TRENDS
ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES NEWSLETTER

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Appellate practice in the Environment and Natural Resources Division: "Calls for Views of the Solicitor General"

By Ethan G. Shenkman

The Environment and Natural Resources Division (ENRD) of the U.S. Department of Justice has responsibility for cases involving more than 150 statutes and represents virtually every federal agency in courts throughout the United States. About half of ENRD's lawyers concentrate on enforcement cases premised on civil and criminal violations of the nation's pollution control laws. Others defend environmental challenges to government programs and activities, and represent the United States in matters concerning the stewardship of the nation's natural resources and public lands. ENRD is also responsible for cases arising under federal wildlife protection laws, for acquisition of real property by eminent domain, for cases concerning protection of tribal rights and resources, and defense of tribal claims against the United States.

ERND's Supreme Court practice

ENRD's Appellate Section handles the initial appeals of all cases litigated by division lawyers in the trial courts. It also works closely with the Department of Justice's Office of the Solicitor General on ENRD cases that reach the U.S. Supreme Court. In cases in which the Court grants certiorari, ENRD assists the Solicitor General in preparing merits briefs where the government is a party. ENRD also works with the Solicitor General on amicus briefs where the government is not a party but the Solicitor General decides it is in the interest of the United States to participate.

Reflecting the breadth of its appellate practice, ENRD has had a wide variety of constitutional law and other cases decided by the Court. Recent cases in past Terms, for example, have presented challenges to the adequacy of the government's review of the potential environmental effects of genetically modified agricultural products, claims that property law decisions rendered by a state supreme court constituted a judicial takings under the Fifth Amendment, First Amendment challenges to religious displays on public lands, displacement under the Clean Air Act of federal common law nuisance claims based on greenhouse gas emissions, and the scope of fiduciary duty in tribal breach of trust claims against the United States. In its 2011 Term, the Court considered a myriad of issues involving ENRD, including the standard for determining the navigability of rivers for purposes of the "equal footing" doctrine, issues regarding pre-enforcement review of wetlands enforcement under the Clean Water Act, and a case implicating the Fifth and Sixth Amendments addressing the proper division of responsibility between the judge and jury in assessing criminal fines under the Resource Conservation and Recovery Act.

In addition to merits cases, ENRD assists the Solicitor General in preparing briefs in opposition to petitions for certiorari in cases that ENRD won in the courts of appeals and, on occasion, in preparing petitions for certiorari in cases that ENRD lost below.

The Court's increasing use of CVSG orders

Rarely will the Solicitor General file an amicus brief relating to a pending petition for certiorari filed by a non-federal party. However, each Term the Court issues "Calls for the Views of the Solicitor General"—or "CVSG" orders—in which the Court invites the Solicitor General to file an amicus brief expressing the views of the United States on a pending certiorari petition. Although not discussed in the Court's rules, it is generally believed that the vote of four Justices (the same number of votes required to grant certiorari) is sufficient for the Court to issue a CVSG order.

CVSG orders are issued after the parties have completed briefing on the petition for certiorari, all other amicus briefs supporting or opposing the petition have been filed, and the Justices have held an initial private conference to discuss the petition. The Court issues CVSG orders not only to obtain the views of the United States on legal questions, but also on whether the petition should be granted. The Solicitor General has a range of potential responses to such an invitation from the Court, including supporting the grant of certiorari—in whole or in part, or opposing certiorari. In some cases, the government contends that the court of appeals decision was incorrect but the case, nonetheless, does not warrant further review by the Court. Where appropriate, the Solicitor General may suggest that the Court grant, vacate, and remand a case to the court of appeals to address an intervening Court decision or legislative or regulatory development, or that the Court "hold" the petition pending the Court's decision in a related case.

When a CVSG order is issued, the Court, as a matter of practice, does not impose a specific deadline for the Solicitor General to prepare and file a brief, and no further consideration is given to the petition until the Solicitor General weighs in. Where practicable, the Solicitor General will generally submit its response in time for the Court to be able to consider the petition by the final conference of the term.

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Inside...

Views from the Chair

By Irma S. Russell

The Section's commitment to service

As I write this final column as chair of the ABA Section of Environment, Energy, and Resources, I reflect on what a privilege it has been to serve in this role. My year as chair has given me an even greater appreciation of the scope of the work of the Section and its members. I have gotten to know friends in the Section better, and I have become friends with Section members I did not previously know. Serving as chair has also provided me with the opportunity to become acquainted with people in the ABA I would not have known without my involvement in leadership.

In 2009, when I became the Section vice chair, I chose the theme "Service to Members and Society" for my year as chair. My intent was to cast a spotlight on the Section's core values and long-standing commitment to its members and to the public. The 2011–2012 Bar year has been an extraordinary year for our Section, especially in the area of service. Below are a few examples.

This past year, eight more law offices and organizations became ABA-EPA Law Office Climate Challenge Partners or Leaders. To date, more than 270 law offices and organizations are taking simple, practical steps to become better environmental and energy stewards through the Climate Challenge.

The Section also continued its support of its "One Million Trees Project—Right Tree for the Right Place at the Right Time." Activities in conjunction with Section programs included tree plantings at an elementary school in Indianapolis, in San Diego's Balboa Park, and in a riparian habitat near Salt Lake City to contribute to the goal of planting one million trees across the United States by 2014. The Section has discussed this project with the ABA as a possible association-wide initiative. Registrants at three Section programs were offered the opportunity to provide a donation toward achieving carbon neutrality for their participation. Additionally, we have made exciting partnerships with The Nature Conservancy and The World Justice Project.

The Section's Membership Diversity Enhancement Program has continued to provide partially subsidized dues for minority lawyers, young lawyers, government lawyers, and solo practitioners who have been under-represented in our Section and are willing to assist with the development of Section activities, programs, and publications. The Section's Leadership Development Program again provided a foundation for its participants to become more actively involved in the Section.

I would also like to recognize the experience of our leaders who have been active in the Section for years. Serving as chair allowed me to see the inspiring work of so many people and gave me a great respect for their leadership. Many Section members serve as mentors to associates in their firms and to new Section members. Furthermore, the Section is working to provide mentoring for young lawyers and law students. Outreach to law students and young lawyers and attendance of law students at Section programs is higher than ever. The Section is working to strengthen its relationships with young lawyers, law students, and law schools across the country. For example, in April 2013, the Section will host a symposium titled *Balancing Act and Paradigm Shift: The Role of Public Lands in America's Energy Future*, in partnership with *The Public Land and Resources Law Review* at The University of Montana.

It has been a great honor to serve as your chair. Most of all, it has been a privilege to meet and get to know our members and leaders and to see first-hand the accomplishments of the Section and Section members. Thank you all for your continued efforts and commitment to our mission of serving our members and society.

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

Section Spotlight

2012 Fellowships in Environmental Law

The Section's *Diversity Fellowships in Environmental Law* program is designed to encourage disadvantaged or traditionally underrepresented law students to study and pursue careers in environmental, energy, and resources law.

We are pleased to recognize the students who will participate in the program during the summer of 2012. **California:** Irene Burga (Boston University School of Law), Dan Griffiths (University of California Davis School of Law), Kendall Holbrook (University of San Diego School of Law); **District of Columbia:** Rachel Cook (University of Washington, School of Law), Jessica Kabaz-Gomez (George Washington University Law School); **Florida:** Andrew A. Popp (Stetson University College of Law), Wendi Whipkey (Florida Coastal School of Law); **New York:** Sanjeevani "Sunny" Joshi (Albany Law School), Rosemary Spring Ortiona (Hofstra University School of Law); **North Carolina:** Jaye Cole (Elon University School of Law), Anica Angeline Nicholson (North Carolina Central University School of Law); **Puerto Rico:** Michelle Alvarado-Lebron (University of Puerto Rico Law School); and **Rhode Island:** Chloe A. Davis (Roger Williams University School of Law).

Section embraces social media

Throughout the past year, Section leaders have worked together to develop ideas and recommendations regarding the Section's engagement of social media networks. Social media networks facilitate communication on a variety of different internet portals. Examples of these media include *Facebook*, *Twitter*, and *LinkedIn*. These companies have created platforms where millions of networked people, groups, companies, and other stakeholders share information, communicate, and advertise. For a professional organization such as the Section, using these sites to relay information and interact with existing members and to entice new members can be a very successful strategy.

According to the Section's Strategic Plan, the Section "strives to be the premier forum for environmental, energy, and resources lawyers; a meeting place where they can find the most current and sophisticated analyses of the complicated environmental, energy, and resource problems facing the United States and the world." Similarly, we aspire to use "all appropriate forms of communications . . . to disseminate information to members and encourage collaboration among members." We want to provide a forum wherein members "can learn, teach, and contribute to solving" environmental problems.

After surveying Section members' and leaders' needs and interests, a social media implementation strategy was developed and presented to Section Council for approval in February. Then, a social media policy was approved by Council in April. The plan calls for the Section to use: *LinkedIn* as a Section-wide discussion forum on hot-topics and questions the Section wishes to pose to its members; *Facebook* to show members and non-members what the Section is, does, and provides; and *Twitter* to promote Section news, events, and much more.

Social media networks are important tools for organizations like our Section. Sites like *LinkedIn*, *Facebook*, and *Twitter* can allow a new level of member-interaction that augments traditional forms of communication such as newsletters, conferences, and email discussions. Young lawyers and law students regularly make use of these sites for both professional and personal development, so Section presence is important for both recruitment and retention efforts. For all lawyers, these sites provide a quick and easy way to see and share breaking new stories as well as participate in online discussions regarding Section programs and announcements.We welcome you to join us in our new social networks.

Follow the Section and *NR&E* on Twitter! @ABAEnvLaw and @NREMag.
Join the discussions on LinkedIn! Visit http://linkd.in/K6OquT
Stay tuned for our new Facebook page!

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EPA's new air rules mean monumental changes for emissions in Indian country

By Robert Gruenig

On July 1, 2011, the U.S. Environmental Protection Agency (EPA) issued a Federal Implementation Plan (FIP), titled "Review of New Sources and Modifications in Indian Country." The FIP includes two New Source Review (NSR) rules to address a regulatory gap concerning the emissions of minor and major sources in Indian country. The first rule (Tribal Minor NSR Rule) applies to new and modified minor stationary sources, and to minor modifications at existing major stationary sources. The second rule (Tribal Nonattainment Major NSR Rule) applies to new and modified major stationary sources in those areas of Indian country that are in nonattainment for the National Ambient Air Quality Standards (NAAQS). The rules mean monumental changes to how facilities in Indian country must operate in the future.

The regulatory framework

The NSR program is a permitting scheme under the Clean Air Act (CAA) designed to ensure that air quality in compliance with federal standards is not significantly degraded to the point of noncompliance and air quality in noncompliance with such standards is not worsened by the addition of new and modified sources. The program requires new or modified facilities that significantly increase the emissions of regulated NSR pollutants to install modern pollution equipment to prevent any further degradation of air quality. The three types of NSR permitting programs are the Prevention of Significant Deterioration (PSD) (applies to a new major source or a source making a major modification in an attainment area), Nonattainment NSR (applies to a new major source or a source making a major modification in a nonattainment area), and Minor NSR (applies to a new minor source and/or a minor modification to a minor or major source in an attainment or nonattainment area).

Only a few tribes, such as the St. Regis Mohawk Tribe and the Gila River Indian Community, have provided for administration of EPA-approved Minor NSR programs as part of tribal implementation plans (TIPs). As a result, the majority of minor sources in Indian country have gone unregulated.

Facilities affected by the two new rules will be required to follow an NSR program process similar to the one in place for non-tribal lands. Initially, EPA will implement the new NSR rules through a FIP. However, a tribe can seek either delegation from EPA to enforce the rules (minus the enforcement or appeal components) or, alternatively, approval of a TIP in order to administer and implement the rules. By implementing its own TIP, a tribe will have the ability to charge permit fees under its own authority, something that EPA is currently unable to do under the CAA.

The new Tribal Minor NSR Rule

The Tribal Minor NSR Rule covers facilities with the potential to emit regulated NSR pollutants (e.g., carbon monoxide, lead, nitrogen oxides, particulate matter, sulfur dioxide, volatile organic compounds) in amounts that are less than major source thresholds (100 or 250 tons per year), but higher than the minor NSR thresholds established for the pollutants. Examples of facilities covered under the Tribal Minor NSR Rule include auto body shops, dry cleaners, gas stations, sand and gravel mining, sawmills, sewage treatment facilities, and solid waste landfills.

Facilities exempted from the Tribal Minor NSR Rule include mobile sources, consumer use of office equipment and products, and internal combustion engines used for landscaping purposes. EPA intends to develop a supplemental rule to determine if additional exempted units/activities should be added to the list. Permit options include:

Site-specific permits that involve case-by-case determinations of the source emissions limits as well as any control technology requirements (e.g., add-on pollution control equipment, design and equipment specifications, or work practice and operational standards). Site-specific permits can be issued for regulated NSR pollutants and toxic air pollutants.

General permits, developed by EPA after public notice and the opportunity for comment, that include a control technology review and associated emissions limits, to cover similar equipment types or facilities to help simplify the permit issuance process for facilities. General permits are only available for true minor sources.

Synthetic minor permits for a source that has the potential to emit pollutants in an amount at or above the major source threshold, but which has voluntarily accepted emissions limits below this threshold to avoid the more stringent major source CAA requirements. Synthetic minor permits can be issued for regulated NSR pollutants and toxic air pollutants.

The Tribal Minor NSR Rule also requires an air quality impact analysis (if there is a concern that the minor source will cause or contribute to a NAAQS or PSD "increment" violation), public participation through notice-and-comment (and administrative and judicial review upon a permit appeal), and registration of the source with the reviewing authority. The source registration requirements mandate that the owner or operator of a new or existing source provide a description of the source's processes and products, a list of all emission units and activities, production rates information, identification of any existing air pollution control equipment, and existing limitations on source operations.

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The source owner or operator must conduct monitoring, which may include "continuous," "predictive," or "continuous parameter" monitoring systems, equipment inspections, mass balances, periodic performance tests, and/or emissions factors. The owner or operator must also complete annual monitoring reports showing compliance, and recordkeeping must be sufficient to assure compliance.

The Tribal Minor NSR Rule became effective on August 30, 2011, and provides a 36-month phase-in period for minor sources to comply with the following time obligations:

New minor sources need to register within the first 36 months of the rule's effective date; after this period, or six months after a general permit for a source category is published by EPA, whichever is earlier. In addition to registration, new sources will require a permit if monitoring results demonstrate that their emissions exceed the minor source thresholds.

Existing minor sources need to register within 18 months after the rule's effective date or 90 days after the source begins operation; after this period, or six months after a general permit for a source category is published by EPA, whichever is earlier. Existing minor sources will also require a permit if emissions after any proposed modification exceed the minor source thresholds.

New synthetic minor sources may apply for permits starting on the rule's effective date.

Existing synthetic minor sources may need permits depending on the mechanisms they used to obtain their status as a synthetic minor.

Minor modifications at major sources need to apply for permits starting on the rule's effective date. The effective date was August 30, 2011, so this means that the permit application process for these sources should already be underway.

The permit issuance process will follow different schedules depending on the permit type sought. For minor sources seeking a site-specific permit, there will be a 45-day application completeness review followed by a 30-day public comment period. The permit will issue no later than 135 days after the application is deemed complete. For minor sources seeking general permits, the application completeness review is also 45 days with no public comment period (the general permit would already have been subject to notice and comment when it was initially developed). Further, there is a 30-day period for the reviewing authority and a 15-day period for the owner or operator to review. The permit will issue no later than 90 days after the submission of the request for coverage. Finally, synthetic minor permits (and minor modifications at a major source under a site-specific permit) will have a 60-day application completeness review and a 30-day public comment period. The permit will issue no later than one year after the application is deemed complete.

EPA estimates that several thousand new and modified minor sources will be created in Indian country during the first six years of the Tribal Minor NSR Rule. In the first three years, EPA estimates that approximately 4,326 new or modified facilities are expected to incur $549,402 in monitoring, recordkeeping, and reporting to complete registrations or requests for coverage under general permits. Further, EPA calculates that 32,970 existing true and synthetic minor sources will incur $2.1 million to complete registrations for the former sources and secure new permits for latter sources.

EPA's New Source Review rules mean monumental changes to how facilities in Indian country must operate in the future.

Major NSR Rule for non-attainment lands

EPA has a FIP in place for major sources in parts of Indian country that are in attainment for the NAAQS. Sources in these areas are already being issued permits. The Tribal Nonattainment Major NSR Rule will fill in an important regulatory gap by applying to those areas of Indian country that do not meet the NAAQS. Facility owners and operators will be required to install emissions controls that meet the Lowest Achievable Emission Rate control technology, offset any emissions increases by obtaining emission reductions from other sources in the nonattainment area, and certify that all other owned or operated facilities in the same state as the new or modified source are in compliance with CAA regulations.

Implementation of the rules

On June 13, 2011, EPA held a training session for tribal air professionals on the Tribal Minor NSR Rule and Tribal Nonattainment Major NSR Rule. As part of the session, EPA shared a draft of its Implementation Guidance document (Guidance) to provide tribes with a better understanding of the rules and an opportunity to determine the extent of their participation based on their own goals and priorities (e.g., number of sources on their lands and available resources for implementation). EPA finalized this guidance as an Implementation Manual in May 2012. The Implementation Manual includes a decision matrix that a tribe can use to determine its preferred level of involvement with the rules, possible steps it can take in meeting its desired objectives, and resources to lessen administrative and developmental burdens in pursuit of the tribe's objectives.

The timeline for sources to register or request coverage under general permits has begun. Practitioners should therefore swiftly consult with their clients to ensure proper compliance with the rules. To learn more about the Tribal Minor NSR Rule and/or the Tribal Nonattainment Major NSR Rule, visit www.epa.gov/air/tribal/tribalnsr.html.

Of course, like many EPA rules, this rule is subject to a legal challenge in the D.C. Circuit. In August 2011, the Oklahoma Department of Environmental Quality petitioned the D.C. Circuit to review the EPA FIP. Oklahoma claims that EPA lacks legal authority to issue a nationwide FIP for Indian country. As of this writing, briefing for the D.C. Circuit petition has not begun.

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Liquefied natural gas exports and export facilities: A statutory framework

By Sean Dixon

In the not-too-distant past, liquefied natural gas (LNG) imports were the next big thing in the U.S. energy world. Now it may be LNG exports. This article discusses this recent shift in focus and what statutory approvals are needed for exporters of LNG.

About a decade ago, energy companies started work on LNG import facilities from Massachusetts to Texas, and applications to build new import facilities in California, Oregon, and New York City were hastily filed. According to the Federal Energy Regulatory Commission (FERC), there are a total of twelve facilities now capable of importing LNG, located in the northeast and southern states. In the 1980s, most imported LNG came from Algeria; in the 2000s, LNG was imported largely from Trinidad, Egypt, Nigeria, and Qatar.

Although LNG imports were once economically advantageous, the marketplace shifted in favor of cheaper domestic natural gas production. U.S. annual dry production of natural gas skyrocketed from 18.5 trillion cubic feet (Tcf) per year in 2006 to more than 23 Tcf per year in 2011, an almost *25 percent volume increase* that led to a 40 percent price decrease in spot-market trades.

With shale gas fields coming online, and the expansion of hydraulic fracturing and horizontal drilling, domestic gas production is at an all-time high and shows no signs of slowing. Given this new market reality, LNG imports have dropped off significantly. According to the U.S. Department of Energy (DOE), LNG import volume has fallen by almost 23 percent between 2009 and 2011. Some LNG facilities, however, have turned to exports as a way to continue operations, and many have already secured approval to do so. Since 2010, LNG re-exports (LNG that is imported and held in U.S. storage until a sale overseas) were sent to Japan, Spain, India, the United Kingdom, Brazil, China, and South Korea.

LNG trade: imports and exports

Under the Natural Gas Act (NGA) (15 U.S.C. § 717b), DOE is responsible for regulating international trade in natural gas, including LNG. Imports and exports have always been subject to a simple standard of review under the NGA: DOE must approve applications for imports/exports *unless* it finds that such imports/exports would not be consistent with the "public interest." The application fee is surprisingly small at $50 (10 C.F.R. § 590.207).

Two decades ago, Congress amended the NGA to facilitate the United States' involvement with international natural gas trading. In a not-unintentionally named amendment entitled "Fewer Restrictions on Certain Natural Gas Imports," Congress's Energy Policy Act of 1992 declared that "natural gas consumers and producers, and the national economy, are best served by a competitive natural gas wellhead market."

To accomplish this goal, Congress stated that any imports *or* exports with LNG Free Trade Agreement (FTA) nations (e.g., many nations in the Americas, South Korea, Australia) "shall be deemed to be consistent with the public interest" and applications "shall be granted without modification or delay." DOE recently approved twelve applications for exports to FTA nations, each within about two months, and another three are under review or "pending approval."

Applications for LNG trade with *non*-FTA nations continue to be presumptively approved "*unless*" DOE finds such trade to be inconsistent with the public interest. DOE is allowed to "grant such application, in whole or in part, with such modification and upon such terms and conditions as the [DOE] may find necessary or appropriate." However, after approving one non-FTA nation export request, DOE put an unofficial hold on new approvals—and decisions on the eight outstanding applications—until it determines whether these exports are consistent with the public interests.

Aside from DOE's jurisdiction over the *trade* of LNG, the actual *facilities* to and from which LNG is traded can either be within state waters ("onshore terminals"—subject to the NGA) where FERC has approval authority, or they can be located beyond state waters ("offshore ports"—licensed under the Deepwater Port Act (DWPA)) where the Maritime Administration and the U.S. Coast Guard have jurisdiction.

LNG terminals

Unlike the Congressional prohibition on modifying or delaying the approval of DOE import/export *authorizations*, for LNG onshore terminals, FERC is free to "approve an application . . . in whole or in part, with such modifications and upon such terms and conditions" FERC deems appropriate (15 U.S.C. § 717b(e)(3)(A)). FERC, in determining whether to approve or deny an onshore (or within-state-waters) terminal, asks whether the terminal will "improve access to supplies of natural gas, serve new market demand, enhance the reliability, security, and/or flexibility of the applicant's pipeline system, improve the dependability of international energy trade, or enhance competition within the United States for natural gas transportation or supply" (18 C.F.R. 153.7(c)(1)(i)).

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FERC licensing decisions balance the public's interest against any identified adverse impacts (*see* 88 FERC ¶ 61,227 (1999)). Once FERC determines that there are no adverse impacts, FERC takes the position that the market is allowed to determine which gas infrastructure projects will actually be constructed. Thus, without substantial adverse impacts (such as environmental, noise, security), the decision rests on the economics of the proposed uses—here, imports or exports.

Recently, FERC has been very active with respect to LNG terminals, approving construction of an export facility in Louisiana, and reviewing pending applications for two facilities in Texas, one in Oregon, and another one in Louisiana. FERC has also identified three other export facilities as being in the pre-planning phase.

One LNG terminal has already fallen victim to changes in the LNG marketplace. In 2009, FERC found that the LNG import market weighed in *favor of* the public need for new natural gas sources and approved an Oregon terminal. Since then, before construction began, the LNG import market collapsed "beyond mere fluctuations in economic projections of prices and supply." *Jordan Cove Order Vacating Authorization*, FERC Docket # CP07-441-001 (2012). Citing FERC's need to rely on "the usually valid assumption that a project sponsor will not go forward with construction of a project (in this case, an import terminal) for which there is no market," and upon the applicant's own application to forgo construction due to the lack of import need, FERC vacated the authorization. The Oregon applicant, Jordan Cove Energy, LP, has a separate export terminal application pending at FERC for the same site, having already secured authorization from DOE to export to FTA nations.

"Today, we're thinking about what role LNG exports might play in our energy future."
Senator Bingaman

LNG deepwater ports

For offshore ports (located in federal waters), the DWPA sets forth nine requirements that must be met. Those conditions run the gamut from an applicant's fiscal responsibility to environmental, navigation, and public interest concerns. 15 U.S.C. § 1503. The DWPA gives the governors of coastal states adjacent to a proposal's location veto authority over the issuance of a license to construct, own, and operate a port. In transmitting imported LNG to land from a deepwater port, either the port must tie into an offshore pipeline, where the Maritime Administration and the Coast Guard retain jurisdiction over the application, or the port must connect with an onshore pipeline, triggering the need for a FERC pipeline approval under NGA section 7(c).

The DWPA was, quite vaguely, enacted to promote safe "importing of natural gas" into the United States and "transporting … natural gas from the outer continental shelf." While the DWPA does not explicitly say that "exports" are allowed from deepwater ports, exports are *not* prohibited and are *not* inconsistent with the main purpose of the DWPA: to provide for the safe siting and construction of ports. While this issue has not yet been examined by the courts, the statutory structure suggests that Congress intended DOE to be the arbiter of *whether* LNG can be exported while the Maritime Administration and the Coast Guard decide *where* LNG can be imported (through DWPA has jurisdiction over siting, constructing, and port operations).

Declining imports, rising exports

At a November 2011 Senate Committee on Energy and Natural Resources hearing on LNG Exports, Chairman Bingaman began the proceedings with an apt observation: "We had a hearing in 2005 on the future of LNG . . . however, in 2005 we were thinking about anticipating need to import growing quantities of LNG. Today, we're thinking about what role LNG exports might play in our energy future."

The senator's statement was timely. In just the past year, DOE data show that LNG imports into U.S. terminals and deepwater ports are down by a third while the price is up by 20 percent. In contrast, over the same period, the price of LNG re-exports rose 73.3 percent. In 2007, LNG import facilities were operating at over 11 percent capacity; in 2011 that had fallen to 5 percent. According to data from FERC and the U.S. Energy Information Administration (EIA), between 2007 and 2011, the ratio of imports to re-exports fell 98 percent, a harbinger of upcoming trends.

DOE has already approved a substantial volume of LNG exports from lower-48 states' domestically produced natural gas, representing 23 percent of the United States' non-Alaskan daily production. The EIA's Annual Energy Outlook 2012 Early Release projects that the United States will become a net exporter of natural gas in 2021. Given that one of four units of domestically-produced gas is already licensed to be exported as LNG, Senator Bingaman was right to state that "understanding how exports might affect domestic prices is also critical." In the first in a series of reviews on the subject, DOE and EIA estimate that projected exports could lead to wellhead-natural gas price increases by as much as 54 percent in the first few years of exports. In all cases (including low-export and high-production scenarios) EIA anticipates that "increased natural gas exports [will] lead to increased natural gas prices." LNG exports are also anticipated to lead to an increase in activities like hydraulic fracturing (to create more exportable supply) and even increases in the use of coal for domestic power generation.

As the LNG market shifts, LNG terminal and port operators are scrambling to provide economic evidence that export facilities are in the public interest while some project proponents are still trying to claim that import facilities are in the public interest. For now, however, the only sure thing for LNG traders, terminals, and ports is that under NGA section 3, export applications to send LNG to our free-trade partners will be approved without modification or delay. Everything else likely will take both regulators and the marketplace a while to sort out.

Sean Dixon *is the coastal policy attorney at Clean Ocean Action, and he can be reached at Policy@CleanOceanAction.org.*

Wednesday, October 10, 2012

2:00 p.m. – 5:00 p.m.
Public Service Project

6:00 p.m. – 6:30 p.m.
Law Student Scholars Meeting

6:30 p.m. – 8:00 p.m.
Welcome Reception

Thursday, October 11, 2012

7:30 a.m. – 8:30 a.m.
Continental Breakfast

8:20 a.m. – 8:30 a.m.
Welcome and Opening Remarks

8:30 a.m. – 10:00 a.m.
Plenary Session: Legal Guidance for U.S. Energy Providers in the Era of Pendulumatic National Energy Policy

10:00 a.m. – 10:30 a.m.
Networking Break

10:30 a.m. – 12:00 p.m.
Concurrent CLE Sessions

- Waiting For the Next Big Bang: ERCOT as the U.S. Grid in Microcosm
- Social Media and the Environmental, Energy, and Resource Lawyer NON-CLE
- Next Generation Environmental Compliance: What's on the Horizon for EPA Enforcement?
- Lassoing Liability—How to Succeed at Brownfields Redevelopment

12:00 p.m. – 1:30 p.m.
Committee Get-Together Luncheon

1:30 p.m. – 3:00 p.m.
Concurrent CLE Sessions

- The Critical Role of Water in Energy Facility Siting, Development, and Operation
- Wind, Water, Weather, and the Endangered Species Act
- Next Generation Environmental Compliance: What's on the Horizon for EPA Enforcement?
- The Challenge of EPA's Power-Plant Regulations and Their Impacts on the Electric System

3:00 p.m. – 3:30 p.m.
Networking Break

3:30 p.m. – 5:00 p.m.
Concurrent CLE Sessions

- Environmental Impacts of Oil and Gas Production in Shale Formations: Policy, Perception, and Reality
- Is This Federalism? Texas v. EPA
- Air "Hot Topics"
- Transparent yet Competitive: Environmental Disclosures from Hydraulic Fracturing to Consumer Products

5:15 p.m. – 6:30 p.m.
Speed Networking

6:30 p.m. – 10:30 p.m.
Dinner Event at the Bob Bullock Texas State Museum

ABA Section of Environment, Ene

20th Section

OCTOBER 10–13, 2012 ★

AUSTIN CVB

Join us in Austin for the very best in CLE programming, networking opportunities, and idea exchange for environmental, energy, and resources lawyers. The conference theme will be Our Tangled Web of Energy Policies and Practices: Their Natural Resource and Environmental Consequences Examined. What better place than in the heart of Texas to hear about the latest developments and future trends from environmental and energy regulators, leading academics, in-house counsel, NGO lawyers, and prominent private-practice lawyers.

Public Service Project

Join our public service project with Section volunteers and partner Keep Austin Beautiful (KAB), which educates and inspires individuals to be greater environmental stewards by beautifying and protecting Austin's environment through physical improvements and hands-on education. Project participants will work with middle-school students to create wildlife habitats with native species that are drought tolerant and have low water requirements. To volunteer, please indicate your interest when you register and bring your work gloves!

Speed Networking

Speed Networking will offer young lawyers and law student attendees the invaluable opportunity to meet one-on-one with several seasoned environmental, energy, and resources law practitioners over the course of an hour. This is the place to network and seek general advice from your colleagues and potential mentors and to discuss Section activities and initiatives of interest.

ergy, and Resources Law Summit

Fall Meeting

HILTON ★ AUSTIN, TEXAS

Bring family and friends to Austin, and stay for the weekend!

Austin is the Live Music Capital of the World, where day or night you can find a variety of live music to enjoy. We're fortunate this year to have the acclaimed Austin City Limits Music Festival taking place in nearby Zilker Park. More than 100 bands on eight stages will be featured. If you are interested, order your tickets now. And music is just the beginning. Check out all the great places to grab a bite to eat, do some shopping, and find out what really makes Austin weird! Don't forget the dinner event for meeting attendees at the Bob Bullock Texas State Museum!

AUSTIN CVB

Stay connected with the Fall Meeting!

Download the mobile app for easy access to the meeting schedule, maps, attendees, and more! Just search for "20th Fall Meeting" in Apple's App Store or Android's Google Play—or read the QR code below. You can also visit **http://crwd.cc/SFM20th.**

For the latest discussions, news, and events on environment, energy, and natural resources law, join the Section on Twitter and LinkedIn! Follow our Twitter page at @ABAEnvLaw and join our LinkedIn group at **http://linkd.in/K6OquT.**

Friday, October 12, 2012

7:30 a.m. – 8:30 a.m.
Continental Breakfast

8:00 a.m. – 8:30 a.m.
Welcome, Opening Remarks, and 2012 ABA Award for Excellence in Environmental, Energy, and Resources Stewardship

8:30 a.m. – 10:00 a.m.
Plenary Session: Developing and Sustaining An "All-of-the-Above" National Energy Policy

10:00 a.m. – 10:30 a.m.
Networking Break

10:30 a.m. – 12:00 p.m.
Plenary Session: Environmental Law Before the Supreme Court

12:00 p.m. – 12:30 p.m.
Luncheon

12:30 p.m. – 1:30 p.m.
Technical Roundtables

1:30 p.m. – 3:00 p.m.
Concurrent CLE Sessions

- Pipelines in the Crosshairs: Siting, Permitting, Compliance, and Enforcement After the Keystone XL Nonapproval
- Energy, Environment, and Politics in 2012: Expectations and Prognostications for the Next Four Years
- The Challenges of Permitting Renewable Projects Across a Diverse Landscape
- Greenhouse Gas Update: EPA Rule Challenges, Cap and Trade, LCFS, Common Law Litigation, and Public Trust

3:00 p.m. – 3:30 p.m.
Networking Break

3:30 p.m. – 5:00 p.m.
Ethics—Saving a Corporate Client from Itself: Knowing When to Climb the Ladder and Blow the Whistle

3:30 p.m. – 5:00 p.m.
Keystone XL Pipe Dreams: Game On or Game Over? NON-CLE

5:30 p.m. – 7:30 p.m.
Local Flair Reception

7:30 p.m.
Dining Together

Saturday, October 13, 2012

8:00 a.m. – 9:00 a.m.
Continental Breakfast

9:00 a.m. – 10:00 a.m.
Committee Chairs Meeting

10:00 a.m. – 11:00 a.m.
Vice Chair Working Groups

11:30 a.m. – 5:00 p.m.
Council Meeting

5:30 p.m. – 6:30 p.m.
Section Chair's Farewell Reception

IN BRIEF

By Theodore L. Garrett

CERCLA

A court of appeals held that the United States may recover response costs from General Electric (GE) for the cleanup of a site operated by a paint manufacturer. *United States v. General Electric Co.*, 670 F.3d 377 (1st Cir. 2012). The court rejected GE's argument that it was not an arranger because it sold scrap polychlorinated biphenyl (PCB) materials to the paint manufacturer, concluding that *Burlington Northern* does not require a stated objective to dispose of hazardous materials. The court upheld the district court's finding of intent, emphasizing that GE considered the scrap PCB materials to be a waste product, GE controlled the delivery of PCB materials to the site, the paint manufacturer had asked GE to retrieve drums of scrap PCB that were not needed, and GE continued shipments to the site even after the paint manufacturer stopped paying GE.

A party that incurred costs in complying with a federal consent decree may not pursue cost recovery claims under section 107(a) of Superfund against other potentially responsible parties, the 11th Circuit held. *Solutia Inc. v. McWane, Inc.*, 672 F.3d 1230 (11th Cir. 2012). The decision clarifies a question left open in the Supreme Court's decision in *United States v. Atlantic Research Corp.,* 551 U.S. 128 (2007), namely whether section 107(a) cost recovery is available only to parties who volunteer to clean up a site. The court's opinion agrees with decisions in three other circuits that denying a section 107(a) remedy under these circumstances is appropriate "in order '[t]o ensure the continued vitality of the precise and limited right to contribution.'"

Air quality

The Fifth Circuit vacated EPA's disapproval of provisions of the Texas State Implementation Plan (SIP) for minor new source review (NSR) permits for pollution control projects. *Luminant Generation Co. v. EPA*, No. 10-60891, 2012 WL 999435 (5th Cir. Mar. 26, 2012). The court concluded that EPA's disapproval was arbitrary and capricious because the Clean Air Act prescribes "only the barest of requirements" for minor NSR, and the agency based its decision on "three extra-statutory standards that the EPA created out of whole cloth." The opinion found no support in the act for EPA's objection that the SIP does not include "replicable" limits on how the state director is to exercise discretion. The decision emphasizes that the states have "sweeping discretion" in developing their SIP, whereas EPA has the "narrow task" of ensuring that a SIP "meets the minimal requirements of the Act."

Hydraulic fracturing

A New York trial court upheld a county ordinance that banned exploration and production of natural gas or petroleum. *Anschutz Exploration Corp. v. Town of Dryden*, No. 2011-0902, 2012 NY Misc LEXIS 687 (N.Y. Sup. Ct. Feb. 21, 2012). The zoning amendment was enacted because of concerns that hydraulic fracturing may involve the risk of contaminating ground and surface water. The plaintiff spent $5 million in preparation to produce gas from the Marcellus shale in the area before enactment of the ordinance. The court rejected plaintiff's argument that the ordinance is preempted by New York's Oil, Gas and Solution Mining Law, stating that a court should avoid an interpretation of state law that would abridge a town's power to regulate land use through zoning powers.

Water quality

In a unanimous decision, the Supreme Court held that affected persons may bring a civil action under the Administrative Procedure Act to challenge an EPA section 404 compliance order. *Sackett v. EPA,* 132 S. Ct. 1367 (2012). EPA issued a compliance order alleging that the Sacketts, in the course of building their home, had filled in a wetlands in violation of the Clean Water Act and requiring them to restore their property. The Sacketts unsuccessfully sought judicial review of EPA's order, with the lower court agreeing with the government's argument that the Sacketts could comply with the EPA order or submit an application for a wetlands permit or defend if EPA brings an enforcement action, but may not seek pre-enforcement review of EPA's order. The Supreme Court rejected the government's argument that EPA is less likely to use orders if they are subject to judicial review, saying that "[t]he APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all." It will be important to see how EPA responds and what, if any, changes are made to EPA's practice and procedure for issuing administrative compliance orders in wetlands and perhaps other matters.

The Clean Water Act bar on citizen suits in cases where the alleged violation is being "diligently prosecuted" is not a threshold jurisdictional matter for purposes of a Rule 12(b)(6) motion to dismiss, a court of appeals held. *Louisiana Envtl. Action Network (LEAN) v. City of Baton Rouge,* 2012 WL 1301164 (5th Cir. Apr. 17, 2012). The court of appeals agreed that plaintiff was not barred as a jurisdictional matter from asserting its claims under the Clean Water Act. The court remanded the case to the district court for further proceedings, including review of the plaintiff's allegation that there is no diligent prosecution, because a prior consent decree between the City of Baton Rouge and EPA was not in fact being enforced.

A U.S. district court invalidated EPA's decision to veto a section 404 permit, issued by the U.S. Army Corps of Engineers (Corps) in 2007, allowing a company to discharge fill material from a coal mine to nearby streams. *Mingo Logan Coal Co. v. EPA*, 2012 WL 975880 (D.D.C. Mar. 23, 2012), *appeal docketed*, No. 12-5150. Noting that EPA vetoed the permit in 2011, years after it was issued by the Corps, the district court stated that "neither the statute nor the Memorandum of Agreement between EPA and the Corps makes any provision for a post-permit veto, and EPA had resorted to "magical thinking" to justify its action revoking the permit issued by a prior administration. EPA's action leaves permit holders in the "untenable position of being unable to rely on the sole statutory touchstone for measuring their Clean Water Act compliance: the permit."

NEPA

The Ninth Circuit upheld a U.S. Forest Service permit allowing an Arizona ski resort to produce artificial snow. *Save the Peaks Coalition v. U.S. Forest Service*, 2012 WL 400442 (9th Cir. Feb. 9, 2012). The court's decision was critical of the plaintiff environmental groups, stating that the suit was brought "for no apparent reason other than to ensure further delay and forestall development" at the resort through litigation. The court found that the final environmental impact statement prepared by the government adequately considered the issue of human ingestion of snow made with reclaimed water.

Theodore L. Garrett *is a partner of the law firm Covington & Burling LLP in Washington, D.C. He is a former chair of the Section and is a contributing editor of Trends.*

CALENDAR OF SECTION EVENTS

2012

- **20th Section Fall Meeting**
  October 10–13, 2012
  Austin, Texas

2013

- **ABA Midyear Meeting**
  February 6–12, 2013
  Dallas
- **Key Environmental Issues in U.S. EPA Region 4**
  February 26, 2013
  Atlanta
- **42nd Annual Conference on Environmental Law**
  March 21–23, 2013
  Salt Lake City
- **ABA Petroleum Marketing Attorneys' Meeting**
  April 11–12, 2013
  Washington, D.C.
- **ABA Public Lands and Resources Law Symposium**
  April 18, 2013
  University of Montana Law School
  Missoula, Montana
- **31st Annual Water Law Conference**
  June 5–7, 2013
  Las Vegas
- **ABA Annual Meeting**
  August 8–13, 2013
  San Francisco

For more information about Section events, visit www.ambar.org/EnvironCalendar or contact the Section at (312) 988-5625 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.

Sackett v. EPA: Parties may challenge Clean Water Act compliance orders

By Theodore L. Garrett

The U.S. Supreme Court issued its long-awaited decision in *Sackett v. EPA*, 132 S. Ct. 1367 (2012). In a unanimous decision on March 21, 2012, the Court held that the Sacketts may bring a civil action under the Administrative Procedure Act (APA) to challenge the Environmental Protection Agency's (EPA's) compliance order. The Court rejected the government's argument that EPA is less likely to use orders if they are subject to judicial review, holding that "[t]he APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all."

The Sacketts are individuals residing near Priest Lake in Idaho who filled part of their property with dirt and rock in preparation for building a home. Some months later, EPA issued a compliance order charging the Sacketts with unlawfully filling a wetland. EPA's order directed the Sacketts to restore their property based on a finding that the Sacketts' placement of fill materials into wetlands constituted a discharge of pollutants without a permit in violation of the Clean Water Act. The Sacketts disputed that their property is a wetland within the jurisdictional scope of the Clean Water Act. EPA denied them a hearing, and the Sacketts filed for relief in the district court, claiming that EPA's order was both arbitrary and capricious in violation of the APA and their Fifth Amendment right to due process. They argued that immediate judicial review was imperative, because they and faced severe monetary penalties for noncompliance with EPA's order. The United States argued that the Sacketts could comply with the EPA order or submit an application for a wetlands permit or defend if EPA brings an enforcement action, but may not seek judicial review of EPA's compliance order. Both the district court and the Ninth Circuit agreed with EPA and denied the Sacketts any "pre-enforcement" review.

The Supreme Court's opinion, written by Justice Scalia, concludes that EPA's compliance order has all the hallmarks of finality under 5 U.S.C. § 704 of the APA: it required the Sacketts to restore their property according to an agency-approved plan, exposed the Sacketts to double penalties in future enforcement proceedings, and severely limited their ability to obtain a section 404 permit from the Army Corps of Engineers. *See* 33 C.F.R. § 326.3(e)(1)(iv)(2011)(providing that the Corps will not process a permit application when enforcement actions are pending unless doing so is clearly appropriate). The Court held that applying to the Corps of Engineers for a permit and then filing suit under the APA if that permit is denied does not provide an adequate remedy.

The Court had little difficulty in disposing of the government's argument that the Clean Water Act should be read as precluding judicial review under the APA, 5 U.S.C. § 701(a)(1). The APA creates a presumption favoring judicial review of administrative action, and the Court concluded that nothing in the Clean Water Act's statutory scheme precludes APA review. The Court was similarly not persuaded that the issuance of a compliance order is simply a step in the deliberative process. Justice Scalia's opinion concluded that "there is no reason to think the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction."

Justice Alito's concurring opinion is of interest because of its emphasis on the fact that the "reach of the Clean Water Act is notoriously unclear." Citing an *amicus* brief filed by the Competitive Enterprise Institute, Justice Alito cites EPA's guidance advising property owners that jurisdictional determinations will be made on a case-by-case basis. He concludes that allowing property owners to sue under the APA is "better than nothing," but only clarification of the jurisdictional reach of the Clean Water Act can rectify the underlying problem.

Given the *Sackett* decision, it will be important to see how EPA responds over time. Will EPA change its procedures to more thoroughly examine the facts and the law before deciding to issue orders? Will EPA rely as much on orders, or will EPA instead shift toward issuing warning or notice letters? If EPA issues orders, will EPA afford affected parties an opportunity for a hearing on the record? Would that hearing be before an Administrative Law Judge or would EPA rely on the Justice Department? As Justice Ginsburg notes in her concurring opinion, the Court's opinion does not address the issue of what standard lower courts should use in reviewing EPA orders.

The *Sackett* decision will be relied upon by parties who are subject to orders under other statutes that EPA administers. For some of the reasons cited by Justice Alito, the *Sackett* decision also underscores the need for clarification of the reach of the Clean Water Act. Stay tuned.

Theodore Garrett *is a partner of Covington & Burling LLP in Washington, D.C. and a former chair of the Section. He submitted an amicus curiae brief in* Sackett v. EPA *on behalf of the Competitive Enterprise Institute. Mr. Garrett can be reached at tgarrett@cov.com.*

Y'all come to the Fall Meeting in Austin!

By Angela R. Morrison

The 20th Section Fall Meeting will be held in Austin, Texas, this October 10–13, so pack up your boots and jeans and join us for the premier forum for discussions of the hottest topics in environmental, energy, and resources law. Don't miss out; make your plans now!

Located in central Texas on the eastern edge of Hill Country, Austin has beautiful natural areas and parks with abundant trees and wildflowers as well as native plants and grasses. Austin has much to offer intellectually, being home to the state capital, the Blanton Museum of Art, the Lyndon Baines Johnson Library & Museum, and the University of Texas. Austin has also emerged as one of the hottest cities for high-tech startup companies, in part because the community encourages creativity and nurtures free spirits. Locals thrive on diversity and enjoy touting their slogan "Keep Austin Weird."

Austin is a music haven known for diverse and unique brands of original music. On any given evening, you can enjoy live performances offered in dozens of venues such as coffee shops, restaurants, and bookstores, featuring all types of music genres, including folk, country, blues, jazz, pop, rock, alternative, and bluegrass. These and other nightlife opportunities abound throughout Austin's renowned Sixth Street entertainment district, a block from our venue.

On Thursday evening, Fall Meeting attendees will enjoy the Jason Roberts Combo, comprised of the core musicians from the legendary nine-time Grammy-winning band Asleep at the Wheel, which has helped preserve the traditional Western Swing sound. Music fans will also be excited to know the famous outdoor Austin City Limits Music Festival is taking place while we are in Austin with headliners this year including the Red Hot Chili Peppers and Neil Young.

Meeting highlights

The Fall Meeting theme this year is tied to energy policies and their natural resource and environmental consequences. We will discuss challenges energy companies face as our national energy policies swing like a pendulum from administration to administration and even from year to year. Experts will examine existing legal impediments to a better energy policy, and consider how to establish a clearer and more consistent energy policy going forward.

With energy comes heat, and Fall Meeting speakers will discuss the hottest topics in environmental law, including panels on potential implications from the upcoming election and recent U.S. Supreme Court decisions. EPA Assistant Administrator Cynthia Giles and others will examine EPA's "Next Generation Compliance" program and enforcement policies. Panels will focus on hydraulic fracturing, pipelines, federalism, and energy distribution challenges. You can also hear experts analyze current issues for renewables, utilities, climate change, air regulations, the nexus between water and energy, brownfield developments, and threatened and endangered species.

The Fall Meeting will feature excellent technical roundtables by our sponsors Bloomberg BNA, Geosyntec Consultants, and Cardno ENTRIX on topics ranging from groundwater and takings law to realistic cost estimates to wastewater management in the context of hydraulic fracturing. And we will learn about social media opportunities and enjoy a robust discussion of ethical obligations to take a matter up the corporate ladder. For more details on the sessions, please visit www.ambar.org/EnvironFM and select "Brochure" in the left-hand side navigation bar.

Because it is important to develop and improve our relationships with other attorneys in the field, the Fall Meeting will provide numerous opportunities for networking, including receptions and coffee breaks. Of note, you can join colleagues with similar interests at the Committee Get-Together Luncheon, and make new friends at a special dinner event at the Bob Bullock Texas State History Museum. If you are a young lawyer or law student, the meeting has special networking opportunities planned for you, including "Speed Networking" (like speed dating).

The Fall Meeting will also provide a public service opportunity with a project in conjunction with Keep Austin Beautiful.

Consider becoming a regular attendee of the Section's meetings. The more you participate in Section activities and the more you get involved, the more benefits you'll reap. After all, your career is what you make of it, and it often comes down to relationships that can prove invaluable. I can think of no better group to get to know than this one.

The 20th Section Fall Meeting will be held at the Hilton Austin. You are encouraged to make your hotel and airline reservations early. Meeting details and online registration are available at www.ambar.org/EnvrionFM. If you have a smart phone, be sure to download our mobile app to have easy access to the meeting schedule, maps, attendees, and more! Just search for "20th Fall Meeting" in your phone's app store. Please accept our invitation to join your colleagues in Austin in October. You won't be disappointed!

Angela R. Morrison *is a partner with the Tallahassee, Florida, firm Hopping Green & Sams and is chair of the 20th Section Fall Meeting in Austin. She can be reached at amorrison@hgslaw.com.*

Continued from page 1

Appellate practice

There appears to be an upward trend in the number of CVSG orders issued by the Supreme Court over the last 10–15 years. For example, from July 1998 through June 1999, the Solicitor General filed a total of seven amicus briefs in response to invitations from the Court; from July 2000 through June 2001, the Solicitor General filed fourteen such briefs; and most recently, from July 2010 through June 2011, the Solicitor General filed twenty-five invitation briefs. *See* http://www.justice.gov/osg/briefs/index.html. Consistent with that trend, ENRD has had to address an increasing number of important environmental, natural resources, and Indian law issues in CVSG briefs.

A number of commentators have noted the effect that an invitation brief filed by the United States may have on the likelihood that a particular petition will be granted (or denied). *See* D. Thompson & M. Wachtel, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for the Response and The Call for the Views of the Solicitor General,* 16 Geo. Mason L. Rev. 237 (2009). But the significance of CVSG orders extends beyond whether the Court agrees to hear a particular case. For example, the issuance of a CVSG order may require the government to develop a position on an important legal issue for the first time, or to resolve internal conflicts or tensions in positions that various agencies have taken in the lower courts. Furthermore, regardless of whether the Court grants certiorari, the positions the Solicitor General takes in a brief filed before the Court may be of great general significance to future litigation involving both governmental and private parties.

Reflecting the breadth of its appellate practice, ENRD has had a wide variety of constitutional law and other cases decided by the Court.

Recent CVSG briefs involving ERND

Recent noteworthy CVSG briefs in which ENRD was centrally involved include *Hogan v. Kaltag Tribal Council*, No. 09-960, which concerned the inherent sovereignty of Alaska Native villages to decide Indian child welfare cases. In its invitation brief, the Solicitor General opposed the granting of certiorari, and certiorari was ultimately denied by the Court. Another example of a CVSG brief is found in a case decided this Term, *PPL Montana v. Montana*, No. 10-218, which involved the test for determining whether rivers or river segments are navigable-in-fact for purposes of determining whether title to the river beds passed to the state at the time of statehood. In its invitation brief, the United States opined that certain aspects of the Montana Supreme Court's decision were incorrect, but supported respondent, the State of Montana, in opposing certiorari. Although the government opposed certiorari, the Court nonetheless decided to hear the case. The United States then filed an amicus brief on the merits supporting the petitioner, a hydropower company. The Court ultimately issued an opinion on the merits consistent with the United States' position regarding the correct standard for determining navigability.

The Supreme Court also recently invited the views of the United States in a series of important Indian law cases within ENRD's purview, in which the Court had to decide whether to take up cases involving state-tribal gaming compacts, Indian reservation boundaries, and enforcement of tribal court judgments. In all three cases the Supreme Court denied certiorari, consistent with the views expressed by the United States' CVSG briefs.

As of the time of writing of this article, there are at least five CVSG orders outstanding in cases of relevance to ENRD, involving a wide range of issues: whether a California rule requiring vessels to use low sulfur fuel is preempted by federal law, regulation of municipal sewage discharges under the Clean Water Act, whether runoff from forest roads requires a NPDES permit or is otherwise regulated under the Clean Water Act, whether certain tax payers had standing under state law to challenge tax treatment of Native Hawaiian lease interests, and claims that an interstate water compact (the Red River Compact) that apportions water among the signatory states preempts Oklahoma statutes that impose different standards on out-of-state appropriators than in-state appropriators. A complete listing of CVSG or "invitation" briefs filed by the Solicitor General for the 2011 Term is available at http://www.justice.gov/osg/briefs/2011/2011brieftypes.html.

Assuming that the current trend continues for the Supreme Court inviting the views of the United States at the petition for certiorari stage—on important issues relating to environmental, natural resources, and Indian law—CVSGs will continue to be an area of interest to Section of Environment, Energy, and Resources members.

Editor's Note: During the last week of its 2011 Term, the Supreme Court ruled on four of the five certiorari petitions in environmental/Indian law cases for which it had invited briefs from the Solicitor General, granting two and denying two. On June 25, 2012, the Court granted certiorari in *Decker v. Northwest Environmental Defense Center* (consolidated with *Georgia-Pacific West, Inc. v. Northwest Environmental Defense Center*), Nos. 11-374 and 11-338, and *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc.,* No. 11-460.

Ethan G. Shenkman *has practiced environmental law and Indian law in both the government and private sector. He is currently serving as Deputy Assistant Attorney General in ENRD, where he supervises ENRD's Appellate Section and Indian Resources Section and was previously partner at the law firm WilmerHale. He started his legal career as a Bristow Fellow in the Office of the Solicitor General. The views expressed in this article do not necessarily represent the views of the Department of Justice or the United States.*

PEOPLE ON THE MOVE

By Steven T. Miano

Corporate moves

Chuck Barlow recently was promoted to the position of Vice President, Environmental Strategy & Policy, for Entergy Corporation. Barlow previously served the company as lead in-house environmental counsel. In his new role, he will coordinate the company's environmental actions and response regarding a broad range of issues facing the energy industry. Entergy is an integrated, publicly held electric provider based in New Orleans. Barlow is based in the company's Jackson, Mississippi, office. He is a Section Council member and Governance Task Force vice chair.

James Checkley was recently appointed Vice-President, Legal and Regulatory, at LS Power Development, LLC, in Austin, Texas. Checkley will work on matters related to Cross Texas Transmission, LLC, a new transmission-only utility that was selected by the Texas Public Utility Commission of Texas to develop competitive renewable energy zone transmission lines. Checkley was previously a partner at Locke Lord LLP. He is a member of the Section's Book Publishing Board.

Firm moves

Wendy Bowden Crowther has joined Parsons Behle & Latimer's Salt Lake City office as a shareholder and a member of the Environmental, Energy, and Natural Resources Department. Crowther concentrates her practice on water law and represents municipalities, water conservancy districts, special service districts, irrigation companies, and private water rights holders. She also represents clients in Clean Air Act and Clean Water Act regulatory matters. Crowther's Section appointments include serving as a co-chair of the Section's Annual Conference on Environmental Law and as a Water Law Conference vice chair.

Lisa E. Jones recently joined Sidley Austin LLP as counsel in the environmental practice in the firm's Washington, D.C., office. Jones joined the firm from the U.S. Department of Justice, where she was a trial lawyer and then an assistant section chief in the Appellate Section of the Environment and Natural Resources Division. She is an editorial board member of the Section publication *Trends*.

Karl Karg was recently promoted to partner in the Environment, Land, and Resources Department at Latham & Watkins' Chicago office. Karg's practice focuses on the defense of enforcement actions and other lawsuits under the Clean Air Act, Clean Water Act, CERCLA, RCRA, and other environmental laws. He also advises clients on environmental management, compliance, transactional, policy, and government relations issues.

Charles Kazaz has recently joined the Environmental group at Blake, Cassels & Graydon LLP, working out of the firm's Montreal and Toronto offices. Kazaz represents clients in the mining, commercial, industrial, waste management, and property development sectors with respect to project development, on-going operational issues, and transactional matters.

Leah B. Silverthorn has joined Wooden & McLaughlin LLP in Indianapolis. Silverthorn's practice includes brownfields redevelopment and green real estate development, as well as the defense of claims brought under CERCLA, RCRA, and various state hazardous substances statutes across the country. She also advises clients on environmental insurance coverage. She is a vice chair of the Section's Constitutional Law Committee.

This and that

Shelia Hollis was honored as the University of Denver's Outstanding International Alumni, and was a featured speaker on the future of energy law at the 40th anniversary celebration of the university's Journal of International Law and Policy. Hollis also discussed opportunities and barriers for women entering the legal profession in the energy field. She is a partner and chair of the Washington, D.C., office of Duane Morris. Hollis is a Section delegate to the ABA House of Delegates and is a former Section chair.

The Environmental Law Institute recently announced the election of **Edward L. Strohbehn Jr.** as its new board chairman and **Alexandra Dapolito Dunn** and **Ann R. Klee** as board members. Strohbehn is of counsel at Bingham McCutchen in San Francisco and Washington, D.C., and serves as a member of the Leadership Council of the Yale School of Forestry and Environmental Studies. He is a former Section council member. Dunn serves as the executive director and general counsel for the Association of Clean Water Administrators in Washington, D.C. Dunn is the Section's chair-elect. Klee is vice president for Environment, Health & Safety at General Electric in Fairfield, Connecticut. She is a former Section Council member.

Steven T. Miano *is a shareholder at Hangley Aronchick Segal & Pudlin in Philadelphia. He is a contributing editor to Trends. Information about Section members' moves and activities should be e-mailed to Mr. Miano at smiano@hangley.com.*

AMERICAN BAR ASSOCIATION
Section of Environment, Energy, and Resources

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Trends to Become an Electronic-Only Publication!

Beginning with the **September/October 2012** issue, your Section newsletter ***Trends*** will become an electronic-only publication. Watch for ***Trends*** in your e-mail inbox!

The electronic format allows you to access articles and back issues online. Individual articles are posted in html format and contain hyperlinks to important cases and other resources cited in the text.

To ensure you receive your electronic issue of ***Trends***, 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.

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