TRENDS

ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES NEWSLETTER

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The Keystone XL pipeline debate Local concerns or global cause?

By Joseph M. Dawley

The Keystone XL pipeline, a proposed crude oil pipeline project that would extend from the tar sands oil fields of Alberta, Canada, to the Texas Gulf Coast, has recently become ground zero in environmental and climate change policy. While the attention that the Keystone XL has garnered is clear, the debate over the pipeline is multifaceted and shows how local issues can be used to challenge a global issue. Specifically, the State of Nebraska and state and federal environmental organizations have raised concerns about the pipeline's potential environmental impacts on Nebraska's Sand Hills region, which contains numerous wetlands of special concern, a sensitive ecosystem, and significant areas of shallow groundwater. At a broader level, national and international environmental organizations are strongly critical of the environmental impact of the tar sands oil extraction process, which requires large quantities of water and results in carbon dioxide emissions. Also on the national level are pipeline supporters who believe the project will enhance U.S. energy security and provide much needed jobs. As with many issues, the truth lies somewhere in the middle. While many of the local issues can be resolved through the permitting process, the larger debate over tar sands oil development must be addressed at an energy and environmental policy level by the executive and legislative branches of our government.

To construct the pipeline, TransCanada Keystone Pipeline, L.P., must obtain a Presidential Permit, which is required for cross-border liquid pipelines and would be issued by the U.S. Department of State pursuant to Executive Order 13,337 (Apr. 30, 2004). Although the Executive Order suggested that it was intended to accelerate the permitting process, in fact this premise is contradicted by the Keystone application. This process began over three years ago when TransCanada filed an application for a Presidential Permit in September 2008. The Presidential Permit review process requires the State Department to prepare an Environmental Impact Statement (EIS) in accordance with the National Environmental Policy Act (NEPA). Upon issuance of the Final EIS, the State Department must determine whether the proposed project is in the national interest by expanding its evaluation beyond environmental concerns and considering economic, energy security, foreign policy, and other issues that it considers relevant. As part of the national interest evaluation, the State Department is required to consult with the U.S. Environmental Protection Agency, the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA), the U.S. Attorney General, and the U.S. Departments of Energy, Interior, Commerce, and Homeland Security.

On August 26, 2011, the State Department published the Final EIS (FEIS) in which it concluded that the proposed project would result in no significant impacts along the project corridor as long as TransCananda: complies with all applicable laws and regulations; incorporates fifty-seven project specific conditions developed by PHMSA into the pipeline's operations and maintenance manual; incorporates avoidance, mitigation, and reclamation measures; and constructs and operates the pipeline in the manner described in the FEIS. See 76 Fed. Reg. 55,155 (Sept. 6, 2011). With regard to the alternatives considered in the NEPA review process, the State Department concluded that its preferred alternative is the proposed route with the variations and minor route realignments described in the FEIS. *Id.* The variations and minor route alignments described in the FEIS did not include re-routing the pipeline to avoid the Sand Hills region of Nebraska.

The issuance of the FEIS was met with furor. The State of Nebraska and Nebraska residents and non-governmental organizations raised concerns about the risks of a pipeline crossing the Sand Hills. Ultimately, the State Department announced that it would delay a decision until 2013 so it could conduct a Supplemental EIS to consider route alternatives to avoid or mitigate impact on the Sand Hills. Almost immediately after this announcement, however, TransCanada announced agreement with the State of Nebraska on a new route alternative along with a plan to expedite the environmental review process. The State Department, however, has not yet moved off of its current first quarter of 2013 projected timeline.

While time heals all wounds, it is unclear whether two more years will resolve the tar sands oil debate. TransCanada is clearly working hard to address the environmental concerns raised by Nebraskans. Even if these concerns are addressed, given the political pressure exerted against the project so far, issuance of the Presidential Permit does not appear to be guaranteed. The permitting process requires the consideration of both environmental (NEPA) impact and national interests. Once the deck is cleared of the environmental impact issue, the hard policy work begins for the State Department. But without a clear national energy policy, the decision will be the subject of the political winds of 2013.

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Inside...

Views from the Chair

By Irma S. Russell

Leading by example: The view from history

Two books I recently read provide fascinating historical accounts of the development of the ethic of conservation and preservation. They also provide striking insights into leadership and mentoring.

In *The Big Burn: Teddy Roosevelt and the Fire that Saved America*, Timothy Egan tells the story of the Great Fire of 1910, which burned three million acres in Montana and Idaho in only two days. Rangers of the fledging Forest Service led 10,000 fire fighters in responding to the fire, putting their lives and health at risk. The Forest Service, which had been in existence only five years, was under attack from critics who called for abolishment of the agency as an unjustified expenditure of taxpayer money. The valiant efforts of rangers in fighting the Great Fire changed public opinion about the Forest Service and the Service survived. Today approximately 30,000 Forest Service employees and many conservationists and other professionals work to protect and manage forests.

The River of Doubt: Theodore Roosevelt's Darkest Journey by Candice Millard chronicles Roosevelt's 1913 trip down an unexplored South American river shortly after his defeat in his third run for the presidency. The uncharted 600-mile waterway in the heart of the Amazon presented a perilous trip. It resulted in the death of three of the exploration party and tested Roosevelt's commitment to "the strenuous life" and his own code of conduct. Faced with endless portaging of gear, near-starvation, bouts with malaria, and a life-threatening infection, Roosevelt refused special treatment and undertook the journey on the same terms as the others. The trip literally put the river "on the map."

Both books stress the values of leadership and mentoring. Egan's book focuses on the role Gifford Pinchot, the first chief of the Forest Service, played in the rise of an ethic of conservation and inspiring a growing cohort of conservationists. A contemporaneous report in the *New York Times* stated that Pinchot's followers showed their loyalty to him "by the most faithful and loyal service that Uncle Sam gets from any of his employees." Pinchot's dedication to land conservation inspired the young men who signed up as rangers. One of *The Big Burn*'s messages is that Pinchot's leadership served future generations by inspiring future leaders. Millard's book describes how on Roosevelt's journey on the River of Doubt, he worked as hard as the much younger men who traveled with him, refusing any suggestion of the "camping with royalty" approach to exploration. After one of the boatmen murdered another, Roosevelt rose from his sick bed to protect the next intended victim. When detractors challenged the mapping produced by the expedition, Roosevelt was determined to address all criticisms through presentations to groups around the country. In the end, he accomplished this task, despite significant personal cost.

These books invite reflection on mentoring as well as on history. Mentors play an important role in all fields. Because the legal profession is central to a free society and the rule of law, the importance of mentoring future lawyers can hardly be overstated. Many Section members already serve as mentors to associates in their firms and to law students. Given the importance of mentoring, the Section is working to recruit mentors for young lawyer and law student members.

In a future *Trends* column, I will share tips from members on serving as effective mentors and describe Section programs that include mentoring opportunities. Please e-mail me to share your ideas about ways that lawyers and the Section can provide effective mentoring.

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Section Spotlight

Trends now in new electronic format

The Section is excited to announce that *Trends* can be found in a new electronic format on the Section's website at www.ambar.org/EnvironTrends. Beginning with the November/December 2011 issue, individual articles will be posted in html format and will contain hyperlinks to important cases and other resources cited in the articles.

When a new issue becomes available online, Section members will be sent an e-mail announcement. Open that announcement and the latest issue of *Trends* will be available on your desktop, laptop, tablet, or smart phone. Please note that to receive these announcements, the ABA will need to have your current e-mail address. To update your contact information in your member record visit www.americanbar.org and click on "myABA"—or call the ABA Member Service Center at (800) 285–2221.

Beginning with the September/October 2012 issue, *Trends* will be made available to Section members exclusively in electronic format. There are plans for continued optimization of the *Trends* electronic format to better serve Section members.

The Section is also developing enhanced electronic formats for *Natural Resources & Environment* and *The Year in Review*.

Call for nominations

The Section invites nominations for the following awards that will be presented at the ABA Annual Meeting in Chicago, in August 2012.

Environment, Energy, and Resources Government Attorney of the Year—exceptional achievement by a federal, state, tribal, or local government attorney who has worked or is working in the field of environmental, energy, or natural resources and is esteemed by his/her peers and viewed as having consistently achieved distinction in an exemplary way.

Law Student Environment, Energy, and Resources Program of the Year—best student-organized educational program or public service project of the year focusing on issues in the field of environmental, energy, or natural resources law.

State or Local Bar Environment, Energy, and Resources Program of the Year—best CLE program or public service project of the year focused on issues in the field of environmental, energy, or natural resources law.

Nominations for these three awards are due by May 14, 2012.

Award for Distinguished Achievement in Environmental Law and Policy—recognizes individuals or organizations and programs who have distinguished themselves in environmental law and policy, contributing significant leadership in improving the substance, process, or understanding of environmental protection and sustainable development. Nominations for this award are due by March 30, 2012.

Additionally, the Section seeks nominations by June 18, 2012, for the *2012 ABA Award for Excellence in Environmental, Energy, and Resources Stewardship*. This award recognizes and honors the accomplishments of a person, organization, or group that has distinguished itself in environmental, energy, and resources stewardship. This award will be presented at the 20th Section Fall Meeting in Austin, Texas, October 10–13, 2012.

The Section reserves the right not to make the award if there are no suitable candidates.

For more details about these awards and where to send your nominations, please visit the Section website at www.ambar.org/EnvironAwards.

Energy Law Student Writing Competition

The Renewable, Alternative, and Distributed Energy Resources Committee and the Energy and Environmental Markets and Finance Committee are pleased to announce the 2011–2012 Energy Law Student Writing Competition. Any student enrolled in an accredited law school in the United States during 2011–2012 is eligible to submit an entry on issues addressing: *Are past legal constructs for the development of alternative energy resources effective prologues, or should alternative energy deployment (including renewables) or climate change issues be addressed through sui generis rules?*

Submissions are due by March 1, 2012. Winning entries will be published in a special joint committee newsletter to be distributed in June 2012. For more details, please visit www.ambar.org/EnvironLawStudents.

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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.

Emerging trends in Clean Water Act NPDES withdrawal petitions

By Erin A. Flannery

The Clean Water Act (CWA) requires that the U.S. Environmental Protection Agency (EPA) limit discharges to the nation's water to only those permitted pursuant to the National Pollutant Discharge Elimination System (NPDES). EPA can delegate to states the authority to administer the NDPES program. *See* 33 U.S.C. § 1342(b). Although EPA has delegated its NPDES permitting authority to forty-six states and the U.S. Virgin Islands, several recent petitions ask EPA to withdraw this delegated authority.

There are several checks on how states administer NPDES programs. First, EPA retains oversight over state programs, and periodically reviews how states write and enforce NPDES permits. Second, citizens or environmental groups may petition EPA to investigate whether there are systemic problems within a state's NPDES program such that the state has failed to comply with the requirements for state programs. *See* 40 C.F.R. § 123.63 (a), 123.64(b)(1). EPA's regulations outline the criteria that the agency uses to determine whether to initiate withdrawing a program. For example, petitioners could allege that a state issued unlawful permits, failed to enforce permit terms, or failed to comply with the EPA-State Memorandum of Agreement. *See* 40 C.F.R. §§ 123.63 and 123.64. The CWA provides that EPA may withdraw a state's authorized program for cause, after considering a petition to withdraw such authority and public input. *See* 33 U.S.C. § 1342(c)(3).

Some NPDES withdrawal petitions are encyclopedic complaints about many allegedly deficient aspects of a state program. In 2010, a group of Alabama environmental organizations filed a petition to withdraw Alabama's NPDES program and alleged twenty-six problems ranging from failure to inspect dischargers to failure to timely prosecute permit violators. Other petitions may stem from public concern about high-profile environmental issues. The claims in a 2010 petition filed by environmental groups to withdraw Kentucky's NPDES program included Kentucky's alleged failure to implement and enforce water quality criteria for pollutants from mountaintop mining operations in mining permits and a claim that Kentucky did not have adequate administrative resources to handle the high volume of mining permits. A 2008 petition filed by the Illinois Citizens for Clean Air & Water asserted that Illinois was not properly implementing the NPDES program because it failed to regulate discharges from concentrated animal feeding operations (CAFOs).

Two withdrawal petitions filed in February 2011, in Maine and Florida, alleged a different sort of problem not directly related to permit limits or enforcement—they cited the CWA's conflict of interest provision. Two separate citizens' groups alleged, in separate petitions, that the newly appointed commissioners of both the Maine Department of Environmental Protection (MDEP) and the Florida Department of Environmental Protection (FDEP) had conflicts of interest that prevented both commissioners from serving and that put the validity of the states' authorized NPDES programs in jeopardy. The petitioners both averred that both commissioners had received a significant portion of income from business entities in Maine and Florida that held NPDES permits. The CWA and EPA's regulations require that "no state board or body that approves NPDES permits can include a person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit." *See* 33 U.S.C. 1314(i)(2)(D); 40 C.F.R. § 123.25(c). The Maine petition was rendered moot when the commissioner of MDEP resigned his position on April 27, 2011, six months after his appointment. EPA denied the petition on September 7, 2011. The Florida petition is pending. Some state statutes require state water boards to have a diverse membership, including industry representatives. In addition, the expanding number of regulated entities has correspondingly reduced the pool of potential, conflict-free board members. This raises the possibility that the number of withdrawal petitions specifically alleging conflict of interest could increase.

Even though EPA has never withdrawn an authorized NPDES program, EPA's ordinary course of responding to withdrawal petitions has involved a variety of methods for working with states to reshape and strengthen NPDES programs. For example, the 2008 petition alleging deficiencies with the Illinois regulation of CAFOs resulted in a cooperative work plan establishing benchmarks for improving Illinois' CAFO permitting program. It is possible that this collaborative approach could serve as a model for addressing other pending petitions and similarly improving other states' NPDES permit programs without EPA withdrawing authority for those programs. Thus, withdrawal petitions are one mechanism that the public can use to bring possible state program deficiencies to light, and may encourage EPA and states to establish additional collaborative ways to improve the overall administration of the NPDES program.

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Sunshine! The new www.FOIA.gov

By Gretchen Frizzell

The Department of Justice (DOJ) launched the new FOIA.gov website in March 2011 as the "flagship initiative" of its Open Government Plan and in commemoration of Sunshine Week, "a national initiative to promote a dialogue about the importance of open government and freedom of information." The new FOIA.gov, which aims to make information about the Freedom of Information Act (FOIA) accessible, interactive, and easy to understand, is a website that every environmental, energy, and natural resources law practitioner should explore and use.

DOJ's Open Government Plan was developed as part of the administration-wide Open Government Initiative begun during President Obama's first year in office. This initiative includes a directive requiring federal agencies to take immediate steps toward achieving greater transparency, participation, and collaboration. In formulating its plan, DOJ sought the input of department employees, stakeholders, and members of the public, inviting ideas via a new e-mail address and a temporary website. The plan's stated goals are to improve the availability and quality of information, work better with others inside and outside the government, and be more efficient and innovative. According to DOJ, FOIA.gov was inspired by the public feedback it received in response to that appeal for input.

The new FOIA.gov compiles, centralizes, and streamlines mountains of FOIA information on a single user-friendly website, complete with video lessons presented by Melanie Pustay, director of DOJ's Office of Information Policy. The site advises the public as to how it may utilize FOIA and describes how agencies are complying with it. It offers a plain-language explanation of the act and how to submit a request. It also describes generally how requests are processed, as well as where to direct a request. FOIA.gov shares basic data on the number of FOIA requests received by the federal government, the disposition of those requests, and the extent of the government's backlog of requests, as well as much more detailed data and reports.

FOIA.gov now serves as a central repository for information contained in federal agencies' FOIA reports, which must be submitted annually to the Attorney General pursuant to 5 U.S.C. § 552(e). In addition, the site allows practitioners and members of the public to search, sort, and compare data from those reports. Each agency's FOIA data is available at a glance, and there is even a feature that makes it possible to generate one's own report of detailed agency information, e.g., a report comparing all agencies' FOIA request processing times. A handy glossary defines obscure terms like "Non-Commercial Scientific Institution" and "FOIA" (oddly, the glossary seems to be the site's only avenue to the actual text of the act, which one can reach by clicking a link within the definition of "FOIA"). Finally, a Frequently Asked Questions page offers answers accompanied by more video lessons from Ms. Pustay.

Attorneys seeking to access the vast array of federal information should consult the FOIA Contacts page. This single source provides the FOIA contact information for every federal agency, i.e., the contact information (typically name, title, mailing address, phone number, fax number, e-mail address, and website) of the person to whom a request for information from a given federal agency—or a particular office within an agency—should be sent. Every agency's FOIA contact information is available individually as well as in the form of a spreadsheet compiling all the agencies' information. If the name of the FOIA contact for a given office is not identified directly on FOIA.gov, it may be available on the specific agency website listed on FOIA.gov. In this manner, DOJ has centralized the vital contact information on FOIA.gov. Typically, the website listed on the FOIA Contacts page for each agency or office—including, for example, each of the Environmental Protection Agency's regional offices—provides access to that specific agency's or office's Electronic Reading Room. Visiting the appropriate Electronic Reading Room before submitting a FOIA request may forestall the need to make a request at all, since it houses documents specifically identified for inclusion under FOIA along with frequently requested documents. For attorneys and members of the public seeking federal information, the aggregation of all federal agencies' FOIA contact information and access to Electronic Reading Rooms in one place should yield noticeable savings in both time and money.

By consolidating diverse information about FOIA in a single website, DOJ has indeed cast sunshine on a previously dark area of federal law. In addition, DOJ continues to seek input on FOIA.gov. To keep the site up to date, federal agency employees are asked to send contact changes and other updates to agencyfeedback@foia.gov. Those working outside of the federal government are also encouraged to share feedback on the website. If you think of a way to improve the new FOIA.gov, send an e-mail to feedback@foia.gov.

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The Cross-State Air Pollution Rule and EPA's rush to regulate

By Margaret Campbell and Byron Kirkpatrick

Over the last three years, the U.S. Environmental Protection Agency (EPA) has moved quickly on several fronts to set a new course on Clean Air Act (CAA) regulation. From promulgation of the first ever greenhouse gas emission regulations to new ambient air quality standards to unprecedented regulation of fossil-fuel fired utilities and industrial boilers, the Obama administration has undertaken a complete makeover of the federal clean air program. EPA's recently issued Cross-State Air Pollution Rule, addressing interstate transport of certain air emissions in the eastern United States, is one example of the push to expedite this new air quality vision. It also illustrates EPA's willingness to test the limits of its authority under the CAA. While the new rule applies exclusively to fossil-fuel power plants, according to EPA, the rule will establish the methodology for future interstate transport rules, which will likely apply to industrial facilities as well. The new rule is the subject of over fifty petitions for administrative reconsideration, forty-five petitions for judicial review, and eighteen motions asking the court to stay the rule pending review. The challenges call into question both the process and substance of the final rule.

Cross-State Rule basics

The Cross-State Rule replaces the Bush administration's Clean Air Interstate Rule (CAIR). CAIR was vacated on numerous grounds by the D.C. Circuit, but on reconsideration in December 2008, the court left CAIR in place pending EPA's remand rulemaking. *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), *reconsidered at*, 550 F.3d 1176 (2008). The remand rule, proposed August 2, 2010, was originally known as the Clean Air Transport Rule (75 Fed. Reg. 45,210 (Aug. 2, 2010)), but was renamed the "Cross-State Air Pollution Rule" or CSAPR in the final rule. 76 Fed. Reg. 48,208 (Aug. 8, 2011). While CAIR and CSAPR share the same basic framework, as the name change suggests, CSAPR is very different from its predecessor.

CSAPR is designed to implement the "Good Neighbor" provision of the CAA. The CAA is based on a framework of cooperative federalism in which EPA develops national ambient air quality standards and states implement those standards through State Implementation Plans, or SIPs. The Good Neighbor provision requires SIPs to include rules sufficient to prevent air emissions within that state from significantly contributing to air quality problems in other states. 42 U.S.C. § 7410(a)(2)(D)(i)(I). CSAPR specifically addresses interstate air quality impacts under the 1997 ground-level ozone and annual fine particulate matter ($PM_{2.5}$) air quality standards. CSAPR also addresses interstate impacts under the 2006 daily $PM_{2.5}$ standard. Central to both rules are three separate cap and trade allowance programs that target sulfur dioxide (SO_2) and nitrogen oxides (NOx) emissions. Both of these pollutants are precursors to the formation of $PM_{2.5}$ year-round. NOx emissions are also a precursor to the formation of ground-level ozone, but only during the warmer months. Thus, the rule creates an annual trading programs for SO_2 and NOx to reduce $PM_{2.5}$ and a separate ozone seasonal NOx trading program (effective May to September) to reduce ozone.

One of the "fundamental flaws" the D.C. Circuit identified for the prior rule, CAIR, was that it allowed unlimited interstate trading of emissions allowances without respect to interstate impacts. The court found that unlimited trading violated the Good Neighbor provision by allowing states to essentially buy the right to contribute significantly to another state's air quality problems. In response, CSAPR places significant limits on interstate allowance trading. Specifically, CSAPR establishes geographic limits by splitting the annual SO_2 program into two distinct trading areas, and it also sets allowance volume limits for each state under all of the programs, effectively capping emissions for each affected state. These limits make CSAPR much more stringent than CAIR.

While the overall geographic reach of the two rules is similar, CSAPR includes fewer New England states and expands the programs west. Massachusetts, Connecticut, and Delaware are out, but Nebraska, Oklahoma, and Kansas are in. CSAPR maintains CAIR's two-phased emissions reduction approach, with the first reductions required in 2012 and additional reductions required in many states by 2014.

The methodology

The methodology that EPA says will be its template for future interstate transport rules is very complex. CSAPR establishes a multi-step process that relies heavily on modeling to identify and quantify (i) interstate air quality impacts, (ii) a state's "significant contribution," and (iii) emissions caps. In this process, EPA first identifies areas projected to have ambient air quality concerns, either nonattainment or maintenance problems, under the relevant standards. EPA then identifies each state that has a measurable impact on the identified areas of concern in other states. A state is "linked" to air quality concerns downwind if its contribution to ambient levels of ozone and/or $PM_{2.5}$ is greater than one percent of the applicable ambient standard. Once a state has been

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linked, the next step is to quantify the state's "significant contribution," that is, the emissions that must be reduced to address the downwind problems.

To quantify significant contribution, EPA models the targeted emissions—in this case, SO_2 and NOx from power plants—and identifies emissions reductions that are both cost effective and resolve all or most of the downwind problems. This quantification analysis is regional, not state-specific. EPA selects a regional investment level for emissions reductions (e.g., $500 per ton of SO_2 removal) and then assesses the modeled impacts on each area if all states linked to that area make reductions achievable at that level of investment. The cost-effective reductions that achieve the desired result are defined as the state's "significant contribution" to be eliminated under the Good Neighbor provision. Then, EPA establishes state-by-state emissions budgets or caps for each pollutant based on emissions remaining after eliminating that "significant contribution."

Rush to regulate

Although the D.C. Circuit declined to set a deadline for EPA's remand rule, EPA has moved very quickly to finalize the new rule—some say too quickly. EPA published the proposed rule in August 2010 and finalized it just one year later. The proposal, detailing EPA's new methodology, exceeded 1,300 pages before it was published in the *Federal Register* and was accompanied by numerous technical support documents detailing the modeling that is the basis for the rule. Despite the volume and complexity of the rule, EPA denied requests for extension of the sixty-day comment period, including requests from numerous states.

EPA has moved very quickly to finalize the new Cross-State Air Pollution Rule—some say too quickly.

During and following the public comment period on the proposal, EPA issued three successive Notices of Data Availability, each announcing proposed revisions to the models and assumptions underlying the rule. For example, the agency announced new versions of the models used to project future emissions and emissions impacts, new emissions inventories, and new fuel price assumptions. EPA also announced alternative methods for allocating emissions allowances to individual units under the program.

Notwithstanding the new data releases, the agency did not issue a supplemental proposed rule using the new models and data, which would have shown the impacts of the many proposed revisions on the state emissions budgets and allowance allocations. As a result, the final rule caught many states and affected sources by surprise. Based on the updated models and assumptions, many states and sources received substantially reduced emissions budgets and allowance allocations as compared to the proposal. Some were cut by almost half. In addition, based on the new modeling, some states were included in programs they were not subject to in the proposal. For example, the final rule included Texas in all three regulatory programs whereas it was only included in the seasonal NOx program in the proposal. Several states and industry petitioners argue that EPA's rulemaking approach in this case violates basic public notice and comment requirements of the CAA and the Administrative Procedure Act.

The same day EPA finalized the rule, it began revising it. With the final rule, EPA simultaneously issued a proposal to expand the number of states subject to the seasonal NOx program. In October 2011, EPA proposed additional revisions to the final rule, including changes to the emissions budgets for several states to address errors in the underlying data and assumptions.

Despite significant changes from the proposal and the fact that the final rule is still in flux, compliance is required in short order. The annual SO_2 and NOx reduction requirements take effect January 1, 2012—less than five months after publication of the final rule. The seasonal NOx reduction requirements begin May 1, 2012.

To achieve this unusually short compliance deadline, EPA has issued CSAPR as a Federal Implementation Plan (FIP), rather than allowing states to develop SIPs. That is, EPA not only determines the amount of emissions that must be reduced in each state to comply with the Good Neighbor provision, but it also determines how those reductions will be achieved in each state by deciding which sources must reduce and setting the allowance allocations for those sources, including set asides for new sources on a state-by-state basis. Numerous comments on the proposal took issue with this FIP-first approach as contrary to the CAA's basic principle of cooperative federalism that calls for EPA to set ambient standards but states to determine implementation of those standards. In the final rule, the agency defended the FIP-first approach by taking the position that the CAA required the states to submit SIPs designed to eliminate significant contribution within three years of EPA's promulgation of the ambient standards. States, on the other hand, argue that they have EPA-approved rules in place that implement CAIR, and following the remand, it was EPA's responsibility to provide states with a replacement rule redefining their "significant contributions" (i.e., the new amounts states are obligated to reduce via their SIPs).

There are numerous other challenges to the rule as well. For example, several states and utilities argue that CSAPR unlawfully forces them to shoulder a portion of other states' emissions reduction obligations under the Good Neighbor provision.

CSAPR illustrates this EPA's unusual sense of urgency, even at the expense of procedural obligations under the CAA and the Administrative Procedures Act, and its willingness to test the limits of its authority under the CAA. The D.C. Circuit left no question that CAIR requires a makeover—the question is whether this version will fare any better upon review.

Editor's Note: On December 30, 2011, the U.S. Court of Appeals for the District of Columbia Circuit issued an order staying CSAPR and reinstating CAIR pending judicial review.

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IN BRIEF

By Theodore L. Garrett

CERCLA

A real estate developer that performed voluntary cleanup actions failed to state a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 113(f) contribution claim against the successor to a former owner, a district court held. *Queens West Development Corp. v. Honeywell International, Inc.*, 2011 WL 3625137 (D.N.J. Aug. 17, 2011). Voluntary cleanup costs are only recoverable under CERCLA section 107(a), and plaintiff also did not claim that it is a responsible party. The company's nuisance claim was dismissed because historic contamination on plaintiff's property is not an invasion of property under state nuisance law.

A property owner alleged to have caused contamination to become more widespread may be liable under CERCLA. *Saline River Properties v. Johnson Controls*, No. 10-10507, 2011 WL 4916681 (E.D. Mich. Oct. 17, 2011). The prior property owner alleged that the present owner, Saline, destroyed the building slab, causing migration of contamination to soils and groundwater. These allegations were sufficient to deny Saline's CERCLA section 107(a) summary judgment motion, the court stated, noting that the allegations went beyond passive migration.

Air quality

Present and former owners of a power plant were not liable for the alleged failure to obtain pre-construction permits for projects undertaken from 1991 to 1996, a district court held. *U.S. v. EME Homer City Generation LP*, 2011 WL 4859993 (W.D. Pa. Oct. 12, 2011). The court held that because the projects occurred fifteen to twenty years ago, the five-year limitations period to file claims for civil penalties had expired. The current owners cannot be held liable for injunctive relief because they did not violate the Prevention of Significant Deterioration (PSD) program. Injunctive relief was not warranted against the former owners, the court ruled, because the plant was operating normally under a Title V permit and there was no danger of recurrent violations.

EPA may not bring an enforcement lawsuit against a company that submitted a pre-construction notice estimating that future emissions would not trigger New Source Review (NSR), a court held. *U.S. v. DTE Energy Co.,* 2011 WL 3706585 (E.D. Mich. Aug. 23, 2011). The opinion states that the 2002 NSR rules allow sources "the option of either getting a permit before commencing their projects, or measuring their emissions afterward and running the risk of the Government bringing an enforcement action." Once the source operator submits a projection that construction would not result in a significant net emissions increase, it need not obtain a NSR permit before beginning construction. The determination whether the project triggered NSR cannot be made until the submission of the report due within sixty days of the calendar year following the project's completion. The court also rejected EPA's attempt to challenge the notification, stating that the company was not required to submit back-up data supporting its calculations.

Water quality

Environmental groups may pursue a lawsuit against a coal company for alleged National Pollutant Discharge Elimination System (NPDES) permit violations even though an enforcement action was pending in state court. *Ohio Valley Environmental Coalition v. Maple Coal Co.*, No. 3:11-0009, 2011 WL 3874576 (S.D. W. Va. Sept. 2, 2011). The district court held that the state action was non-specific and was not being diligently prosecuted, and that injunctive relief is appropriate because of the frequency of the effluent limitations violations.

RCRA

A district court held that the owner of PCB-contaminated property is not entitled to injunctive relief under the Resource Conservation and Recovery Act (RCRA) to compel the former owner to pay for future cleanup costs or perform remediation. *Tyco Thermal Controls LLC v. Redwood Industrials*, 2010 WL 3211926 (N.D. Cal. Aug. 12, 2010). Because an EPA-approved RCRA cleanup plan was in place at the site, the current owner is not entitled to the relief requested.

The Third Circuit vacated a lower court decision dismissing, on grounds of abstention, environmental groups' RCRA and Clean Water Act citizens suit seeking to require the current and prior owners of a site to clean up river sediments. *Raritan Baykeeper v. NL Industries, Inc.,* No. 10-2591, 2011 WL 4537837 (3d Cir. Oct. 2, 2011). The court held that there is little risk of a conflict with state directives in light of agency inaction during the last several years.

FIFRA

A district court vacated an EPA order, prohibiting the manufacture and distribution of a pesticide, under the Federal Insecticide, Fungicide, and Rodenticide Act. *American Vanguard Corp.v. Jackson*, No. 10-CV-1459, 2011 WL 3606517 (D.D.C. Aug. 17, 2011). The court held that the order was invalid because it was issued by the director of the Waste and Chemical Division whereas another division had been granted delegated authority to issue such orders. The opinion states that "the Court will not stand idly by and permit significant action undertaken by an official who is not legally authorized to take it."

Toxic torts

A district court granted in part and denied in part motions to dismiss various personal injury claims against oil drillers, cleanup responders, and a dispersant manufacturer based on exposure to oil and dispersants following the Deepwater Horizon incident. *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico*, No. MDL 2179, 2011 WL 4575696 (E.D. La. Sept. 30, 2011). The court rejected the derivative immunity argument by responders and the manufacturer because the complaint alleged that BP, rather than the federal government, was in control of response actions. The court held that the plaintiffs' claims for negligence, gross negligence, product liability, and medical monitoring may proceed under maritime law, but only for plaintiffs who alleged a physical injury.

The Third Circuit affirmed a district court decision denying class certification in a suit alleging that defendants released contaminants at an industrial site near their homes. *Gates v. Rohm &Haas Co*., 655 F.3d 255 (3d Cir. 2011). Consideration of whether medical monitoring of plaintiffs is medically necessary would require individual proceedings to consider a class member's specific exposures and medical histories, and the district court found that individual issues predominate over any issues common to the class under the federal class action rule, Rule 23(b)(3). For similar reasons, the district court did not abuse its discretion in refusing to certify a class of owners seeking property damages.

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CALENDAR OF SECTION EVENTS

2012

- **ABA Midyear Meeting**
  February 1–7, 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

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Sea level rise: Regulatory responses in San Francisco Bay and across the globe

By Zane Gresham and Miles Imwalle

The National Oceanic and Atmospheric Administration has concluded that during the 20th century, sea levels rose some 5–9 inches throughout the world. On an annual basis, each increment was small; the cumulative effect was considerable. Recent research estimates that 10 percent of the world's population lives in low lying areas potentially vulnerable to sea level rise impacts, a number that is expected to balloon as coastal areas are expected to see considerable population growth. It goes without saying that sea level rise has the potential to be utterly devastating. Regulatory agencies are starting to take note, and action.

The American agency furthest along in this effort is the San Francisco Bay Conservation and Development Commission (BCDC). BCDC is a regional planning and regulatory agency that includes representatives of the California State Senate and Assembly, various municipalities and counties, as well as representatives of the federal Environmental Protection Agency and the Army Corps of Engineers, the State Lands Commission and State Water Resources Control Board. On October 6, 2011, BCDC amended its "San Francisco Bay Plan" to address projected sea level rise. The process took two and a half years, dozens of public hearings, and extensive negotiations among BCDC staff, local governments, environmental organizations, business, and labor. The resulting Bay Plan amendment (Amendment) requires shoreline projects to anticipate and plan for sea level rise. While BCDC may have been one of the first agencies to adopt policies responding to sea level rise, coastal regions throughout the country—and globe—are starting to take regulatory action.

A challenging problem

The sea level in the San Francisco Bay is expected to rise 16 inches by mid-century and 55 inches by the century's end. Without action to protect shoreline areas, BCDC concluded that sea level rise could leave 180,000 acres of bay shoreline vulnerable to flooding by mid-century. By 2100, sea level rise could threaten 270,000 residents and an estimated $62 billion in shoreline development. Sea level rise also has ecological impacts as habitat is modified and wetlands move inland, or are prevented from doing so.

While BCDC declared that it is imperative to plan for the impacts of sea level rise, how to do so presents enormously complex policy and economic issues both for existing communities and new development. There are several strategies for responding sea level rise, ranging from protection (raising or building levees), to building "resilient" structures, to precluding new development in flood-prone areas, to abandoning existing built-up areas and retreating from the rising waters. The favored approach depends not only on the specific circumstances, but also on one's point of view regarding which values to protect.

The BCDC debate on the Amendment exemplifies these difficulties. Environmental organizations urged BCDC to focus on habitat protection and a retreat from the bay, while local government, business, and labor groups argued for protecting existing communities, promoting "smart growth," and preserving a vitally important economic region.

The Bay Plan Amendment

The key portion of the BSDC Amendment is a new "Climate Change" section in the Bay Plan which includes the following concepts:

Flood risk assessment. When conducting shoreline planning or designing larger shoreline projects, the Amendment calls for preparing a risk assessment based on the estimated 100-year flood elevation. The assessment should identify potential flooding, degrees of uncertainty, the consequences if flood protection devices fail, and the risk to existing habitat from proposed flood protection devices.

Resilient design. Projects determined to be vulnerable to future shoreline flooding should be designed to be "resilient" to a mid-century sea level rise projection. Projects that are intended to remain in place longer than mid-century should prepare an "adaptive management plan" to manage long-term sea level rise impacts.

Habitat protection in undeveloped areas. Undeveloped shoreline areas that also sustain significant habitat should be considered for preservation and habitat enhancement.

Interim case-by-case assessment. Until a regional sea level rise adaptation strategy is developed, BCDC will assess projects on a case-by-case basis to determine the public benefits, resilience to flooding, and capacity to adapt to climate change. The Amendment generally considers the following types of projects to meet this test: remediation of contamination, transportation facilities and public utilities that serve planned or existing development, certain types of infill projects, and natural resource restoration or enhancement. Other types of projects are encouraged if they do not negatively affect the bay or increase risks to public safety, including repairs of existing facilities, small projects, interim projects that can be easily removed or relocated, and public parks.

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Rising bay, new Amendment...now what?

BCDC's action has gained widespread attention, but most notable is what remains to be done. The Amendment did not address questions such as which developed areas deserve protection (and which do not), how to protect such areas, how to fund new infrastructure, or how these difficult decisions would be made and by whom.

BCDC recognized these difficult questions, but it also respected the limits of its jurisdiction. Accordingly, the Amendment calls for regional planning bodies, in collaboration with federal, state, and local governments, to create a comprehensive regional sea level rise adaptation strategy. The Amendment envisions that this regional strategy will tackle the hard choices of identifying existing communities to be protected, new development to be allowed and, to the contrary, where existing structures should be removed.

Such a policy framework is essential, but hardly sufficient. Responding to sea level rise is enormously expensive—the shoreline within the bay is roughly the same length as the entire coast of California—and fraught with complexity. Government in the Bay Area is fragmented among nine counties, dozens of municipalities, various regional agencies, and a plethora of special districts. Confronting sea level rise will require all these agencies to take a coordinated, regional approach.

Nationwide and international responses to sea level rise

East Coast and Gulf Coast states have been responding to problems related to erosion, flooding, and storm surges for years, but are now beginning to pursue long-term solutions. Most past responses have taken the form of mitigating contemporary impacts. Those impacts are substantial on the East Coast and the Gulf Coast and are exacerbated by the large number of structures within 500 feet of the shoreline in those areas. The average shoreline along the East Coast is eroding at a rate of between two and three feet per year, while along the Gulf Coast average shoreline erosion exceeds four feet per year.

Regulatory responses have been varied. Many states have developed rules for oceanfront developments that prohibit construction of structures within a certain distance from the shoreline. North Carolina, for instance, requires new buildings of less than 5,000 square feet to be constructed at a distance from the shore of thirty times the annual erosion rate (with a minimum setback of 60 feet). Larger buildings must be set back at a distance of at least sixty times the annual erosion rate.

In contrast, Texas courts recognize public beaches as rolling easements that migrate inland with the shore. *Feinman v. State*, 717 S.W.2d 106 (Tex. App. 1986). As such, Texas has prevented people from repairing their storm-damaged houses because their houses were seaward of the shore vegetation line. *Arrington v. Mattox*, 767 S.W.2d 957 (Tex. App. 1989). The South Carolina legislature has since adopted the rolling easement approach as well.

Especially after Hurricane Irene, New York City presents one of the most startling examples regarding the dangers of sea level rise. Projected sea level rise around Long Island is between two and five inches within the next twenty years. Given the huge population and development of New York City in close proximity to the shore, the risks to this area are enormous. New York began to address these risks on December 31, 2010, when New York's Sea Level Rise Task Force (Task Force) delivered its final report to the state legislature. Significantly, the report notes that structural protection measures such as seawalls and beach nourishment— the most common measures nationwide—are likely more expensive and less effective considering long-term sea level rise than non-structural measures such as planned relocation away from shorelines. Internal disagreements within the Task Force prevented complete adoption of some of the more aggressive recommendations, such as requiring some state agencies to factor projected impacts of sea level rise into all relevant aspects of decision making. The New York legislature has yet to act on the Task Force's recommendations.

Although some states' attention to sea level rise may be lagging behind the Bay Area, some foreign countries are far out ahead. In the Netherlands, where half the country is at or below sea level, locally elected groups have managed flooding since the thirteenth century. These groups, called *waterschappen*, still exist today as independent government organizations and play an integral part in managing the country's substantial sea level rise risks. Twenty-five *waterschappen* build, operate, and manage structural defenses such as dunes and dykes, maintain safe water levels and surface water quality, issue permits for sewage discharge and treatment, and collect their own taxes to fund their operations. The local *waterschappen* are given significant control over their particular areas, but are supervised by provincial governments.

The United Kingdom has responded to similar risks from the North Sea. The Thames Barrier near London, completed in 1984, was designed with sea level rise in mind, to protect London from flooding and storm surges for at least another fifty years. The government's Environmental Agency, in association with local authorities, is developing revised Shoreline Management Plans incorporating up-to-date sea level rise projections. These plans seek to move away from structural protection measures toward long-term, adaptive approaches such as realigning natural shoreline features to better protect coastal communities.

Sadly, although the threat of sea level rise is most immediate in low-lying developing countries, such as Bangladesh and the Maldives, the lack of funding and of alternative interior space leaves the most vulnerable most at risk. Even in this country, the impact of rising sea levels has devastated at least one native Alaskan village. *See Native Village of Kivalina v. ExxonMobil Corp.*, No. 09-17490 (9th Cir.).

Although most climate change related regulatory action has focused on reducing greenhouse gas emissions, responding to perhaps the most immediate climate change threat—sea level rise—is proving to be an equally daunting challenge. The decisions required are difficult—particularly whether a community should "retreat"—the solutions complex and enormously expensive, while the actual impact is likely to be years beyond the career life of most elected officials. Despite these challenges, agencies in the Bay Area and around the world are starting to confront the problem.

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DOE's final report on shale gas: Where do we go from here?

By Jason Hutt and Salo Zelermyer

Back in March 2011, with rising gas prices and a stagnant economy, President Obama responded to the seemingly annual energy crisis by delivering a national energy policy—the "Blueprint for a Secure Energy Future." Beyond the expected nods to the development of clean energy sources and increased energy efficiency, the president explicitly acknowledged the growing phenomenon of American shale gas production and its importance to the nation's economy, energy security, and environment. Specifically, the president's Blueprint declared that the administration would take steps to assure that safety concerns relating to hydraulic fracturing practices would be addressed. This task was assigned to the Secretary of Energy Advisory Board (SEAB) which was directed to form a subcommittee on shale gas development and identify near-term actions and recommendations to federal agencies on improving the safety and environmental performance of hydraulic fracturing.

On November 10, 2011, the SEAB Shale Gas Production Subcommittee released its final 90-day report recommending twenty actions that the subcommittee believes "would assure that the nation's considerable shale gas resources are being developed responsibly, in a way that protects human health and the environment and is most beneficial to the nation." These recommendations—directed to federal agencies, states, and stakeholders—will now be transmitted to Secretary of Energy Stephen Chu who will then discuss them with the administrator of the U.S. Environmental Protection Agency (EPA) and with the Secretary of the U.S. Department of the Interior (DOI). With the U.S. Department of Energy (DOE) acknowledging that it has no regulatory authority over shale gas and thus no means of enforcing or acting upon these recommendations, the question on most people's minds is: Where do we go from here?

As with many policy debates, the report's importance may lie mainly in shaping public perception. Accordingly, it is helpful to review what the subcommittee says about some of the key issues relating to shale gas development. First, the final report states unequivocally that the subcommittee "shares the prevailing view that the risk of fracturing fluid leakage into drinking water sources through fractures made in deep shale reservoirs is remote." This statement is important as it goes to the heart of what many consider to be a key environmental concern relating to hydraulic fracturing. Notably, in a public call presenting the final report to the SEAB, subcommittee Chairman John Deutch rejected an attempt to alter this statement by saying that the subcommittee had been presented with no evidence to refute this statement.

With respect to the role of federal and state regulations, the final report recommends actions in both forums. On the federal side, the subcommittee recommends pending federal regulatory initiatives by EPA and DOI despite the subcommittee's oft-repeated acknowledgment that decisions about federal regulatory policy were outside of its jurisdiction. With respect to EPA, the subcommittee "commends" the agency's proposed emission standards for the oil and gas sector and suggests that the rule does not go far enough by failing to control methane emissions directly. The subcommittee also "urges the EPA to take action as appropriate" during the pendency of its study on the impact of hydraulic fracturing and drinking water. Finally, the subcommittee "welcomes" DOI's announcement of new regulations requiring the disclosure of chemicals used in hydraulic fracturing on federal lands.

Despite these nods to current federal regulatory actions, the subcommittee does, at least implicitly, recognize and support the idea of continued state regulation of shale development. One example of this support is the subcommittee's recommendation for increased federal funding of the State Review of Oil and Natural Gas Environmental Regulations (STRONGER) and the Ground Water Protection Council (GWPC)—two non-profit organizations that assist states in evaluating their regulations. This funding recommendation for state regulators would seem to be less important if in fact the subcommittee favored the replacement of state regulation with top-down EPA regulation. A second example can be seen in the subcommittee's recommendations relating to the development of "best practices" for reducing air pollution, well completion, and water use. In advocating for this effort, the subcommittee states that it "favors a national approach including regional mechanisms that recognize differences in geology, land use, water resources, and regulation." This recognition is important for industry, as it acknowledges the fallacy of a "one-size-fits-all" federal regulatory approach.

Beyond its statements on some of the key issues facing shale development, perhaps the most important contribution of the subcommittee is the return of DOE to a national energy policy discussion that has mostly been dominated by EPA and the climate change office of the White House for the past three years. Within the federal government, DOE has the most historical knowledge relating to energy development and the innovations that have occurred in the natural gas industry. This knowledge can make DOE a productive and reliable voice within the Obama administration in favor of policies that will allow responsible shale gas development—and the associated economic, security, and environmental benefits—to go forward.

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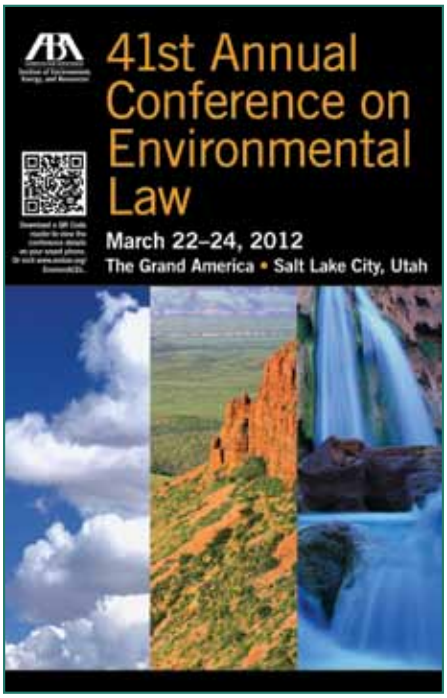
41st Conference on Environmental Law: Back to the basics—air, land, and water

By Roger R. Martella, Jr.

Download a QR Code reader to view the conference details on your smart phone.

The 41st Annual Conference on Environmental Law to be held March 22–24, 2012 in Salt Lake City will highlight how the core areas of environmental law—air, land, and water—are rapidly evolving along with our legal practices. This year's conference will delve into how environmental law and its practice are responding to shifting environmental priorities and challenges. Highly substantive discussions of cutting edge environmental topics will provide opportunities for both newer and experienced lawyers. Session topics will interest litigators, and regulatory and transactional lawyers, alike.



Four plenary sessions will provide context for how environmental law is rapidly evolving. The first will focus on one of the most significant trends in recent years: the rise of nongovernmental organizations in driving environmental laws before regulatory agencies and the courts. That discussion will lead into the second plenary session, addressing how ongoing budget constraints and disputes threaten to place environmental protection on the chopping block, with ramifications for both the environment and environmental law. The third plenary session will present a forum for advocates on both sides of the national debate on hydraulic fracturing to argue their case before a panel of experts serving as judges. Finally, the fourth plenary session will reflect on the increasingly blurring lines between environmental and energy law by discussing developments under the Clean Air Act that are impacting energy use, efficiency, and reliability in the United States.

Beyond the plenary sessions, twelve breakout session panels will address topics in the core environmental practice areas. Regarding air, panels will discuss EPA's ongoing agenda for the Clean Air Act, including the upcoming agenda for the next phase of greenhouse gas regulations. As to land, experts will discuss how history, science, and money all play a role in identifying and negotiating cost allocations among potentially responsible parties. And for water, the focus will be on laws and decisions related to water resources that are impacting urban growth throughout the nation.

Litigation-related topics will include trends in environmental enforcement from the U.S. Environmental Protection Agency and the states, and how core constitutional principles are increasingly shaping environmental law. Transactional topics will include trends confronting transactional environmental lawyers, and how in the face of aging infrastructure and financial challenges, ecosystem services are emerging as a key way to mitigate pollution.

Finally, cross-cutting topics include the emerging issues that agencies and the courts are grappling with under the Endangered Species Act and the National Environmental Policy Act, the role and responsibilities of in-house counsel in responding to governmental inquiries, the role of tribal consultation in pursuing projects impacting tribal resources beyond reservation lands, and the increasing interaction between environmental regulatory issues in the United States and the European Union. The conference will also offer a substantive ethics session that will cover the recent technology related proposals of the ABA Commission on Ethics 20/20.

We are pleased to return to our spectacular venue at The Grand America. This five-diamond hotel provides elegance and convenience to both the airport and ski slopes, as a backdrop to the country's premiere environmental law forum. We look forward to seeing you in March 2012 in picturesque Salt Lake City. For further details about the conference visit our program page, **www.ambar.org/EnvironACEL**.

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An Invitation to Young Lawyers and Law Students

The Annual Conference on Environmental Law, known for providing sophisticated discussions on the hottest topics in environmental law, will this year reach out specifically to you. Breakout session panels will be identified for those who may not have prior experience with a certain topic. Also, on Friday night, we will host a speed networking event followed by a special reception held in honor of all young lawyers and law students in attendance. So please consider a spring break to Salt Lake City, for the learning opportunities, networking, and skiing!

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The Ozone Rule that wasn't: How EPA makes decisions

By Jim Wedeking

In early September 2011, the Obama administration withdrew its proposed rule to revise the National Ambient Air Quality Standard (NAAQS) for ozone to a level more stringent than the 2008 standard promulgated by the Bush administration. *See generally* 73 Fed. Reg. 16,436 (Jan. 19, 2010) (Obama administration proposed rule to revise ozone NAAQS); 73 Fed. Reg. 16,436 (Mar. 28, 2008) (2008 Ozone Rule). Both the 2008 Ozone Rule—and the 2011 decision not to revise it—have been challenged in court, as is the norm for major U.S. Environmental Protection Agency (EPA) rulemakings. These lawsuits, however, go beyond the typical petitions for review that focus on just agency discretion and procedural minutiae. They raise questions about *who* makes decisions at EPA. At first glance, the answer appears simple: The Clean Air Act charges "[t]he Administrator" with "prescribing a national primary ambient air quality standard" for air pollutants. 42 U.S.C. § 7409(a). However, the two recent ozone disputes suggest otherwise.

The 2008 Ozone Rule lowered the ozone NAAQS from 84 parts per billion (ppb) to 75 ppb. Despite the rule's increased stringency, controversy erupted because it was less protective than the 60 to 70 ppb range recommended by EPA's Clean Air Scientific Advisory Committee (CASAC) to then-Administrator Stephen Johnson. Congressman Henry Waxman, then the chairman of the House Oversight Committee, quickly denounced the standard for deviating from CASAC's "expert advice." Letter from Rep. Henry Waxman to Admin. Stephen L. Johnson (Mar. 12, 2008) at 1 (on file with author). Denunciations ignited into outrage after the *Washington Post* reported that the White House "pressured" EPA. Katherine Boyle, *EPA standards under scrutiny at long-awaited Waxman hearing*, Env't & Energy Daily (May 19, 2008), available at www.earthportal.org/?page=1158.

Congressman Waxman responded with subpoenas and a rancorous hearing. Katherine Boyle, *Dems say Johnson is a puppet for White House*, Env't & Energy Daily (May 21, 2008). The subpoenas, and subsequent assertion of executive privilege, set the stage for a showdown between the political branches over who actually set the 2008 ozone standard. The resulting war of words saw Congressman Waxman invoking the dirty tricks of Richard Nixon and advocacy groups demanding that Administrator Johnson resign. Katherine Boyle, *White House invokes executive privilege over subpoenaed docs*, E&ENews PM (June 20, 2008); Anthony Lacey, *Activists look to Congress to bolster push for Johnson resignation*, InsideEPA.com (Mar. 21, 2008).

The change of administrations mooted the Congressional investigation. The new EPA administrator, Lisa Jackson, spurned the 2008 Ozone Rule as "not legally defensible" and vowed to issue a new standard in line with CASAC's recommendation. Letter from Lisa Jackson to Sen. Thomas R. Carper (July 13, 2011) (on file with author). Administrator Jackson appeared to make good on her word, publishing a notice of proposed rulemaking to re-set the ozone NAAQS on January 19, 2010. 73 Fed. Reg. 16,436. But a funny thing happened on the way to a new ozone NAAQS: EPA withdrew the proposed rulemaking. This time, there was no doubt about who made the decision. President Obama publicly stated that he ordered the rule withdrawn. The process began anew; Congress geared up for hearings and environmental groups sued. *Inhofe Seeks Urgent Ozone Hearing*, InsideEPA.com (Oct. 26, 2011).

These political dramas only served to cloud, not clarify, the central question of who makes the decisions at EPA. The dust-up over the 2008 Ozone Rule appeared to lay out the following ground rules: (1) the administrator makes the decisions, (2) unless he or she disagrees with the agency's scientific advisors, and (3) under no circumstances should the president make any decisions because that would be "political." These apparent ground rules raised significant concerns about the management of an executive branch agency.

The Unitary Executive theory

Lost in all of this was the opportunity to better understand the president's role in managing executive agencies, as well as to test a coherent theory of administration. This theory is a challenge to the conventional view that "the President has no authority to make the decision himself, at least if Congress has conferred the relevant authority on an agency head." Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. Chi. L. Rev. 1, 25 (1995). Under the conventional understanding, the president has no role in the substance of administration other than hiring and firing the agencies' political appointees. By contrast, the Unitary Executive theory asserts that the Constitution prohibits Congress from delegating executive authority in a way that bypasses the president.

The Unitary Executive theory, long promoted by law professor Steven Calabresi, holds that the Vesting Clause of Article II, section 1, endows the entirety of the executive power in the president. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 581 (1994). Although Congress may create inferior executive officers, those officers may exercise the executive power only through implicit presidential delegation. *Id.* at 593-95. This

relieves the president from personally delivering the mail, collecting tariffs, coining money, and so on, *id.* at 593, while preserving the president's ability to make important decisions. Granted, the president only "executes" the law, and thus, any agency decision that violates statutory criteria will be vacated regardless of whether the president or the administrator made that decision. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001) (vacating NAAQS standards for considering costs in violation of statute). However, where Congress leaves decisions to an agency official's discretion, it is by necessity the president's discretion as well.

Presidential control over administrative agencies has taken its lumps from the Supreme Court in the past. The Court upheld Congress' power to limit the circumstances under which the president can remove members of "independent" agencies in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (Federal Trade Commission) (*Humphrey's Executor*). To the Court, "[t]he authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted…." *Id.* at 629. The Court reached the same conclusion in similar cases involving legislative restrictions on the president's removal powers. *See Wiener v. United States*, 357 U.S. 349 (1958) (prohibiting removal of War Claims Commission member); *Morrison v. Olsen*, 487 U.S. 654 (1988) (independent counsel law did not violate Appointments Clause or impinge on president's executive powers). None of these cases, however, directly addressed the constitutional issue raised by legislation that appears to delegate executive power to agency officials and to the exclusion of the president.

Over the years, the Unitary Executive theory has garnered diverse support, in whole or in part. *See Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981) (Wald, J.) ("[t]he authority of the president to control and supervise executive policymaking is derived from the Constitution…."); Neal Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2318 (2006) (endorsing Unitary Executive theory with caveats regarding internal checks on executive power); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001) (endorsing president's authority to direct agency decisions on statutory interpretation grounds instead of constitutional basis); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (endorsing strong unitary executive on policy grounds while rejecting constitutional basis). Many of these endorsements are due to a shift in thinking as to why administrative agencies make so many policy decisions.

The presumption of agency neutrality and expertise

The language of *Humphrey's Executor*, describing administrative agencies as "non-partisan," "act[ing] with entire impartiality" and "exercise[ing] the trained judgment of a body of experts," now seems antiquated. 295 U.S. at 624. In fact, these presumptions have been eroding for some time, giving way to a view of administrative agencies as being politically accountable through the president. *See* Lessig & Sunstein, *supra*, at 94; Kagan, *supra*, at 2331–39. Nobody practicing environmental law believes that EPA acts in a completely non-partisan or impartial manner, as the *Humphrey's Executor* Court did. EPA during the Bush administration was the "Bush EPA." The subsequent "Obama EPA" was expected to enact different policies than its predecessor because the two presidents had different beliefs and philosophies. For the sake of political accountability, these differences *should* change the agency's priorities and how its administrator exercises its discretion. Political opponents have frequently cited EPA decisions as reasons to vote out the president in order to change what EPA is doing. *See*, *e.g.*, John M. Broder & Kate Galbraith, *E.P.A. Is Longtime Favorite Target for Perry*, N.Y. TIMES (Sept. 29, 2011) (discussing attacks on EPA by presidential candidate Governor Rick Perry).

Acknowledging the president's ability to direct EPA decision-making would do nothing other than make the practice more transparent.

A case for EPA independence from the president cannot hang on agency expertise, as cited by *Humphrey's Executor*, either. The Clean Air Act leaves NAAQS decisions to "[t]he Administrator." 42 U.S.C. § 7409(a). Yet, Stephen Johnson and Lisa Jackson are the first EPA administrators with scientific credentials; their predecessors were attorneys (Ruckleshaus, Train, Costle, Gorsuch, Reilly, Browner) and governors (Whitman, Leavitt). Career staff supply the agency expertise. Their recommendations are reviewed, questioned, and ultimately accepted or rejected by the administrator. Where the president is the one making a discretionary decision, the process is no different. Recognizing that the president is responsible for agency decisions would not change how courts view those decisions. In fact, the *sina qua non* of administrative law, *Chevron* deference, is premised on the political accountability of the *president*, not the EPA administrator: "While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices…." *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 865 (1984). Thus, acknowledging the president's ability to direct EPA decision-making would do nothing other than make the practice more transparent.

Litigation over both ozone rules—the one that was and the one that wasn't—will plow forward. But, one must not lose sight of what is buried in these relatively obscure and technical agency decisions—a very real and basic question about who makes decisions in the executive branch that is as old as the administrative state itself.

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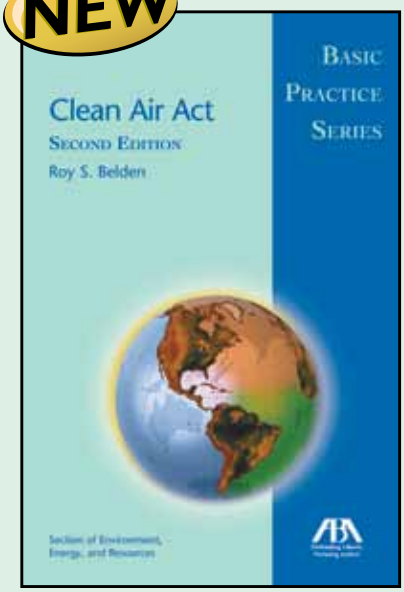

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