TRENDS
ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES NEWSLETTER

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Rising tide and crosscurrents: Federal regulation of ocean renewable energy

By Thomas C. Jensen

The year 2007 will be seen as the year that ocean renewable energy—wave, tidal, and current power projects in marine areas—officially arrived on the national stage. Over the course of the year, the first prototype tidal and wave projects went into operation. Developers, local governments, utilities, and speculators fought to claim the best sites. Investors pumped millions of dollars into start-ups. Congress held hearings and took up legislation. *The Washington Post* and *The New York Times* ran prominent stories with splashy graphics. Coastal states jockeyed to become new industry hubs. Lawyers and consultants held conferences and primped their Web sites. NIMBY groups emerged. Coalitions formed. The "hot topics" panel at the ABA Section of Environment, Energy, and Resources' 2007 Annual Conference on Environmental Law even included discussion of ocean energy.

After all the activity and attention, however, 2007 ended as it had begun with respect to the two essential factors that will decide the fate of the ocean renewable energy industry: basic physics and federal rules. One factor will never change, but the other must.

Immutable and alluring is the fundamental fact of physics that moving water is a gold mine of renewable energy. Water is 800 times denser than air—a cubic meter of moving water can carry 800 times the energy of a cubic meter of moving air. With wind energy projects now proving themselves profitable using a "fuel" that is one eight-hundredth the energy resource of waves, tides, and currents, it is simple to understand ocean renewable energy's powerful appeal to industry and policymakers.

The factor that must change—if ocean renewable energy technology is to have a meaningful future in the United States—is the federal regulatory system. The physics may be clear, but the law is not. The regulatory environment for ocean renewable energy is composed of laws written with no awareness of or intent to deal with ocean renewable energy projects. Technology is ahead of the law.

Private use of the public's sea

Ocean renewable energy's emergence confronts policymakers with a "public lands" issue as important as any the country has faced. Unlike other renewable technologies, ocean renewables are entirely a "public lands" play. Ocean energy cannot come into being on the foundation of private deals. The foundation of the industry will not be farmers and ranchers in windy places seeking an extra cash crop or homeowners hoping a new solar roof will spin the meter backward. The foundation will be the concurrence of federal, state, and tribal natural resource and environmental agencies, and their constituencies, as to how to use the sea—the largest part of our national territory—for renewable energy production.

The scale of the public policy issue is equal to that embedded in the iconic public lands laws, such as the Homestead, Mining, and Reclamation Acts, and the laws creating the original national forest reserves, parks, and monuments. The critical difference, of course, is that the public policy issue of ocean renewable energy development will be addressed against the backdrop of contemporary environmental laws, which were nowhere to be seen in the late nineteenth and early twentieth centuries when America set most of the rules for development of its terrestrial domain.

How to integrate energy development with the harvest and fish habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act? How to address the concerns of states that regulate fisheries in state waters and onto whose beaches power cables will come ashore? Which parts of the ocean should be seen as "wilderness" and which as the equivalent of multiple use lands?

Distracted by "Who?" instead of "How?"

Policymakers are beginning to respond, but they have gotten off on the wrong foot. Instead of focusing on how to help the new industry move forward in a way that respects the public interest, government officials and lawmakers are devoting most of their energy to fighting over which agency should be in charge.

The starting point for the jurisdictional fight is the 1953 federal Submerged Lands Act (SLA). The SLA granted the states ownership and authority over submerged lands inside 3 nautical miles from the coastline, including both ocean and freshwater areas. The federal government would hold title to submerged lands in U.S. territorial waters outside that limit. Under the Outer Continental Shelf Lands Act (OCSLA), enacted as a companion to the SLA, the Department of the Interior (DOI) would have authority to lease and regulate mineral development in the federal areas.

Congress specifically reserved federal authority in state waters with respect to commerce, international affairs, defense, and "*water power, or the use of water for the production of power*." The SLA's legislative history is reasonably clear that the reservation of federal authority was intended to preserve the Federal Power Commission's, now Federal Energy Regulatory Commission (FERC), Federal Power Act jurisdiction over in-river

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More about the future

In the last issue I wrote about the future of the practice of our Section members, and recent actions show how the future is full of opportunities. President Bush has signed the Energy Independence and Security Act of 2007, which sets a Renewable Fuel Standard requiring the production of least 36 billion gallons of biofuel by 2022 and a fuel economy standard of 35 miles per gallon for motor vehicles by 2020. This is the first increase in fuel economy standards since they were enacted in 1975.

At the UN Climate Change Conference in Bali, Indonesia, participants agreed to the Bali Action Plan, which charts the course that will ultimately lead to a post-2012 international agreement on climate change by the end of 2009. In an unrelated action, the U.S. Environmental Protection Agency denied California's request for a waiver to enforce more stringent motor vehicle emissions standards.

Two years ago, former Section Chair Michael Gerrard provided his list of ten growth areas of environmental law practice in a *Trends* column. Here I evaluate his list, not to be critical of that effort, but rather to see how dynamic our area of practice has been. My methods of evaluation are no more scientific or official than were his.

1. "*Toxic torts*—Scientific discoveries about the effects of various chemicals . . . create fertile ground for toxic tort litigation." This is still a vibrant area.
2. "*Global climate change*—Concern about sea level rise, extreme weather patterns, desertification . . ." Another on target prediction. With the *Massachusetts v. EPA* decision, three coalitions of U.S. states and Canadian provinces underway, and legislation pending in Congress, this is a major area for the Section. The ABA House of Delegates resolution in February 2007 places the Section in a premier position. The Section has been aided by our book *Global Climate Change and U.S. Law*, edited by Michael Gerrard.
3. "*Land use disputes*—Population and economic growth increase pressures on the use of land." Still a top area, but resource disputes probably are occupying most of this area.
4. "*Deals gone bad*—Legislation over the past decade has granted hazardous substance liability relief to certain kinds of parties, but has not reduced the overall cleanup costs." Not as vibrant as expected.
5. "*Regulated chemicals*—Advances in toxicology and analytical chemistry are finding new dangers and emerging fields like nanotechnology may be creating new hazards." Larger than predicted, and the Section's efforts on nanotechnology and the precautionary principal issue I wrote about dovetail well with this topic.
6. "*Natural resource damages*—The potential recoveries are so large that massive litigation can ensue." I agree, although this area has not been as active as I would have thought.
7. "*Homeland security/infrastructure protection*—Since 9/11, there is increased concern over protection of . . . critical infrastructure." This was on target and is a continuing hot topic.
8. "*Grandfathered facilities*—Examples are the controversies over New Source Review under the Clean Air Act . . ." On target. The AEP settlement with an annual reduction of 813,000 tons of air pollutants at an estimated cost of $4.6 billion, a $15 million penalty, and $60 million on SEP projects set many records.
9. "*Brownfields development.*" A steady area that has not blossomed as many thought it would.
10. "*Corporate compliance*—The current climate of disclosure and accountability is leading to more use of environmental management systems and product stewardship programs." This area has been subsumed into a greater topic of sustainability with shareholder initiatives, greening of boardrooms, and SEC pressures.

In conclusion, our Section understands trends in our practice and delivers services about them to our members.

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Section Spotlight

Student Writing Competition

The Environmental Law Institute, the National Association of Environmental Law Societies, and the Section announce the third annual "Endangered Environmental Laws" Student Writing Competition. Law students are invited to submit papers exploring current issues of constitutional environmental law addressing recent developments or trends in U.S. environmental law that have a significant constitutional or "federalism" component. There is a $2,000 prize plus an offer of publication in ELI's *Environmental Law Reporter*. The competition deadline is April 4, 2008. For details, please visit http://www2.eli.org/writingcontest.htm.

Nanotechnology Project—Phase II

The Section's Pesticides, Chemical Regulation, and Right-to-Know Committee is launching Phase II of its Nanotechnology Project. The Section recently completed Phase I successfully, which included the preparation of seven white papers and the Nano Quick Teleconference (QT) Track. This new phase is intended to address important legal topics not covered in Phase I. The committee is soliciting interested lawyers to volunteer to work on teams that will develop issue papers and teleconference programs related to the following statutes: FQPA, FFDCA, NEPA, and ESA. For full details and contact information, please visit www.abanet.org/environ/nanotech/.

Model Sustainability Policy

The Section's Climate Change, Sustainable Development, and Ecosystems Committee, with the help of several dozen members, has created a draft Model Sustainability Policy for law organizations. The Model Sustainability Policy and Implementation Guideline shows how sustainable development relates to lawyers and their individual firms, corporate law departments, and other law organizations. The tool is designed to allow such entities to show in a meaningful way the actions they have taken to promote sustainability. Full details of the project are available at www.abanet.org/environ/committees/climatechange/ModelLaw/about.shtml.

ABA-EPA Law Office Climate Challenge

The Section and the U.S. Environmental Protection Agency (EPA) have designed a program to encourage law offices to take simple, practical steps to become better environmental and energy stewards. Law offices may participate by joining at least one of three voluntary EPA partnership programs.

Congratulations to the following law firms for recently qualifying as Law Office Climate Challenge Partners: Bowditch & Dewey, LLP; Crowell & Moring LLP; Davis Polk & Wardell; Edgcomb Law Group; Fairfield and Woods, P.C.; Gallop, Johnson & Neuman LC; Godfrey & Kahn SC; Hogan & Hartson LLP; Holland and Knight LLP; IMS Expert Services; Lara Pearson, Ltd.; Littler Mendelson, P.C.; Lowenstein Sandler PC; Luper Neidenthal & Logan; Marten Law Group; Newmeyer & Dillion LLP; Novack and Macey LLP; O'Melveny and Myers LLP; Pear Sperling Eggan & Daniels PC; Robins, Kaplan, Miller & Ciresi LLP; Schwabe, Williamson & Wyatt; The Session Law Firm; Stoel Rives LLP; Tonkon Torp LLP; and Van Kley & Walker LLC. For full details of each firm's participating locations, please visit the Climate Challenge pages on the Section Web site.

Call for nominations—Distinguished Achievement

The Standing Committee on Environmental Law and the Section invite nominations for the *2008 Award for Distinguished Achievement in Environmental Law and Policy*. This award recognizes individuals or organizations and programs that have distinguished themselves in environmental law and policy by contributing significant leadership in improving the substance, process, or understanding of environmental protection and sustainable development. Nominations are due *on or before March 28, 2008*. For details about the Distinguished Achievement award, please visit www.abanet.org/publicserv/environmental/ or call the Standing Committee at (202) 662-1694.

Call for nominations—Excellence in Stewardship

The Section invites nominations for the *2008 ABA Award for Excellence in Environmental and Resources Stewardship*. Nominees must have demonstrated significant achievement or leadership in sustainable development or environmental or resources stewardship. Nominations are due *on or before June 13, 2008*. For details about the award and nomination process, please visit www.abanet.org/environ/sectaward/.

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Defining "significant nexus" after *Rapanos*

By Joshua A. Bloom and Estie A. Manchik

After almost twenty-two years, the U.S. Supreme Court completed in 2006 what can be considered its Clean Water Act (CWA) jurisdictional trilogy. Unfortunately, the Court has done little more than muddy the waters in defining the extent of the federal government's authority under the CWA. In addition, the Court is unlikely to have spoken its final word on the matter. The three cases are *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. U. S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*); and *Rapanos v. United States*, 126 S. Ct. 2208 (2006). Taken together, however, these three cases do suggest the parameters of the CWA's scope. As discussed below, that may prove to be enough for the U.S. Army Corps of Engineers (the Corps) to undertake the agency action the Court has invited.

Two competing standards for a CWA jurisdictional threshold are found in *Rapanos*: Justice Kennedy's "significant nexus" test and the plurality's two-part test (i.e., whether the receiving waters have a relatively permanent flow and whether those waters have a continuous surface connection to navigable-in-fact waters). Most courts that have followed *Rapanos* have concluded that satisfying either test will suffice. The Department of Justice in its case briefs and the U.S. Environmental Protection Agency (EPA) and the Corps in their draft June 2007 joint guidance document have reached the same conclusion. *See Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos* at www.epa.gov/owow/wetlands/guidance/ CWAters.html (June 5, 2007). It is the "significant nexus" test, however, that appears to be the primary jurisdictional focus.

Assuming a significant nexus between a wetland and navigable water (or between any "water" and a navigable-in-fact water) is required to confer jurisdiction under the CWA and that ephemeral or intermittent streams can constitute statutory "waters," the question remains, "How is a significant nexus to be defined?"

As Justice Kennedy persuasively reasons in *Rapanos*, the plurality's requirement for a continuous surface connection between the wetland and navigable water simply finds no support in the CWA, *Riverside Bayview*, or *SWANCC*. According to Justice Kennedy, a mere hydrologic connection cannot suffice in all cases. *See also U.S. v. Robison*, 505 F.3d 1208 (11th Cir. 2007).

Moreover, contrary to the plurality's assertion that dredged or fill material normally does not wash downstream, Justice Kennedy, and Justice Stevens in his dissent, made clear that the assertion simply is untrue. Justice Kennedy noted that the discharge of dredged and fill material should be treated the same as the discharge of any other pollutant under the CWA. Justice Kennedy articulated the clear intent of the CWA to maintain wetlands that provide filtering and other attributes to benefit adjacent bodies of water.

The Corps' current regulations define "adjacent" but do not address "significant nexus." *See* 33 C.F.R. § 328.3(a). Interestingly, the definition of "significant nexus" may be summoned from the Fifth Circuit, which has taken possibly the narrowest view of any circuit in interpreting *SWANCC* and *Rapanos*.

In *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), the Fifth Circuit took one of the more confining post-*SWANCC* views of any court, requiring evidence of a "close, direct and proximate link between [the] discharges of oil and any resulting actual, identifiable oil contamination" of a navigable-in-fact water. *Id*. at 272. *See also In re Needham*, 354 F.3d 340, n. 9 (5th Cir. 2003) (quoting *Rice v. Harken*). Further, in *United States v. Chevron Pipe Line Co*., 437 F. Supp. 2d 605, 614 (N.D. Tex. June 28, 2006) (appeal to Fifth Circuit pending), the Northern District of Texas noted that one "must look to see if there is a genuine issue of material fact as to whether the farthest traverse of the spill is a navigable-in-fact water or adjacent to an open body of navigable water."

In *Chevron*, the court laid the burden on the government to show that the pollutants in question "actually reached a navigable waterway—some evidence more than speculation that such an event could occur." *Id*. at 615. The district court added that

> [i]f the effects of the pollutant have occurred upon a navigable-in-fact water, or is so likely to occur as the United States argues, then it should not be too onerous a task for the United States to come forward with some actual, concrete evidence at the summary judgment stage showing that the pollutant reached a navigable-in-fact water or waters adjacent to an open body of navigable water.

Id. at 615, n. 14.

Similarly, in *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), the Ninth Circuit functionally applied the same "significant nexus" test formulated by the district court in *Chevron*. Following Justice Kennedy, it found a significant nexus existed between a man-made pond and

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a nearby navigable water because the pond had a significant effect on the chemical, physical, and biological integrity of the navigable water. *See also San Francisco Baykeeper v. Cargill Salt Division*, 481 F.3d 700 (9th Cir. 2007) ("mere adjacency" as a basis for CWA jurisdiction could be applied only to wetlands adjacent to navigable waters, and not where a nonwetland, isolated pond was adjacent to the navigable body of water). The *Cargill* court, in analysis very similar to that in *Chevron*, found that "[b]y any permissible view of the evidence," the effect of the pond on the navigable water "is speculative and insubstantial; the Pond does not affect the integrity of" the navigable water. *Id.* at 708. The court said expert testimony that "it is possible" water from the pond could flow to the navigable water under the right hydrologic conditions "fits the definition of 'speculative.'" *Id*.

The Ninth Circuit, the pre-*Rapanos* Fifth Circuit, and the district court in *Chevron* appear to address what Justice Kennedy meant by "significant nexus," at least with respect to discharges to surface waters, intermittent or not. However, they do not directly address the issue of determining the jurisdictional status of an "adjacent" wetland that acts to keep pollutants out of navigable waters rather than contributing pollutants to the navigable-in-fact water. Although Justice Kennedy in *Rapanos* suggests that mere adjacency itself is enough to establish jurisdiction, his suggestion seems to be based on a presumed nexus between the adjacent wetland and navigable water.

Indeed, with regard to wetlands adjacent to navigable waters, Justice Kennedy stated that "the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone." *Rapanos*, 126 S. Ct. at 2248. For consistency, the Corps might well consider whether to apply a factual significant nexus test to adjacent wetlands as well or, in the alternative, apply a rebuttable presumption to a finding of jurisdiction and permit a prospective permittee the opportunity to show that no such significant nexus exists in a particular circumstance. Justice Kennedy provides some direction on how to apply the significant nexus test to adjacent wetlands with his discussion of the filtering and other benefits wetlands have to other waters. That same test could be applied as well to establish or refute the connection between a wetland adjacent to a nonnavigable water and navigable water. The key to establishing that connection would be hard evidence (not speculative or insubstantial evidence) that the wetland beneficially impacts the navigable water.

The Corps' current regulations may possibly be retained while adding a controlling proviso that such waters are jurisdictional only if they have a "significant nexus" to "waters currently used, used in the past, or susceptible to use in interstate or foreign commerce." Consistent with the reasoning and jurisdictional limitations set forth in *Riverside Bayview*, *SWANCC*, and Justice Kennedy's significant nexus test, and absent legislative action clarifying the matter, the Corps should consider amending its regulations as follows:

> New subsection 33 C.F.R. § 328.4(d) (Limits of Jurisdiction): *For the purposes of subsections (2), (3), (4), (5), and (7) of § 328.3(a), jurisdiction under the Clean Water Act is conferred only to the extent discharges to the waters set forth in such subsections have a significant nexus to a water which is currently used, or was used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide*.
>
> A new definition at § 328.3 of "significant nexus": *The term significant nexus means an impact to a water which is currently used, or was used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide. For the purposes of this definition, the burden shall be on the entity seeking to apply jurisdiction to demonstrate such impact. Evidence that a pollutant has reached such water shall constitute a rebuttable presumption of impact. With respect to discharge of dredge or fill materials into adjacent wetlands under § 328.3(a)(7), a rebuttable presumption of impact shall be demonstrated by evidence that the wetland functions as an integral part of the aquatic environment of such water*.

Two competing standards for a CWA jurisdictional threshold are found in *Rapanos*.

While the specifics of the regulation (and parallel changes to EPA regulations) certainly can be debated, the basic principle is this: If a discharge impacts a navigable-in-fact water, that discharge should be jurisdictional. For example, if there is a discharge to an intermittent creek and that creek connects to a tributary (or a series of tributaries or other hydrologically connective features) of a navigable-in-fact water, the question in applying the presumption becomes whether the pollutant discharged actually makes it to the navigable-in-fact water. Conversely, if the pollutants are discharged to the intermittent creek while the creek is dry and sufficient cleanup precludes the pollutant from actually impacting the navigable-in-fact water, then the discharge is not subject to CWA jurisdiction. It would not necessarily be enough that a single molecule of the pollutant makes it to the navigable water, but if evidence demonstrates that the molecule makes it that far, it is up to the party contesting jurisdiction to present a credible argument that there is no actual impact. Similarly, if the issue is whether an adjacent wetland is an integral part of the aquatic environment associated with a navigable-in-fact water, the Corps would have to demonstrate that impacts that otherwise would affect that navigable water are in fact mitigated by the presence of the adjacent wetland.

Ultimately, the public review process and judicial challenges to any regulation on this matter will frame the final regulation. The Corps needs to start at some point, however, and it might as well start now.

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By Theodore L. Garrett

Constitutional law

A district court in California held that a municipal ban on land disposal of sewage sludge, or "biosolids," violated the Commerce Clause. *City of Los Angeles v. County of Kern*, 509 F. Supp. 2d 865 (C.D. Cal. 2007). The court found that the measure has the discriminatory effect of banning Los Angeles sludge, forcing the county to develop alternate recycling sites, most probably in Arizona, while allowing in-county sludge producers to continue to dispose of sludge locally. The court concluded that the ordinance cannot withstand scrutiny under the dormant Commerce Clause because the county could have guarded against environmental harm with a more tailored regulation regarding the location, quality, and volume of biosolids applied to land.

CERCLA

The 9th Circuit reversed a district court's grant of summary judgment, based on the "useful product doctrine," to companies that sold lead content materials at prevailing commodity prices to a former lead processing facility that incurred cleanup costs. *Calif. Dep't Toxic Substances Control v. Alco Pacific*, 2007 WL 4180593 (9th Cir. Nov. 28, 2007). A jury could conclude that the dross and slag were by-products and not defendants' principal product, the court held, and thus that the transactions were intended as arrangements for disposal or treatment of a hazardous substance.

In light of the Supreme Court's decision in *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331, the Third Circuit reversed its earlier decision and held that DuPont could pursue an action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to recover from the United States after the company voluntarily cleaned up its sites. *E.I. Du Pont de Nemours v. United States*, 2007 WL 4105651 (3d Cir. Nov. 20, 2007). The court held that, following *Atlantic Research*, a party may rely upon § 107 and need not be an innocent party, noting that voluntary cleanups are vital to fulfilling CERCLA's purpose and that recoverable cleanup costs must be consistent with the national contingency plan.

A party that conducts a cleanup under a settlement with the United States may bring a contribution action under CERCLA § 113(g) only within three years of the date of a settlement. *RSR Corp. v. Commercial Metals*, 496 F.3d 552 (6th Cir. 2007). The court rejected RSR's argument that the six-year statute of limitations should apply because the exact amount of liability is unknown, reasoning that the consent decree established RSR's liability for cleanup costs.

A party who enters into a voluntary EPA administrative consent order to perform a streamlined and focused remedial investigation and feasibility study may not sue for contribution to recover $2 million in costs incurred. *ITT Industries v. BorgWarner*, 506 F.3d 452 (6th Cir. 2007). The order did not resolve CERCLA liability and did not constitute a settlement under §113(f)(3) because EPA reserved its right to adjudicate Plaintiff's liability for failure to comply with the order and Plaintiff has not conceded liability. The issue whether a claim under § 107 may proceed under the Supreme Court's *Atlantic Research* decision was remanded to the district court.

Air quality

The fuel economy (CAFE) standards promulgated by the National Highway Traffic Safety Administration were held invalid by the 9th Circuit. *Center for Biological Diversity v. NHTSA*, 2007 WL 3378240 (9th Cir. Nov. 15, 2007). The agency failed to analyze the benefit of greenhouse gas emissions reduction under the Energy Policy and Conservation Act, the court held, or to consider under NEPA the cumulative impact of such emissions on climate change and the environment.

Modifications to three industrial boilers at a heating plant without obtaining permits violated the Clean Air Act, a district court held. *Sierra Club v. Morgan*, 2007 WL 3287850 (W.D. Wisc. Nov. 7, 2007). The court rejected defendants' argument that the projects were routine maintenance and repair, and replacement (RMMR). The court found RMMR was contradicted by their large scope, infrequency, a purpose to increase reliability and availability or productivity or efficiency, and/or funding as a capital project.

Water quality

The 11th Circuit rejected the government's position that, to establish Clean Water Act jurisdiction, it may rely either on the Justice Scalia's justice plurality opinion in *Rapanos* or the concurring opinion by Justice Kennedy who provided the fifth vote. *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007). Reversing a criminal conviction, the court held that the jury

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charge was erroneous because it did not require a "significant nexus" to navigable waters, as set forth in Justice Kennedy's concurrence, or the need to consider the chemical, physical, or biological effect on a navigable water.

In a split decision, the 9th Circuit held invalid EPA's review of effluent guidelines and limitations based on a hazard-based approach. *Our Children's Earth Foundation v. EPA*, 506 F.3d 781(9th Cir. 2007). The majority found that the statute requires a technology-based approach to the periodic review of effluent guidelines as technology improves and that EPA's position on this issue has been inconsistent and therefore entitled to less deference. The dissent would have found that the district court lacked jurisdiction because there is not a clear-cut mandatory duty on the part of EPA.

The Sierra Club was entitled to attorney's fees as a "prevailing or substantially prevailing party," even though the alleged violations were resolved by a consent decree with the United States to which the Sierra Club was not a party. *Sierra Club v. Hamilton County Board of Commr's*, 504 F.3d 634 (6th Cir. 2007). Without the Sierra Club's efforts, the initial consent decree would not have been withdrawn, the majority stated, and a more comprehensive consent decree would not have come to fruition. The dissent emphasizes that the Sierra Club proceeded exclusively as an intervenor in the government's enforcement action, and thus was not a prevailing or substantially prevailing party in its own citizen suit.

Energy

A district court held that the government acted unlawfully in directing Kerr-McGee to pay royalties on natural gas and oil it produced in 2003 and 2004 for eight leases the company operated under the Outer Continental Shelf Deepwater Royalty Relief Act of 1995. *Kerr-McGee Oil & Gas Corp. v. Allred*, 2007 WL 3231634 (W.D. La. Oct. 30, 2007). The court rejected the government's argument that the royalty relief provisions of the act did not apply because the average annual price of natural gas and oil was in excess of price thresholds defined by Congress, agreeing with Kerr-McGee that its mandatory relief leases were not subject to price thresholds for royalty-free production below the minimum volume of royalty-free production.

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Calendar of Section Events

2008

- **37th Annual Conference on Environmental Law**
  March 13–16, 2008
  Keystone, Colorado
- **Symposium: Common Grounds, Common Waters: Toward a Water Ethic**
  March 14, 2008
  Santa Clara, California
  (Cosponsored with the Santa Clara Journal of International Law)
- **Mining Law Reform: A Review of Current Legislative Proposals**
  March 17, 2008
  Quick Teleconfrence
- **Eastern Water Resources Confrence: Eastern Water Law–A Climate of Change**
  May 1–2, 2008
  Charlotte, North Carolina
- **ABA Annual Meeting**
  Aug. 7–12, 2008
  New York
- **16th Section Fall Meeting**
  Sept. 17–20, 2008
  Phoenix

For more information, see the Section Web site at www.abanet.org/environ/ or contact the Section at (312) 988-5724 or environ@abanet.org.

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Eastern water law: Less water, more change

By Catherine D. Little

At the time of this writing, more than one-third of the Southeastern United States is in a severe drought, including most of Tennessee, Alabama, North Carolina, and South Carolina, as well as parts of Kentucky and Virginia. The Atlanta area, with a population of 5 million, is in the middle of the affected region and is presently the largest metropolitan area struggling with extreme drought conditions. Along with other pressures on available water supplies, drought conditions bring to the forefront a variety of legal and policy issues that Eastern states will have to contend with in coming years to attain a more predictable and equitable allocation of public and private uses of a limited resource. In this context, this article will provide a short background summary of Eastern water law, briefly address water quantity policies in the East, and consider current water quantity issues.

History of Eastern water law

Two legal doctrines underpin the historical allocation of water in the United States: the Appropriation Doctrine in the West and the Riparian Doctrine in the East. The rationale for adopting one doctrine or the other rested in the quantity of water available; less water compelled an administrative system of priority whereas more water had the luxury of conferring a right of reasonable use. Over time, however, the differences between the two doctrines, and the variations of each, have become less meaningful.

The Riparian Doctrine is a common law concept that assimilates water to the land through which it flows, such that a person whose land has frontage on a body of water has the right to use the water. This riparian right is limited to a reasonable use and cannot interfere with other riparian landowners' uses. All of the states east of Texas, except Mississippi, have traditionally adopted the Riparian Doctrine, or some variation thereof, and these states historically have had abundant water supply. Much of Eastern water law has been developed through the courts, and Eastern state legislatures generally did not adopt water codes until well into the twentieth century. *See, e.g.,* Florida, Laws 1957 c. 57-380; *see generally* K. Wright (ed.), *Water Rights of the Fifty States and Territories* 19 (AWWA 1990) and K. Wright (ed.), *Water Rights of the Eastern United States* (AWWA 1998) for a thorough discussion of Eastern water law and the Riparian Doctrine.

In contrast, settlement of the arid Western states led to development of the Appropriation Doctrine, a priority based system—"first in time, first in right"—that ensures those who first appropriate water to a beneficial use will have priority over future users. Water rights under the Appropriation Doctrine are not connected to the riparian land to which the water is attached; instead, they can be sold separately from the land. The doctrine is established through statutory and administrative processes, and permits are typically required. Once a right is perfected, it is superior in priority to future rights. If the water right is not used, however, it can be lost. *See, e.g., Coffin v. Left Hand Ditch Co.,* 6 Colo. 443 (1882).

While groundwater has historically been treated differently than surface water in the Eastern states, most Eastern states now view groundwater in the context of the Riparian Doctrine's "reasonable use" standard. This is reflected in the evolution of case law and the Restatement (Second) of Torts, as well as in various permitting schemes in the Eastern states. *See* J. Dellapenna, "Riparianism," in 1 R. Beck (ed.), *Water and Water Rights* § 7.02(d) at 241 (1991); *see, e.g.,* Georgia's Groundwater Use Act of 1972, O.C.G.A. § 12-5-90 *et seq.*

Water quantity policies in the East

Rapid economic and population growth following World War II placed increasing demands on water resources throughout the country. In riparian states, the inefficiencies of the riparian "reasonable use" standard to effectively allocate water resources in times of drought or increased need caused several states to develop administrative water withdrawal permitting programs. The Eastern system of permitting has frequently been referred to as "Regulated Riparianism." *See* K. Wright (ed.), *Water Rights of the Eastern United States* (AWWA 1998), *supra*.

These permitting programs have become a means of allocating water and regulating the use of water resources through a variety of withdrawal and discharge permits. Some Eastern states, such as Connecticut, Delaware, Florida, and Georgia, have strong regulatory systems that administer the allocation of surface water and groundwater. Others, such as Maine, Michigan, and Tennessee, follow a more benign "registration" approach. *Id*.

Current issues

Increasing demands for water resources continue to intensify because of a myriad of issues: periods of extended drought, population growth, demographics, economic development, the balance between providing drinking water and sufficient protection of wildlife habitats, and climate change. As the demands intensify, so too does the need for further refinement in Eastern water law.

In response to the overarching concerns about the sufficiency of current and future water supplies, many states are now engaged in comprehensive, statewide water planning efforts to overlay their administrative permitting processes. For instance, Georgia's Environmental Protection Division recently proposed a Draft Comprehensive Statewide Management Plan, the purpose of which is to develop a comprehensive plan that addresses the state's long-term water needs and conservation efforts pursuant to O.C.G.A. § 12-5-522(a). (The agency presented a final plan to

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the Georgia General Assembly at the outset of Georgia's 2008 legislative session, and although there is opposition to the plan, it is likely that it will be adopted by the Georgia legislature in 2008.) Effective planning for future water use relies on each state's ability to quantify its uses, demands, and threats, both present and future. Of equal importance will be each state's ability to flexibly respond to these needs by using creativity in the administration of the regulatory system and in managing shared resources both intrastate and interstate.

That creativity will likely need to extend to increasing the use of interbasin transfers in the East, although a number of obstacles exist. While not a new concept, particularly in the drier Western states, large-scale interbasin transfer to resolve water supply issues has traditionally not been pursued by the Eastern states. Some Eastern states have laws in place to permit interbasin transfers, while many do not. North Carolina, for instance, has been regulating interbasin transfers since 1993, but the state recently adopted a revised rule that requires a more comprehensive statewide analysis when considering interbasin transfer certificates. N.C. GEN. STAT. § 143-215.22L. Georgia allows it in some instances, but not in others. For example, the metropolitan Atlanta area, the largest consumer in the state, is prohibited from transferring water from outside the sixteen-county metro area. Regardless, interbasin transfers are potentially vulnerable to challenge by other riparian interests in the same basin from which the water is being withdrawn as well as under environmental laws requiring a host of considerations before granting a transfer.

Effective planning for future water use relies on each state's ability to quantify its uses, demands, and threats, both present and future.

Interbasin transfers could provide long-term flexibility in seeking to resolve regional water supply issues and may be a useful tool for both intrastate and interstate management of shared resources. Such transfers also could be less costly than more innovative approaches, such as desalination in coastal states. Ongoing disputes—such as those between Georgia, Alabama, and Florida over the past two decades concerning management of Lake Lanier and the Apalachicola-Chattahoochee-Flint river basins and the dispute between Georgia and Alabama regarding the Alabama-Coosa-Tallapoosa river basins—could potentially include interbasin transfer as a component of their resolutions. *See In re: Tri-State Water Rights Litigation*, No. 3:07-MD-01-PAM-HTS (M.D. Fla.) (*filed* Mar. 2007) (consists of five different cases transferred by the Judicial Panel on Multidistrict Litigation to the United States District Court for the Middle District of Florida); *City of Apalachicola v. United States Army Corps of Engineers*, 4:8-CV-23 (N.D. Fla.) (*filed* Jan. 2008). Other states face similar threats, such as a recent suit filed by South Carolina against North Carolina in the U.S. Supreme Court over use of the Catawba River, and a resolution passed by the Georgia Legislature suggesting that the state of Georgia may pursue the correction of the state line at the 35th parallel between Georgia and Tennessee that was incorrectly surveyed in 1818, the result of which would provide Georgia with rights to the Tennessee River.

While interbasin transfers potentially provide a unique option for resolving water supply issues at a regional level, there are developments at the national level that could weaken that potential. There is significant debate in both the federal judicial and administrative arenas as to whether National Pollutant Discharge Elimination System (NPDES) permits should be required for such transfers. An appeal is pending before the Eleventh Circuit Court of Appeals of a Florida district court decision ordering the South Florida Water Management District to obtain an NPDES permit for a water transfer utilized as part of a federal water project. *Friends of the Everglades, Inc. v. South Fla. Water Mgt. Dist.*, No. 02-80309-CIV-ALTONAGA/Turnoff (S.D. Fla. June 14, 2007), *appeal docketed,* No. 07-13829-HH (11th Cir. Aug. 20, 2007). At the same time, the U.S. Environmental Protection Agency (EPA) has been evaluating comments to a rule it proposed in June 2006 that would exempt water transfers from NPDES permitting under Section 402 of the Clean Water Act, consistent with EPA's historical position that water transfers are nonpoint sources of water pollution not subject to permitting under Section 402. 71 Fed. Reg. 32,887 (June 7, 2006). EPA is still reviewing the many comments it received, but action is expected within the next several months. In the interim, there is mounting concern that EPA may adopt a radically different approach for which it requested public comment, entitled "designation authority," whereby EPA and states would have the ability to permit interbasin transfers as point sources where water quality may be impaired.

Looking to the future

With the sustained droughts in the East that climate change impacts portend and the pressure of increased demands from population growth, Eastern states will of necessity have to consider alternatives in order to provide adequate water supply. The challenge for the future will be to find appropriate regulatory structures that can manage existing water supplies and balance competing demands. In meeting this challenge, states will inevitably depart further from their common law riparian roots, as they evaluate the public need and other policy issues in pursuing alternatives to meet water supply needs. That will require them to balance the interests among drinking water, industrial and agricultural needs, and protection of natural resources, including aquatic life, and endangered species. While it is likely that many states will include interbasin transfers as an important element of their water supply strategy, it is equally likely that interbasin transfers will remain controversial and subject to challenge. Historically, water quality not quantity has been the dominant concern in the East. Now that water quantity is coming to the forefront, Eastern water laws will likely need to change to accommodate the shift.

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Continued from page 1

Rising tide and crosscurrents

hydropower projects. No one at the time anticipated use of marine areas for electricity production, so the SLA's drafters unknowingly left open the question of which federal agency or agencies would regulate electric power production in marine areas. Did the OCSLA's grant of mineral leasing authority to DOI in federal waters displace FERC from regulating power in those same waters? Did it authorize DOI to regulate power projects in addition to leasing minerals?

Latent and unrecognized for decades, the jurisdictional questions finally arose in recent years, though in different ways on the West and East Coasts. On the West Coast, a pioneering developer stumbled into the issue by proposing a wave energy project in state and federal waters off the northwest tip of Washington's Olympic Peninsula. In 2003, FERC asserted jurisdiction over the project, taking the view that the wave energy project was a hydropower project requiring a license under the Federal Power Act. Aqua Energy Group, DI02-3-01, 102 FERC ¶ 61,242 (Feb. 28, 2003). FERC asserted licensing authority throughout U.S. territorial waters, the marine zone from the shoreline to 12 nautical miles offshore. FERC's unprecedented decision was big news in the nascent world of ocean energy technology but essentially invisible elsewhere. In the wake of that decision, the project proponent and developers of other projects in state and federal waters set their regulatory strategies on the assumption that FERC was in charge of the industry's future.

Moving water is a gold mine of renewable energy.

On the East Coast, the Cape Wind project, a controversial wind farm proposed for federal waters off Cape Cod, raised the issue of agency jurisdiction but framed the question differently. No hydropower was involved, so FERC's authority was never at issue. But the OCSLA gave DOI authority over mineral development in federal waters. Did any federal agency have authority to site a wind project in federal waters? Project opponents exploited the regulatory uncertainty in litigation. Project proponents turned to Congress.

Following an intensive lobbying effort framed solely in terms of the Cape Wind situation, and with apparent ignorance of FERC's assertion of authority in marine waters, Congress, as part of the Energy Policy Act of 2005 (2005 Act), granted DOI lead authority to issue leases for all renewable energy projects in federal waters. But the new law also included a savings clause that preserved existing authorities of other agencies, including, implicitly, the ocean project licensing authority FERC had been exercising for several years.

Congress had created a substantial regulatory risk for the ocean energy industry. Risk became reality in early 2007 when DOI lawyers filed a protest in FERC proceedings involving a wave energy facility planned for an area off the Oregon coast straddling the boundary between state and federal waters. DOI's filing disputed FERC's authority outside of state waters, claiming that the 2005 Act and OCSLA granted the power to DOI.

The project developer responded by adjusting the proposed project's footprint to fit entirely within state waters, where FERC's jurisdiction was unchallenged. Other developers are taking the same approach with their proposed projects, confining them to state waters to avoid the regulatory conflict and risk created by the jurisdictional dispute between DOI and FERC but raising tensions with existing users of near-shore areas.

The ocean renewable energy industry approached Congress in 2007 seeking a legislative fix to the interagency conflict. FERC and DOI joined the lobbying to press their respective claims. The Senate passed an energy bill stripping FERC of any jurisdiction outside state waters. The energy bill passed by the House was silent on jurisdiction, though it did include various ocean energy funding and research and development provisions promoted by coastal state members. When the ocean energy provisions reached conference between House and Senate leaders, the Senate's pro-DOI jurisdictional provision was dropped.

Stalemated in Congress, FERC and DOI were, at the end of 2007, negotiating a memorandum of understanding that would create a framework for administrative coordination, without resolving the underlying legal dispute. Vying to be seen as the most supportive of a new renewable energy resource, each agency is taking steps to streamline the process for siting pilot or demonstration projects. FERC is leaning well forward to promote a rapid six-month pilot project siting protocol and issued the first ocean energy project license in late December 2007. DOI is preparing an environmental impact statement and, perhaps in 2008, will issue renewable energy leasing regulations.

The efficacy of both efforts will depend on the willingness of state, tribal, and other federal natural resource and environmental agencies to cooperate in making decisions about the siting and conditioning of proposed projects—not a willingness to be taken for granted given the contentious history of hydropower project licensing and offshore energy development.

Finding the right questions first, then answers

The energy-rich waves and tides rolling off the nation's shores will keep moving of their own accord. The question for 2008 and after is whether America's policymakers will set rules that allow entrepreneurs to tap those rich forces to meet our energy needs.

The industry's future raises important, complex policy issues. The jurisdictional question creates legal risks as well as some political ones, but it is largely a distraction. We should focus on the "public lands" management questions but resist the temptation to try to answer them in the abstract. Policymakers should allow enough projects to go forward that we learn the right questions to ask before we settle on the right answers. Ideally, a relatively small number of demonstration projects will be allowed to go forward, employing different technologies at different types of sites on both coasts. With the benefit of five to ten years of experience, we should know which issues are important and which are not. This will require acceptance of risk by industry, agencies, and the public. There is gold in the water. Clean, infinitely renewable energy. It's worth trying to bring it ashore.

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EPA proposes Audit Policy incentives for new owners

By John L. Wittenborn

The U.S. Environmental Protection Agency's (EPA's) Audit Policy encourages regulated entities to voluntarily discover, disclose, correct, and prevent the recurrence of violations of federal environmental law by reducing or eliminating civil penalties and potential criminal charges for entities that make voluntary disclosures under the policy's terms. EPA recently clarified the existing Audit Policy and proposed additional, specially tailored incentives to encourage new owners of regulated entities to make voluntary disclosures. *See* 72 Fed. Reg. 27,116 (May 14, 2007). Among other things, EPA is considering incentives for new owners that would reduce civil penalties beyond what the current Audit Policy offers and allow consideration of violations that would otherwise be ineligible.

EPA is focusing the incentive program on new owners for several reasons. First, the agency's recent experience has resulted in recognition that new owners of regulated facilities may be particularly well situated and motivated to discover, disclose, and rectify environmental violations. Second, pre-acquisition environmental due diligence reviews may provide new owners with beneficial information related to potential noncompliance issues. Finally, EPA believes that incentivizing new owners to participate in the Audit Policy program can improve the overall effectiveness of the program.

The clarifications and proposed incentives respond to perceived uncertainties that have discouraged past participation. New owners may have elected not to disclose in the past because of the uncertainty related to the Audit Policy's eligibility requirements. EPA evaluates disclosures against the Audit Policy's nine eligibility requirements, which include voluntary and prompt disclosure, correction and remediation, cooperation, and an absence of a corporate pattern of repeated violations. If EPA determines the eligibility requirements are not met, it is free to pursue traditional enforcement techniques, including civil and criminal penalties. Regulated entities, therefore, have been understandably hesitant to make disclosures for fear of inviting a self-inflicted enforcement action.

A common thread throughout the incentives is the yet-to-be determined definition of "new owner." EPA's proposal sought comment on the definition of "new owner" because of the agency's concern that a company could evade its environmental liabilities by a sham transaction designed to make it appear the facility had a new owner. EPA also sought comment on how long an acquirer should be considered a "new owner." The thought here is that a new owner may need more than the sixty days allowed by the current Audit Policy to remedy violations.

EPA also proposed a clarification of the Audit Policy's requirement that a disclosure be "voluntary." That requirement has limited the utility of the Audit Policy as many internal audit programs are performed in coordination with mandates under environmental statutes, notably the Clean Air Act (CAA). Title V of the CAA mandates yearly analysis and certification of a source's CAA compliance status, and disclosures of noncompliance reportable under Title V have been interpreted by EPA not to meet the "voluntariness" requirement. This has been a significant roadblock to use of the Audit Policy because the Title V program is broadly applicable to air sources. EPA has now proposed that a new owner can avail itself of the Audit Policy so long as it does so before the first annual Title V certification due date under new ownership. This would provide needed certainty for new owners and significantly increase the universe of air sources eligible to utilize the policy. EPA is considering providing similar treatment for violations disclosed pursuant to the CAA's Risk Management Program under § 112(r)(7).

EPA also proposed a clarification of the "corporate pattern" exclusion to newly acquired facilities. Normally, EPA will not allow an entity to obtain Audit Policy benefits where there is a pattern of repeated noncompliance. However, EPA has recognized that bona fide new owners generally have no responsibility for past noncompliance and has proposed not to consider the compliance history of the acquiring entity when a disclosure relating to a newly acquired facility is made.

Finally, EPA is reconsidering its policy of waiving only the "gravity" component of a civil penalty for new owners. Previously, a new owner participating in the Audit Policy program took the risk of EPA levying a potentially arbitrary economic benefit penalty. The agency now recognizes that economic benefits from past noncompliance are unlikely to run to the new owners and that the risk of incurring an economic benefit penalty may be a considerable disincentive to participating in the Audit Policy program.

The comment period on the proposal closed last July, and EPA is now considering whether to develop a pilot program to determine whether offering these new incentives will have the intended effect. The proposal makes sense and should yield significant benefits for the agency and new owners alike. The devil, however, may be in the details. Stay tuned.

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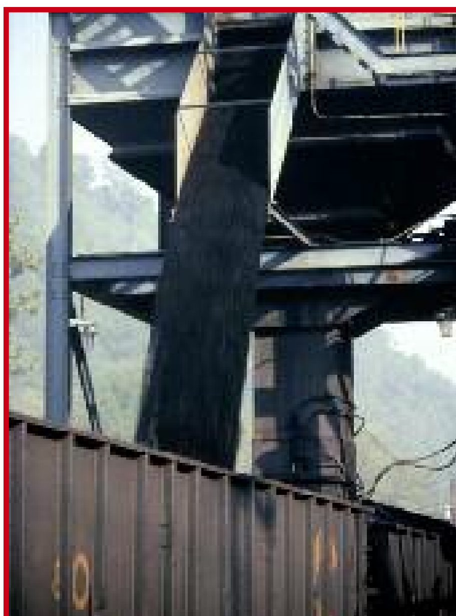
Proposed mining law reforms leave industry apprehensive

By J. P. Tangen

For four generations, mining for metalliferous minerals has been one of America's strongest basic industries. From the earliest days, America's approach to mining has been unique because of the rule that if one discovers a deposit of valuable minerals in commercial quantities on vacant and unappropriated public land, he can own it. All that is required is to monument the location and record a certificate to that effect with local authorities.

This straightforward approach induced battalions of prospectors to scour the West in search of the "mother lode." The United States further promised successful prospectors the right to buy the land upon which they made their discovery. These two principles, self-initiation and security of tenure, coupled with America's vast buried resources, have resulted in deposits being exploited with neither royalty nor other substantial special compensation being disbursed to the national treasury.

From 1872 until 1970, little heed was paid by miners to the environmental consequences that ensued from their operations. Like many basic industries in the 1970s, air and especially water pollution drew the focus of nongovernmental activist organizations. However, efforts to date to reform the General Mining Law of 1872 have been generally unsuccessful.



Metalliferous mining provides a large part of our nation's basic resources. From the chromium, nickel, and steel needed for flatware, office buildings, and mechanized equipment our lifestyle depends on, to the gold dental crowns, copper pipes, and wires we use with little thought, the products of mining are so endemic that they are invisible; yet our health and safety depend upon their ready, economic availability. Nonetheless, because of the abuses that occurred before the environmental movement gained traction, mining law reform has been a *cause célèbre* for many. Others believe the industry has not paid the United States fairly for removing valuable resources from the public domain.

The most recent effort of advocates for mining law reform, synthesizing responses to these two concerns, has manifested itself as H.R. 2262. This bill, passed by the U.S. House of Representatives last November, is pending before the Senate. If enacted, the legislation will fundamentally change the way mining is conducted in the United States. H.R. 2262 would end both self-initiation and the security of tenure on federal public lands; it would also impose royalties and foreclose potentially valuable mineral deposits from being mined. The following discussion evaluates some of the provisions in H.R. 2262.

Patents banned

Patenting vests the locator of a mining claim with an unassailable fee interest in real property, thereby enhancing the locator's security of tenure. This allows the locator the time to marshal sufficient economic resources so that a prospect can be developed. Initially, the premium due the United States for such fee interest was set at a reasonable amount; however, that charge has become relatively trivial due to the effects of inflation. Rather than adjusting the fee to reflect contemporary standards, H.R. 2262 would eliminate patents altogether. As a practical matter, this will have a *de minimus* effect because of the Congressional moratoria on the expenditure of appropriated funds for processing most patent applications that has been imposed repeatedly since 1994. However, elimination of patents, if enacted, represents a radical paradigm shift that will have a chilling effect on the exploration for minerals in the United States.

Royalties

By not imposing a royalty, the General Mining Law encouraged the development of hardrock mining operations on federal lands. This policy promoted the development of the West and provided the resources to fuel the country's economic expansion and prosperity. Additionally, the absence of a royalty under the General Mining Law made the recovery of peripheral, low-grade resources economical. Critics of the General Mining Law have argued that the lack of a royalty has allowed miners to remove and sell minerals from public lands without fair payment. H.R. 2262 establishes a royalty equal to 4 percent of the gross income generated by operations on lands that were in production on the date of enactment and 8 percent of the gross income generated by operations on lands that begin production thereafter. A royalty of this magnitude ensures that most mining on public lands in the United States cannot be profitable. Moreover, because courts have consistently ruled that mining claims are property interests, imposing a royalty on existing claims arguably constitutes a compensable taking. For this reason, the Bush administration has indicated that it would veto legislation that includes such a provision.

Special places closed to mining

H.R. 2262 requires that the Secretary of the Interior evaluate the suitability of land proposed for inclusion within mining claims for other uses before mining can be permitted. Recreational areas and sacred sites could be foreclosed to mining irrespective of their potential for containing mineral deposits. Historically, due to the scarcity of mineral deposits and the small general footprint of mines, mining has been considered the highest and best use of land. However, as competing users have ventured into remote areas where valuable deposits are often found, the impact of mining has become more apparent.

Pre-1970 mines, abandoned in careless disarray, have come to be considered eyesores as well as the source of toxic pollutants.

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Although mining is a transient use, reformers seek to ban operations in specific locations rather than risk possible surface degradation. H.R. 2262, therefore, authorizes states, political subdivisions, and Indian Tribes to petition the Secretary to withdraw additional tracts with special values, such as drinking watersheds, wildlife habitats, scenic vistas, and religious, cultural, or historic resources.

This authorization disregards the fact that for the past forty years, the obligation to reclaim mined-out areas has been a prerequisite to securing needed permits. Modern hardrock mines cannot legally degrade the air or water and must restore impacted surface areas to their pre-mining condition upon termination of operations. After reclamation, such mined-out areas become readily available for most other uses. Withdrawing special places ostensibly to protect them fails to take into account existing proscriptions on the industry.

Statutory mandates to protect the environment

H.R. 2262 commissions the Bureau of Land Management (BLM) to ensure mining operations comply with a detailed list of environmental protection mandates. These requirements are currently imposed through the BLM's Surface Management Regulations for hardrock mining, 43 C.F.R. § 3809, *et seq.* Notwithstanding the existing regulatory program, H.R. 2262 establishes a two-stage permitting requirement for hardrock mining on federal land.

First, H.R. 2262 requires prospectors to obtain an exploration permit before seeking minerals on federal public land. Second, to engage in mining, the bill requires mine operators to obtain an operating permit. This permit requires that mining operations commence within a specific timeframe and prohibits an operation from being shut down for more than 180 days at a time, irrespective of economic considerations. Moreover, the proposed permit is limited to a twenty-year period and can be renewed only for one additional twenty-year period. As such, the bill completely disregards the possibility of seasonal operations and long-term projects.

Additionally, the legislation bars the Secretary from issuing a permit for mineral activities that would diminish a citizen's experience at a national park or monument. This is tantamount to a 10-mile buffer around all national park units and would prohibit activities on holdings within such park units.

If enacted, H.R. 2262 will fundamentally change the way mining is conducted in the United States.

Locatable Minerals Fund

The bill proposes a Locatable Minerals Mine Reclamation Fund into which all receipts from fees, royalties, penalties, and other sources collected under the legislation are to be deposited. Two-thirds of that fund is to be allocated to a Hardrock Reclamation Account, and the balance is to be allocated to a Hardrock Community Assistance Account.

The Secretary is directed to maintain an inventory of abandoned mines on federal lands, to use money in the fund for the reclamation and restoration of land and water resources adversely affected by past mining activities, and to deliver an annual report to Congress on the progress of cleanup of such sites. The Secretary is to use the Hardrock Community Assistance Account to provide public services to political subdivisions that are socially or economically impacted by ongoing mining activities.

These two funds, if adequately endowed, could be useful in redressing a number of problems generated by historic and contemporary mining operations; however, if the balance of the bill deters mining on federal public lands, as critics allege, it is unlikely that there will be sufficient revenue generated for the funds to make a substantial difference either in the area of reclamation or community impact.

Conclusion

Most would agree that the General Mining Law of the United States would benefit from some fine-tuning; however, H.R. 2262 does far more harm than good. Even the positive concepts, such as establishing an abandoned mine lands fund and a community impact fund, are muddled by this bill.

Elimination of patents is neither necessary nor desirable. Mineral lands should be available for sale for an amount equal to the value of the surface estate by the United States to those who legitimately discover valuable mineral deposits on the public land. The imposition of royalties may constitute an unconstitutional taking. In addition, royalties are an added cost of producing minerals and as such marginalize lower-grade deposits, inducing miners to leave otherwise valuable mineralized material in the ground.

Finally, the panoply of environmental requirements proposed in H.R. 2262 appears to duplicate existing regulatory requirements and, therefore, may not provide any substantial additional protection to the environment.

The U.S. Senate has commenced hearings on mining law reform and will consider many of these issues over the next year. Calendar considerations suggest that an early enactment of alternative legislation is unlikely. In addition, because H.R. 2262 has been pronounced "dead on arrival" in the Senate, extensive compromises are expected to occur before both Houses of Congress can agree on acceptable reforms. Until the Senate acts, it is uncertain what mining law reform will look like. The last time mining law reform was approved by Congress, President Clinton vetoed it; therefore, there is a long way to go before this issue will be put to rest. Nor is reform inevitable. Over the past forty years, the industry has embraced contemporary environmental and other social standards. As such, the need for massive reform continues to dwindle. While miners must maintain a constant vigil, there is reason to hope that at some point meaningful, acceptable reform will be enacted.

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Financial disclosure of risks related to global climate change

By Michael B. Gerrard and Christopher Anderson

Securities and Exchange Commission (SEC) regulations require publicly traded companies to disclose the material impacts of environmental laws on their business. Increasing attention is being paid to the issue of securities disclosure of financial risks and opportunities posed by impending regulation relating to global climate change and by climate change itself.

Many companies have considered these risks too speculative to warrant disclosure. However, recent developments have led to a widespread revision of this view. On the scientific front, a consensus has emerged that greenhouse gas (GHG) emissions from human activities are altering the climate. Significant regulatory developments have also occurred—in 2005, for example, the European Union began a cap and trade program for carbon emissions, affecting U.S. businesses with European operations. Now that Australia has joined, the United States is the only major industrialized country that has not ratified the Kyoto Protocol, and pressure on the United States to adopt mandatory regulations is growing. Domestically, several states will begin imposing mandatory GHG caps in the near term, including the ten northeastern states comprising the Regional Greenhouse Gas Initiative in 2009. Federal legislation also seems likely in 2009.

Plainly, companies must analyze and report the costs of complying with existing laws on carbon emissions. But companies are also coming under pressure on several fronts to consider the broader effects of climate change on their business.

In September 2007, a coalition of environmental organizations, government entities, and institutional investors led by Environmental Defense and Ceres petitioned the SEC to issue guidance that companies must assess and disclose the risks and opportunities to their business posed by climate regulation and environmental change. The petition argues that companies must quantify their carbon emissions to analyze their risks adequately. It also notes that several companies address the risks of climate change in voluntary disclosures and sustainability reports but not in their SEC filings. Though few expect the SEC to act on the petition before President Bush leaves office, the petition is adding to the pressure on companies.

From a different point on the ideological spectrum, the Free Enterprise Action Fund, a mutual fund that seeks to fight "the Left's use of capitalism against capitalism," filed its own petition with the SEC in October 2007, asking that companies be made to disclose the cost of complying with GHG regulations that the companies have supported. The petition argued that many of these regulations could hurt earnings.

Congress is also in on the act. Shortly after the Environmental Defense petition, the Senate Banking Committee held hearings on the effect of climate change on disclosure requirements, and at least the early prints of America's Climate Security Act (S. 2191), introduced by Sens. Lieberman (I-CT) and Warner (R-VA), would require the SEC to promulgate regulations on this subject. In addition, on the enforcement front, Attorney General Andrew Cuomo of New York subpoenaed five energy companies for documents related to their disclosure of climate risks in September 2007.

Shareholders are pressing companies to improve their climate change related disclosures. According to Ceres, forty-two shareholder resolutions were filed in 2006 demanding greater climate risk disclosure. Once tallied, the number of resolutions filed in 2007 is expected to be even higher. Although concentrated in the energy sector, resolutions were filed with a broad range of companies, including retailers and insurance companies. Several resolutions garnered the support of more than 20 percent of shareholders, and others were withdrawn after management voluntarily agreed to make the requested disclosures. Many of these resolutions were supported by large institutional investors, such as city and state pension funds.

To encourage better reporting, Ceres and the Association of Chartered Certified Accountants sponsor an annual competition for the North American Sustainability Reporting Awards, seeking to highlight best practices in reporting on sustainability issues.

Although the "state-of-the-art" approach to disclosing the effects of climate change is continuing to develop, certain things are already clear. First, companies must be scrupulous in their disclosures of the costs of complying with both promulgated and expected regulation of GHGs. The requirement that companies disclose the cost of complying with environmental regulation is already well established, and those that fail to do so run the risk of enforcement actions and shareholder suits. Second, companies should endeavor to speak with one voice on the issue. For example, it is perilous to omit risks from SEC filings that are discussed in voluntary disclosures or sustainability reports. Finally, companies should closely monitor developments in this area. Whether through regulation, litigation, or shareholders' initiatives, the standards and practices that govern climate change issues in financial reporting will continue to evolve rapidly.

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By Steven T. Miano

Law firm moves

Kinnan Golemon, formerly with Austin, Texas-based Brown McCarroll LLP, has formed a new firm that will focus on the practice of environmental law and the representation of companies before the Texas legislature. The firm, KG Strategies LLC, will be based in Austin. Golemon's practice has focused on a broad array of federal, state, and local environmental issues and on advising clients with respect to Texas legislative issues. He has served in a variety of leadership positions within the ABA, including chair of both the Section of Environment, Energy, and Resources and the Standing Committee on Environmental Law. Golemon currently serves as Section Delegate to the ABA House of Delegates.

David A. Hartman has been elected a partner in the Environmental & Land Use Department of Smith Robertson. Hartman, based in Austin, Texas, concentrates his practice in the areas of land use and real estate development law, including land development permitting, zoning, planning, entitlement, and natural resource issues. His practice includes environmental and regulatory compliance issues arising under the Endangered Species Act, Clean Water Act, and other natural resource programs.

Janet L. McQuaid has joined the Austin, Texas, firm of Smith Robertson as a partner in its Environment & Land Use Department. McQuaid was formerly with Fulbright & Jaworski, L.L.P., where she was a partner in its Austin office. Her practice includes a wide range of environmental matters, including water quality, water rights, wetlands, solid and hazardous waste management, contaminated site remediation, chemical and pesticide regulation, and endangered species.

Steven T. Miano recently joined the firm of Hangley Aronchick Segal & Pudlin as a shareholder in its Philadelphia office. Miano will continue his practice in all aspects of environmental law, with a particular emphasis on water, air, hazardous waste, environmental due diligence, and brownfields cases. His clients include Fortune 500, mid-sized, and small companies as well as municipalities. Miano currently serves as the secretary of the Section and as an Executive Committee member, and as a vice chair of the Governance Task Force and a contributing editor of *Trends*. He previously served as a Council member, co-chair of the Water Quality and Wetlands Committee, and co-chair of the Eastern Water Resources Conference.

Roy Palk has formed a strategic alliance with the firm of WolfBlock LLP to assist the firm in expanding its practice in the areas of energy development, energy law, and environmental law and in advising its clients. Palk recently retired as president and CEO of the East Kentucky Power Cooperative located in Winchester, Kentucky. He has spent his entire career in the energy field. Palk's company, New Horizons Consulting, is based in Lexington, Kentucky, and he maintains a law office in Lafayette, Tennessee.

Kenneth Warren recently joined the firm of Hangley Aronchick Segal & Pudlin as a shareholder in its Philadelphia office. Warren will continue his broad-based practice in environmental law and litigation. His clients include large and small corporations, individuals, and governmental agencies. Warren currently serves as the general counsel to the Delaware River Basin Commission and serves on the board of the Academy of Natural Sciences in Philadelphia. He is a past chair of the Section and has also served as a Council member, and chair of the Strategic Planning, Rapid Response, and Public Service Committees. Warren currently serves as a member of the ABA Standing Committee on Environmental Law.

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 Steven T. Miano at smiano@hangley.com.

ABA Section of Environment, Energy, and Resources

16th Section Fall Meeting

Phoenix, Sept. 17-20, 2008

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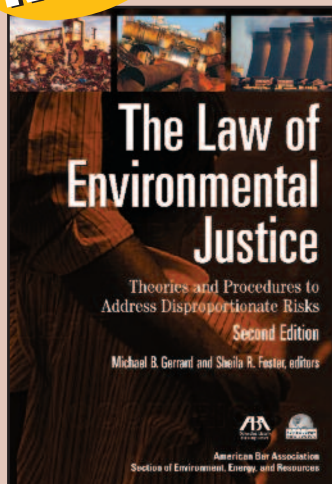

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The Law of Environmental Justice

Theories and Procedures to Address Disproportionate Risks

Second Edition

Michael B. Gerrard and Sheila R. Foster, editors

Environmental justice is the idea that minority and low-income individuals, communities and populations should not be disproportionately exposed to environmental hazards, and that they should share in making the decisions that affect their environment. This newly updated edition of *The Law of Environmental Justice* examines the sources of environmental justice law and how evolving regulations and court decisions impact projects around the country.

In the years since the first edition published in 1999, many of the initial questions raised about environmental justice have been answered by the courts, most importantly by the U.S. Supreme Court in *Alexander v. Sandoval*, and the techniques for analyzing environmental justice conditions and impacts have been further developed and refined. Intended for lawyers on all sides of controversial issues, *The Law of Environmental Justice* is a clearly written, measured resource for those who counsel government agencies, corporations, environmental groups, individuals who have been harmed or are at-risk for exposure, and community or advocacy organizations. The 21 individual chapters, written by many of the leading practitioners and scholars in the field, are divided into three categories: legal theories, legal procedures, and legal objectives. Among the topics covered are federal and state regulations and programs, Native American law, access to information, impact and risk assessment, access to the courts, ethics and evidentiary issues, challenges to permits for new facilities and controlling existing facilities, brownfields, residential and workplace exposure, and tort remedies and litigation strategies. A free, online update service posts timely information about new cases and other developments in the area.

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