in the CBD petition.

The Center for Biological Diversity's petition is available at: http://www.biologicaldiversity.org/campaigns/pesticides_reduction/endocrine_disruptors/pdfs/EPA_304_EDC_petition.pdf. For more information, please contact Karen Hansen at khansen@bdlaw.com or (202) 789-6056. This alert was prepared with the assistance of Anne Finken.

EPA Proposes Stricter Smog Standards

On January 7, 2010, the U.S. Environmental Protection Agency (EPA) proposed to decrease the national standard for ground-level ozone (smog) from 0.075 ppm to between 0.060 and 0.070 ppm. EPA, *EPA Strengthens Smog Standard/Proposed standards*, Jan. 7, 2010, http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceeac8525735900400c27/d70b9c433c46faa3852576a40058b1d4!OpenDocument. The existing level of 0.075 ppm was established by the Bush Administration in 2008, over the objections of some of the Agency's scientific advisers.

EPA announced in September of 2009 that it intended to reconsider the 2008 ozone rule, based on the current Administration's belief that the 2008 standard was not protective enough of human health. Ground-level ozone, which forms when emissions from industrial facilities, power plants, landfills and motor vehicles react in the sun, is linked to health problems including aggravation of asthma and other respiratory illnesses. Id.

The 0.060 to 0.070 ppm range for the revised primary standard is based on EPA's conclusion that a lower range is necessary to provide increased protection for children and other "at risk" populations. EPA also proposed a new cumulative, seasonal secondary standard based on weighted hourly concentrations during peak ozone season to provide increased protection against ozone-related adverse impacts on vegetation and forested ecosystems. EPA, Ground-level Ozone Regulatory Actions, http://www.epa.gov/air/ozonepollution/actions.html#jan10s (includes link to proposed rule).

The proposed rule was published in the Federal Register on January 19, 2009 (75 Fed. Reg. 2939). Written comments are due by March 22, 2010. Public hearings have been scheduled on February 2, 2010 in Arlington, Virginia and Houston, Texas, and February 4, 2010 in Sacramento, California.

For more information, please contact David Friedland at (202) 789-6047 (dfriedland@bdlaw.com) or Laura McAfee at (410) 230-1330 (lmcafee@bdlaw.com). This alert was prepared with the assistance of Sarah Doverspike.

EPA Seeks Comment on Proposed National Enforcement Priorities for 2011-2013

On January 4, 2010, the U.S. Environmental Protection Agency ("EPA") published in the Federal Register its proposed enforcement priorities for fiscal years 2011-2013. The proposed priorities, if finalized, will form the basis for targeted inspections, compliance assistance, and enforcement actions nationwide. Comments are due January 19, 2010; the notice emphasizes that EPA will not extend this deadline.

Background

EPA sets national enforcement priorities every three years through a consultation process with EPA regions, states, tribal governments, and the public. Enforcement priorities are selected according to three criteria: (1) environmental impact; (2) significance of noncompliance; and (3) the appropriateness of federal action to address the noncompliance.

For each selected national priority area, EPA develops a strategy to achieve specific goals. According to EPA's website, these strategies:

- describe the environmental or noncompliance problem;
- discuss the reasons why the EPA chose to address the problem;
- explain how the problem will be addressed; and
- highlight the progress made by EPA action.

Once enforcement strategies for national priorities have been developed, EPA assembles teams of EPA headquarters and regional office staff to direct work and set benchmarks for specific strategies. EPA also monitors implementation to ensure that sufficient progress is occurring to achieve the long-term goals set out in the strategy. At the end of the three-year cycle, EPA may decide to continue the priority strategy into the next cycle or transition from priority status to EPA's core enforcement program (the fundamental activities implemented by EPA, state, and local agencies to protect the environment).

Preliminary List of 2011-2013 Proposed National Enforcement Priorities

As a first step in developing the 2011-2013 priorities, EPA solicited feedback from EPA regions, states, tribes, associations, and the public in Fall 2009. Public comment during this initial phase was administered through the online National Enforcement and Compliance Assurance Priorities Discussion Forum on EPA's blog in August 2009 (http://blog.epa.

gov/enforcementnationalpriority/2009/08/epa-national-enforcement-compliance-priority-discussion-forum/). EPA requested feedback on three specific topics: EPA's selection criteria for priorities, suggestions for future environmental priorities, and providing information for public use.

Based on the feedback received, EPA developed the following list of "priority candidates" for enforcement during fiscal years 2011-1013:

Air Toxics. EPA is proposing to continue its 2008-2010 focus on national problem areas of leak detection and repair, flares, and toxics near schools. EPA is also considering the addition of a geographic initiative to allow regions to identify and evaluate compliance of large sources of hazardous air pollutants in disproportionately affected geographic areas.

Concentrated Animal Feeding Operations (CAFOs). EPA is proposing to focus on ensuring that CAFOs in the U.S. (approximately 19,000) comply with the Clean Water Act requirements to protect surface waters from animal waste.

Environmental Justice—Community Based Approach. EPA is proposing geographically-based targeted enforcement activities in identified disadvantaged communities. EPA regions would work with the communities to identify environmental and health threats within the geographic area to achieve maximum compliance with environmental regulations and protect human health and the environment.

Indian Country Drinking Water. EPA is proposing greater compliance assistance, monitoring, and enforcement of drinking water quality in Indian Country to reduce threats to human health from consumption of contaminated drinking water.

Marine Debris. EPA is proposing enforcement of newer permit requirements, such as the NPDES general permit for vessels, to eliminate discharges that contribute to marine debris.

Mineral Processing. EPA is proposing stronger enforcement, including process-based inspections and EPA sampling, of solid and hazardous waste disposal requirements at mineral processing and mining facilities.

Wet Weather Municipal Infrastructure. EPA is proposing to encourage utilities to carry out an ongoing process of oversight, evaluation, maintenance and replacement of stormwater and sewage system infrastructure.

New Source Review / Prevention of Significant Deterioration (NSR/PSD). EPA believes that many stationary sources have made modifications to facilities without applying for and obtaining NSR/PSD permits under the Clean Air Act. The Agency is proposing to continue its 2008-2010 focus on compliance in four industry groups (coal-fired electric utilities, cement manufacturing facilities, sulfuric and nitric acid manufacturing facilities and glass manufacturing facilities) and is considering the addition of lime manufacturing facilities to the NSR/PSD priority.

Resource Conservation and Recovery Act (RCRA) Enforcement. EPA is proposing a comprehensive national RCRA corrective action enforcement strategy that will establish consistent RCRA corrective action enforcement program principles, priorities and practices. The strategy would provide greater public transparency of cleanup activities, development of guidelines for conducting targeted file reviews to evaluate compliance status, inspection or oversight plans for facilities that have not been inspected for several years, tracking tools to review compliance with order/permit schedules, and model orders and voluntary agreements.

Resource Conservation and Recovery Act (RCRA) Financial Assurance. Financial assurance has been a national enforcement priority since 2006, covering both RCRA corrective action and RCRA closure/post-closure obligations. EPA is proposing to extend the financial assurance priority for RCRA corrective action into fiscal years 2011-2013. Under this proposal, financial assurance for site closure/post-closure under RCRA would no longer be a national enforcement priority and would transition back to EPA's core enforcement program.

Resource Extraction. EPA is proposing a combination of activities to increase focus on resource extraction activities: compliance assistance to help companies to understand their responsibilities for both energy and environmental needs; increased monitoring at wastewater treatment plants, resource extraction sites, and sensitive ecosystems to obtain data and to evaluate conditions; and targeted enforcement at facilities coupled with an enhanced deterrence effect.

Pesticides at Day Care Facilities. A joint study between EPA and the U.S. Department of Housing and Urban Development revealed that a large variety of pesticides (both general and restricted use) are being used in day care facilities nationwide. EPA is proposing a uniform approach to detecting pesticide labeling and use violations to send a strong enforcement message to day care facility owners and operators and commercial pesticides applicators. EPA also proposes to engage in capacity building for the states to enable them to develop outreach materials, target for, and inspect these facilities.

Surface Impoundments. EPA is proposing increased scrutiny of an estimated 18,000 surface impoundments operating nationwide. According to an EPA study, 90% of industrial surface impoundments are not correctly reporting all chemicals of concern. The proposed enforcement strategy would focus on chemical, petroleum, and paper product manufacturing.

Wetlands. EPA is proposing to address the perceived pattern of noncompliance with Clean Water Act section 404 permit violations and unpermitted discharge to wetlands, especially in coastal watersheds.

Worker Protection Standards (WPS) for Agricultural Pesticides. EPA is proposing to address WPS violations through targeted product use and compliance inspections and "aggressive pursuit" of violators (using a combination of enforcement and media announcements).

Background documents for these priority areas may be found on EPA's website at http://www.epa.gov/compliance/data/planning/priorities/index.html.

EPA is seeking comment on the above list of candidate enforcement priorities. EPA also invites proposals for additional priority areas for consideration.

A complete copy of the EPA notice is available at http://edocket.access.gpo.gov/2010/pdf/E9-31042.pdf. For more information, please contact Steve Herman at (202) 789-6060, sherman@bdlaw.com, David Friedland at (202) 789-6047, dfriedland@bdlaw.com, or Lauren Hopkins at (202) 789-6081, lhopkins@bdlaw.com.

EPA Issues Four Chemical Action Plans Under TSCA

On December 30, 2009, the U.S. Environmental Protection Agency (EPA) posted chemical action plans for certain phthalates, long-chain perfluorinated chemicals, polybrominated diphenyl ethers, and short-chain chlorinated paraffins. Development of these chemical action plans targeting EPA's chemicals of concern is a key component of EPA's comprehensive approach to the enhancement of chemical management under the Toxic Substances Control Act (TSCA) announced on September 29, 2009.

EPA selected these chemicals for action plan development based on a number of factors, including presence in human blood; persistent, bioaccumulative and toxic characteristics; use in consumer products; and production volume. The released action plans are based on EPA's initial review of readily available use, exposure and hazard information on each particular chemical.

The full alert, with details on the four chemical action plans, is available at http://www.bdlaw.com/news-764.html

For more information, please contact Mark Duvall at (202) 789-6090 (mduvall@bdlaw.com) or Sarah Doverspike at (202) 789-6034 (sdoverspike@bdlaw.com).

Firm News & Events

Benjamin F. Wilson Featured in Howard University 140th Anniversary Video

Benjamin F. Wilson, the Managing Principal at Beveridge & Diamond, P.C. is featured in a video celebrating Howard University's 140th Anniversary.

The video features students and faculty, and highlights the achievements of the institution over the past 140 years. Mr. Wilson serves as an Adjunct Professor in Environmental Law at the Howard University Law School, where he teaches courses on Environmental Law and Environmental Justice.

To view the video, please click here.

For more information, please contact Benjamin Wilson at bwilson@bdlaw.com.

Jimmy Slaughter Quoted in New York Times

In the January 5, 2010 issue of the New York Times, Beveridge & Diamond, P.C. Principal James B. (Jimmy) Slaughter is quoted on a lawsuit Mr. Slaughter and colleagues at Beveridge & Diamond are prosecuting for the electronics industry against a New York City law requiring manufacturers to collect and recycle electronic goods. Beveridge & Diamond filed the lawsuit in July 2009 on behalf of the Consumer Electronics Association and the Information Technology Industry Council. Since then, the City has agreed to stay implementation of the e-waste law, and a federal judge in Manhattan will hear arguments on February 10, 2010 on the Plaintiffs' motion for a preliminary injunction.

For the full article, please visit: http://www.nytimes.com/gwire/2010/01/05/05greenwire-court-showdown-looms-for-nyc-electronics-recyc-19622.html?scp=1&sq=e-waste&st=cse.

For more information, please contact Jimmy Slaughter at jslaughter@bdlaw.com, (202) 789-6040 or Michael Murphy at mmurphy@bdlaw.com, (212) 702-5436.

Stephen Richmond Elected to Board of Directors of Sudbury Valley Trustees

Beveridge & Diamond, P.C. is pleased to announce that Stephen Richmond has been elected to the Board of Directors of the Sudbury Valley Trustees. Mr. Richmond is the Managing Principal of the Firm's Massachusetts office.

Sudbury Valley Trustees is a regional land trust dedicated to conserving land and protecting wildlife habitat in the watershed of the Concord, Assabet and Sudbury Rivers in Central Massachusetts. The organization has over 3,300 members who support conservation work in 36 different municipalities, and has helped to preserve over 6,000 acres of diverse conservation lands in its watershed.

To read more about the Sudbury Valley Trustees, please visit their website at http://www.sudburyvalleytrustees.org/home.

Paul Hagen Elected to Friends of the John Smith Chesapeake Trail Board of Directors

Beveridge & Diamond, P.C. is pleased to announce that Paul Hagen has been elected to the Board of Directors of the Friends of the John Smith Chesapeake Trail. Mr. Hagen leads the International Environmental Practice at Beveridge & Diamond.

The Friends of the John Smith Chesapeake Trail (the "Friends") is a regional environmental organization dedicated to conserving treasured landscapes, creating public access and promoting education and stewardship in the Chesapeake Bay. Founded in 2005, the Friends' mission is "... to celebrate the unique history and environment of the Chesapeake

Bay while highlighting current efforts to restore the Chesapeake's health and creating a lasting legacy for future generations." The Friends announced the election of Paul Hagen to the Board of Directors on December 16, 2009.

To read more about the Friends of the John Smith Chesapeake Trail, please visit their website at http://www.friendsofthejohnsmithtrail.org/. To read more about Beveridge & Diamond, P.C., please go to http://www.bdlaw.com.

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