TRENDS
ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES NEWSLETTER

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Bitter Cold War legacy highlighted in 'favorable' Navajo settlement

By Dana J. Stotsky

The United States clearly "won" the Cold War, as evidenced by the 1989 disestablishment of the U.S.S.R. As with any war, to the victor belong loss and pain, too. There is no better illustration of this than the radiologic ordeal continuing to this day on the Navajo Nation. The Navajo, readily answering the call from the United States for uranium ore to support the Manhattan Project during World War II, allowed extensive mining on their lands in the American Southwest. During the Cold War, the Navajo Nation allowed five uranium mills to be built, enabling production of weapons-grade, enriched uranium. The tribe benefitted from these activities with increased employment for its members, who often lived and raised families in close proximity to the mines and mills. In the end, nearly four million tons of uranium ore were extracted from Navajo lands. And yet today, long since the last victory march ended over twenty years ago, the devastating legacy of radiologic contamination from mill wastes and from hundreds of abandoned uranium mines haunts the tribe and threatens existential Navajo ways.

This article describes the extent and nature of the radiologic contamination of Navajo lands. Next, it reviews recent federal government efforts to strengthen and enforce the federal environmental justice policy that might apply to this contamination. Then, the article discusses a troubling trend in corporate and bankruptcy practice, where environmental liabilities are shed from the successor entity and instead burden the American taxpayer. Finally, it outlines a recent bankruptcy settlement that implicates each of the preceding topics.

The Navajo experience with uranium

The lands of the Navajo Nation include some 27,000 square miles spread over Arizona, New Mexico, and Utah in the Four Corners area of the Southwest. This is an area approximately equal in size to West Virginia. Although uranium mine and mill operations are long-closed on Navajo lands, a legacy of radiologic contamination remains, including some 520 abandoned uranium mines located in nearly half of the "Chapters" (or local units of Navajo government). Further, homes and drinking water sources with elevated levels of radiation have been identified. Over thirty percent of all Navajo obtain their drinking water from unregulated sources (the national percentage is less then one percent). Potential adverse health effects from exposure to radionuclides in drinking water include lung cancer from inhalation of radioactive particles, bone cancer, and kidney disease. Reproductive-organ cancers in teenage Navajo girls average seventeen times higher than the average of teenage girls in the United States. J. Raloff, "Uranium, the newest 'hormone'" 2004, *at* www.phschool.com/science/science_news/articles/uranium_hormone.html.

In 1978 Congress acted to address the very worst sites, the uranium mills, by enacting the Uranium Mill Tailings Radiologic Control Act. But, as a precondition to federal remedial action by the U.S. Department of Energy (DOE) at its five uranium mills, the tribe was required to waive its rights and hold the United States harmless *in perpetuity* for any damages resulting from implementation of the DOE-selected remedy for groundwater management at the mill sites. Mill wastes have been formed into large piles (at one site combining the waste of two mills) with engineered covers at four mill sites on Navajo land at the cost of hundreds of millions of dollars. Recent analyses of groundwater discharged from or near these piles indicate the presence of contaminants of concern, and the tribe continues to monitor the remedy's implementation carefully.

The risks presented by groundwater contamination are complicated by the fact that, generally, most tribal members living on or near the reservation rely on or support the traditional livestock subsistence economy. This can be problematic when the animals graze on contaminated vegetation and drink contaminated water. Further, the traditional Navajo way involves consuming all parts of a slaughtered animal. This is significant since some animal parts bioaccumulate contaminants and consequently pose an increased threat to tribal members.

After thirteen years of study, in August 2007, the U.S. Environmental Protection Agency (EPA) compiled a comprehensive database and atlas with the most complete assessment to date of all known uranium mines on Navajo lands. Later in 2007, at the request of the U.S. House Committee on Oversight and Government Reform (then chaired by Congressman Waxman), EPA, along with the Bureau of Indian Affairs, the Nuclear Regulatory Commission, DOE, and the Indian Health Service, developed a coordinated five-year plan to address uranium contamination in consultation with the Navajo Nation Environmental Protection Agency (NNEPA), the environmental arm of the tribe. The Five-Year Plan is the first coordinated approach taken by the five federal agencies to systematically assess these legacy health and environmental issues. The milestones identified in the Five-Year Plan range from assessing the contamination of structures and water sources, to providing alternative water supplies to residents, to cleaning up the mine sites themselves. EPA is the lead federal agency for assessing and requiring cleanup of the 520 known mines. Beginning in 2012, EPA will conduct detailed assessments of the thirty-five highest-priority sites, at a rate of seven per year, with an eye toward identifying

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Inside...

Views from the Chair

By Irma S. Russell

Our Big Tent

In the process of appointing members to lead the Section's committees, task forces, and other roles of responsibility, I was struck anew by the breadth of focus and the diversity of our membership under the Section's "big tent." The wide range of subject matter in the Section—evidenced by over thirty-five substantive committees—is apparent. Our membership encompasses practitioners who represent individuals, partnerships, NGOs, and corporations. We include private lawyers and government lawyers at all levels, and academics and law students, and in-house corporate counsel. Even with such a range of areas and diverse practice groups, a "close-knit" feeling of community and common purpose permeates our work.

I want to take this opportunity to highlight a few Section activities that I am pleased reside under our big tent.

This year the Section has accepted a more comprehensive role within the ABA as it integrates the work of the former ABA Standing Committee on Environmental Law. Through its new Task Force on Policy and Coordination, the Section will work closely with former Standing Committee members and staff to foster and enhance a robust policy focus in our areas of environment, energy, and resources. Additionally, the Task Force will incorporate policy considerations and coordinate the work of other ABA sections in these areas. The Task Force will contribute to the Section's policy work in originating policy recommendations for consideration by the ABA House of Delegates. For example, over the past year the Section initiated successful ABA resolutions on TSCA reform and on the role of America's indigenous communities in U.S. climate negotiations.

Similarly, exciting new membership initiatives are designed to bring innovative ideas into our work. This year we will develop a social media plan to centralize our Section's online information dissemination and reach additional communities and lawyers in new ways. I have created two new task forces designed to expand our outreach to law students, law faculty, and young lawyers. These task forces will continue our efforts to ensure we represent the full range of the environmental, energy, and resource legal community.

The Section's Leadership Development Program (LDP) is in its second year. The LDP identifies Section members with leadership potential and interest and provides them with training and opportunities to participate, to encourage and prepare them to assume greater Section leadership roles.

The Section is committed to broadening its membership base to fully reflect the diversity of society. In support of that goal, the Section continues its Membership Diversity Enhancement Program, which facilitates the active engagement and integration of lawyers who traditionally have been under-represented. This program is available to lawyers meeting the admission criteria for the Young Lawyers Division, minority lawyers, solo practitioners, and government lawyers whose employers do not pay membership dues for the ABA or the Section.

Our Section's successes are a direct result of our members' input and participation. Members identify topics, authors, and speakers to further quality legal education through our publications and programming; to promote competence, ethical conduct, and professionalism through our ethics programs; and to advance *pro bono* and public service in the legal profession through our service projects. The Section works to enhance public understanding and respect for the rule of law and the global role of lawyers through its participation in the World Justice Forum, collaboration with international organizations such as the Canadian Bar Association, and focus on rule of law issues.

Our goals can be achieved only through openness and inclusiveness. I look forward to the challenges and opportunities we find under the Section's big tent.

Irma S. Russell *is dean and professor at the University of Montana School of Law. She can be reached at irma.russell@umontana.edu.*

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Section Spotlight

Indian tribe participation resolution

At the 2011 ABA Annual Meeting, the Section submitted a recommendation and report to the House of Delegates. The control and administration of the ABA is vested in the House of Delegates, the policy-making body of the Association. Action taken by the House of Delegates on specific issues becomes official ABA policy. The Section's recommendation was adopted by the House of Delegates. The resolution reads as follows:

> RESOLVED, That the American Bar Association urges the United States government to ensure that federally-recognized Indian tribes (Tribes) listed pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a, may participate fully (including, e.g. consideration for membership on United States delegations) in policy discussions on the issue of climate change domestically and in international fora;
>
> FURTHER RESOLVED, That the American Bar Association urges the United States government to consult on a government-to-government basis with Tribes on climate change; and
>
> FURTHER RESOLVED, That the American Bar Association urges the United States government to provide adequate and equitable financial and other support for Tribes to:
>
> 1. carry out measures such as mitigating climate change, reducing greenhouse gases, and promoting renewable energy and energy efficiency; and
> 2. adapt to direct impacts from climate and sea-level changes to their territorial and reservation land bases and resources, including, with the free, prior, and informed consent of Alaska Native villages imminently threatened by erosion and flooding, the development and implementation of plans for permanent relocation.

The full report accompanying this resolution can be found on the ABA website.

Committee recognition

At the 19th Section Fall Meeting in Indianapolis, committees were recognized for their outstanding efforts during the 2010–2011 ABA year. The Phoenix Award was given to the committees that had made an outstanding effort to improve their performance. Congratulations to the following committees and their leadership: ***The Phoenix Award***: Forest Resources; ***Best Committee:*** Energy and Environmental Markets and Finance; ***Best Newsletters***: Constitutional Law; and ***Best Programs:*** Science and Technology.

Leadership Development Program participants announced

The Section is pleased to announce the selection of the following members to participate in the Leadership Development Program (LDP) for 2011–2012: **Donald D. Anderson**, McGuire Woods LLP, Jacksonville, Florida; **Julia A. Bailey** Dulan, Southern Company Services, Atlanta, Georgia; **Kari Fisher**, California Farm Bureau Federation, Sacramento, California; **Nathan Gardner-Andrews**, National Association of Clean Water Agencies, Washington, D.C., **Lauren E. Godshall**, Stone Pigman Walther Wittman, LLC, New Orleans, Louisiana; **Robert F. Gruenig**, Stetson Law Offices, P.C., Albuquerque, New Mexico; **Jehmal Hudson**, Federal Energy Regulatory Commission, Arlington, Virginia; **Margaret E. Peloso**, Vinson & Elkins LLP, Washington, D.C.; **Charles Victor Pyle III**, Exxon Mobil Corporation, Houston, Texas; **Lauran M. Sturm**, Stites & Harbison, PLLC, Louisville, Kentucky; **Grant W. Wilkinson**, University of Findlay, Findlay, Ohio; and **Julia B. Wyman**, Providence, Rhode Island.

The LDP is designed to support Section members interested in expanding a current leadership role or expanding their knowledge of the Section so that they can assume a leadership role in the future.

2011 ABA Award for Distinguished Achievement in Environmental Law and Policy

The 2011 ABA Award for Distinguished Achievement in Environmental Law and Policy was presented at a ceremony and reception during the 2011 ABA Annual Meeting. The individual award went to **Richard J. Lazarus**, Professor of Law, Harvard Law School, Cambridge, Massachusetts. The institutional award went to **IUCN** (International Union for Conservation of Nature) Academy of Environmental Law.

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Trends endeavors to provide important current developments pertaining to environmental, energy, and natural resources issues, as well as Section news and activities of professional interest to members and associates. Please direct editorial inquiries to the Editor-in-Chief, Norman A. Dupont at ndupont@rwglaw.com.

Curbing illegal trafficking in timber and other plant products

By Elinor Colbourn and Thomas W. Swegle

There is international consensus on few things, but the need to curb illegal logging is one of them. Illegal logging destroys forests, watersheds, and habitats and negatively impacts biodiversity, agriculture, fisheries, and global climate change. The scope of illegal logging worldwide is enormous. The World Bank estimated in 2006 that timber harvested illegally on public lands worldwide results in lost assets and revenue in excess of $10 billion dollars annually in developing countries. *See* Strengthening Forest Law Enforcement and Governance, Report No. 36638-GLB (2006). This illicit trade hurts both those in developing and developed countries. Money that could otherwise be used in developing countries to meet the basic needs of their people, better manage their forests and other natural resources, and reduce their international debt is diverted by such trade. The trade in lower-priced illegal timber and the products made from it also injures those in developed countries, such as American wood products companies that operate legally and, therefore, pay full price for imported timber.

Congress enacted supplemental legislation, effective May 22, 2008, that now allows prosecutors to act against trade in such illegal timber and other plants. The new law that amends the century-old Lacey Act, 16 U.S.C. §§ 3371–3378, represents one of the most significant pieces of environmental legislation enacted since the 1970s and is changing the way the international wood products industry conducts business.

The Lacey Act as amended

The Lacey Act has been the most powerful tool in the arsenal of the prosecutor of fish and wildlife crimes for over a century. However, prior to the 2008 amendments, the statute defined "plant" to exclude the majority of known species. Almost all tropical timber and the majority of other plants were not covered by the Lacey Act prohibitions. For those species that were covered, prohibitions were more limited than for fish and wildlife. For example, trafficking in plants that had been taken in violation of an underlying foreign law, rather than a state or federal law, was not prohibited as it was for fish and wildlife. That has now changed.

Congress amended the Lacey Act to provide three primary new components relevant to combating international trafficking in plants. First, the amendments changed the definition of the term "plant" to expand the application of the Lacey Act. "Plant" is now defined broadly to mean "[a]ny wild member of the plant kingdom, including roots, seeds, parts, or products thereof, and including trees from either natural or planted forest stands." 16 U.S.C. § 3371(f) (2010). However, three categories of plants remain exempt from the provisions of the act: (1) common cultivars, except trees, and common food crops, (2) scientific specimens of plant genetic material that are to be used only for laboratory or field research, and (3) plants that are to remain planted or to be planted or replanted (e.g., live plants in the nursery trade). *Id.* (It is unclear why legislators felt that trade in trees or other plants *cut* in violation of foreign law should be prohibited while trade in trees or other plants *uprooted* in violation of foreign law and later replanted should be allowed.) However, plants in the last two categories—scientific specimens and "planted" plants—are *not* exempt if they are listed in an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (International Convention), if they are listed as an endangered or threatened species under the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531–1544 (2011), or if they are similarly listed pursuant to a state law. *Id.*

Second, the 2008 amendments expanded the scope of prohibitions related to plants. The Lacey Act now makes it unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant taken, possessed, transported, or sold in violation of any federal, state, tribal, or foreign law that protects plants. *Id.* § 3372(a)(2). Thus, the act prohibits a person from bringing into the United States any plant or plant product taken in violation of a foreign law that protects plants or that regulates a variety of plant-related offenses. *Id.* § 3372(a). In addition, the Lacey Act includes enforcement provisions if a person makes or submits any false record of any plant or plant product that is imported into the United States. *Id.* § 3372(d).

Third, the amendments added a new import declaration requirement for plants and plant products. *See id.* § 3372(f). The amendments make it unlawful to import certain plants or plant products without an import declaration. The declaration must include, among other things, the scientific name of the plant materials, the country of harvest, the value of the importation, and the quantity of the plant materials. Enforcement of this declaration requirement is being phased in by tariff code to allow for a smoother implementation process. *See* 74 Fed. Reg. 45,415 (Sept. 2, 2009) *available at* www.aphis.usda.gov/plant_health/lacey_act/.

The plant declaration requirement is a keystone of the 2008 amendments. The law now holds importers responsible for knowing the type of wood or other plant product they are importing and where it was harvested. This means that the supply chain becomes more transparent, thus deterring trade in

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illegally sourced plants and plant products. Moreover, industries that never concerned themselves with tracking the provenance of their source materials are rethinking their practices and asking questions they never before considered. The requirement also provides basic information about plant materials coming into the United States, allowing the efficient allocation of enforcement resources. Agencies responsible for collecting the large volumes of import declarations have been required to create a mechanism for receiving those declarations from importers in a manner that does not hinder legal trade. The Animal and Plant Health Inspection Service maintains a website, www.aphis.usda.gov/plant_health/lacey_act/, which provides information on the Lacey Act, relevant *Federal Register* notices, and guidance to industry on these new requirements.

The penalties for Lacey Act violations were largely unchanged by the 2008 amendments, except that penalties for violations of the new declaration requirement were specified. Violations of the Lacey Act may be addressed in three basic ways: (1) through forfeiture of the goods in question, (2) through the imposition of civil administrative monetary penalties, and/or (3) through the imposition of criminal penalties, ranging from misdemeanors to Class D felonies. *See* 16 U.S.C. §§ 3373, 3374 (2010).

The new law that amends the century-old Lacey Act represents one of the most significant pieces of environmental legislation enacted since the 1970s.

Implementation and enforcement

A federal government interagency group began meeting in the summer of 2008 to cooperatively address issues relating to implementation of the Lacey Act Amendments. The interagency implementation group's primary tasks have been: (1) to advise the Secretaries of Agriculture and the Interior on development of statutorily required definitions of common food crop and common cultivar, (2) to implement the import declaration requirement under the amendments, (3) to conduct the statutorily required review and assist the Secretary of Agriculture with preparation of the required report to Congress regarding the implementation of the plant declaration requirement, and (4) to work on initial enforcement efforts. The Department of Agriculture published a proposed regulation defining common food crop and common cultivar on August 4, 2010, but a final regulation has not yet been issued. 75 Fed. Reg. 46,859 (Aug. 4, 2010). The proposed regulation is drafted to effectively exclude from this exemption plants listed in an appendix to the International Convention, under the ESA, or in a similar state list. The rationale behind this exclusion is that any plant considered threatened or endangered cannot be common. The plant declaration requirement continues to be phased in, and work on the required report to Congress is ongoing.

To date, the Department of Justice has utilized only the forfeiture provisions of the Lacey Act. In *United States v. Three Pallets of Tropical Hardwood*, Inv. No. 2009403072 (June 22, 2010), the Department of the Interior denied a petition for remission filed by an importer seeking the return of a shipment of tropical hardwood imported from Peru for which a Lacey Act declaration was not filed upon importation and which was declared under an improper tariff code. The shipment, valued at just over $7,000, was declared under tariff code 4421 that covers finished wood products such as clothes hangers, blinds, toothpicks, and clothespins, even though the shipment actually contained raw, sawn wood that should have been declared under tariff code 4407. At the time, the declaration requirement was not being enforced for goods in tariff code 4421 but was being enforced for goods in 4407. Prior imports of similar goods by this importer had used the proper tariff code of 4407.

The denial of the petition for remission noted the history of use of correct tariff codes and the importer's lack of diligence in handling the transaction, including his failure to request the required information on genus and species, his failure to contact the Peruvian government to determine if he was dealing with a legitimate company, and his failure to follow up on information that indicated that the shipment was questionable. This last failure includes the fact that the importer was asked to make payment directly to an individual rather than the exporting company because the company had gone out of business.

A second civil forfeiture action is being handled judicially and remains ongoing. The action involves ebony wood seized from the premises of Gibson Guitars in Nashville, Tennessee. According to the affidavit of a U.S. Fish and Wildlife Service Special Agent in support of that forfeiture, on September 28, 2009, Customs and Border Protection reported the import of a shipment of Madagascar ebony wood at the Port of Newark, New Jersey, with a total value of approximately $76,400. Nagel GMBH and Company KG (Nagel) of Hamburg, Germany, exported the ebony wood for its customer, Gibson Guitars of Nashville. Since at least April 2000, the Republic of Madagascar has had various laws that restrict the harvest and export of ebony wood, which is slow growing and increasingly rare. Gibson Guitars has filed a claim in this forfeiture proceeding and moved to dismiss the forfeiture complaint, but no decision has yet been rendered.

The passage of the Lacey Act Amendments catapulted the United States into a global leadership role in the ongoing multilateral effort to combat illegal logging and associated trade. Since the enactment of the amendments, other nations are now considering laws to help stem this damaging international trade. It is anticipated that this change in the legal landscape will contribute to a significant reduction in the current global illegal trade in plants and its related social, economic, and environmental damages.

Elinor Colbourn *is an assistant chief in the Environmental Crimes Section and* **Thomas W. Swegle** *is a senior counsel in the Law and Policy Section of the Environment and Natural Resources Division, U.S. Department of Justice. The views expressed in this article are solely those of the authors and do not purport to reflect the views of the Department of Justice or any other agency.*

EPA imposes strict numeric nutrient criteria in Florida: Background and implications

By Mohammad O. Jazil and David W. Childs

The State of Florida is the focal point of a national debate over the proper roles of federal and state governments in implementing the Clean Water Act (CWA). This debate is focused on EPA's imposition of strict numeric criteria for Florida's surface waters to curb nutrient pollution.

The CWA empowers the states with primary responsibility for establishing water quality standards. The U.S. Environmental Protection Agency (EPA) may promulgate its own standards but only when EPA determines that a new or revised standard is necessary (33 U.S.C. § 1313(c)(4)(B)). Such determinations are rare. Even EPA has noted that a determination is "symptomatic of something awry with the basic statutory scheme" (57 Fed. Reg. 60,848 (Dec. 22, 1992)).

Background

In 2008, environmental organizations sued EPA for failing to set *numeric* nutrient water quality criteria in Florida, which like most states implements a *narrative* nutrient water quality criterion. Relying on a 1998 national guidance document, the environmental organizations alleged that EPA had already determined numeric criteria were necessary and that EPA, therefore, had a nondiscretionary CWA duty to promulgate numeric criteria for Florida. EPA disputed this claim, but it determined in January 2009 that numeric nutrient criteria are in fact necessary for Florida to comply with the CWA.

In August 2009, EPA and the environmental litigants entered into a consent decree that required EPA to promulgate nutrient criteria for all of Florida's surface waters in a two-phase rulemaking process. Consistent with this consent decree, EPA finalized numeric nutrient criteria for Florida's rivers, lakes, and springs in December 2010 (75 Fed. Reg. 75,762 (Dec. 6, 2010)) (the Rule). These now-final criteria have an effective date of March 6, 2012. The consent decree requires EPA to finalize criteria for Florida's estuaries, marine waters, and southern canals by August 15, 2012 (*Florida Wildlife Fed'n v. Jackson*, Case No. 08-00324 (N.D. Fla.)).

EPA's Rule divides the state into five watershed regions. The Rule establishes phosphorus and nitrogen criteria for rivers and streams in each region. The Rule also divides Florida's lakes into three groups based on color and alkalinity and establishes criteria for chlorophyll-a, phosphorus, and nitrogen. Rivers and streams that feed into lakes must comply with downstream protective values (DPVs). If a downstream lake meets applicable criteria, the DPV for waters upstream is the ambient nitrogen and phosphorus concentration at the point where water enters the lake. If a downstream lake does not meet applicable criteria, the DPV for waters upstream is identical to the lake's nitrogen and phosphorus criteria. EPA intends to promulgate DPVs for estuaries during the second phase of its rulemaking process.

The Rule establishes a process whereby the state or an individual can petition EPA for site-specific alternative criteria on a "watershed, area-wide, or water-body specific basis." If approved, the site-specific criteria would apply in lieu of the EPA criteria. Petitioners must provide a technical analysis to justify the proposed alternative site-specific nutrient criteria. It is unclear what level of technical analysis would suffice, although draft EPA guidance indicates that at least three consecutive years of data collection will be required.

Over thirty parties have filed legal challenges over the Rule. The State of Florida, local governments, utilities, agricultural interests, and private industry litigants claim that the Rule and its predicate—the January 2009 determination—are legally, scientifically, and factually indefensible. Environmental litigants allege that the Rule is too lax. Briefing in the case is expected to be complete by the end of 2011, and the district court has indicated that it will endeavor to issue a ruling prior to the Rule's March 6, 2012, effective date.

While this litigation proceeds, the Florida Department of Environmental Protection (FDEP) has reinitiated its own nutrient criteria rulemaking and asked EPA to rescind its federal rulemaking effort. Also, the National Research Council has initiated an independent review of EPA's economic analysis for the Rule. As explained below, these issues present significant national implications.

The CWA and legal arguments

The stated goal of the CWA is to "restore and maintain" the quality of the nation's waters. Water quality criteria—like EPA's numeric nutrient criteria—are set at levels necessary to meet a water's designated uses, e.g., fishing and swimming. The criteria are reflected in national pollution discharge elimination (NPDES) permits that facilities discharging to surface waters must obtain. Where waters are not meeting water quality standards, states must establish—and EPA must approve—total maximum daily loads (TMDLs). TMDLs set the maximum quantity of a pollutant that may be added to a water body from all sources without exceeding the applicable water quality standard for that pollutant. Like water quality criteria, TMDLs must protect designated uses.

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To date, Florida has adopted TMDLs for seventy-nine water bodies, and stakeholders have spent hundreds of millions of dollars implementing the TMDLs.

The state, local governments, and other regulated entities challenging the Rule argue that Florida's TMDL program as well as other state nutrient management programs are protecting and restoring Florida's waters from nutrient pollution, and, thus, EPA's January 2009 determination was unsupported by the facts. These entities also allege that a desire to settle the environmental litigants' initial CWA citizen suit against EPA impermissibly prompted the agency to issue the January 2009 determination. As support for that allegation, the State of Florida cites an internal EPA memorandum addressed to the EPA Administrator. The state alleges that EPA's consideration of such a non-environmental factor was not contemplated or authorized by Congress in crafting the CWA.

The state, local governmental agencies, agricultural interests, and utilities also take issue with the substance of the Rule. In short, the coalition argues that EPA's criteria for rivers and streams are arbitrary and capricious because EPA (1) failed to establish a cause-and-effect relationship or account for relevant factors such as stream size, width and depth, canopy, and color when it grouped rivers and streams into geographic regions; (2) relied on too few reference sites and collected too few reference points in establishing the criteria; (3) established criteria that overprotect some streams and underprotect others and have a high error rate; (4) and generally failed to protect the designated uses of Florida's rivers and streams. According to the coalition, the lake criteria are arbitrary and capricious because, among other things, EPA (1) failed to consider the uniqueness of lakes in Florida's phosphorus-rich Bone Valley and (2) ignored its own conclusion that chlorophyll-a alone is an adequate measure of whether nutrients impair a lake. The coalition further alleges that the DPV provision is flawed because EPA (1) presumed all lakes need DPVs to protect their designated uses, and all waters upstream from a lake contribute to the lake's impairment, if any, and (2) ignored factors (e.g., groundwater inflow, atmospheric deposition) that may contribute to a lake's water quality.

Finally, the coalition argues that EPA erred in failing to exclude waters with existing nutrient TMDLs from the freshwater rule. As the coalition explains, existing nutrient TMDLs—like criteria established by the Rule—set numeric endpoints designed to ensure that the waters meet their designated uses. Unlike criteria established by the Rule, however, the TMDLs are specific to particular waters or segments of particular waters. Thus, the coalition concludes, endpoints established by TMDLs are preferable to those established by the Rule.

In contrast, environmental organizations such as the Sierra Club and Natural Resources Defense Council claim that the Rule is too lax. The environmental organizations contend that the alternative site-specific criteria should not be available on a watershed or areawide basis. Further, the environmental organizations state that EPA erred by including provisions that determine compliance with the criteria based on annual averages not to be exceeded once every three years, which they argue is not protective.

FDEP petition

In April 2011 FDEP filed a petition with EPA asking EPA to withdraw its January 2009 determination, repeal the Rule, and "discontinue proposing or promulgating further numeric nutrient criteria in Florida." By comparing Florida's efforts to manage nutrients against an eight-part framework outlined in a March 2011 EPA memorandum, FDEP concluded that Florida regulates nutrients from industry and agricultural sources, among others, more diligently and comprehensively than most other states, and EPA never should have interfered with Florida's nutrient water quality standards program.

EPA responded to FDEP's petition in June 2011. In its initial response, EPA did not expressly accept or deny FDEP's petition; however, EPA indicated a willingness to seek modifications to the rulemaking schedule outlined in the 2009 consent decree so long as Florida continued towards state promulgation. Consistent with the CWA, EPA represented that it would repeal its federal Rule if Florida's final nutrient criteria rules are satisfactory.

Despite EPA's failure to accept the state petition, FDEP has initiated a state rule development process. The outcome of this state rulemaking is uncertain. FDEP publicly indicates that it has not decided whether it will propose its draft rules for adoption absent EPA's acceptance of its petition.

National Research Council review

At U.S. Senator Bill Nelson's request, the National Research Council has also initiated an independent review of the economic analysis of the Rule. EPA's estimated compliance costs are over an order of magnitude lower than that produced by the State of Florida and private entities. For instance, EPA has estimated that domestic wastewater utilities will spend $22 to $38 million per year to comply with the Rule while FDEP and a statewide consortium of wastewater utilities have separately estimated it will cost over $400 million per year. The council has convened a fourteen-member panel of civil engineers, economists, and one lawyer to review EPA's cost projections. The panel conducted its first public meeting in Orlando in July 2011 and intends to conclude its review prior to the Rule's effective date.

National implications

Nutrients remain a national water quality issue. Indeed, thirteen organizations, including several environmental organizations, recently asked EPA to promulgate numeric nutrient criteria for navigable waters in all states where such criteria do not already exist. The petition emphasized the need to promulgate criteria for the Mississippi River water basin, which drains approximately 41 percent of the contiguous United States. EPA denied this request. (For a discussion of this topic see Ridgway Hall, *EPA Denies Petition for Nutrient Criteria Rulemaking for the Mississippi River Basin*, American College of Environmental Lawyers Blog (Sept. 7, 2011) *at* http://www.acoel.org/post/2011/09/07/EPA-Denies-Petition-for-Nutrient-Criteria-Rulemaking-for-the-Mississippi-River-Basin.aspx.) Should EPA's Rule for Florida survive the legal challenges against it, it could prompt additional petitions in other states as well as serve as a template for future EPA nutrient criteria rulemakings.

Mohammad O. Jazil *and* **David W. Childs** *practice environmental law with Hopping Green & Sams, P.A., where they may be contacted at mohammadj@hgslaw.com and davidc@hgslaw.com, respectively.*

IN BRIEF

By Theodore L. Garrett

CERCLA

The Ninth Circuit upheld the dismissal of a dry cleaning store operator's Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) suit against the manufacturer of a machine for filtering and recycling water contaminated with perchloroethylene used in dry cleaning. *Team Enterprises, LLC v. Western Investment Real Estate Trust*, 2011 WL 3075759 (9th Cir. July 26, 2011). The court held that the manufacturer lacked requisite intent to qualify as "arranger" and did not exercise control over operator's disposal process for purposes of arranger liability. The court rejected plaintiff's argument that intent could be inferred from its failure to warn of the risks of disposal, stating: "we are not convinced that sellers of useful products must instruct buyers on proper disposal techniques in order to avoid CERCLA liability."

Air quality

The D.C. Circuit vacated an EPA guidance document that allowed states in compliance with the 8-hour ozone standard to avoid Clean Air Act section 185 fees on sources that miss deadlines, even if the region was not in compliance with the 1-hour standard. *Natural Resources Defense Council v. Environmental Protection Agency,* 643 F.3d 311 (D.C. Cir. 2011). The court held that the guidance was improperly issued without providing for public notice and comment. The court also agreed with NRDC that the guidance allowed violations of the 1-hour standard to continue and was contrary to the anti-backsliding provisions in section 172(e) of the statute.

The dismissal of a lawsuit challenging the adequacy of a Prevention of Significant Deterioration permit for a Wyoming coal-fired power plant was upheld on appeal. *Sierra Club v. Two Elk Generation Partners Ltd. Partnership*, 2011 WL 2120048 (10th Cir. May 31, 2011). The state issued an order resolving the permit issues that was upheld on appeal in state court. Relying on the full faith and credit statute, 28 U.S.C. § 1738, the majority 10th Circuit opinion concluded that "Wyoming's policy of finality of judgments favors against allowing the Sierra Club to relitigate issues that have already been decided."

A district court held that section 231 of the Clean Air Act requires EPA to evaluate whether aircraft greenhouse gas (GHG) emissions endanger human welfare. *Center for Biological Diversity v. EPA*, 2011 WL 2620995 (D.D.C. July 5, 2011). However, the court was not persuaded that EPA must conduct endangerment determinations for non-road engines and vehicles, which are regulated under section 213 of the act and provide EPA with discretionary authority.

Water quality

EPA's approval of a total daily maximum load (TMDL) for total suspended solids (TSS) and sediment for the Anacostia River was held arbitrary and capricious. *Anacostia Riverkeeper v. Jackson*, 2011 WL 3019922 (D.D.C. July 25, 2011). EPA ignored the effects of sediment and TSS on recreational and aesthetic uses of the Anacostia River, the court held, and thus the record was insufficient to support the conclusion that the TMDL protects all designated uses.

Environmental groups' lawsuits challenging three Corps of Engineers' nationwide permits for mining activities were dismissed. *Kentucky Riverkeeper, Inc. v. Midkiff*, 2011 WL 2789086 (E.D. Ky. July 14, 2011). The court rejected plaintiffs' challenge to the Corps's cumulative impact analysis and its reliance on compensatory mitigation measures.

RCRA

The Ninth Circuit upheld the dismissal of a shopping center owner's Resource Conservation and Recovery Act (RCRA) citizen suit against manufacturers of dry cleaning equipment. *Hinds Investments, LP v. Angioloi,* 2011 WL 3250461, 3268027, 3268096 (9th Cir. Aug. 1, 2011). The court rejected plaintiff's argument that the manufacturers contributed to the release because the equipment was designed to allow the discharge of contaminated wastewater to the sewer system. The opinion states that defendant must have a measure of control over the waste at the time of disposal or otherwise be actively involved in the disposal process in order to be liable.

The dismissal of RCRA claims against a mineral processing plant alleged to have contaminated streams and groundwater with aminoethylethanolamine (AEEA) and arsenic was upheld on appeal. *Brod v. Omya*, 2011 WL 2750916 (2d Cir. July 18, 2011). The court held that plaintiffs' notice of intent did not include sufficient information to permit defendant to identify the alleged violation because the notice did not identify AEEA and arsenic as contaminants in the plant's waste.

NEPA

A lawsuit by environmental groups challenging the Bureau of Land Management's (BLM's) approval of two oil and gas lease sales in New Mexico, for alleged failure to adequately address climate change, was dismissed for lack of standing. *Amigos Bravos v. United States Bureau of Land Management,* 2011 U.S. Dist. LEXIS 95710 (D.N.M. Aug. 3, 2011). The court found that plaintiffs presented only bare assertions, but no scientific evidence or recorded data, that climate change caused injury to their use and enjoyment of specific lands. Moreover, plaintiffs did not show that their alleged injuries are fairly traceable to the BLM's alleged failure to comply with the National Environmental Policy Act.

Energy

The D.C. Circuit dismissed, on ripeness grounds, petitions challenging the attempt by the Department of Energy (DOE) to withdraw its application to the Nuclear Regulatory Commission (NRC) for a license to construct a permanent nuclear waste repository at Yucca Mountain, Nevada. *In re Aiken County*, 645 F.3d 428 (D.C. Cir. July 1, 2011). The court held that there is a lack of finality until the NRC either acts on DOE's request to withdraw or acts on the license application.

ESA/Resources

A court remanded the Fish and Wildlife Service's (FWS's) designation of 143 acres of property as critical habitat under the Endangered Species Act (ESA). *Otay Mesa Property, L.P. v. United States Department of the Interior,* 2011 WL 2937177 (D.C. Cir. July 22, 2011). The court found that one isolated sighting, in a tire rut, of four fairy shrimp, each the size of an ant, was insufficient to render a property "occupied" by the shrimp for purposes of critical habitat designation.

A district court upheld the FWS's listing of the polar bear as a threatened species under the ESA. *In re Polar Bear Endangered Species Act Listing*, 2011 WL 2601604 (D.D.C. June 30, 2011). The court ruled that a timeframe of forty-five years over which the polar bear was likely to become endangered was not arbitrary and capricious and the FWS reasonably declined to designate any polar bear population or ecoregion as a distinct population segment.

Theodore L. Garrett *is a partner at Covington & Burling in Washington, D.C. and can be reached at tgarrett@cov.com. He is a former chair of the Section and is a contributing editor of* Trends.

CALENDAR OF SECTION EVENTS

2012

- **ABA Midyear Meeting**
  February 9–15, 2012
  New Orleans
- **30th Annual Water Law Conference**
  February 22–24, 2012
  San Diego
- **41st Annual Conference on Environmental Law**
  March 22–24, 2012
  Salt Lake City
- **ABA Petroleum Marketing Attorneys' Meeting**
  April 19–20, 2012
  Washington, D.C.
- **ABA Annual Meeting**
  August 2–7, 2012
  Chicago
- **20th Section Fall Meeting**
  October 10–13, 2012
  Austin, Texas

For more information, see the Section website at www.americanbar.org/environ/ or contact the Section at (312) 988-5724 or environ@americanbar.org. Course materials from many prior Section programs are available through the ABA Web Store, as well as audio files from select Section CLE programs and teleconferences. Details can be found at www.ambar.org/EnvironPublications..

Supreme Court preview

By Channing J. Martin

During its 2010 term, the U.S. Supreme Court issued a blockbuster decision in *American Electric Power Co. v. Connecticut*, 564 U.S.__ , 131 S. Ct. 2527 (2011), holding that the Clean Air Act displaces the ability of courts to impose federal com1mon law remedies to address greenhouse gas emissions. Similar headlines are unlikely to be generated by the two environmental cases that will be heard by the Court during its 2011 term—*Sackett v. Environmental Protection Agency*, No. 10-1062, and *PPL Montana, LLC v. Montana*, No. 10-218—but the decisions in those cases will nevertheless have important implications for environmental, energy, and resource practitioners.

The *Sackett* petitioners seek a determination that preenforcement review of an agency decision on the jurisdictional status of property as wetlands is available under the Administrative Procedure Act (APA), 5 U.S.C. § 500, et seq. They seek review of a compliance order issued by the U.S. Environmental Protection Agency (EPA) under the Clean Water Act (CWA). Four circuit courts of appeal have considered this issue and are aligned in rejecting preenforcement review. It is, therefore, surprising that the Court granted certiorari, particularly since it denied certiorari only three weeks earlier in *General Electric Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010), a case upholding the bar against preenforcement review under the Comprehensive Environmental Response, Compensation, and Liability Act.

The Sacketts filled a half acre of their property with dirt and rock so they could construct a home near Priest Lake in Idaho. EPA issued a CWA compliance order alleging the Sacketts filled wetlands without obtaining a CWA section 404 permit. The order required the Sacketts to remove fill material and restore the property to its original condition. It also threatened civil penalties of up to $32,500 per day for failure to comply. The Sacketts sought administrative and then judicial review of the order without success. The Ninth Circuit affirmed the trial court's dismissal of the action, concluding that the CWA precludes judicial review of such orders until EPA has filed an enforcement action in federal court. *Sackett v. EPA*, 622 F.3d 1139 (9th Cir. 2010).

In its order granting certiorari, the Court indicated that it would review whether the APA provides for preenforcement review of the compliance order and, if not, whether that violates the Due Process Clause. By agreeing to consider whether the APA authorizes preenforcement review, and not simply whether the CWA precludes it, the Court has broadened the implication of its decision to other statutes. Moreover, by addressing whether a bar on preenforcement review violates the Due Process Clause, the Court's decision could significantly affect the ability of EPA and other federal agencies to issue administrative orders. Such a ruling could change the respective bargaining power of regulators and regulated parties alike.

In *PPL Montana*, the State of Montana maintains that it owns three riverbeds as an incident of state sovereignty and that PPL Montana, the owner and operator of hydroelectric projects located on the rivers, owes it $41 million in retroactive lease payments. PPL Montana contends that, as owner of the riparian land on both sides of the river, it owns the riverbeds and may continue to occupy them without payment.

The parties agree that the appropriate legal test is whether, under federal law, the rivers were "navigable" when Montana was admitted to the Union in 1889. The parties do not agree, however, on how the constitutional test is to be applied. PPL Montana argues navigability is not established because the sections of rivers on which its dams exist were not navigable when the state was admitted to the Union. The state argues navigability is established because the rivers as a whole were generally navigable when the state was admitted to the Union and that present day usage is probative on this issue.

The state trial court ruled on a motion for summary judgment that Montana had title to the riverbeds, and it awarded the state $41 million. The Supreme Court of Montana affirmed. In petitioning for certiorari, PPL Montana argued to the U.S. Supreme Court that the decision below "provides a roadmap for cash-strapped states to take (and collect back-rent from) riverbed lands heretofore believed to belong to private landowners and the federal government by the simple expedient of declaring them to have belonged to the State all along." It is a safe bet that power utilities and states around the nation will be watching the outcome of this case closely.

The Court will hear oral argument in *PPL Montana* this December. Oral argument in *Sackett* has not yet been scheduled. Decisions in both cases are expected by June 2012.

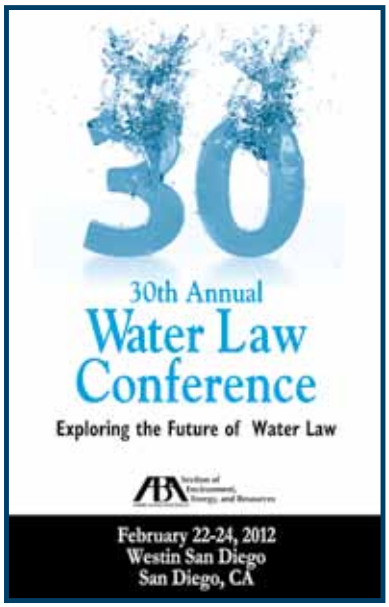
Channing J. Martin *is chair of the Environmental Law Group at Williams Mullen in its Richmond, Virginia, office. He is the Section's budget officer and can be reached at cmartin@williamsmullen.com.*

The 30th Annual Water Law Conference: Exploring the future of water law

By Kathy Robb and Jon Schutz

The 30th Annual Water Law Conference will be held in San Diego on February 22–24, 2012. The conference will address emerging national and international water issues in the coming decades against the backdrop of the most important developments in the past thirty years of water law. As the American forester and founding member of The Wildness Society, Bernard Frank, said: "You could write the story of man's growth in terms of his epic concerns with water."

This two-day discussion by leading academics, in-house counsel, NGO and government representatives, and practitioners will feature keynote speaker Dr. Peter Gleick, co-founder and president of the Pacific Institute. A MacArthur Fellow, elected to the National Academy of Sciences in Washington, D.C. and an academician of the International Water Academy in Oslo, Norway, Dr. Gleick has been dubbed "a visionary on the environment" by the BBC. His presentation will set the stage for the 30th Annual Conference, which will include several plenary and breakout sessions, a reception, and a luncheon.



Key sessions include:

The Human Right to Water in the United States? With 884 million people worldwide without access to safe drinking water and 2.6 billion without access to basic sanitation, the United Nations General Assembly adopted a resolution in 2010 calling on states and international organizations to scale up efforts to provide clean, accessible, and affordable drinking water and sanitation for all. These concerns have largely been addressed in the United States. Is it, therefore, necessary to formally recognize a human right to water in this country?

Water and Gas Shale Development in the United States Extensive gas shale reserves confirmed throughout the United States and internationally have been hailed as a potential game changer for the world's energy profile. Yet concerns have been raised that shale gas development may adversely affect ground and surface water supply and quality. What are the jurisdictions of federal and state agencies studying the issues, and what is the latest thinking on the effects of hydraulic fracturing on water?

Where's the Money? Water Infrastructure Financing in a Whole New World Across the nation, investment in water facility construction and maintenance is confronting serious financial challenges. How do water facility sponsors pursue financing? What alternatives are available from infrastructure banks, public-private partnerships, and innovative state and local initiatives?

East Meets West: Lessons to Be Learned A significant trend in U.S. water practice is the convergence of eastern and western water law issues. What can the East learn from the western history of allocation and the West take from the East about the role of quality in resource allocation? What joint approaches inform responses to federal regulation and water conservation?

Legal Issues Across Interstate Boundaries Current litigation abounds throughout the country over interstate waters, addressing important federalism and state sovereignty issues that have nationwide impact. Panel members will explore three ongoing disputes: Lake Lanier (Georgia, Alabama, and Florida), the Republican River (Kansas, Nebraska, and Colorado), and Grand Lake (Oklahoma and Texas).

The Climate Has Changed, Now What? Leading water agencies at the federal, state, and local levels already have begun adaptation to prepare for water uncertainty. How do these strategies affect and how will they be affected by the law in the coming years?

Tribal Water Rights What are the off-reservation water marketing efforts by tribes in Arizona, New Mexico, Oklahoma, and elsewhere, and how should they be treated in the law? Can tribes sell settlement water across state lines?

To Act or Not to Act: Federal ESA and Water Management Discretion The Endangered Species Act consultation provisions apply to federal actions that are discretionary. Where does the line of discretion begin and end in the law?

The Mystery of Water Flow Unmasked—Where Does the Water Go, and How Does It Get There? Hydrologists will explain it all.

The schedule will also feature a practical session discussing ethical issues for water lawyers.

The Water Law Conference is targeted towards lawyers, engineers, policy makers, and water managers with interest in the protection, development, and allocation of water rights and water resources, or those who participate in the management of surface and groundwater resources. It will offer insights to all persons involved in water right issues nationwide, including those with private, municipal, agricultural, and tribal water rights. The conference is open to any interested persons, and is not limited to lawyers.

Rounding out the 30th Annual Water Law Conference will be a public service project in the beautiful San Diego area and opportunities to network with your colleagues. Further information about the conference is posted on the Section's Web site at www.ambar.org/EnvironWL or can be obtained by calling the Section at (312) 988–5724. We hope you will join us.

Kathy Robb *is a partner with Hunton & Williams LLC in New York, New York and can be reached at krobb@hunton.com.*
Jon Schutz *is an attorney with Mabey, Wright & James in Salt Lake City, Utah and can be reached at jschutz@mwjlaw.com. They are the co-chairs of the 30th Annual Water Law Conference.*

Permitting for greenhouse gases: Federal standards and state battles

By Ronda L. Moore

The U.S. Environmental Protection Agency (EPA) has implemented the regulation of greenhouse gas (GHG) emissions through promulgation of the federal Tailoring Rule. Implementation of this Rule under the Prevention of Significant Deterioration (PSD) program is, however, far from easy. Some states can implement this rule and regulate GHGs, while other states cannot until EPA approves their state's GHG program. For an "unapproved" state, EPA uses its federal authority to regulate GHG emissions until approval of the state program. In addition, EPA is continuing to defend state and industry lawsuits over the regulation of GHGs. The agency is also adjusting to a recent court decision that requires EPA to issue PSD permits within one year's time. Environmental counsel must stay tuned to further developments in the regulation of GHGs to assist clients in understanding which regulations apply, when, and to what authority to apply for PSD permitting.

Background

On April 2, 2007, the U.S. Supreme Court decided in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that EPA could regulate GHG emissions as an "air pollutant" under the Clean Air Act (CAA). Subsequently, in December 2009, EPA issued its findings that current and projected atmospheric concentrations of six key GHGs, including carbon dioxide (CO_2), methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride, endanger the public health and welfare of current and future generations. Though these findings were the prerequisite for finalizing GHG emissions standards for light-duty vehicles, the regulation of GHGs for stationary sources followed. Once EPA finalized the light-duty vehicle rule, GHGs became "regulated." Regulated pollutants are addressed under the PSD air permitting program, which applies to new and modified major stationary sources.

EPA then determined how to effectively regulate GHGs under the PSD permitting program when GHGs did not fit into the traditional applicability thresholds for triggering PSD. To trigger PSD, a source has to emit or have the potential to emit 100 tons per year of a PSD pollutant if it falls within a list of twenty-eight source categories or 250 tons on an annual basis if it does not fall within that list. If this same threshold of 100 to 250 tons were imposed for the regulation of GHG emissions without additional applicability requirements, the program would encompass a significant number of previously unregulated stationary sources, imposing undue costs on small sources of air pollution and overwhelming the permitting authorities.

The GHG Tailoring Rule

EPA issued its GHG Tailoring Rule on June 3, 2010 (75 Fed. Reg. 31,514). The rule essentially raised the thresholds for triggering GHG emission regulation under PSD permitting by adding a new definition of "subject to regulation." The agency also established a phased implementation schedule for the regulation of GHGs for new stationary sources and modifications to existing stationary sources, as well as requirements for obtaining operating permits.

The first phase of EPA's Tailoring Rule began on January 2, 2011, and requires new and modified stationary sources that are already required to obtain a PSD permit for non-GHGs to include GHG emissions in their PSD permits. New sources trigger the GHG requirements if they have the potential to emit 75,000 tons per year of carbon dioxide equivalent (CO_2e) emissions (based on global warming potential), and modified sources trigger the requirements if they increase their CO_2e emissions by 75,000 tons.

The second phase of the Tailoring Rule began on July 1, 2011, and requires all new stationary sources with the potential to emit 100,000 tons per year or more of CO_2e and 100/250 tons per year of mass GHGs to be subject to PSD for GHGs. Existing stationary sources undergoing major modifications to their facilities that emit at least 100,000 tons per year of CO_2e, would increase their GHG emissions by at least 75,000 tons of CO_2e, and those that also exceed 100/250 tons of GHGs on a mass basis would also have to obtain PSD permits.

State implementation of PSD permitting for GHGs

Most states have the authority to implement the federal PSD permitting program, either through a delegation, or through approval of a state program where the state uses its own clean air rules. Delegated states would simply begin using the Tailoring Rule when it became effective at the federal level. States with approved programs, however, typically have added steps.

Approvals of state programs are memorialized by EPA through State Implementation Plans (SIPs). As part of implementing the Tailoring Rule, EPA consulted with the states, reviewed SIPs, and considered states' laws to determine which states would have the authority to issue PSD permits for GHG emissions. EPA determined that thirteen states (compromising state and locals programs in Alaska, Arizona, Arkansas, California, Connecticut, Florida, Idaho, Kansas, Kentucky, Nebraska, Nevada, Oregon, and Texas) lacked current authority to regulate GHGs. EPA determined

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that some of the states' SIPs explicitly precluded application of the PSD program to regulate GHGs, and in other states where the SIP would otherwise have allowed such regulation, the state's constitution or other state laws precluded the application of PSD to GHG emissions.

EPA issued notice through a "SIP call" for the thirteen states on December 13, 2010, requiring these states to submit SIP revisions between December 22, 2010, and December 1, 2011, demonstrating that their PSD programs satisfied the CAA requirements in applying the PSD requirements to GHG sources. Some states advised EPA that they would revise their SIPs by December 22, 2010. When this deadline was not met, EPA established a Federal Implementation Plan (FIP) on December 30, 2010.

Other states advised EPA that they would revise their SIPs within one year of EPA's December 22, 2010, deadline. In the meantime, EPA is delaying implementation of PSD permitting for GHGs in these states. So far, this has not been an issue for the permitting of GHG emissions due to the lack of new or modified emission sources applying for permits.

Since the SIP call, some of the thirteen states have submitted revised SIPS. Currently, EPA is proposing to approve at least four: Nebraska, New Hampshire, Kansas, and Wyoming. Texas, on the other hand, has refused to revise its SIP. EPA promulgated a FIP, and the state has until December 1, 2011, to submit its SIP revision for EPA approval. If Texas still refuses, then EPA will promulgate a new FIP.

Environmental counsel must stay tuned to further developments in the regulation of GHGs to assist clients.

Legal battles over the Tailoring Rule and SIP call

During the 2011 state legislative sessions, at least two states (Montana and Texas) introduced bills to stop the implementation of GHG regulation in their states, citing it as a violation of the Tenth Amendment of the U.S. Constitution. Neither bill, however, passed.

Additionally, Texas has challenged EPA's regulation of GHGs in a case transferred to the D.C. Circuit Court of Appeals. At the D.C. Circuit, Texas' challenge was combined with at least five other challenges against EPA's GHG regulation filed by the SIP/FIP Advocacy Group, the Utility Air Regulatory Group (a non-profit group of electric utilities and trade associations), and various mining and energy interests. The combined case before the D.C. Circuit is *Utility Air Regulatory Group v. EPA* (Docket No. 11-1037), and is still in the briefing phase.

Wyoming, along with the National Association of Manufacturers and the Utility Air Regulatory Group, recently filed similar challenges in the U.S. Court of Appeals for the Tenth Circuit. It is anticipated that these challenges will be transferred to the D.C. Circuit as well.

These challenges have largely focused on EPA's December 2010 determination that several state SIPs were inadequate to regulate GHGs and the establishment of FIPs in response. Challengers also assert that EPA violated the CAA because states were not given proper notice-and-comment periods to revise their SIPs, that previously EPA allowed states up to three years to write SIPs conforming to the implementation of past EPA regulations, that EPA incorrectly issued its SIP call, and that SIP revisions are not required to implement GHG permitting. EPA rejoins that these challenges are not jurisdictionally before the court of appeals and should be dismissed. The brief of the United States was just filed this September.

EPA's actions during initial implementation

Since January 2, 2011, EPA has reviewed and provided comments on a handful of PSD permits that were processed by states with full authority to regulate GHG emissions. Most of EPA's comments have recommended inclusion of numeric limits and installation of continuous emission monitoring systems or some other type of monitoring requirement, that the use of carbon capture and storage systems be evaluated, and that the best available control technology analysis should address startup and shutdown. Since these states have full authority, the states would have the ability to reject EPA's comments—and certainly some states have. So far, it does not appear that EPA has itself issued a PSD permit for GHG emissions under a FIP.

Some applications are currently under review, and as part of its review of pending PSD permit applications under a FIP, EPA is requesting that applicants list all endangered or threatened plant and animal species and their critical habitat around the proposed project. Should any plant, animal, or habitat be in the proposed area, then a biological assessment of the proposed facility's impact would be needed for EPA's evaluation in determining whether, pursuant to the Endangered Species Act, a section 7 consultation with the U.S. Fish and Wildlife Service would be necessary.

What's new on the PSD front?

EPA's embattled PSD permitting program recently received another challenge. On May 26, 2011, the U.S. District Court for the District of Columbia in *Avenal Power Center v. EPA*, 2011 U.S. Dist. LEXIS 56251 (D.D.C. 2011) held that EPA was required to issue PSD permits within the one-year timeframe established in section 165(c) of the CAA. Before this decision, EPA's timeframe for issuing or denying a PSD permit could take approximately two to three years, in part because EPA's proposed permitting decision would be subject to an administrative appeal process before EPA's Environmental Appeals Board (EAB), prior to EPA's issuance of the final permit. The practical implications of the *Avenal* decision may mean that EPA will issue more denials for PSD permits, including PSD permits for GHGs, and the EAB may not be able to consider challenges to proposed agency air permits as a result of this timeframe.

Ronda L. Moore *is an assistant general counsel for the Florida Department of Environmental Protection and can be reached at Ronni.Moore@dep.state.fl.us.*

Continued from page 1

Bitter Cold War legacy

candidate sites for Superfund enforcement. As the Five-Year Plan nears expiration, the agencies will need to decide how to move forward with remediation, and consider the implications of recent changes in the federal government's environmental justice policy.

Recent federal actions on environmental justice

In an October 2007 Congressional hearing, Congressman Waxman observed "[i]f a fraction of the deadly contamination the Navajos live with every day had been in Beverly Hills or any wealthy community, it would have been cleaned up immediately. But there's a different standard applied to the Navajo land . . . while time passes, people get sick, people die, people develop kidney disease, children, babies are born with birth defects, bone cancer develops and gets worse, lung cancer, leukemia, while we wait." Mr. Waxman's statement tersely captures the vast environmental justice issues involving legacy uranium mining impacts on the Navajo.

In September 2010, the federal Interagency Working Group on Environmental Justice met for the first time in more than a decade. In early August 2011, the seventeen federal agencies that comprise the Working Group signed a "Memorandum of Understanding on Environmental Justice and Executive Order 12898" (MOU), which sets forth goals important to all Americans disproportionately affected by environmental problems: providing all Americans—regardless of their race, ethnicity, or income status—full protection under the nation's environmental, civil rights, and health laws and to make sure that certain communities are not unfairly burdened with pollution or toxic chemicals. The MOU specifically reaffirms that agency responsibilities under the Executive Order "shall apply equally to Native American programs." It also notes that those Americans living with these environmental problems face disproportionate health problems and greater obstacles to economic growth when their communities cannot attract businesses and new jobs. The MOU is a critical step in reestablishing federal agency obligations to address environmental justice concerns involving health threats and economic inequities present in some communities. The MOU builds on Executive Order 12898, issued in 1994, and requires each covered agency to "identify and address . . . any disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations." This would ostensibly include remediation and enforcement efforts, which are obviously relevant for the Navajo. Given that many potentially liable entities may be implicated in multiple sites around the country, EPA may have to consider how the environmental justice issues presented by contaminated sites on Navajo and other Indian lands would affect division of cleanup funds and penalty awards. This consideration is further complicated by the fact that potentially responsible parties have not been idle.

Corporate restructurings, bankruptcy law, Kerr-McGee, Tronox, and the Navajo Nation

Bankruptcy law has often been academically criticized for its sometimes-questionable role in corporate reorganizations designed to limit or avoid environmental liabilities. As one author frames the problem: "the current structures of bankruptcy, corporate, and environmental law allow a firm to protect its assets by creating a subsidiary that carries the firm's environmental liabilities but has insufficient assets with which to pay those liabilities. The subsidiary then declares bankruptcy, leaving the taxpayers with the environmental cleanup bill and the parent corporation's assets untouched." *Scary Stories and the Limited Liability Polluter in Chapter 11*, 65 Wash. & Lee L. Rev. 451, 454 (2008). The vast scope of cleanup costs associated with legacy uranium mining issues on Navajo makes the prospect of a corporate restructuring by a potentially responsible party truly "scary," especially if it shifts the cleanup burden onto the increasingly constrained federal government, seriously weakened for the foreseeable future by the expanding national debt.

And yet this scenario has occurred. Specifically, Kerr-McGee Corporation created and spun-off Tronox Incorporated as part of a complete reorganization known by the seemingly innocuous title "Project Focus." Tronox is a multi-national chemical company that makes and sells titanium dioxide, and other specialty chemicals. As part of Project Focus, Tronox was also given all of Kerr-McGee's mining interests, including Kerr-McGee's uranium mining and milling interests and operations it had extensively conducted on Navajo land from 1952 to 1968. Several months after the spin-off, Anadarko Petroleum Corporation purchased Kerr-McGee for $18 billion. Tronox subsequently declared bankruptcy. During the bankruptcy proceedings, Tronox's creditors (including those affected by its environmental liabilities) asserted that Tronox had been purposely underfunded prior to the spin-off and saddled with the bulk of Kerr-McGee's legacy environmental liabilities to make Kerr-McGee more appealing to potential buyers. The creditors asserted that Project Focus resulted in a fraudulent conveyance that a court order could remedy.

EPA and the U.S. Department of Justice announced on November 23, 2010, that Tronox agreed to resolve its environmental liabilities with EPA, other governmental agencies, and the Navajo Nation, at numerous contaminated sites around the country. www.epa.gov/compliance/resources/cases/cleanup/cercla/tronox. The settlement agreement provides the governments will receive, among other consideration, $270 million up front, and 88 percent of Tronox's interest in a pending fraudulent conveyance litigation against Anadarko, which is scheduled for trial in March 2012. *Tronox Inc. v. Anadarko Petroleum Corp.*, Case Nos. 09-10156 and 09-1198 (Bankr. S.D.N.Y.). Although we cannot determine what an 88 percent share would be in practical terms, the outcome of this fraudulent conveyance litigation will likely have long-reaching repercussions in the bankruptcy law arena and will certainly have a significant effect on the efforts to remediate the Cold War legacy of uranium mining operations in the Navajo Nation.

Dana J. Stotsky *is a career enforcement attorney with U.S. Environmental Protection Agency. He is on detail to the Navajo Nation Department of Justice during 2011–2012, and can be reached at djstotsky@nndoj.org.*

PEOPLE ON THE MOVE

By Steven T. Miano

Firm moves

Julie Domike recently joined the Washington, D.C. office of Kirkpatrick Townsend & Stockton LLP. Domike's practice focuses on matters under the Clean Air Act related to both mobile and stationary emissions sources, including counseling and permitting under New Source Review. She also represents clients in environmental litigation in federal and state courts. Previously, Domike practiced at Wallace King Domike & Relskin PLLC and with the Environmental Protection Agency. She is the co-editor of *The Clean Air Act Handbook*, *Third Edition*, recently published by the Section and ABA Publishing.

David Stanish recently joined the Boise, Idaho, office of Holland & Hart. Stanish is a member of the firm's Environment, Energy, and Natural Resources Group, where he represents and advises clients on endangered species, public lands, project permitting, water rights, water quality, and other environmental and natural resources matters. Previously, he practiced in the Natural Resources Division of the Idaho Attorney General's office.

Government moves

Bruce S. Gelber was recently appointed to the position of deputy assistant attorney general in the Environment and Natural Resources Division of the Department of Justice (DOJ). Gelber, a 25-year veteran of DOJ, will oversee the division's Environmental Enforcement Section, which represents the government in civil enforcement actions under federal environmental statutes. In addition, Gelber will oversee the division's Environmental Defense Section, which defends the government in civil litigation filed under environmental statutes, including law suits challenging EPA regulations. Prior to this appointment, Gelber was chief of the Environmental Enforcement Section. Gelber recently received the Section's 2011 Environment, Energy, and Resources Government Attorney of the Year Award.

Edward F. McTiernan was recently appointed deputy general counsel at the New York State Department of Environmental Conservation in Albany, New York, where he will work on site remediation, redevelopment, and related issues. Previously, McTiernan was a partner at Gibbons PC, where he lead the firm's Environmental Practice Group and served on the firm's Executive Committee. He is a former chair of the Environmental Section of the New Jersey State Bar Association.

This and that

Paul Hagen, a principal in the Washington, D.C. office of Beveridge & Diamond, P.C., was recently elected to the board of directors of the Conservation Fund. The Conservation Fund, one of the nation's leading land conservation non-profits, works to conserve land, train leaders, and invest in communities.

Steven T. Miano *is a shareholder at Hangley Aronchick Segal & Pudlin in Philadelphia. He is a contributing editor to Trends.*

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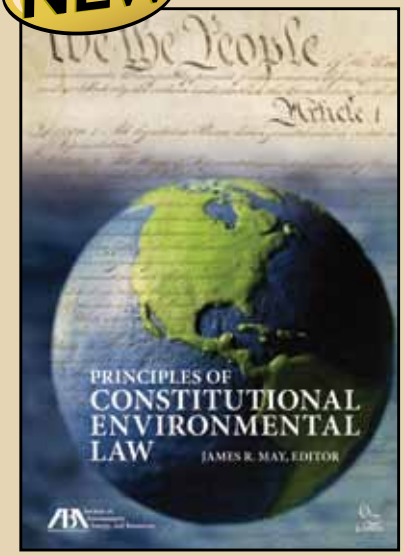

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James R. May, Editor

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