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Back to the Future One More Time!

2010 Emerging Issues 5406

California's Sustainable Communities and Climate Protection Act (Senate Bill 375): Back to the Future One More Time!

By Ms. Alene Taber

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SUMMARY: Get the latest expert analysis on California's landmark SB 375 legislation, the "Sustainable Communities and Climate Protection Act." The article discusses the challenges posed by the legislation and includes a "survival guide" for developers and developments.

ARTICLE: Introduction

Already struggling to merely survive during this economic downturn, developers of land in California will soon be facing yet another daunting challenge, this time mandated by the state's Legislature to combat global warming. Under the Legislature's law, the Sustainable Communities and Climate Protection Act of 2008 [Senate Bill 375-Steinberg], developers could be required to implement and/or pay for various land use and transportation demand management ("TDM") strategies to change travel modes from single passenger vehicles to walking, bicycling, transit, carpools and vanpools (e.g., "mode shifting") in order to reduce the number of vehicle trips and vehicle miles traveled ("VMT"). Unfortunately, the odds are against these mode shift TCMs accomplishing very much in terms of reducing emissions from passenger vehicles (e.g., cars and light-duty trucks). For over forty years government has sought to implement these same types of TDMs to reduce "criteria" air pollution (for example, pollutants that contribute to smog and ozone problems) from passenger vehicles. However, these efforts have resulted in little widespread success in part because they require individual people to change their behavior. The public must be willing to embrace:

* Housing in high density developments, mixed use (e.g., housing above businesses) projects, or located near railroad tracks;

* Bicycling, instead of driving, to work;

* Riding a bus to the grocery store;

* Paying taxes for using the "free"-ways and the number of miles they drive their cars;

* An insufficient supply of parking spaces at their place of business or at a retail establishment;

* Paying more for parking; and

* Allowing their children to walk or bike to school.

Despite the dismal track record of altering land use patterns and implementing TDMs to significantly reduce emissions associated with vehicle use, SB 375 will require government and developers to yet again try to change the traveling public's behavior. Developers may have little choice but to go along with these mandates to reduce greenhouse gas ("GHG") emissions. This article will explore the modest benefits that have been achieved from past efforts to implement SB 375-like provisions, as well as strategies that developers and their advisors can employ to better position their projects for SB 375 compliance.

The Challenges Posed by the SB 375 Mandate

SB 375 was an outgrowth of California's Global Warming Solutions Act (AB 32). It was based in part upon assumptions that the numbers of miles passenger vehicles are driven needs to be decreased in order to reduce GHG emissions, and that by redesigning communities people will drive less [http://gov.ca.gov/fact-sheet/10707/]. However, decreasing the amount of GHG emitted by passenger vehicles depends upon a trifecta of sorts: (1) carbon content of vehicle fuel; (2) vehicle fuel efficiency; and (3) the number of miles the vehicle travels. The first two are technological fixes to fuels and the vehicle, while the last element requires changes in human behavior.

California has made great strides with the technological fixes. In September 2004, the California Air Resources Control Board ("CARB") adopted landmark vehicle fuel efficiency regulations to reduce GHGs from passenger vehicles that had been earlier authorized by 2002 legislation [Assembly Bill 1493-Pavley; 13 Cal. Code. Reg. §§ 1900, 1961, 1961.1]. After a protracted legal battle with U.S. Environmental Protection Agency ("EPA"), California in 2009 finally received approval to implement the new Pavley emissions standards for passenger vehicles *[74 Fed. Reg. 32744*-32784 (July 8, 2009) (Notice of Decision Granting a Waiver for California's GHG Emission Standards for New Vehicles)]. Governor Schwarzenegger proclaimed that: "By implementing these [Pavley] standards, California would be eliminating greenhouse gases equivalent to taking 6.5 million cars off the road by the year 2020" [http://gov.ca.gov/press-release/8400/].

On January 18, 2007, this same Governor signed Executive Order S-01-07 establishing a groundbreaking Low Carbon Fuel Standard ("LCFS") for transportation fuels sold in California. Adopted by CARB in 2009, California's LCFS requires by 2020 for fuel providers to reduce the carbon content of transportation fuels sold in the state by 10 percent. Together, the LCFS and Pavley regulations are expected to reduce 116 million metric tons of carbon dioxide a year ("MMTCO2/yr") [www.arb.ca.gov/cc/sb375/tools/pavleylcfs-userguide.pdf]. Reducing one MMTCO2 is akin to taking 179,000 passenger vehicles off the road for one year [www.arb.ca.gov/cc/factsheets/1mmtconversion.pdf]. After achieving these considerable reductions in GHGs, then the overall benefits ascribed to reducing VMT is less because each mile driven is already be considerably reduced as a result of improved fuels and fuel efficiency measures. [*See* Southern California Association of Government's Final Appendix IVC for the 2003 AQMP at pp. 5-6].

Achieving any GHG benefit from VMT reductions will be a formidable task. Whether this new emphasis on redesigning communities will cause Californians to give up their cars to walk or ride the bus is anyone's guess. Despite the herculean efforts of planners and developers to improve urban connectivity, linkages to transit, and walkability, per capita VMT has increased steadily until very recently. Per capita VMT reached a plateau in 2004 and then dropped in 2007 for the first time since 1980. [Puentes, Robert and Tomer, A., The Road Less Traveled: An Analysis of Vehicle Miles Traveled Trends in the U.S., Brookings Institute (December 16, 2008).] Whether the modest decline in 2007 is due to fuel prices, the recession, unemployment, a desire for a less auto-dependent lifestyles, or whether per capita VMT will resume its upward trend when the economy turns around remains to be seen.

In past air quality management plans, only modest emission reductions have been attributed to TDMs. For example, the South Coast Air Quality Management District's ("SCAQMD") 2007 Air Quality Management Plan ("AQMP") includes a measure to reduce emissions from new or redevelopment projects by an enhanced California Environmental Quality Act ("CEQA") process and mitigation through its regulatory process. This measure attributes no emission reductions until 2023 and then the reductions are modest, ranging from 0.5 tons a day to 0.8 tons a day depending upon the particular pollutant. [SCAQMD, Final 2007 AQMP, Appendix IV-A.] It is also difficult to quantify the VMT reduction benefits of TDMs. [CARB, Transportation Control Measure Analysis Procedures (November 1991)]. Other than strategies that promote financial disincentives for using passenger vehicles, in general TDM strategies have not had major impacts on improving air quality. [E.D. Arnold, Jr. Effectiveness of Transportation Control Measures: An Overview of the State of the Practice, Virginia Transportation Research Council February, p. 12 (1996)]. A CARB study determined that VMT and trips could be reduced by five to seven percent through parking charges, fuel tax, VMT fees, emission fees, and congestion pricing [CARB, Transportation Pricing Strategies for California: An Assessment of Congestion, Emission, Energy, and Equity Impacts (November 1996)].

Home-to-work trips offer the best opportunities for changing transportation modes from the single passenger vehicle because of their consistent reoccurrence and employers' influence over these trips. But, these vehicle trips compose only a 20 to 30 percent fraction of all trips.[E.D. Arnold, Jr. Effectiveness of Transportation Control Measures: An Overview of the State of the Practice., Virginia Transportation Research Council, p. 12 (February 1996)].

The SB 375 Mandate and GHG Target Development

SB 375 was approved by Governor Schwarzenegger on September 30, 2008. Important aspects of SB 375 that are pertinent to this discussion include the following:

* No later than September 30, 2010, CARB must provide each region with a GHG emission reduction targets for passenger vehicles for 2020 and 2035 [Gov. Code § 65080(b)(2)(A)].

* Each metropolitan planning organization ("MPO") must prepare a sustainable communities strategy ("SCS") that achieves the GHG emission reduction target and is approved by CARB [Gov. Code § 65080(b)(2)(B), (b)(2)(I)].

* Residential or mixed-use residential projects that are consistent with the use designation, density, building intensity, and applicable policies specified for the project area in either a sustainable communities strategy or an alternative planning strategy that CARB has approved are entitled to a streamlined CEQA analysis [Pub. Res. Code § 21159.28].

SB 375 established a process for CARB to follow in adopting the GHG targets. By January 31, 2009, CARB was required to appoint a Regional Targets Advisory Committee ("RTAC") to recommend the factors to be considered and methodologies to be used in setting the GHGs [Gov. Code § 65080(b)(2)(A)(i)]. The RTAC provided its recommendation to CARB on September 29, 2009 [www.arb.ca.gov/cc/sb375/rtac/report/092909/finalreport.pdf]. Among its recommendations was that CARB express the targets as a percent reduction per capita in GHG emissions from a 2005 base year, which CARB staff agreed with and is recommending to their Board for adoption [CARB Staff Report, Proposed Regional Greenhouse Gas Emission Reduction Targets for Automobiles and Light Trucks Pursuant to Senate Bill 375. August 9, 2010 ("CARB GHG Target Staff Report")].

SB 375 also requires that prior to setting the targets for a region, CARB must exchange technical information with the MPO and the affected air district. The MPO may also recommend a target for the region [Gov. Code § 65080(b)(2)(A)(ii)]. Several of the MPOs did provide information to CARB and suggested targets [www.arb.ca.gov/cc/sb375/data/data.htm]. CARB staff is recommending that its Board adopt the targets recommended by its four largest MPOs (SCAG, MTC, SANDAG, and SACOG) except for the 2035 target for SCAG. SCAG has proposed aggressive targets of eight percent per capita reduction in GHG emissions for 2020 and five to six percent for 2035 [*see* CARB GHG Target Staff Report]. However, because SCAG's 2035 target is lower than the targets suggested

by the other MPOs, CARB staff is recommending that the Board reject SCAG's recommendation and instead adopt a target for SCAG of 13 percent.

Target setting by CARB is occurring in the abstract without any connection or consideration of reality: Is there sufficient funding? What programs will be necessary to achieve the modeled VMT and trip reductions? Will the public be willing to change their driving habits, pay more in fees and taxes, or accept more dense urban areas?

On September 2, 2010, SCAG's Board voted to recommend CARB adopt target of six percent for 2020 and eight percent for 2035 for the region, rejecting CARB staff's recommendation. The GHG targets recommended by SCAG are based on ambitious assumptions in the computer modeling that VMT and trips will be reduced. CARB is scheduled to consider adopting targets for all 18 MPOs on September 23, 2010.

In setting the GHG targets, CARB is supposed to also take into account GHG emission reductions that will be achieved by improved vehicle emission standards [Pavley, discussed above], changes in fuel composition [*i.e.*, LCFS, discussed above], and other measures it has approved that will reduce GHG emissions in the affected regions, and prospective measures it plans to adopt to reduce GHG emissions from other greenhouse gas emission sources [Gov. Code § 65080(b)(2)(A)(iii)]. However, the targets CARB staff proposes do not appear to account for reductions in GHG emissions from these standards and requirements [*see* CARB GHG Target Staff Report].

Once the targets are adopted by CARB, the MPOs will be required to adopt SCSs [Gov. Code § 65080(b)(2)(B)]. If the SCS is unable to achieve the GHG target established by CARB, then the MPO must prepare an alternative planning strategy ("APS") showing how the GHG targets would be achieved through alternative development patterns, infrastructure, or additional transportation measures or policies [Gov. Code § 65080(b)(2)(H)].

The MPO must submit either the SCS or APS to CARB for its review and either acceptance or rejection of the MPO's determination that the strategy submitted would, if implemented, achieve the GHG targets [Gov. Code § 65080(b)(2)(I)(ii)]. If CARB determines that the SCS or APS would not achieve the GHG targets, the MPO must revise its strategy or adopt an APS if it had adopted an SCS [Gov. Code § 65080(b)(2)(I)(iii)]. Importantly, neither an SCS nor an APS is supposed to regulate land use or subject land use to state approval, supersede the exercise of the land use authority by cities and counties, be interpreted to authorize the abrogation of any vested right, or require a city's or county's land use policies and regulations, including its general plan, to be consistent with the regional transportation plan or an APS [Gov. Code § 65080(b)(2)(K)].

SB 375 provides a glimpse of programs that developers can expect will be included in an SCS or APS. There will be an adopted regional or subregional land use plan(s) that identifies the general location of uses, residential densities, and building intensities within the region, and identify areas that are sufficient to house all the population of the region. The extent to which these regional or subregional land use plans accommodate future growth will be critical: How much future population growth should be assumed? Where will these populations locate? How will these populations travel around the region? Importantly, the development of a regional land use plan is likely to spark serious disagreements among the cities as to where housing and jobs should be located: cities will not be willing to forego their economic growth potential to other cities [Fregonese Associates, White Paper: Conceptual Land Use Scenario, Prepared for SCAG (June 2009)]. A measure to reduce air pollution emissions from improved jobs/housing balance had been included in the SCAQMD's 1991 AQMP. However, it was eventually removed from the air plans because it was simply too controversially and unlikely to be implemented. The SCS/APS will have to address and resolve these inherently difficult issues that have tempered the viability of land use and TDMs as a viable air quality control measures in the past.

The SCS/APS will also identify a transportation network to service the transportation needs of the region. The transportation commissions, MPOs and local cities and counties will have to agree on the transportation network: Are the transit lines and stations being located in areas with sufficient density? Which projects in the region should be funded first? How much money should be devoted to regional verses local transportation systems? Is the transportation

network sufficient to accommodate future population growth and offer acceptable travel modes? Exactly how the SCS/APS will be implemented is unknown particularly since a city's or county's general plan and the regional transportation plans are not required to be consistent with an SCS or APS.

The SCS/APS will also set forth a forecasted development pattern for the region, which, when integrated with the transportation network and other transportation measures and policies, shows that the region will reduce GHG emissions from passenger vehicles to achieve the GHG targets set by CARB [Gov. Code § 65080(b)(2)(B)]. It is this aspect of the SCS/APS that TDM programs included pricing strategies are most likely to be introduced. The Land Use Subgroup of the Climate Action Team's ("LUSCAT") draft document prepared for the CARB Scoping Plan is instructive in this regards [www.climatechange.ca.gov/luscat/meetings.html]. LUSCAT had recommended that CARB define GHG emission reduction targets for land use and transportation. The strategies LUSCAT identified included: congestion pricing, pay as you drive insurance premiums, mitigation of high transportation carbon footprint development, strategies to reduce employee commute trips, and public education to promote transportation conservation. LUSCAT also identified numerous barriers to successfully achieving GHG emission reductions that have not been fully addressed by either the Legislature or CARB.

SB 375 also provides that if residential or mixed-use residential projects are consistent with the use designation, density, building intensity, and applicable policies specified for the project area in either a CARB-approved SCS or APS and the project incorporates mitigation measures required by an applicable prior environmental document, then the CEQA analysis for the project is not required to discuss (1) growth inducing impacts; or (2) any project specific or cumulative impacts from passenger trips generated by the project on global warming or the regional transportation network [Pub. Res. Code § 21159.28].

A "Survival Guide" for Developers and Development Projects

Once the GHG targets are adopted by CARB, the MPOs will begin preparing their SCS/APS. These plans will establish yet another standard and hurdle for development. Below are some strategies that developers and their advisors can employ to better position their development projects for SB 375 compliance:

* Find out the GHG reduction target that CARB adopts and the process the MPO will follow to develop the SCS/APS.

* Determine the land use and density that is ascribed in the regional or subregional land use plan for the interested areas or properties if the plans go to that level of detail. If the land use and density is not correct, then it will need to be changed to reflect development plans. This is also necessary to obtain the CEQA benefits for residential and mixed-use residential projects in Pub. Res. Code § 21159.28.

* Determine whether the land use and density that is ascribed in the regional or subregional land use plan is consistent with the city or county general plan. Even though it is not required, it is suggested that the general plan and regional plan be similar. However, if there is a conflict, the local general plan and vested development approvals prevail.

* Review the transportation network to ensure it accommodates the development plans and provides funding for necessary improvements consistent with the development timeline.

* Monitor the analysis in the SCS/APS that will demonstrate achievement of the GHG targets for any recommendations leading to the enactment of state legislation and local ordinances to impose requirements on development projects.

* Advocate for the SCS/APS to include strategies to overcome barriers, particularly public and local government opposition relating to infill and higher density developments. Importantly, these land use patterns are favored by state and regional officials to achieve GHG reductions, and they will need to support the developments projects that carry out their objectives.

* Seek to have the SCS/APS clearly identify funding shortfalls and achievable plans that will have public support to obtain the necessary funds. The SCS/APS must be fundable.

* Seek to have the SCS/APS rank the strategies to achieve the GHG emission reduction targets by cost-effectiveness and obtain commitments from the MPOs, transportation commissions, and state and local governments to implement the most cost-effective measures first and to discard those strategies that are not cost-effective and will have a negative impact on the economy and job creation.

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Gulf Oil Spill Prompts NEPA Review

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Gulf Oil Spill Prompts NEPA Review of Minerals Management Service

By Mr. Ronald Bass

September 17, 2010

SUMMARY: The oil spill in the Gulf of Mexico has prompted the Council on Environmental Quality and the Department of Interior to review the Mineral Management Service's compliance with NEPA. MMS is the federal agency within DOI responsible for approving oil and gas exploration and development on the outer continental shelf. This article summarizes MMS's current approach to NEPA and explains the scope and purpose of the review.

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ARTICLE: Abstract n1

The recent oil spill in the Gulf of Mexico has prompted the Council on Environmental Quality (CEQ) and the U.S. Department of Interior (DOI) to review the Mineral Management Service's (MMS's) compliance with the National Environmental Protection Act (NEPA). MMS is the federal agency within DOI responsible for approving oil and gas exploration and development on the outer continental shelf (OCS). n2 This article summarizes MMS's current approach to NEPA and explains the scope and purpose of the review.

Introduction

The explosion and ensuing oil spill in the Gulf of Mexico have caused many critics to ask: *Where was NEPA when BP's Deep Water Horizon oil platform was approved by MMS? Was the possibility of a spill ever studied? What mitigation measures were proposed for such an event?*

In response to these and many related questions, CEQ and DOI opened a critical inquiry into MMS's review and approval of oil and gas exploration and development on the outer continental shelf (OCS). The review seeks to ascertain how MMS applies NEPA in its planning and review of projects and to identify opportunities for improvement. On May 17, 2010, CEQ sought public comments about the MMS NEPA program. n3 The 30-day public comment period closed June 17.

Under NEPA, CEQ is responsible for overseeing NEPA compliance by all federal agencies. This oversight

includes issuing NEPA regulations, reviewing the NEPA rules and regulations of other federal agencies, writing guidance, and otherwise assisting federal agencies in complying with the law. Although CEQ rarely conducts an inquiry into an ongoing NEPA programs, the recent (and ongoing) events in the Gulf certainly justify such an effort. The review is expected to answer key questions about the MMS program and recommend changes.

NEPA's Legal Framework

Over the past 40 years, NEPA has become the backbone of the federal government's efforts to protect the environment. It requires federal agencies to prepare Environmental Impact Statements (EISs) whenever their plans, programs, or projects have the potential to "significantly affect the quality of the human environment." n4 An EIS contains a detailed evaluation of the environmental effects of the proposed action and considers alternative ways to meet the project's purpose and need. The EIS must evaluate the direct, indirect, and cumulative impacts of the proposed project and alternatives, and identify measures to mitigate the project's adverse impacts. To prepare an EIS, the agency must carry out a complex procedural process that complies with the regulations established by CEQ as well as its own NEPA regulations. The process includes rigorous requirements for public review and inter-agency consultation.

However, not all projects subject to NEPA require an EIS. To determine whether an EIS is necessary, the federal lead agency must first prepare an Environmental Assessment (EA) to evaluate the potential for significant impacts. n5 If the EA reveals that the proposed action would not result in any significant impacts, the agency may adopt a Finding of No Significant Effect (FONSI). n6 Together, the EA/FONSI must evaluate impacts, describe mitigation measures, and explain the reasons why no significant impacts would occur. In practice, an EA is often less detailed than an EIS and the procedural process for preparing and reviewing an EA is typically less rigorous. Over the years, NEPA compliance based on an EA/FONSI has become far more common than compliance based on an EIS.

Under NEPA, each federal agency is permitted to adopt Categorical Exclusions (CATEXs) for proposed actions that normally would not individually or cumulatively result in any significant impacts and, therefore, need neither an EIS nor EA/FONSI. n7 CATEXs differ from agency to agency but are typically adopted for small projects, repairs to existing facilities, administrative activities, or others actions with little potential for resulting in environmental impacts. CEQ must approve an agency's CATEXs through an open, public process. Although a CATEX should be documented for the administrative record, such documentation is typically very brief and supported by only minimal analysis. IN some cases, no documentation is prepared. Additionally, CATEXs are subject to exceptions for "extraordinary circumstances," such as when a project is proposed in an environmentally sensitive area.

This general three-document framework has been adopted throughout the federal government, but considerable differences occur in how NEPA is implemented from agency to agency. In recent years, some agencies have dramatically streamlined their NEPA procedures and customized them to fit highly diverse individual programs and activities. The resulting patchwork of NEPA regulations sometimes leads to inconsistent implementation. For example, the same type of project may be subject to an EIS in one agency but only an EA/FONSI or CATEX in another.

The highly divergent approaches to NEPA have left some critics questioning whether federal agencies have gone too far in weakening NEPA. MMS is the most recent target of criticism. The following brief explanation of the MMS approach to NEPA compliance for oil and gas programs helps explain why such criticism is being leveled at MMS and why CEQ and DOI have initiated their inquiry.

MMS NEPA Program

MMS must comply with both DOI NEPA regulations n8 and its own NEPA implementing procedures. n9 Together these rules provide the overall framework for MMS's NEPA program. Typically, MMS conducts its NEPA

reviews using a "tiered" approach. Under NEPA, "tiering" refers to the coverage of general matters in broader, programmatic EISs (e.g., first-tier documents) with subsequent narrower EISs or EAs (e.g., second-tier documents) focusing only on the impacts of individual activities or projects within the broader program. n10 The MMS approach to NEPA compliance for OCS oil and gas exploration and development typically follows such a multi-tiered approach, beginning with broad programmatic documents and eventually leading to preparation of site-specific documents. This tiered approach and its application to the Gulf of Mexico and the Deepwater Horizon project are summarized in Table 1:

MMS Tiered Approach to NEPA Compliance for OCS Activities

Tier

Explanation

Applicability to the Gulf of Mexico and the Deepwater Horizon Project

Tier 1 - Nation-wide programmatic EIS

MMS prepares a nationwide programmatic EIS for a 5-year OCS oil and gas development program that evaluates the broad range of impacts that could occur from oil and gas activities.

In April 2007, MMS prepared a broad "programmatic" EIS on the OCS Oil and Gas Leasing Program for 2007-12 for the entire United States.

Tier 2 - Regional programmatic EIS

MMS prepares a regional multi-sale EIS for each specific OCS area that evaluates the impacts which could occur from all oil and gas activities in the region, not limited to a single company.

In April 2007, MMS prepared a multi-sale EIS for the Gulf of Mexico OCS Oil and Gas Lease Sales in the Western and Central Planning Areas.

Tier 3 - Exploration plan and EA

MMS approves an individual oil company's exploration plan and typically prepares an EA to comply with NEPA.

In October 2007, MMS completed an EA under the multi-sale EIS for the Central Gulf of Mexico Lease Sale 206 issued for the location that includes the Deepwater Horizon well. Additionally, MMS previously approved BP's development operations based on a programmatic EA that MMS prepared in December 2002.

Tier 4 - Project-level Categorical Exclusion Review

MMS approves an oil company's development and production plan for a specific drilling and production platform based on a Categorical Exclusion Review (CER) that must be completed with 30 days of receipt of a drilling permit application. Such reviews were authorized more than 20 years ago under section 11 of the Outer Continental Shelf Lands Act, *43 U.S.C. 1340.* n11

For the Deepwater Horizon well in April 2009, MMS applied its CER process prior to the decision to approve the exploration plan that included the drilling of the Deepwater Horizon well.

Source: *75 Fed. Reg. 29996* (May 28, 2010).

Many federal agencies use tiering to streamline NEPA review for subsequent projects. I However, MMS' use of CATEX's to approve il oil development and production projects (e.g., BP's Deepwater Horizon project) avoids the

detailed environmental analysis that typically occurs when an EIS or EA is prepared. Without an EIS or EA, not only are environmental impacts studied in less detail, but some important NEPA topics, such as alternatives and mitigation measures, may be overlooked completely.

Scope of CEQ's Review

In its *Federal Register Notice*, CEQ asked for comments on the MMS's NEPA program with specific emphasis on the following questions:

- *What are substantive issues and at what level should they be analyzed in each of the tiered NEPA submissions from National 5-Year Oil and Gas Program to an individual well permit?*
- *Does this sequence of permitting stages (and associate NEPA submissions) allow for comprehensive evaluation of all relevant issues?*
- *What have been past industry and agency experiences with the use of* CATEXs *for OCS oil and gas activities?*
- *Has the use of the CER process been effective in reducing unnecessary paperwork without compromising the robustness of the NEPA analysis for OCS oil and gas activities?*
- *To what degree has public engagement been a part of MMS NEPA practice, particularly for CETEXs?*
- *What resources are available in federal, tribal, state, and local government agencies with a stake in OCS oil and gas exploration and development?*

CEQ's Findings and Recommendations

To conduct its review**,** CEQ interviewed staff and decision-makers at MMS and other involved agencies, reviewed past NEPA documents prepared for OCS oil and gas projects and carefully evaluated the above questions. On August 16, 2010 CEQ released its report containing the findings of the review and recommendations for reforming the MMS NEPA process n12. The CEQ report contains the following main topics:

- Review of the legal framework for OCS oil and gas leasing, exploration and development and the associated NEPA process
- How the process worked for the BP project
- Recommendations for reforming NEPA

CEQ's Findings

Regarding the OCS oil and gas leasing and exploration process, the CEQ report summarized the four-step approval process under the OCS Land Act 1) development of 5-year national OCS program; 2) Planning for a specific sale; 3) exploration plan approval; and 4) development and production plan approval.. The CEQ report then explained how these steps were implemented for the BP project. It revealed a parallel four-tiered NEPA process consisting of: 1) a nationwide programmatic EIS on the 2007-2012 OCS Oil and Gas Leasing Program; 2) another programmatic EIS on the Gulf of Mexico Leasing Program; 3) an EA/FONSI for the proposed OCS Lease sale that encompassed the BP project; and finally 4) two Categorical Exclusion Reviews for the approval of the BP exploration plans

In the process of describing the overall NEPA process, the CEQ Report included some interesting revelations about deficiencies in the approach to impact analysis and the inadequacy of mitigation related to oil spills. Although tiering is a well-established practice under NEPA, in the case of OCS oil and gas program, the misuse of the tiering process allowed some critical elements of NEPA to fall through the cracks. For example, the programmatic EIS for Gulf of Mexico leasing focused only on high-probability, low-impact oil spills and concluded that spills only 10,000 barrels were reasonably foreseeable. Following this conclusion, neither the EA nor the CATEX that tiered from the

programmatic document included any site-specific oil spill analysis. Thus, the likelihood of a major spill occurring, such as the one that occurred in the Gulf of Mexico, was never analyzed

Another deficiency in the NEPA process identified by CEQ related to mitigation, or the lack thereof. Some mitigation measures that were identified in the programmatic EISs were never carried through to either the project-level EA or the CATEX review. To exacerbate this the problem the project-level EA identified the need for additional mitigation measures, but deferred them to future study. Thus, no mitigation measures related to oil spills were ever properly evaluated or adopted.

Recommendations for improving the NEPA process

Based on the problems noted above, as well as other deficiencies in the MMS approach to NEPA, CEQ concluded its report with recommendations dealing with four areas of NEPA compliance:

1. Tiering and site-specific analysis

- MMS should perform careful and comprehensive NEPA reviews of individual deepwater exploration, operation, development production and decommissioning activities, including site-specific information where appropriate
- MMS should track and take into account all mitigation commitments made in NEPA and decision documents that are relied upon in determining the significance of environmental impacts, from the initial Programmatic EIS through site specific NEPA analysis and decisions.

2. Transparency, Public Accountability, and Sound Decision Making

- MMS should ensure that NEPA analysis full inform and align with the substantive decision at all rele3van decision points; that subsequent analysis accurately reflects and carry forward relevant underlying data,; and that those analysis will be fully available to the public.
- MMS should ensure that NEPA documents provide decision makers with a robust analysis of reasonably foreseeable impacts, including an analysis of reasonably foreseeable impacts associated with low-probability catastrophic spills for OCS oil and gas

3. Categorical Exclusion

- The administration should review the use of categorical exclusions for OCS oil and gas exploration and development in light of the increasing levels of complexity and risk and the consequent potential environmental impacts associated with deepwater drilling. The agency should determine whether to revise these CATEXs. n13
- The administration should continue to seek amendments to the OCS Lands Act to eliminate the 30-day decisional timeframe for approval of submitted oil and gas exploration plans. n14

4. Changed Circumstances

- MMS should consider supplementing existing NEPA practices, procedures, and analysis to reflect changed assumptions and environmental conditions, due to circumstances surrounding the BP oil spill

The CEQ report contains more details about these recommendations and explanations of why each is necessary.

Conclusion

CEQ's recommendations for more robust analysis of oil spills, greater transparency, and more emphasis on

carrying through with mitigation are all important aspects of NEPA that will hopefully encourage MMS to usher in a new era of NEPA compliance for OCS oil and gas projects Additionally, since MMS is not the only agency whose NEPA process could stand improvement, many of CEQ's recommendations should also be relevant to the broader implementation of NEPA throughout the federal government. CEQ's report can be found at: http://ceq.hss.doe.gov/current_developments/mmsnepa.html.

Return to Text

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n2 In June 2010, the Obama administration renamed and reorganized MMS as the Bureau of Ocean Energy Management, Regulation and Enforcement. The Bureau now has two main programs: Offshore Energy and Minerals Management which deals with planning and permitting oil and gas development, and Minerals Revenue Management which handles revenues from oil and gas production.

n3 *75 Fed. Reg. 29996* (May 28, 2010).

n4 *40 USC 4332;* 40 C.F.R. 1502.3, 1508.11.

n5 40 C.F.R. 1501.3,1508.9; an agency need not prepare an EA if it decides at the outset to prepare an EIS.

n6 40 CFR 1501.4(e); 1508.13

n7 40 C.F.R. 1508.4

n8 Department of the Interior NEPA regulations, 43 C.F.R. 46 (available at www.doi.gov/oepc/nepafr.html).

n9 MMS NEPA implementing procedures found in the Department of the Interior's Director's Manual 516 at Chapter 15 (available at : http://elips.doi.gov/app_DM/act_getfiles.cfm?relnum=3625)

n10 40 C.F.R. 1508.28.

n11 The Obama Administration, in its supplemental budget request sent to Congress on May 12, 2010, requested that Congress extend the 30-day time period, but Congress has yet to act on that request.

n12 Council on Environmental Quality. *Report Regarding the Minerals Management Service's National Environmental Policy Act Polices, Practices, and Procedures as They Relate to Outer Continental Shelf Oil and Gas Exploration and Development.*. August 16, 2010

n13 In its report, CEQ noted that the categorical exclusions associated with OCS oil and gas exploration were developed more than 20 years ago, before the proliferation of deep-water drilling and its attendant impacts.

n14 The 30-day time frame is the main reason that MMS felt compelled to rely on categorical exclusions. The elimination of that time frame would allow the time necessary to prepare a more robust NEPA review.

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CEQA Review Is "Meaningless Exercise" When Agency Is Unable to Shape Project

2010 Emerging Issues 5308

CEQA Review Is a "Meaningless Exercise" When the Agency Is Unable to Shape the Project

By Mr Gregory P. Powers

September 17, 2010

SUMMARY: This article examines the evolution of California Environmental Quality Act cases regarding ministerial, discretionary, and mixed ministerial-discretionary projects, and courts' decisions relating to the applicability of CEQA review under these scenarios. It analyzes recent cases addressing an agency's authority to shape a project through imposing mitigation, and the courts' view of project exemptions from CEQA when agencies lack such authority.

ARTICLE: Introduction

In determining the need for environmental review for projects under the California Environmental Quality Act [Pub. Res. Code § 21000 et seq.] ("CEQA"), public agencies and California courts have traditionally looked to the question of whether the project is ministerial or discretionary in nature. If it is the former, then the project is exempt from CEQA. [Pub. Res. Code § 21080.] If it is the latter, agencies and the courts have customarily held that CEQA review is required for the project.

However, based on the recent case of *San Diego Navy Broadway Complex Coalition v. City of San Diego [(2010) 185 Cal. App. 4th 924, 2010 Cal. App. LEXIS 898,* 2010 CELR 312] ("*Broadway Complex*"), and several previous cases, it is increasingly clear that the inquiry regarding CEQA applicability has evolved. The question has now become whether the project is discretionary, *and if so*, does the agency have the authority to "shape" the project in order to reduce or eliminate *any* potential environmental impacts. If not, case law reveals that CEQA review is "meaningless" and unnecessary.

This article examines the evolution of CEQA cases dealing with ministerial, discretionary, and mixed ministerial-discretionary projects, and the courts' decisions relating to the applicability of CEQA review under these various scenarios. It also analyzes recent case law regarding an agency's authority to shape a project through the imposition of mitigation, and the courts' view of project exemptions from CEQA when agencies lack such authority.

The Developing Trend As Evidenced by the *Broadway Complex* Case

On June 17, 2010, the California Court of Appeal, Fourth District, held that a nonprofit benefit corporation failed to demonstrate that the City of San Diego ("City") had the authority to address potential environmental impacts associated with a downtown development project, and therefore the City was not required to prepare an updated Environmental Impact Report ("EIR") under CEQA. [*Broadway Complex, 185 Cal. App. 4th at 940-941.]* The court's holding was based on the principle that, under CEQA, the environmental review process becomes a "meaningless exercise" in situations where a lead agency cannot "shape" (i.e., reduce environmental concerns identified in a CEQA document through the imposition of mitigation requirements) the project in a way that would respond to concerns raised in an environmental review document. *[185 Cal. App. 4th at 933-934.]*

While this concept has been applied by the courts mostly to situations involving purely ministerial acts by public agencies, the current trend as evidenced in *Broadway Complex* shows that the pivotal question is not whether the agency lacks discretion in its action, but also whether the agency lacks the authority to influence the project in a manner that can produce mitigation to environmental impacts caused by the project. In cases where lead agencies are unable to meaningfully affect a project so as to reduce or eliminate any environmental impacts, like in *Broadway Complex* and the previous case of *Friends of Westwood, Inc. v. City of Los Angeles [(1987) 191 Cal. App. 3d 259, 235 Cal. Rptr. 788]* ("*Westwood*"), courts have deemed the CEQA review process to be a "useless-and indeed wasteful-gesture," despite how extreme the project's environmental impacts might be. [*Westwood, 191 Cal. App. 3d at 272.]*

CEQA Review for New and Evolving Projects Generally

The Legislature enacted CEQA "to protect the environment by the establishment of administrative procedures drafted to 'Ensure that the long-term protection of the environment shall be the guiding criterion in public decisions.' (Pub. Resources Code, § 21001, subd. (d).)" [*No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 74, 118 Cal. Rptr. 34.]* CEQA requires that a public agency prepare an EIR whenever an agency undertakes a discretionary project that may have a significant impact on the environment. [Pub. Res. Code § 21080.] "Project" is defined under CEQA as "activities directly undertaken by any public agency." [Pub. Res. Code § 21065.]

There is a strong presumption against further environmental review for a project once an EIR has been prepared and certified. [*Moss v. County of Humboldt (2008) 162 Cal. App. 4th 1041, 1049-1050, 76 Cal. Rptr. 3d 428.]* However, in situations where an EIR has been certified by a lead agency, but then the project evolves or changes over time, additional CEQA review, such as a subsequent or supplemental EIR, may become necessary. Section 21166 of the Public Resources Code provides, in pertinent part, the following with regard to subsequent and supplemental EIRs:

When an [EIR] has been prepared for a project...no subsequent or supplemental [EIR] shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs:

(a) Substantial changes are proposed in the project which will require major revisions of the [EIR].

(b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the [EIR].

(c) New information, which was not known and could not have been known at the time the [EIR] was certified as complete, becomes available.

Therefore, conditions warranting the preparation of a subsequent or supplemental EIR are somewhat limited under CEQA. Nevertheless, when an agency issues a discretionary approval for a project that is covered by a previously certified EIR and one or more of the triggering factors contained in Pub. Res. Code § 21166 are evident, a subsequent or supplemental EIR must be prepared and certified in compliance with CEQA.

As applied to private development projects, the purpose of CEQA is to minimize the adverse effects of new construction on the environment. [*Friends of Westwood, 191 Cal. App. 3d at 266.]* CEQA requires analyses of potential environmental impacts "where government has the power through its regulatory powers to eliminate or mitigate"

adverse environmental effects that are revealed in an environmental study. *[191 Cal. App. 3d at 267.]*

Consequently, in determining whether an agency is required to prepare an EIR, subsequent EIR, or supplemental EIR, California courts have relied on the premise that the "touchstone" is whether the agency could meaningfully address *any* environmental concerns that might be identified in an EIR. [*Broadway Complex, 185 Cal. App. 4th at 933,* citing *Westwood, 191 Cal. App. 3d at 266* (emphasis added).] If an agency lacks the authority to do so, as the court recently found in *Broadway Complex*, then CEQA review becomes pointless and unnecessary. *[185 Cal. App. 4th at 929.]*

When Is Government Foreclosed from Shaping a Project?

In *Broadway Complex*, the project opponent ("Coalition") argued that the City was required to prepare an EIR to address the project's impacts on numerous environmental issues, including water supply, public services, groundwater contamination, air pollution, and greenhouse gas emissions. *[185 Cal. App. 4th at 930.]* The Coalition agreed that the decisions at issue were limited to determining whether certain submittals by the developer were consistent with the Development Agreement for the project, but it argued that the City had made subjective determinations as to whether the developer's submittals were of "sufficient quality and beauty" so as to be consistent with provisions in the *Development Agreement. [185 Cal. App. 4th at 930.* The decisions at issue were made by the Centre City Development Corporation, a public nonprofit corporation formed by the City in 1975 to staff and implement downtown San Diego redevelopment projects and programs. (*See* CCDC website, www.ccdc.com.) For purposes of this article, the CCDC will simply be referred to as the "City."] Thus, the Coalition alleged that the City had intertwined a discretionary component into an otherwise non-discretionary act, thereby triggering CEQA review.

In turn, the City argued that none of the environmental concerns raised by the Coalition met the criteria in Pub. Res. Code § 21166 necessitating a subsequent or supplemental *EIR. [185 Cal. App. 4th at 930-931.]* The developer, as a real party in interest, relied on *Westwood* and argued that the City's consistency reviews did not constitute discretionary actions sufficient to trigger further review under section 21166. *[185 Cal. App. 4th at 931.]*

In upholding the trial court's denial of the Coalition's amended petition for writ of mandate, the court ruled that the City did not have the authority to address the environmental concerns raised as part of its consistency determinations, and therefore was not required to prepare an *EIR. [185 Cal. App. 4th at 933.]* The court acknowledged that section 15357 of the CEQA Guidelines define a discretionary project as "a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations." [The CEQA Guidelines can be found in Title 14 of the California Code of Regulations, section 15000 et seq.]

The court in *Broadway Complex* relied heavily on the standard set forth in *Westwood* and the California Supreme Court's decision in *Mountain Lion Foundation v. Fish and Game Commission [(1997) 16 Cal.4th 105, 65 Cal. Rptr. 2d 580]* ("*Mountain Lion Foundation*"), that limiting CEQA to discretionary projects "implicitly recognizes that unless a public agency can shape the project in a way that would respond to concerns raised in an EIR, or its functional equivalent, environmental review would be a meaningless exercise." [*Broadway Complex, 185 Cal. App. 4th at 933-934*, citing *Mountain Lion Foundation, 16 Cal.4th at 117.]* The court further noted that even if the City's consistency reviews involved some discretionary authority with respect to aesthetic issues, the Coalition made no showing that the scope of the City's discretion extended to the project's potential environmental impacts, and that failure to make such a showing was fatal to the Coalition's action. *[185 Cal. App. 4th at 938.]*

In so stating, the court in *Broadway Complex* went beyond the traditional analysis in determining whether CEQA review was required and proper by expressly acknowledging that the question is not just whether the agency action is ministerial in nature; but whether the action can be discretionary and yet still not trigger CEQA review if a sufficient nexus does not exist between the project's environmental effects and the agency's ability to respond to impacts identified

in a CEQA document.

What Is Truly "Ministerial" Under CEQA?

A ministerial action involves the application of fixed standards or objective measurements. [*Health First v. March Joint Powers Authority (2009) 174 Cal. App. 4th 1135, 1143, 96 Cal. Rptr. 3d 290]* ("*Health First*").] "Ministerial" describes a governmental decision involving "little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision." [*Leach v. City of San Diego (1990) 220 Cal. App. 3d 389, 393, 269 Cal. Rptr. 328* (citing Guidelines, § 15369)] ("*Leach*"). Ministerial acts and approvals are exempt from CEQA. [Guidelines, § 15268(a).]

Some agencies will, without much analysis or thought, treat some common approvals like the issuance of building permits or grading permits as ministerial acts that are exempt from CEQA review. In many cases, the agencies are correct in doing so since local codes typically do not impart discretion on agency officials or employees in issuing these approvals. For it to be a truly "ministerial" act, the agency cannot have the ability to manipulate or affect the project in a meaningful way to address any environmental impacts associated with the approval. However, some jurisdictions do allow for some subjectivity in issuing common permits such as building permits and grading permits. Under those circumstances the courts have held that CEQA review is required, even in issuing those types of "everyday" approvals. [*Westwood, 191 Cal. App. 3d at 269.]*

Public Resources Code § 21080(b)(1) exempts ministerial acts from CEQA review. The court in *Westwood* went to great lengths to interpret the meaning of "ministerial" under section 21080, including a detailed discussion on the legislative history of Assembly Bill 889 (the bill creating section 21080). *[191 Cal. App. 3d at 267-268.]* In *Westwood*, a citizen group sought to enforce compliance with CEQA for the issuance of a building permit for the construction of a proposed office tower. The Court of Appeal, Second District, reversed the trial court's denial of the citizen group's request, and held that the building permit approval process involved discretionary components, thereby triggering CEQA review, since the City of Los Angeles had the authority to modify the project as part of the building permit process. *[191 Cal. App. 3d at 281-282.]*

In looking to the legislative history of Assembly Bill 889 ("AB 889"), the court in *Westwood* noted that building permits, and even grading permits, had initially been included in the list of ministerial projects under AB 889. *[191 Cal. App. 3d at 267.]* However, prior to AB 889's adoption by the Legislature, the Senate amended the bill and deleted building permits and grading permits from the list of ministerial projects. *[191 Cal. App. 3d at 268.]* In a letter from Assembly Member Knox, the author of AB 889, it was later explained why building and grading permits were removed from the list of ministerial projects. Assembly Member Knox stated, in pertinent part, that "the purpose of Section 21080 was to clarify the applicability of [CEQA] to ministerial activities. California courts have long held that 'ministerial' actions are those which *legally require* the issuance of a permit...if the applicant therefore satisfies certain *specific* requirements. ... The essential element of a ministerial act is that the approving agency does not have the legal authority to refuse a qualified applicant or to *insist upon modifications or changes in his project*.... It was subsequently pointed out, however, that such actions are not always ministerial. Some local building ordinances, for example grant local officials the *authority to require substantial changes in building design* or even to refuse a building permit altogether. Such situations are *not ministerial* and should fall within the scope of [CEQA]." [*Westwood, 191 Cal. App. 3d at 268-269,* citing Letter from Honorable John T. Knox to Mr. Jack C. Crose, dated Feb. 6, 1973 (italics added by the court)].

Based on this, the court in *Westwood* held that the issuance of a building permit by the City of Los Angeles involved enough discretion to fall outside the traditional definition of "ministerial," and therefore triggered the need for environmental review. The court stated that the "legislative history makes it abundantly clear the term 'ministerial' is limited to those approvals which can be legally compelled without substantial modification or change. Thus, the fact a city lacks the discretion to deny a building permit outright in the event environmental problems are identified does not

make issuance of the permit 'ministerial.' *It is enough the city retains discretion to require substantial changes in building design*." *[191 Cal. App. 3d at 269* (emphasis added).] The court observed that in section 15268 of the CEQA Guidelines, which provides that building permits are presumed to be ministerial where the agency lacks any discretion in issuing them, a the presumption arises "only where a pre-condition exists-the public entity must retain no discretion in connection with the issuance of the building permit." *[191 Cal. App. 3d at 269.]* The court further opined that where the building permit ordinance contains any discretionary component whatsoever, the presumption is not just dissolved; it "simply fails to come into existence." *[191 Cal. App. 3d at 269-270.]*

Many examples of purely ministerial acts can be found in case law. For instance, approval of final subdivision map has been deemed to be a ministerial act that is exempt from CEQA. In *Hensler v. City of Glendale [(1994) 8 Cal.4th 1, 22, fn. 11, 32 Cal. Rptr. 2d 244]*, the California Supreme Court held that approval of a final map that substantially complies the previously approved tentative map is a mandatory ministerial act. Courts have also held that the issuance of a building permit can be deemed ministerial (unlike the situation in *Westwood*) where the ordinance requiring the permit limits the public official to determining (1) whether the zoning allows the structure to be built in the requested location, (2) the structure would meet the strength requirements in the Uniform Building Code, and (3) the applicant has paid the required fee. [*Adams Point Preservation Society v. City of Oakland (1987) 192 Cal. App. 3d 203, 206, 237 Cal. Rptr. 273.]*

Courts have found even more complicated agency approvals to be purely ministerial and exempt from CEQA review under certain circumstances. For instance, in *Health First*, the court held that the approval of a design plan application for a large warehouse distribution facility was ministerial where the agency review involved deciding whether the application was consistent with requirements, fixed standards, and proposed mitigation of the applicable Specific Plan, Focused EIR, and Design Guidelines for the reuse of a military base. [*Health First, 174 Cal. App. 4th at 1144.]* Also, in *Leach*, the court held that the City of San Diego's operation of a reservoir system, *including decisions by City officials to draft water from one reservoir to another*, were ministerial and exempt from CEQA. [*Leach, 220 Cal. App. 3d at 393* (holding that the decision to draft water between reservoirs did not involve personal judgment as to the wisdom or manner of carrying the action out, and the only decision to be made was the timing, not the method).]

Projects of Mixed Ministerial-Discretionary Character

Although Pub. Res. § 21080 draws a line between purely ministerial and entirely discretionary projects, it does not mention those having both characteristics. [*People v. Department of Housing and Community Development (1975) 45 Cal. App. 3d 185, 194, 119 Cal. Rptr. 266* ("*HCD*").] However, the CEQA Guidelines and the courts have traditionally made it clear that for purposes of CEQA review, an otherwise ministerial act will trigger CEQA where the action contains any discretionary element. Now, with the recent holding in *Broadway Complex*, it has been made more apparent that not only must there be a discretionary element to the approval, but *the agency must have the authority to address any environmental impacts associated with the approval as part of its discretionary action*. [*Broadway Complex, 185 Cal. App. 4th at 935-936.]*

Section 15268, subdivision (d) of the Guidelines provides, in significant part, the following: "Ministerial projects are exempt from the requirements of CEQA.... Where a project involves an approval that contains elements of both a ministerial action and a discretionary action, the project will be deemed to be discretionary and will be subject to the requirements of CEQA."

This section does not directly address the standard currently being followed by the courts that the agency must also be able to "shape" the project for CEQA to apply. Thus, when read in concert with cases like *Westwood* and *Broadway Complex*, perhaps the more appropriate interpretation of section 15268 is that all discretionary projects are subject to CEQA, but discretionary projects are not subject to the CEQA *review process* when the agency cannot meaningfully affect the project through the imposition of mitigation.

In any event, in situations where it is questionable whether the agency action involves some discretion, the courts

have adopted a restrictive interpretation of what "ministerial" means for purposes of avoiding CEQA review. [*Westwood, 191 Cal. App. 3d at 271.]* The California Supreme Court has held that CEQA "must be interpreted in such a manner as to afford the *fullest possible protection* to the environment within the *reasonable* scope of the statutory language." (*Westwood, 191 Cal. App. 3d at 271*, citing *Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, 259, 104 Cal. Rptr. 761* (italics added by the court).] Based on this, the courts have followed the mandate that CEQA applies "even where the process is largely ministerial." *[191 Cal. App. 3d at 271.]*

The issue of hybrid ministerial-discretionary approvals was addressed in *HCD [45 Cal. App. 3d at 193-194].* In that case, a district attorney sought a writ compelling the state to rescind a construction permit for a mobile home park on the ground that the permit was invalid because CEQA review had not been conducted. The Court of Appeal, Third District, provided a detailed explanation of how project approvals involving a mix of ministerial and discretionary actions should be handled for purposes of CEQA, noting that where permits are governed by fixed design and construction specifications, the approval "leaves scant room for the play of personal judgment," and can be classified as ministerial. *[45 Cal. App. 3d at 193.]* But when the construction permit involves questions about adequacy of water supply, sewage disposal, lighting sufficiency, and drainage ability, "these are relatively personal decisions addressed to the sound judgment and enlightened choice of the administrator," and they inevitably involve some degree of discretion. *[45 Cal. App. 3d at 193.]* The court concluded that whenever there is a question whether a project is ministerial or discretionary in nature, an agency (and the courts) should always find in favor of the latter. *[45 Cal. App. 3d at 194.]*

CEQA Review Is Irrelevant Unless the Project Can Be Modified Through Discretionary Action

In comparing the court's reasoning in *HCD* to Fourth District Court of Appeal's discussion in *Leach*, it becomes more evident that the agency's ability to "shape" the project through its discretionary judgment is the lynchpin for determining whether CEQA review is appropriate. In *Leach*, the decision to draft water between reservoirs, even in light of the fact that the City of San Diego had not done so in over ten years, was not the result of personal judgment or wisdom, but rather one of timing based on existing conditions. *[220 Cal. App. 3d at 394.]* Therefore, the decision was purely ministerial and exempt from CEQA.

The court in *Leach* acknowledged that profound environmental effects could be caused as the result of the drafting between reservoirs, but the court was not swayed from the legal principle that if an agency is foreclosed from "shaping" the project through discretionary action, CEQA review is "wasteful" and "meaningless." *[220 Cal. App. 3d at 394-395.]* Notably, the court stated the following:

The only way to accomplish the primary purpose of water supply is to draft water between the reservoirs as needed. *We are not unmindful that the drafting...is likely to have a significant environmental impact on a reservoir that remained untouched for 10 years and built up an ecosystem.* However, we note the affected ecosystem here is not indigenous to the area but rather developed in response to the artificial lake created for a utilitarian purpose. In spite of the environmental consequences, the City could do little or nothing to prevent or modify drafting of water between reservoirs to "mitigate the environmental damage in any significant way." To require an EIR every time drafting of a reservoir is proposed for the ultimate purpose of supplying the community with water would indeed be useless and wasteful.

[220 Cal. App. 3d at 395 (emphasis added).]

This acknowledgment by the court in Leach that CEQA is not required when the agency lacks the ability to meaningfully shape the project, even where profound environmental damage can result, is echoed in the court's recent opinion in *Broadway Complex*, and also in *Westwood*:

No matter what the EIR might reveal about the terrible environmental consequences of going ahead with a given project, the government agency would lack the power (that is, the discretion) to stop or modify it in any relevant way. The agency could not lawfully deny the permit nor condition it in any way which would mitigate the environmental

damage in any significant way. The applicant would be able to legally compel issuance of the permit without change. Thus, to require the preparation of an EIR would constitute a useless-and indeed wasteful-gesture.

[*Broadway Complex, 185 Cal. App. 4th at 933,* quoting *Westwood, 191 Cal. App. 3d at 272.]*

Conclusion

Based on these cases, it is clear that the question of CEQA review to a project does not rest only on whether the project approval is ministerial or discretionary, but whether it is discretionary, *and* whether the agency has the ability to influence the project in a meaningful way. In the absence of discretion, an agency has no jurisdiction to prepare an environmental document under CEQA. As stated in *Broadway Complex,* "[t]his jurisdictional limitation is consistent with the notion that it is nonsensical to require an agency to prepare [an EIR, subsequent EIR, or supplemental EIR] unless the agency has the authority to take action that would respond to any concerns that might be raised...." *[185 Cal. App. 4th at 935-936.]* Thus, CEQA review becomes a meaningless exercise unless the agency has the power to "shape" the project in a manner that addresses environmental concerns raised in an environmental document.

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Environmental Protection Laws under Siege

2010 Emerging Issues 5215

Environmental Protection Laws under Siege: The Advance of Efforts to Create Exemptions to CEQA and Suspend AB 32

By Mr. Douglas Carstens

July 23, 2010

SUMMARY: Get insightful analysis on recent attacks against the California Environmental Quality Act (CEQA) and the California Global Warming Solutions Act (AB 32). This article addresses attempts to blame CEQA and AB 32 for many economic ills that beset California, and the current efforts to exempt certain projects from CEQA. The article initially appeared as the Lead Article for the July issue of CALIFORNIA ENVIRONMENTAL LAW REPORTER (Matthew Bender).

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ARTICLE: I. Introduction

This year, attacks against the Global Warming Solutions Act (AB 32) and the California Environmental Quality Act (CEQA) are intense. CEQA for the past several decades has protected California's natural environment and the quality of Californians' lives in numerous ways. It has enabled ordinary people, environmental and community groups, and public agencies to participate in public decision[#8209]making about a wide variety of projects affecting their communities. AB 32 has been touted as an example of Governor Schwarzenegger's commitment to a greener California, and is credited with setting an example nationwide of how to control the emissions of greenhouse gasses.

However, some manufacturers, builders, engineers, developers, business interests, and others have blamed CEQA and AB 32 for many of the economic ills that beset the state. They have called for the suspension of AB 32 until the economy improves, and for significant limitations on CEQA. Although many recent proposals and two enacted bills last year dealt with exempting certain projects, most proposals to amend CEQA focus on creating limitations on judicial review of decisions under the Act to curb alleged abuse of CEQA and shorten delays associated with litigation. As a result, the ability of concerned individuals, groups, and public agencies to effectively challenge that review in court to ensure its legal sufficiency would be eliminated. This article explores the background of this current wave of proposals, identifies and explains some of the exemptions, and identifies the various arguments that have been espoused for and against the proposals.

II. Background to Current Environmental Exemption and Suspension Proposals

A. The Global Warming Solutions Act (AB 32) Was Passed in 2006

In 2006, the Legislature passed AB 32, the Global Warming Solutions Act, to set greenhouse gas emissions reduction goals into law. It directed the California Air Resources Board to develop early actions to reduce greenhouse gases (GHGs) and prepare a longer range plan to identify how to limit GHG emissions.

B. Historical Development of CEQA and Reform Efforts

CEQA was passed by the California Legislature in 1970. Soon after CEQA's passage, the California Supreme Court interpreted its protections to apply to private as well as public projects [*Friends of Mammoth v. Board of Supervisors (1972) 8 Cal. 3d 247, 104 Cal. Rptr. 761, 502 P.2d 1049].* In response to this decision, business interests sought and obtained revisions to CEQA to set short statute of limitations and ensure it allowed for project approval despite their impacts [Barbour and Teitz, "CEQA Reform: Issues and Options," Public Policy Institute of California (PPIC), April 6, 2005, p. 7, *available at* www.ppic.org/content/pubs/op/OP_405EBOP.pdf].

In the 1980s, there was relatively little effort to reform CEQA, though some reforms occurred after a recession of the state economy in 1983 led Governor Deukmejian to appoint a task force to recommend ways to ease CEQA's regulatory burden [Barbour and Teitz, "CEQA Reform: Issues and Options," p. 7]. Then, in the severe recession of the early 1990s, there were concerted efforts directed at changing the standard for when projects would require extensive environmental review. More than 60 bills to revise CEQA were introduced in the Legislature in 1993 [Barbour and Teitz, "CEQA Reform: Issues and Options," p. 7]. Some amendments to CEQA passed, but they did not fundamentally weaken the statute. They included codification of mitigated negative declarations, revised time limits, and limits on judicial remedies [Barbour and Teitz, "CEQA Reform: Issues and Options," p. 9].

The next major effort to limit CEQA occurred in the summer of 2007 when some legislators attempted to remove GHGs from the purview of CEQA. The crisis was resolved with passage of *Pub. Res. Code § 21097*, which actually recognized that CEQA applies to global warming impacts, but exempted transportation and flooding projects from certain challenges [*Pub. Res. Code § 21097*, now superseded by *Pub. Res. Code § 21083.05* (requiring Resources Agency promulgation of guidelines for analysis of GHG impacts)].

Then, on the heels of the severe recession of 2008, in 2009 the Legislature exempted an NFL Stadium in the City of Industry from CEQA. CEQA has generally applicable categorical exemptions established by the Resources Agency and various statutory exemptions. Categorical exemptions exempt a class of projects such as environmental restoration or minor land use alterations from CEQA, subject to various exceptions [CEQA Guidelines § 15354; *see, e.g.*, CEQA Guidelines §§ 15300-15333]. Statutory exemptions have been passed for specific, usually publicly necessary projects such as prisons or railroad lines [*Pub. Res. Code §§ 21080.01* (prison in San Luis Obispo County), 21080.02 (prison in Kings County), 21080.13 (railroad grade separations), 21080.05 (railroad right of way), and 21080.04 (Napa Valley Wine Train)]. However, until 2009, there had never been a specific CEQA exemption passed for a privately owned and used project.

C. A Proposed Football Stadium Was Given a Pass

In the closing days of the 2009 legislative session, Majestic Realty and the City of Industry proposed that a 75,000 seat National Football League (NFL) stadium and an associated three million[#8209]square[#8209]foot entertainment and retail complex be exempted from CEQA through Assembly Bill 81 x3. It exempted the proposed stadium from further environmental review and from pending and future CEQA lawsuits. After the City of Industry approved the stadium administratively, the nearby City of Walnut filed one lawsuit and a local group filed another one, noting that the original environmental impact report (EIR) was for a business park and did not adequately analyze a stadium. Although proponents claimed, without citing any evidence, that the project would provide 18,000 jobs, an economic analysis by the City of Walnut found that this stadium would produce only part[#8209]time and low[#8209]wage

positions, and not even 18,000 of those. Opponents of the exemption in the Legislature argued that a healthy environment and laws to protect it create the foundation for a strong economy and job creation. The exemption legislation passed the Assembly within a day of its introduction in the last two days of the Legislative session. It was not referred to any legislative committee with experience with CEQA, but rather to the Arts, Entertainment and Sports Committee. Without time for verification of facts, some legislators were convinced by misinformation supplied by stadium proponents that an EIR had already been done for the stadium, that the stadium would be the first LEEDs certified stadium in the country, and that it would create 18,000 jobs. A few weeks later, again without referral to any environmental committees, the Senate passed the legislation without amendment. Governor Schwarzenegger supported the project as a boost to California's economy. At the time of this writing nine months after the passage of the exemption, no construction has been commenced on the stadium, and no NFL team has yet committed to move there.

D. An Exemption for an Air Pollution Rule Was Passed

At the end of the same 2009 legislative session, a bill was passed for the Priority Reserve credit program [AB 1318 and SB 827]. The program allowed the Southern California Air Quality Management District to reserve some emission credits for permitting of priority facilities such as power plants, but it had been successfully challenged in two court cases. The air district complained to the Legislature that the court decision created a de facto air quality permit moratorium in the South Coast Air Basin. The two bills effectively abrogated the court decision, contrary to the Legislature's usual reluctance to interfere in pending litigation.

III. Proposals to Reduce Environmental Protections Are Pending in the Legislature and in the Initiative Process

The success in exempting projects in 2009 apparently emboldened longstanding opponents to CEQA and AB 32 who claim rollbacks are needed because of the economy.

A. Legislative Proposals Would Limit CEQA's Enforcement

In what is called the "CEQA Litigation Protection Pilot Program of 2010," the Governor proposed that the Secretary of Business, Transportation, and Housing Administration select 125 projects over each of the next five years and grant them judicial immunity from the California Environmental Quality Act. For those 125 projects, local communities, cities, and counties would not be able to test in court the adequacy of the environmental review prepared for a project to ensure it met minimal legal requirements.

The four identical bills introduced to promote this program in February 2010 [ABX8 37 (Calderon & Nestande), AB 1805 (Calderon & Nestande), SBX8 42 (Correa & Cogdill), and SB 1010 (Correa & Cogdill)] would prohibit "court review of a lead agency's certification of an EIR or adoption of a mitigated negative declaration, as well as a lead or responsible agency's project approval, for 125 projects that are selected by the Business, Transportation and Housing Agency (BT&H) over a five[#8209]year period" [Senate Com. on Env. Quality, Bill Analysis for SB 1010]. Although most bills have been held in committee, observers anticipate that the concepts they propose will be taken up during budget negotiations in the summer [Los Angeles Times editorial, "Jobs at any price?" Feb. 28, 2010].

Some business interests view these exemptions as a way to expedite construction of numerous, unspecified projects, and boost the economy. Proponents of proposed projects say the bills would create jobs and promote economic progress because they would realize cost savings by cutting the review time necessary to identify impacts and develop mitigation measures for those impacts. Bill opponents include environmental groups, planners, public health advocates, and consumer groups, who argue these bills would strip communities of the ability to hold developers and project proponents accountable for developing and implementing mitigation measures that reduce or avoid a development project's significant adverse effects in such areas as air and water quality, traffic congestion, noise, and open space. People in California's communities, cities, and counties would not be able to enforce the environmental review process of CEQA for any of the 125 projects.

B. Proposed Initiatives Would Undermine Environmental Protections

In addition to the proposals in the Legislature, various measures have been submitted to the Attorney General as initiatives that would undermine environmental protections. The common thread in these measures is to rollback, restrict, or eliminate protections provided by environmental laws in the name of promoting economic activity. The California Jobs and Housing Act would restrict the right to challenge a proposed project's environmental impact report to the California Attorney General [Initiative 10[#8209]0009 and Initiative 10[#8209]0008; www.sos.ca.gov/elections/ballot‑measures/cleared[#8209]for[#8209]circulation.htm]. It would "preclude any person, city, county, or other entity, other than the state Attorney General, from bringing a lawsuit that alleges that an environmental impact report does not comply with the California Environmental Quality Act because it fails to identify ways to minimize significant environmental effects, fails to offer alternatives to the proposed project, or fails to satisfy other legal requirements" [www.sos.ca.gov/elections/ballot‑measures/cleared[#8209]for[#8209]circulation.htm. Initiative 10[#8209]0016, which also qualified for circulation, "Repeals the California Environmental Quality Act, the California Coastal Act, the California Endangered Species Act, and the California Global Warming Solutions Act"]. Initiative 09[#8209]0104 "suspends State laws requiring reduced greenhouse gas emissions that cause global warming, until California's unemployment rate drops to 5.5 percent or less for four consecutive quarters" [www.sos.ca.gov/elections/ballot‑measures/pending[#8209]signature[#8209]verification.htm]. "California's unemployment rate is currently hovering around 13%, and economists do not expect that level to fall below 5.5% in the foreseeable future. So, for all intents and purposes, the initiative if successful would effectively sound the death knell for AB 32" [Richard Frank, "The Looming Political Battle Over AB 32 & California's Environmental & Economic Future" (May 3, 2010), http://legalplanet.wordpress.com/2010/05/03/the‑looming[#8209]political[#8209]battle[#8209]over[#8209]ab[#8209]32[#8209]

Presently, there is no single public agency or individual charged with enforcement of CEQA. Sean Hecht, Executive Director of UCLA's Environmental Law Center, said, "Judicial review is the only way of ensuring environmental review under CEQA actually complies with the law, because there is no state oversight agency to ensure compliance" ["Schwarzenegger, Calderon propose relaxing environmental laws for development," Rebecca Kimitch, San Gabriel Valley Tribune, 2/20/2010]. Despite this lack of a designated enforcement mechanism, CEQA has achieved its vitality by allowing a broad range of potentially interested parties to go to court to enforce its requirements. Theoretically, the state's attorney general as the chief law enforcement officer of the state has the responsibility for enforcement of CEQA and all other state laws. However, the California Supreme Court has observed there is no practical way that the Attorney General can monitor the thousands of proposed projects that are subject to CEQA and ensure that its mandates are met in every instance: "Although there are within the executive branch of the government offices and institutions (exemplified by the Attorney General) whose function it is to represent the general public in such matters and to ensure proper enforcement, for various reasons the burden of enforcement is not always adequately carried by those offices and institutions, rendering some sort of private action imperative" [*Serrano v. Priest (1977) 20 Cal. 3d 25, 44, 141 Cal. Rptr. 315, 569 P.2d 1303].*

IV. Arguments in Favor of Legislative CEQA Exemptions

A. CEQA and AB 32 Allegedly Slow Down Projects and Kill Jobs

Proponents of CEQA exemption legislation and AB 32 suspension rely on similar arguments to advance their positions. One common argument has been that environmental review under CEQA and restrictions imposed by AB 32 interfere with economic activity in the state and prevent job creation. This argument was used to support the NFL Stadium exemption. Assemblyman Anthony Adams, a proponent of the CEQA exemption legislation, stated, "We have to get this economy moving, and we can't do that if we allow our own rules to prohibit people from getting back to work" ["Schwarzenegger, Calderon propose relaxing environmental laws for development," Rebecca Kimitch, San Gabriel Valley Tribune, 02/20/2010].

The initiative to suspend AB 32 requirements is named the California Jobs Initiative, thus implying it will

positively affect the jobs situation in the state. Proponents of suspending AB 32 say it will cost California up to 1.1 million jobs and devastate budgets of California social services agencies through massive losses in tax revenue [www.suspendab32.org/ab_32.htm]. The initiative to suspend private CEQA enforcement is entitled the Jobs and Housing Initiative, thus implying it might positively benefit jobs and housing growth.

Regarding claims that CEQA interferes with economic activity, a 1997 report by the Legislative Analyst's Office stated: "It is difficult to assess fully whether concerns about CEQA litigation act as a major impediment to business development because there has not been any study of CEQA's economic impact on business statewide" ["CEQA: Making it Work Better," California Legislative Analyst's Office, March 20, 1997, *available at* www.lao.ca.gov/1997/032097_ceqa/ceqa_397.html]. This report found that the evidence of problems CEQA opponents rely on "is often anecdotal...there is no quantitative data available to enable an assessment of the magnitude of these problems or measure their overall impact."

People opposing relaxation of environmental restrictions point out that the lack of job creation is a function of the poor economy, not regulatory restrictions imposed by CEQA or AB 32. They view the attacks on the decades old CEQA statute in rough economic times as opportunistic, with those in the position to gain the most economically from relaxed regulations arguing that the regulations interfere with the economy as a whole. A Los Angeles Times editorial stated "many of the stimulus bills are simply retreads that have been reintroduced almost annually on behalf of business interests that opposed California's standards even when the economy was booming and unemployment was low" [Los Angeles Times, "Jobs at Any Price?" Feb. 28, 2010]. For opponents of exemptions and AB 32 rollbacks, the undercutting of environmental protections are not so much about creating jobs as they are about protecting the profit margins of the proponents of the roll[#8209]backs. According to Cal[#8209]Access, the top donations to the effort to suspend AB 32 were all from businesses involved in fossil fuels: Valero Energy Corp., Occidental Petroleum, Tesoro Companies, World Oil Corporation, and Tower Energy Group [http://cal‑access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1323890&view=received].

Other observers opine that AB 32 actually creates jobs and is good for the economy. The Governor stated, "AB 32 will add jobs, create savings in energy costs and increase personal incomes. In fact, the highest job creation California is seeing right now is in our green economy" [http://gov.ca.gov/press‑release/15063].

Professor Richard Frank of the UC Berkeley School of Law said [Richard Frank, "The Looming Political Battle Over AB 32 & California's Environmental & Economic Future," (May 3, 2010), http://legalplanet.wordpress.com/2010/05/03/the‑looming[#8209]political[#8209]battle[#8209]over[#8209]ab[#8209]32[#8209]

As a result of the Golden State's past, demonstrated commitment to effective greenhouse gas reduction efforts and expansion of its renewable energy portfolio, California has become a magnet for green tech venture capital: the Sacramento Bee reports that in 2009, California attracted 60% of all the venture investment in North America for companies involved in renewable fuels and alternative vehicles.

Now, as a result of the pending initiative [to suspend AB 32], many of those same companies are beginning to consider whether they should pursue their business efforts elsewhere. And other states[#8209]including Ohio and Nevada[#8209]are aggressively recruiting these firms away from California, to their own jurisdictions.

Senator Alan Lowenthal called the proposal for creation of multiple CEQA exemptions a "non[#8209]starter," noting, "It is true California is in an economic crisis and it needs to set priorities, but that doesn't have to be done at the expense of who we are as a state...don't do it by attacking the very reason people would ever want to come to California and that is because we have taken care of the environment" [www.sgvtribune.com/news/ci_14439856, "Schwarzenegger, Calderon propose relaxing environmental laws for development," by Rebecca Kimitch, San Gabriel Valley Tribune, 02/20/2010]. Proponents of environmental protections have noted "Some studies show environmental protection normally has no negative impact on the economy overall, and sometimes it has a positive effect" [Martha Marks, President of Republicans for Environmental Protection, "Debunking the False Dichotomy," October 8, 2003,

available at www.repamerica.org/opinions/speeches/29.html].

Opponents of exemptions argue that while exempting projects from CEQA may seem on the surface to be an economic plus, the likely environmental problems that will result would in turn cost money, making the appearance of cost savings an illusion that does not account for resultant costs to address unanticipated environmental problems that these projects will or could create. Recently, proponents of strong environmental protections have pointed out that the loss of life and coastal and water dependent jobs in the Gulf of Mexico due to the oil spill from the BP Deepwater Horizon terminal could be a consequence of the lack of regulatory oversight and failures in safety and spill contingency planning that began with a categorical exclusion from the National Environmental Policy Act review, the federal corollary of CEQA [www.businessinsider.com/bp‑mistakes[#8209]2010[#8209]5#bp[#8209]downplayed[#8209]operational[#8209]risks[#8209]in[# "U.S. exempted BP's Gulf of Mexico drilling from environmental impact study," Juliet Eilperin, Washington Post, Wednesday, May 5, 2010]. Impacts such as water supply, air quality, and traffic often do not manifest themselves fully until years after a project's implementation.

One of the justifications for suspension of AB 32 cited by initiative proponents is that analyzing global warming and the impacts of greenhouse gases emanating from individual projects subject to CEQA will require the implementation of mitigation measures that are not attainable or feasible. Opponents to the initiative argue that the State's determination that mitigation for greenhouse gases is attainable, feasible, and required as part of CEQA review in passing Senate Bill 97 in August 2007 and adopting CEQA Guideline ' 15126.4(c), identifying five general methods for mitigating greenhouse gases under CEQA (Center for Biological Diversity Letter to Legislative Analyst's Office, June 10, 2010, p. 5).

B. Exemption Supporters Allege Abuses of CEQA Litigation

Proponents of CEQA exemptions have cited alleged abuses of CEQA as a reason to provide for exemptions from CEQA court challenges. "The process is misused, the government agency is ignored," Assemblyman Charles Calderon said ["Schwarzenegger, Calderon propose relaxing environmental laws for development," Rebecca Kimitch, San Gabriel Valley Tribune, 02/20/2010]. Some argue that "phony environmentalists" use legal challenges "to stall projects, sometimes for reasons having less to do with environmental protection than with protecting property values or excluding new residents" [Barbour and Teitz, "CEQA Reform: Issues and Options," Public Policy Institute of California, p. 11].

Most projects do not require EIRs and litigation over the adequacy of environmental review under CEQA is relatively rare. While there does not appear to be recent data on CEQA litigation activity, in a survey from 1986[#8209]1990, only one out of every 354 CEQA reviews was the subject of litigation [Barbour and Teitz, p. 13]. A typical California county conducted 125 project reviews, with 96 percent of them resulting in a negative declaration, and five EIRs being initiated [Barbour and Teitz, p. 12]. A typical city processed 27 reviews, with 93 percent resulting in negative declarations, and only two EIRs being initiated [Barbour and Teitz, p. 12]. In addition, judicial review of the adequacy of an EIR is already subject to significant barriers that include a short statute of limitations period and the requirement that an entity seeking judicial review exhaust its administrative remedies by participating in the public process leading up to EIR certification [*Pub. Res. Code §§ 21167, 21177*]. Thus, current statutory limitations function to greatly limit the rights of private entities to bring a CEQA action.

Proponents of CEQA exemptions assert that unions have brought CEQA claims to assert leverage in negotiations to obtain wage concessions, unionize shops, and other objectives that are viewed as non[#8209]environmental. Courts have viewed union involvement as somewhat irrelevant. In 2004, community activists affiliated with the UFCW stopped the construction of two Wal[#8209]Mart stores until their environmental impact reports were revised to include a discussion of the cumulative impacts, air quality impacts, and urban decay impacts of the two stores [*Bakersfield Citizens for Local Control v. City of Bakersfield (2004) 124 Cal. App. 4th 1184, 22 Cal. Rptr. 3d 203]*. The court stated, "unions have standing to litigate environmental claims" *[124 Cal. App. 4th at 1198]*. Health and long term job

sustainability are often concerns of unions that rely on CEQA [*see, e.g., California Unions for Reliable Energy v. Mojave Desert Air Quality (2009) 178 Cal. App. 4th 1225, 101 Cal. Rptr. 3d 81; Environmental Protection Information Center v. California Dept. of Forestry (2008) 44 Cal. 4th 459, 80 Cal. Rptr. 3d 28, 187 P.3d 888].*

Another frequent complaint is that businesses and economic competitors abuse CEQA to reduce competition. Cases such as *Cadiz Land Co., Inc. v. Rail Cycle, L.P. [(2000) 83 Cal. App. 4th 74, 99 Cal. Rptr. 2d 378]* and *Galante Vineyards v. Monterey Peninsula Water Management Dist. [(1997) 60 Cal. App. 4th 1109, 71 Cal. Rptr. 2d 1]* show that some California businesses such as agricultural companies depend on the quality of the environment for their own economic well being. Therefore, CEQA helps preserve California's vibrant economy. Courts have established that businesses are not allowed to bring lawsuits solely for anti[#8209]competitive reasons unrelated to the environment because such interests are outside CEQA's zone of interests [*Waste Management of Alameda County, Inc. v. County of Alameda (2000) 79 Cal. App. 4th 1223, 1229, 94 Cal. Rptr. 2d 740].* However, businesses that seek to advance environmental concerns and notice requirements do have standing [*Burrtec Waste Industries, Inc. v. City of Colton (2002) 97 Cal. App. 4th 1133, 1139, 119 Cal. Rptr. 2d 410].*

Finally, lawsuits brought by public agencies such as cities and counties against adjacent cities or counties are frequently denounced as abusive. In the NFL Stadium litigation leading to passage of a CEQA exemption in 2009 through AB3x 81, representatives of the project proponent complained that the City of Walnut was abusing CEQA and "extorting" them for money for traffic mitigation and other measures [http://nfl.fanhouse.com/2009/07/14/billionaire‑ed[#8209]roski[#8209]wants[#8209]your[#8209]nflteam[#8209]in[#8209]los[#8 But the City of Walnut was really attempting to obtain mitigation, and the cost of that mitigation was characterized by the project proponent, with no opportunity during the legislative proceeding for Walnut to correct the Legislature's misimpression. Indeed, challenges under CEQA by adjacent jurisdictions are often the only opportunity for obtaining modifications of projects in adjacent jurisdictions that could severely impact them, for instance, by creating significant traffic or water supply impacts [*City of Lomita v. City of Torrance (1983) 148 Cal. App. 3d 1062, 196 Cal. Rptr. 538; City of Hawaiian Gardens v. City of Long Beach (1998) 61 Cal. App. 4th 1100, 72 Cal. Rptr. 2d 134; County of Inyo v. City of Los Angeles (1976) 61 Cal. App. 3d 91, 132 Cal. Rptr. 167].* In addition, because local governments often use CEQA to ensure impacts they may experience from a project located outside their jurisdiction are properly mitigated, these entities could have to assume the costs of mitigation themselves absent enforcement of CEQA's requirement for projects to mitigate their own environmental impacts.

The Association of Environmental Professionals acknowledged the possibility of abuse of CEQA litigation, but then noted "AEP believes that exempting projects from judicial review is fraught with its own set of potential abuses and does not directly address the heart of the abuses of the CEQA process" [AEP Letter to Legislators, February 24, 2010, www.califaep.org/resources/Documents/018d_CEQA‑Litigation_Proposal_Opposition_Letter_Final_100224.pdf].

V. Opponents Argue that Environmental Exemptions Could Invite Corruption and Deprive Citizens of Their Day in Court

A. Providing Exemptions from Environmental Review May Be an Invitation to Corruption

Many people see the Governor's proposal for exemption of various projects from CEQA as an invitation to corruption. David Pettit of NRDC said, "It is going to be a race to the trough, some very ugly politics" ["Schwarzenegger, Calderon propose relaxing environmental laws for development," Rebecca Kimitch, San Gabriel Valley Tribune, Feb. 20, 2010].

In the wake of the NFL stadium exemption, various reports surfaced that significant donations were made to the supporters of the exemption. A reporter with the Sacramento Bee stated: "Exactly two months after it [the NFL Stadium exemption] was signed into law, [Ed] Roski's Majestic Realty donated $300,000 to a campaign for a ballot measure that would loosen up the state's legislative term[#8209]limit law, thereby allowing lawmakers to enjoy longer careers in

Sacramento. Coincidence? Somehow one doubts it" [Walters, "Schwarzenegger's environmental plan invites corruption"; www.sacbee.com/2010/02/21/2552775/dan‑walters[#8209]schwarzeneggers[#8209]environmental.html, Sacramento Bee, Feb. 21, 2010]. Walters recognized that CEQA should be reformed if it is abused but "giving post[#8209]Schwarzenegger governors the sole power to exempt high[#8209]dollar projects is simply an invitation to political corruption."

One commentator noted the influence of political contributions more bluntly, stating that Majestic Realty's Ed Roski "just happened to have made the following contributions to the sponsors and co[#8209]authors of the bill that exempted him from everyone else's environmental laws" and listed various monetary contributions of hundreds or thousands of dollars to various legislators [Carter Clews, "Ed Roski, Jr., and the World's Oldest Profession," http://blog.getliberty.org/default.asp?Display=1935]. AEP expressed a similar concern: "AEP is also concerned that the proposed legislation is not without its own potential for abuse as private beneficiaries of project development resort to tactics intended to corrupt the process for selecting projects entitled to judicial immunity" [AEP Letter to Legislators, February 24, 2010].

B. CEQA Exemptions Deprive People of their Recourse to the Courts

The intention of the CEQA exemption legislation is to streamline approval processes so they are not tied up in possibly lengthy litigation. Opponents of CEQA exemption legislation point out the legislation would deprive citizens of recourse to the courts. "A citizen's right to turn to the courts for protection from government abuse-in this case, project approval-ought to be sacred" ["CEQA 'reform plan' open to shadiness, The Bakersfield Californian," Feb. 27, 2010; www.bakersfield.com/opinion/editorials/x1305354275/CEQA‑reform[#8209]plan[#8209]open[#8209]to[#8209]shadiness]. The Association of Environmental Professionals wrote "AEP believes that exempting certain projects from judicial review is inconsistent with the rights of California citizens to participate in, and challenge, the decisions of governmental agencies" [AEP Letter to Legislators, February 24, 2010].

VI. Conclusion

Efforts to reform CEQA and relax environmental laws are not new and are likely to be repeated. Numerous studies have analyzed potential reforms to CEQA and land use laws in California, including The California Performance Review Commission in 2004, the California Legislative Analyst's Office in 1997, and the State Bar in 1995 [Barbour and Teitz, "CEQA Reform: Issues and Options," Public Policy Institute of California, 2005, p. 37]. The latest crop of reform proposals appear to be consistent in some ways with past proposals, but in many ways much farther reaching. AB 32 has only begun to be implemented, with the California Air Resources Board promulgating new regional goals for GHG reductions and progress in reducing emissions being made. With the continuing lethargy in the state's economy, it remains to be seen what the Legislature and electorate will ultimately decide about the future of CEQA and AB 32.

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your particular situation, you should obtain the services of a qualified attorney licensed to practice law in your state.

NEPA After 40 Years

2010 Emerging Issues 5210

NEPA 2010: After 40 Years the Law Is Still Evolving

By Mr. Ronald Bass

July 21, 2010

SUMMARY: This article summarizes key legislative, executive, and judicial developments in 2009 surrounding the National Environmental Policy Act (NEPA) and the influence of these developments on the continued evolution of NEPA.

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ARTICLE: Abstract

Although the National Environmental Policy Act (NEPA) is rarely amended, in 2009 Congress made an important change to stimulate the economy out of its doldrums. This article summarizes the key legislative, executive, and judicial developments in 2009 and their influence on the continued evolution of NEPA.

NEPA: Still Going Strong after 40 Years

On December 31, 2009, President Obama issued a proclamation in recognition of the 40th anniversary of the National Environmental Policy Act (NEPA). In today's era of partisan bickering and congressional stalemates, the proclamation was a refreshing reminder that "*NEPA was signed into law with overwhelming bipartisan support, ushering in a new era of environmental awareness and citizen participation in government. NEPA elevated the role of environmental considerations in proposed Federal agency actions and it remains the cornerstone of our Nation's modern environmental protections*."

While NEPA has been both praised and vilified over its 40-year history, most would agree that it has fundamentally altered the way federal agencies carry out their respective missions. Although details have changed over time, NEPA's step-by-step decision process (consisting of scoping, evaluation of impacts, comparison of alternatives, draft document, public review and comment, final document, and decision making) remains essentially the same after four decades. As the cornerstone of our nation's system of environmental protection, it serves an important bridge between science and government decision making and one of the best forums for public participation. NEPA has not only had profound influence on the outcome of federal actions but also has served as a role model for copycat legislation in 16 states and more than 100 countries.

In our dynamic society, public opinion and important issues of the day are constantly changing, sometimes resulting in profound shifts in federal government policies and programs. These changes often affect how NEPA is carried out by federal agencies. The continued participation of different interest groups results in dozens of court decisions each year, many of which have a profound influence on NEPA's implementation.

Important changes occurred in NEPA 2009. Summarized below are the key legislative, executive, and judicial developments in the past year. Their influence on the continued evolution of NEPA is also discussed.

American Recovery and Reinvestment Act and NEPA: Lessons Learned

Perhaps the most important NEPA development in 2009 was the enactment of the American Recovery and Reinvestment Act (Recovery Act) which was designed to jump start the U.S. economy through the infusion of billions of dollars of federal spending and tax cuts. Among its provisions, this long and complex law contained the unique NEPA Section 1609 which calls upon federal agencies to devote adequate resources to "*ensuring that applicable environmental reviews under NEPA are completed on an expeditious basis and that the shortest existing applicable process under NEPA shall be utilized"* [American Recovery and Reinvestment Act, Section 1609]. The legislation requires the President, through the Council on Environmental Quality (CEQ), to report to Congress every 90 days on "*the status and progress of projects and activities funded by this Act with respect to compliance with NEPA requirements and documentation.*" In March 2009, the CEQ released guidance to federal agencies on how to accomplish this reporting [Council on Environmental Quality. Reporting NEPA Status and Progress for Recovery Act Activities and Projects. March 11, 2009].

The language of Section 1609 represented a legislative compromise to placate certain Senators who wanted an outright NEPA exemption for Recovery Act projects. In lieu of an exemption, Congress agreed to encourage NEPA streamlining and to increase congressional oversight though the quarterly reporting requirement.

As of this writing, CEQ has transmitted four such reports to Congress-May 18, August 3, and November 2, 2009; and January 1, 2010. [The complete text of these reports is available on CEQ's NEPAnet web site at http://ceq.hss.doe.gov/nepa/nepanet.htm.] These reports are based on detailed filings that each federal agency made to CEQ. Table 1 shows the first year's reporting. The large majority of federal projects were "shovel ready," a colloquial term meaning that NEPA compliance (and other federal permitting requirements) has been completed or that the underlying projects were not subject to NEPA. Of those activities that were subject to NEPA, by far the largest category was projects being processed using categorical exclusions (CEs), approximately 94.9%. The large number of CE projects is not surprising. Even before the passage of the Recovery Act, federal agencies prepared far more CEs than environmental assessments (EAs) or environmental impact statements (EISs). While each agency's list of CEs is different, most agencies include maintenance and repair of existing facilities, continued funding for ongoing activities, and a host of minor projects that have little likelihood of resulting in significant impacts on the human environment.

Thus, given a choice of how to spend Recovery Act dollars, most agencies are apparently marshalling discretionary funds to projects that fit into CEs. One reason for the extensive use of CEs may be that the Recovery Act mandates very short deadlines for the allocation and spending of funds. In some situations, if an agency does not spend the money within specified deadlines, the funding for those programs is no longer available. While the number of CEs seems very high, the desire to act quickly in the name of economic stimulus is not a reason to rely on a CE. Rather, for a CE to apply, a project must fit squarely into a category that has been adopted by the appropriate federal lead agency and is not subject to any exceptions for extraordinary circumstances.

CEQ's quarterly reports generally paint a very positive picture about the relationship between NEPA and the Recovery Act. For example, the final report includes dozens of success stories from throughout the federal government of how environmental analysis required by NEPA improved the projects but still allowed timely Recovery Act funding. CEQ provides the following observation about this example and others: "*Agency activities under ARRA are more than just the number of reviews that occur. Across the government, the quality of decision-making is improved by NEPA*

compliance." CEQ concludes that "*agency environmental reviews have resulted in saving taxpayer dollars and energy, better protected resources, and fostering community agreements. These benefits were gained while expeditiously completing NEPA reviews for the ARRA funded projects.*"

Between the statistical details, the agency-by-agency analysis, and the project examples, the first year's quarterly reports reveal thought-provoking information about NEPA practices and will hopefully pave the way for additional improvements to NEPA in the future. The Recovery Act's first-ever NEPA reporting requirements should continue to foster an "open book" approach to overall NEPA compliance.

To learn about streamlining NEPA for projects requiring an EIS or EA, readers should refer to *Economic Stimulus and NEPA Compliance: Streamlining the Environmental Review Process* at http://www.icfi.com/docs/economic‐stimulus-nepa.pdf.

Executive Order 13514

On October 5, 2009, President Obama signed a sweeping new executive order (EO) with far-reaching ramifications for federal energy conservation and environmental policy, including NEPA. *Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance,* strengthens requirements set forth by the Energy Independence and Security Act, the Energy Policy Act of 2005, and Executive Order 13423. It contains a virtual potpourri of initiatives for federal agencies to implement, including requirements related to:

* Energy efficiency

* Greenhouse gas reduction

* Water conservation

* Recycling

* Pollution prevention

* Sustainability

* Livable communities

* Transparency in government

Unlike many other executive orders, which typically contain only general directions for federal policy, EO 13514 has considerable detail such as specific goal-setting, inventory, and reporting requirements. For example-and of particular importance-EO 13514 requires every federal agency to establish quantitative greenhouse gas reduction targets and to develop policies and programs to achieve them. EO 13514 also requires federal agencies to do all of the following:

* Reduce vehicle fleet petroleum use 30% by 2020.

* Improve water efficiency 26% by 2020.

* Achieve 50% recycling and waste diversion by 2015.

* Meet sustainability requirements across 95% of all applicable contracts.

EO 13514 contains a specific provision addressing documents related to the NEPA which provides that:

Federal agencies must advance regional and local integrated planning by identifying and analyzing impacts from

energy usage and alternative energy sources in all EISs (environmental impact statements) and EAs (environmental assessments) for proposals for new or expanded Federal facilities under NEPA.

This provision, which is effective immediately, places a new analysis requirement on federal agencies preparing NEPA documents. If history is any guide, CEQ is likely to issue additional guidance on when and how this NEPA provision must be implemented. In the meantime, however, NEPA practitioners should follow any agency-specific guidance that already exists or that may be developed in the months ahead.

For more detailed discussions of Executive Order 13514, readers should refer to the article entitled *President Signs Executive Order 13514: Federal Leadership in Environmental, Energy, and Economic Performance* at http://www.icfi.com/docs/EO‐13514-NEPA.pdf, and at ICF's Green Government web site at http://www.icfi.com/microsections/green‐government/default.asp.

CEQ Issues Three Proposed Guidance Documents

This article covers NEPA developments that occurred in 2009. On February 18, 2010, CEQ issued three, long-awaited draft guidance documents designed to clarify specific areas of NEPA practice:

* *Draft Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions*

* *Draft Guidance for NEPA Mitigation and Monitoring*

* *Establishing and Applying Categorical Exclusions under NEPA*

Summaries of these proposed guidance documents are provided in a separate article in this edition of THE IMPACT REPORT.

NEPA in the Courts

The courts continue to play an important role in the interpretation and "enforcement" of NEPA. In 2009, the federal appellate courts handed down nearly 50 cases with NEPA-related issues.

When is an action subject to NEPA?

Greater Yellowstone Coalition v. Tidwell

572 F. 3d 1115 (10th Cir. 2009)

For years, the State of Wyoming (Game and Fish Department) has operated elk feeding grounds on USFS and BLM land. Neither federal agency had ever conducted an environmental analysis (EIS or EA) on these operations. The Greater Yellowstone Coalition challenged for failure to comply with NEPA based on environmental impacts of increased disease risk. The court held that NEPA compliance was not required because there were no ongoing "federal actions." Specifically, the court found that as to some USFS feeding grounds, the challenge was moot because the agency had already conducted the required analysis. As to other USFS feeding grounds, the 6-year Administrative Procedures Act's statute of limitations on legal challenges had expired. As to the BLM feeding grounds, there was no ongoing "federal action" because the only government act was an annual review of a 10-year-old memorandum of understanding between the agency and state. According to the court, in none of the situations was NEPA triggered.

When is an action subject to NEPA?

Piedmont Environmental Council v. FERC

558 F. 3d 304 (4th Cir. 2009)

The Federal Energy Regulatory Commission (FERC), with no NEPA compliance, adopted rules implementing Section 216 of the Federal Power Act allowing permit issuance for certain transmission lines and preempting certain state authority. FERC amended its NEPA regulations to be consistent with those rules. The Piedmont Environmental Council challenged the rule-making as a violation of the Federal Power Act and FERC's failure to comply with NEPA because no EIS or EA/finding of no significant impact (FONSI) was prepared. Although the court invalidated the rule for being too broad, it found that no programmatic NEPA document was necessary for its adoption. The future activities under the rules would be carried out by currently unknown private parties, and the impacts would be evaluated when actual projects were proposed. Thus, according to the court, the rule was not a "*major federal action significantly affecting the quality of the human environment.*" However, the court held that FERC violated NEPA by not consulting with CEQ before amending its NEPA rules-a requirement of CEQ's NEPA regulations.

When can an agency rely on a categorical exclusion?

California ex rel. Lockyer v. U.S. Department of Agriculture

575 F. 3d 999 (9th Cir. 2009)

USFS adopted the State Petitions Rule to replace the Clinton-era Roadless Rule which changed the way roadless areas would be considered for wilderness status throughout the entire national forest system. USFS relied on a categorical exclusion that covered "*rules, regulations, or policies to establish Service-wide administrative procedures programs, processes, or instructions."*

California and several other states challenged the rule and argued that reliance on categorical exclusions was an improper distortion of an exemption intended for routine, procedural actions. The court held that the use of CE was unlawful to support a major regulatory change affecting millions of acres of roadless areas. According to the court, "*such a substantial regulatory change is neither routine nor merely procedural."*

EA/FONSI Adequacy: When are proposed actions "connected" versus "independent"? (e.g., "project segmenting")

Ohio Valley Environmental Coalition v. Aracoma Coal Co.

556 F. 3d 177 (4th Cir. 2009)

The U.S. Army Corps of Engineers (Corps) issued numerous 404 permits allowing fill related to surface coal mines (mountain top mining). Specifically, the permits authorized filling of 23 valley areas and the creation of 23 sediment ponds. Additionally 68,841 linear feet (13+ miles) of intermittent and ephemeral streams would be filled. The Corps prepared an EA and issued a FONSI supported by various types of compensatory mitigation, including stream enhancements, stream restoration, and stream creation. Monitoring and success criteria were tied to "value and function." However, the EA was limited to evaluating the impacts of the fills that were within the Corps' jurisdiction. It did not evaluate the impacts of the mining operations.

The Ohio Valley Environmental Coalition challenged the EA/FONSI, alleging that the scope of analysis was too limited and that it should have included the impacts of the entire project as well as the mining. Ohio Valley also argued that mitigation was inadequate to support the FONSI and that the document did not adequately evaluate the cumulative impacts of the entire project. The court held that the EA/FONSI was adequate because the Corps did not have sufficient control over the remainder of project. Rather, the project was subject to the Surface Mine Control and Reclamation Act of 1977 that gave primary control over the mining operation to the states. The court also held that the mitigation measures were adequate and that their details were not improperly deferred. The cumulative impact analysis was also found to be adequate.

EA/FONSI Adequacy: When are proposed actions "connected" versus "independent"? (e.g., "project

segmenting")

White Tanks Concerned Citizens v. Strock

563 F. 3d 1033 (9th Cir. 2009)

The Corps issued a 404 permit authorizing fill on 26.8 acres of ephemeral washes that traversed the site of a proposed 10,105-acre residential, master-planned community in a desert area near the White Tank Mountains and Hassayampa River floodplain in Arizona. The Corps prepared an EA/FONSI, limiting the scope of the document just to the activities directly affecting 787 acres of washes and 83.6 acres of adjacent uplands. The impacts that would result from development of the entire planned community were not included.

The court held that "*because the project's viability is founded on the Corps' issuance of a Section 404 permit, the entire project is within the Corps' purview. The washes are 'dispersed throughout the project area in such a way that, as a practical matter, no large-scale development could take place without filling wetlands.'"*

EA/FONSI Adequacy: What is the standard for triggering an EIS?

Sierra Club v. Wagner

555 F. 3d 21 (1st Cir. 2009)

USFS, based on two EA/FONSIs, approved forest management projects in the White Mountain National Forest, New Hampshire. The Sierra Club challenged for failure to prepare an EIS, alleging that USFS used the wrong methodology to evaluate some of the environmental impacts and completely omitted any analysis of others. The court concluded that USFS, as a federal lead agency, had the discretion to select which methodologies to use. The court upheld the EA/FONSI finding that the agency has considered "*all* arguable categories o*f* harm.*"* Because the EA was long and detailed, the court concluded that "*possibly* littl*e* wa*s* save*d* b*y* doin*g* a*n* E*A* o*f* thi*s* character instea*d* o*f* a*n* EIS, bu*t i*t *i*s no*t* clea*r* tha*t* anythin*g* wa*s* lost." The court also found that the agency's minimal public review of the EA was adequate.

EA/FONSI Adequacy: What constitutes an adequate range of alternatives?

City of Dallas v. Hall

562 F. 3d 712 (5th Cir. 2009)

The U.S. Fish and Wildlife Service (USFWS) prepared an EA/FONSI for establishing an acquisition boundary for a National Wildlife Refuge. The agency's action would preclude the City of Dallas (City) and Texas Water Board from developing a reservoir on the same land. The City challenged, alleging the EA/FONSI was inadequate because it was based on old data, did not evaluate the impacts of the City's proposed reservoir, and reflected inadequate interagency consultation.

The court upheld the EA/FONSI, concluding that the range of alternatives was adequate even though a reservoir alternative was not included. According to the court, the evaluation of the impacts of a potential future reservoir would have involved too much speculation. The court held that the use of old data was adequate, absent a showing that the age of the data made a difference. The court also held that the agency's actions would result in no physical impacts to trigger an EIS and that interagency consultation was adequate.

EA/FONSI Adequacy: When are proposed actions "connected" versus "independent"? (e.g., "project segmenting")

Missouri Coalition for the Environment v. FERC

544 F. 3d 955 (8th Cir. 2008)

FERC prepared an EA and adopted a FONSI for the reconstruction of a hydroelectric generating facility that had collapsed. The Missouri Coalition challenged, alleging that the EA should have looked at the impacts of future relicensing when the current license expires. In upholding the EA/FONSI, the court concluded that reconstruction of the dam does not make future relicensing reasonably foreseeable for cumulative impact purposes. Reconstruction and relicensing are separate actions (e.g., each has independent utility) and need not be considered together.

EA/FONSI Adequacy: How should climate change impacts be evaluated?

Center for Biological Diversity v. Kempthorne

588 F. 3d 701 (9th Cir. 2009)

USFWS issued "incidental take regulations" under the Endangered Species Act relating to the effects of oil and gas operations. The agency prepared an EA/FONSI that included an evaluation of climate change impacts to polar bears. The Center for Biological Diversity challenged, alleging inadequate evaluation of climate change and demanding preparation of an EIS. In upholding the EA/FONSI, the court held that the agency took a "*hard* look" at the climate change impacts to polar bears and concluded that this action would not significantly affect them. The court further concluded that an EIS was not necessary. According to the court, although impacts to polar bears were "uncertain," they were not "*highly* uncertain," thereby triggering the need for an EIS.

EA/FONSI Adequacy: How should risks of terrorism be evaluated?

Public Citizen v. Nuclear Regulatory Commission

573 F. 3d 916 (9th Cir. 2009)

The Nuclear Regulatory Commission prepared an EA/FONSI on the adoption of the "Design Basis Threat" rule which establishes standards and conditions of normal operation, including anticipated operational occurrences, design basis accidents, external events, and natural phenomena for which the plant must be designed to ensure proper functioning. Public Citizen challenged for failure to evaluate risk of air-based terrorist attack. The court held that the EA/FONSI was adequate because air-based attacks were not within the scope of the rule and therefore did not have to be evaluated.

EA/FONSI Adequacy: How should public safety risks be evaluated?

City of Las Vegas v. Federal Aviation Administration

570 F. 3d 1109 (9th Cir. 2009)

The Federal Aviation Administration (FAA) prepared an EA/FONSI to support changes to the departure routes at McCarran International Airport in Las Vegas, Nevada. The City of Las Vegas and various citizens challenged, alleging that the EA did not sufficiently evaluate the safety risks to neighboring residents from rerouting and speed reductions and that the analysis of air and noise impacts was inadequate.

The court held that FAA's simulator flights tests were adequate to evaluate risk and that the opponent's extra-record evidence was insufficient to support the argument for additional risk assessment. The analysis of air and noise impacts was also adequate.

EA/FONSI Adequacy: What constitutes a sufficient impact analysis?

Ventana Wilderness Alliance v. Bradford

313 F. 3d 944 (9th Cir. 2009)

USFS prepared an EA/FONSI to support the re-establishment of grazing in a Ventana Wilderness within the Los Padres National Forest, California. Grazing had been ongoing for over 100 years but was recently interrupted. The Ventana Wilderness Alliance challenged the EA/FONSI, alleging that there would be significant effects and that an EIS should have been prepared. The court upheld the EA/FONSI finding that visual, auditory, and olfactory impacts on recreation from livestock grazing were adequately evaluated.

EIS Adequacy: What constitutes a meaningful comparison of alternatives?

Center for Biological Diversity v. U.S. Department of Interior

581 F. 3d 1063 (9th Cir. 2009)

BLM entered into a land exchange with a mining company which would transfer mining land out of federal ownership that would then not be subject to the Mining Act of 1872. BLM prepared an EIS but concluded that the impacts of the mining would be the same under all alternatives, including the "no[shy]action" alternative (e.g., no land exchange). The Center for Biological Diversity challenged, alleging that mining impacts would be much worse under private ownership where the Mining Act would not apply; thus there would be no federal control over the mining. The court held that the EIS was inadequate for failing to include a meaningful comparison of alternatives. According to the court, the agency's assumption that mining would be the same whether under government control or private control was erroneous, leading to a meaningless comparison of alternatives.

EIS Adequacy: When are proposed actions "connected" versus "independent"?

Coalition on West Valley Nuclear Wastes v. Chu

592 F. 3d 306 (2nd Cir. 2009)

The U.S. Department of Energy (DOE) prepared an EIS and approved various waste management activities, including removal and safer interim storage, at the Western New York Nuclear Service Center. However, the EIS did not evaluate the impacts of closure of the entire site and subsequent long-term disposal of all the wastes. The Coalition on West Valley Nuclear Wastes challenged, alleging that the closure and long-term disposal of the entire center were "connected actions" that should have been included in the EIS. The court held for DOE, concluding that the short-term waste management actions had "independent utility" and could be evaluated without evaluating the impacts of the eventual closure of the site.

EIS Adequacy: What constitutes an adequacy of the Statement of Purpose and Need and range of alternatives?

National Recreation and Park Association v. BLM

586 F. 3d 735 (9th Cir. 2009)

Kaiser Eagle Mountain, Inc. (Kaiser) seeks to build a landfill on a former mining site near Joshua Tree National Park in California. BLM prepared an EIS to support a land exchange with Kaiser for various parcels surrounding the mine site. The National Recreation and Park Association challenged, alleging that the statement of purpose and need was too narrow because it was limited to Kaiser's proposal. Therefore, the range of alternatives was improperly limited to landfills only. The association also claimed that the impact analysis on bighorn sheep and eutrophication was inadequate.

In declaring the EIS inadequate, the court held that only one of many needs listed in the document represented BLM's needs and that the others were improperly limited to the needs of the particular applicant. As a result of this

narrow statement of needs, some viable alternatives were improperly eliminated from detailed study in the EIS. Regarding the adequacy of the impact analysis, the court held that the analysis of the impacts to bighorn sheep was adequate. The study of eutrophication was inadequate because findings were scattered throughout various parts of the EIS and difficult to locate.

EIS Adequacy: What constitutes an adequate range of alternatives?

Natural Resources Defense Council v. FAA

564 F. 3d 549 (2nd Cir. 2009)

FAA prepared an EIS for the proposal to close and relocate the Panama City-Bay County Florida Airport. The Natural Resources Defense Council challenged the EIR, arguing that it contained an inadequate range of alternatives, inadequate cumulative and growth-inducing impacts, and inadequate mitigation measures. In upholding the EIS, the court concluded that FAA could eliminate alternative sites that did not meet purpose and need (because they were not in the designated geographic market area of the airport) and were infeasible (because the state would not issue wetland permits for them). The court also upheld the adequacy of the cumulative and growth-inducing impact, and the mitigation measures. Regarding mitigation, the court held that the likely success of mitigation need not be demonstrated in the EIS.

EIS Adequacy: What constitutes a sufficient impact analysis?

Wildwest Institute v. Bull

547 F. 3d 1162 (9th Cir. 2009)

USFS prepared an EIS for a hazardous fuel reduction project. Wildwest Institute challenged, alleging that the agency disregarded data prepared by its own experts and failed to adequately evaluate cumulative impacts. The court upheld the EIS, stating than a lead agency has discretion to select which data to use so long as its methodology and conclusions are described.

EIS Adequacy: What constitutes a sufficient impact analysis?

South Fork Band Council v. BLM

588 F.3d 718 (9th Cir. 2009)

BLM approved a gold mining project after preparation of an EIS. The South Fork Band Council of Western Shoshone of Nevada and several other tribes challenged, alleging Federal Land Policy and Management Action (FLPMA) and NEPA violations and seeking preliminary injunction. The court held that, as to NEPA but not FLPMA, the council met the requirements for a preliminary injunction- showing likely success on the merits.

The court found that the EIS was inadequate because it failed to evaluate indirect air quality impacts of additional years of ore transportation and used an improper methodology for evaluating the PM 2.5 air quality emissions (e.g., fine particulate matter.) Rather than evaluating project-specific impacts, the EIS improperly relied on the impact evaluation in another EIS on a similar type of project. Finally, the court held that the EIS failed to evaluate the feasibility and likely success of mine dewatering mitigation.

EIS Adequacy: What constitutes an adequate cumulative impact analysis?

Ecology Center v. Castenada

574 F. 3d 652 (9th Cir. 2009)

USFS approved 9 timber sales, each with an EIS or EA/FONSI. The Ecology Center challenged, alleging inadequate cumulative impact analysis, poor data quality, and inappropriate presentation of old-growth data and impacts. The court held that the cumulative impacts of past projects could be aggregated and afforded deference to the agency regarding methods of analysis and presentation of data. The court also held that the EA could rely on data extrapolated from other areas rather than from on-site testing.

EIS Adequacy: What constitutes an adequate cumulative impact analysis?

River Runners for Wilderness v. Martin

574 F. 3d 723 (9th Cir. 2009)

The National Park Service, based on an EIS, approved a permit for the continued use of motorized rafts and support equipment in Grand Canyon National Park. River Runners challenged, alleging inadequate cumulative-impact, noise-impact analysis. The court held that the EIS specifically considered the cumulative effects of noise on the river environment, including noise from river traffic, helicopters, and aircraft overflights.

EIS Adequacy: How should the risk of a terrorist attack be evaluated?

N.J. Department of Environmental Protection v. U.S. Nuclear Regulatory Commission

561 F. 3d 132 (3nd Cir. 2009)

The U.S. Nuclear Regulatory Commission (NRC), relying on a "generic EIS" (e.g., programmatic EIS) relating to nuclear facilities and a "site-specific EIS" for the specific project, approved the relicensing of a nuclear power plant. The N.J. Department of Environmental Protection challenged based on NRC's failure to evaluate the risks and impacts of a hypothetical terrorist attack. The court held that the EIS was adequate, concluding that there was no "*reasonably close causal relationship*" between the relicensing facility and a terrorist attack. The court said that the EIS discussion of impacts from other types of accidents was sufficient to cover impacts from terrorist attacks and that the opponents failed to show how risks or impacts would be different.

When is a supplemental EIS necessary?

State of New Mexico ex rel. Richardson v. BLM

565 F. 3d 683 (10th Cir. 2009)

BLM approved an oil and gas lease on the Otero Mesa, a Chihuahuan Desert grassland in New Mexico. Rather than prepare a site-specific NEPA document, BLM relied on its Resource Management Plan (RMP) EIS. The State of New Mexico challenged, alleging that NEPA required a site-specific analysis of the impacts. The court held that BLM violated NEPA because no site-specific analysis was conducted. In reaching its conclusion, the court found that project did not fall within any of the alternatives in the RMP EIS and that a new alternative should have required a supplemental EIS. The court also held that the prior EIS did not sufficiently evaluate the site-specific impacts to a local aquifer.

Conclusion

After 40 years, NEPA's fundamentals remain sound, and the "NEPA model" of government planning and decision making has become well established. However, the interpretation and implementation of NEPA are constantly evolving. As 2009 illustrates, Congress, CEQ, federal lead agencies, and the courts all continue to pull and tug on the edges of NEPA, attempting to mold it for new types of projects and emerging environmental issues.

Table 1. Summary of NEPA Compliance for Recovery Act-Funded Projects (January 2009 through December

2009)

Type of NEPA Action

Status

Total NEPA Actions by Document Type

Number of Actions by Status

Approximate Percentage of All NEPA Actions

NEPA Does Not Apply

4,141

n/a

Categorical Exclusions

158,316

94.9%

Completed CEs

154,040

Pending CEs

4,276

Environmental Assessments

7,596

4.6%

Completed EAs

6,316

Pending EAs

1,280

Environmental Impact Statements

806

0.5%

Completed EISs

719

Pending EISs

83

Total NEPA Actions

166,718

100.0%

Completed Actions

161,075

Pending Actions

5,643

Total Recovery Act-Funded Projects

161,553*

*Total does not equal the sum of NEPA documents due to status of some pending, unfunded projects.

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CEQ Releases Proposed NEPA Guidance Documents

2010 Emerging Issues 5209

Council on Environmental Quality Releases Three Proposed NEPA Guidance Documents

By Mr. Ronald Bass

July 21, 2010

SUMMARY: Get the latest analysis of the draft guidance documents recently issued by the Council on Environmental Quality (CEQ) to clarify specific areas of NEPA practice. The documents include (1) advice to federal agencies on when and how to address greenhouse gas emissions and on how to adapt their proposed actions to the effects of climate change; (2) guidance on mitigation and monitoring; and (3) guidance on categorical exclusions under NEPA.

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ARTICLE: Abstract

This article summarizes three draft guidance documents issued recently by the Council on Environmental Quality (CEQ) to clarify several specific areas of NEPA practice. The first advises federal agencies on when and how to address greenhouse gas emissions and on how to adapt their proposed actions to the effects of climate change. The second addresses mitigation and monitoring. The third covers categorical exclusions under NEPA. CEQ is seeking public comments on the documents on its NEPA web site.

Introduction

On February 18, 2010, the Council on Environmental Quality (CEQ) issued draft guidance to clarify three different areas of NEPA practice:

- *Draft Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions*
- *Draft Guidance for NEPA Mitigation and Monitoring*
- *Establishing and Applying Categorical Exclusions under NEPA*

Copies of the three proposed documents can be found at CEQ's new NEPA web site: http://ceq.hss.doe.gov/current_developments/new_ceq_nepa_guidance.html

The role of CEQ guidance has become especially important because CEQ's NEPA regulations have not been amended since 1982 and do not reflect recent appellate court decisions, emerging NEPA issues, or contemporary

practices. Although CEQ guidance documents are merely advisory and do not have the same legal effect as regulations, federal agencies generally follow CEQ's advice, and the federal courts are often influenced by CEQ's interpretations of NEPA.

Short summaries of the new guidance follow.

Draft Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas

This draft guidance advises federal agencies on when and how to evaluate greenhouse gas (GHG) emissions in NEPA documents and how to address climate change impacts on their proposed actions. Since the U.S. Supreme Court's decision in *Massachusetts v. EPA*, which declared GHGs to be pollutants under the Clean Air Act, little doubt remains that such emissions should also be evaluated in NEPA documents. Despite that decision, some agencies have resisted evaluating GHG impacts, holding out until official guidance emerged. In the absence of uniform guidance, agencies willing to consider the issue have cobbled together approaches to impact analysis that vary widely from agency to agency and from project to project. Executive Order 13514 is the first formal mandate about GHGs in the context of NEPA. However, it only applies to federal "facilities" and does not explain how to address the issue. Thus, proposed guidance from CEQ has been eagerly awaited.

Evaluating GHG Emissions of Proposed Actions

Under the proposed guidance, CEQ recommends that for projects with annual, direct emissions of 25,000 metric tons of C02 equivalent or more, the NEPA document include the emissions reported under GHG accounting requirements (e.g., EPA reporting requirements under the Clean Air Act). In those cases, the NEPA document should (1) quantify the cumulative emissions over the life of the project, (2) discuss measures and alternatives to reduce GHG emissions, and (3) qualitatively discuss the link between such GHG emissions and climate change. Although the 25,000-metric-ton level provides a useful indicator of how to proceed for large projects, CEQ does not consider it a threshold for determining the "significance" or "non-significance" of the impacts. The draft guidance references three different technical models for quantifying GHG impacts of large projects.

For proposed actions below the 25,000 metric-ton CO2 equivalent level, CEQ recommends use of the same methods as large projects or reliance on scoping and interagency consultation to determine the best available procedures for analysis.

CEQ has indicated that its GHG analysis recommendations do not apply to "land and resource management actions" because established protocols do not exist. Rather, CEQ is seeking suggestions on how the GHG emissions from these types of actions should be evaluated. Although the guidance does not specifically define the phrase "land and resource management actions," presumably it would include many of the actions undertaken by the U.S. Forest Service, the U.S Bureau of Land Management, and the National Park Service.

According to the draft guidance, once an agency decides to evaluate GHG emissions and determines the appropriate methodology to use, it should rely on many of NEPA's established tools to conduct the analysis. For example, for determining how far "upstream" or "downstream" to evaluate indirect impacts, CEQ reminds agencies to limit analysis to what is "feasible" and "practical." The draft guidance also recommends use of programmatic documents and tiering to evaluate GHG impacts. It encourages agencies to ensure that GHG mitigation measures are permanent, verifiable, enforceable, and in addition to measures required by law.

Evaluating Impacts of Climate Change on Proposed Actions

The proposed CEQ guidance also addresses how agencies should consider the current or projected effects of climate change on proposed actions. CEQ lists several examples of the future impacts of climate change that should be considered: risk of floods, storm surges, and higher temperatures. This list is not inclusive. CEQ further notes that climate change can "*increase the vulnerability of a resources, ecosystem or human community causing a proposed*

action to result in consequences that are more damaging than prior experience with environmental impact analysis might indicate."

In the evaluation of the impacts of climate change on proposed actions, CEQ recommends that agencies first identify the reasonably foreseeable conditions of the affected environment. These conditions would serve as the "no-action" alternative and as the baseline for comparing future impacts. In evaluating impacts, agencies should focus on long-term aspects of a project that are more likely to experience the effects of climate change. The draft guidance also suggests that mitigation measures (e.g., adaptation measures) attempt to rely on the principles of adaptive management under which measures should be flexible enough to be modified in the future as conditions change. Monitoring should also be an important component of adaptive mitigation measures. Finally, the guidance recommends that agencies maximize the use of "incorporation by reference" of existing and emerging studies to describe the effects of climate change. Agencies should tailor such information to appropriate regional and local scales to make it more meaningful to agency decision making.

The guidance is very detailed, and users should carefully evaluate each provision. While CEQ's proposed guidance is a good start at how to evaluate GHG and climate change impacts, many issues remain unresolved. To help improve the proposed guidance, CEQ is seeking additional suggestions during a 90-day public comment period.

Draft Guidance for NEPA Mitigation and Monitoring

The second draft guidance document, which addresses mitigating and monitoring, was written partly because of the increasing reliance on mitigation measures to support the adoption of findings of no significant impact (FONSI) under NEPA. Unfortunately, despite the widespread use of such documents, many mitigation measures are never implemented or turn out to be ineffective, according to CEQ.

One of the most important features of the draft guidance is CEQ's acknowledgment that FONSIs can, indeed, be based on mitigation. In its well-known and still influential *40 Most Frequently Asked Questions about the NEPA Regulations*, CEQ originally advised federal agencies not to use FONSIs for NEPA compliance where mitigation was necessary to document that the federal action would not significantly affect the quality of the human environment. However, over the years, the courts have repeatedly allowed their use when the federal agency had documented taking a hard look at the impacts and found that with appropriate environmental commitments, the action would not trigger preparation of an EIS.

In the draft guidance, CEQ expresses three central goals to improve agency mitigation and monitoring: (1) proposed mitigation should be considered throughout the NEPA process, (2) a monitoring program should be created or strengthened to ensure mitigation measures are implemented and effective, and (3) public participation and accountability should be supposed through proactive disclosure of, and access to, agency mitigation monitoring reports and documents.

To achieve these goals, the guidance encourages agencies to make mitigation measures enforceable. It provides specifics on how to do so and discusses how agencies should develop monitoring programs and prioritize monitoring activities. Further it addresses both "implementation monitoring" to ensure mitigation measures are carried out and "effectiveness monitoring" to verify success.

The draft guidance places considerable emphasis on the concept of adaptive management that allows mitigation to be changed in the future in response to changing environmental circumstances. The concept emphasizes the role of the public in monitoring, including with regard to making monitoring reports and mitigations' effectiveness publicly available. The guidance concludes with an example of the U.S. Army's NEPA regulations which already include many of CEQ's recommendations.

Draft Guidance on Establishing and Applying Categorical Exclusions under NEPA

The third draft guidance document addresses the use of categorical exclusions (CEs) under NEPA. According to CEQ, this guidance is necessary because of the overwhelming number of projects that satisfy NEPA using CEs and the potential for their misuse. Specifically, the guidance covers (1) the process for establishing a new CE, (2) the role of public involvement and documentation in defining and substantiating a proposed CE, (3) how to apply a CE and what documentation is necessary to support it, and (4) the conduct of periodic reviews of CEs to ensure their continued appropriate use and usefulness.

In discussing these four topics, the draft guidance covers a broad range of subjects related to categorical exclusions, including the purpose for establishing a new CE, what must go into an exclusion, and the role of extraordinary circumstances as exceptions to exclusion. It also describes when technical studies may be necessary in using exclusions and when the public should be notified.

Call for Comments

CEQ is seeking public comments on all three draft guidance documents. After receipt and consideration of public comments, CEQ intends to issue the guidance in final form. Persons interested in the commenting on the proposed guidance documents may do so on the new NEPA web site noted above.

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Marten Law on Monsanto Co. v. Geertson Seed Farms, 2010 U.S. LEXIS 4980

2010 Emerging Issues 5186

Marten Law on Monsanto Co. v. Geertson Seed Farms: Supreme Court Reasserts Standard for Injunctive Relief in NEPA Cases

By Steven Jones

July 9, 2010

SUMMARY: In this Emerging Issues Analysis, Steve Jones of Marten Law PLLC discusses Monsanto Co. v. Geertson Seed Farms, in which the U.S. Supreme Court reiterated the four-part standard for injunctive relief it announced in 2008, confirming that this same standard applies in cases arising under the National Environmental Policy Act.

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ARTICLE: Reversing a nationwide injunction, the United States Supreme Court reiterated the four-part standard for injunctive relief it announced in 2008, confirming that this same standard applies in cases arising under the National Environmental Policy Act (NEPA). In 7-1 opinion n1 delivered by Justice Alito in *Monsanto Co. v. Geertson Seed Farms* (*Monsanto*), n2 the Court relied on its earlier opinions in *Winter v. Natural Resources Defense Council*, n3 and *eBay Inc. v. MercExchange, L.L.C.*, n4 holding that showings of irreparable injury, inadequacy of legal remedies, a balance of hardships tipping in favor of the party seeking the injunction, and consideration of the public interest are all necessary before an injunction may issue. n5

Background

Monsanto presented the issue of whether cases arising under NEPA are subject to a standard for injunctive relief that is more favorable to NEPA plaintiffs, effectively affording project opponents with a presumption of irreparable harm. In the case below, the Ninth Circuit upheld a district court's decision to permanently enjoin the planting of genetically modified "Roundup Ready" alfalfa (RRA) nationwide, pending preparation of an environmental impact statement (EIS) under NEPA. n6

In *Monsanto*, the Court relied heavily on its 2008 opinion in *Winter v. Natural Resources Defense Council*, another NEPA case. n7 The Ninth Circuit issued its opinion in *Monsanto* before the Supreme Court reiterated the standard for preliminary injunctions in *Winter* - in that case, the Court held that injunctive relief required a showing of: (1) likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3) the balance of equities between the parties; and (4) that the public interest would not be disserved. n8 Petitioners in

Monsanto alleged that the Ninth Circuit applied the wrong standard for permanent injunctive relief, threatening to make blanket injunctions all but automatic in NEPA cases.

Monsanto's Petition to Deregulate Roundup Ready Alfalfa

In April 2004, Monsanto and Forage Genetics petitioned the Animal and Plant Health Inspection Service (APHIS) (a division of the U.S. Department of Agriculture (USDA)) to deregulate RRA. Geertson Seed Farms and other alfalfa growers, along with the Center for Food Safety, Center for Biological Diversity, Western Organization of Resource Councils, Sierra Club and other non-profit organizations, opposed the petition. They argued that: (1) RRA would contaminate conventional and organic alfalfa through gene transmission; (2) due to contamination, deregulation could prohibit farmers from marketing natural products as organic or non-genetically engineered; (3) contamination would also impact organic livestock sellers; and (4) RRA would negatively impact the export market.

In response to the deregulation petition, APHIS prepared an environmental assessment under NEPA, issued a Finding of No Significant Impact, and then granted the petition. In February 2006, Geertson Seed, another conventional alfalfa seed producer, and several environmental groups filed suit against the Secretary of the USDA, APHIS and the U.S. Environmental Protection Agency, challenging the decision to deregulate RRA. The court allowed Monsanto, Forage Genetics, and three individuals to intervene as defendants. n9

The District Court's Injunction

Plaintiffs in *Geertson Seed* brought claims under NEPA, the Endangered Species Act, and the Plant Protection Act. In a February 2007 order, Judge Charles Breyer found that the petition raised "substantial questions" as to whether: "(1) deregulation of RRA without any geographic restrictions will lead to the transmission of the engineered gene to organic and conventional alfalfa; (2) the possible extent of such transmission; (3) farmers' ability to protect their crops from acquiring the genetically engineered gene; [and (4)] the extent to which RRA will contribute to the development of Roundup-resistant weeds ... and how farmers will address such weeds." n10 He reserved consideration of plaintiffs' other claims pending APHIS' preparation of an EIS. Based on those findings, and without holding an evidentiary hearing, Judge Breyer vacated the federal defendants' decision deregulating RRA and enjoined all future planting of RRA nationwide, pending APHIS' completion of an EIS. n11

The Ninth Circuit's Opinion

Monsanto appealed the injunction to the Ninth Circuit, arguing that: (1) the district court should have held an evidentiary hearing before issuing a nationwide injunction; and (2) the district court "erred in ordering injunctive relief because it improperly presumed irreparable injury instead of applying the traditional four-factor test for the issuance of a permanent injunction, as required under *eBay v. MercExchange, L.L.C.*" and, as a result, ordered overbroad injunctive relief. n12

The Ninth Circuit affirmed the lower court. It held that, under *eBay*, to obtain permanent injunctive relief a plaintiff must show: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." n13 The court held that this "traditional balancing of harms" also applies in the environmental context, and that courts cannot categorically grant or deny injunctive relief without applying the *eBay* test. The Ninth Circuit found that the district court properly applied that test. n14 In affirming the district court's decision not to hold an evidentiary hearing, the Ninth Circuit conceded that, a district court must generally hold such a hearing before issuing a permanent injunction "unless the adverse party has waived its right to a hearing or the facts are undisputed." n15

The Ninth Circuit found, however, that the injunction in the case "is not a typical permanent injunction." Instead, the court determined that, because the injunction was designed to ensure compliance with NEPA, it was more limited in "purpose and duration." Citing judicial economy and the district court's consideration of extensive documentary

submissions in the remedy phase, the Ninth Circuit held that the district court did not err by declining to hold an evidentiary hearing before enjoining RRA planting nationwide. The court found that an evidentiary hearing would have required the district court "to engage in precisely the same inquiry it concluded APHIS failed to do and must do in an EIS," and that the appellants "in effect" were asking the court "to accept its truncated EIS without the benefit of the development of all the relevant data and ... without the opportunity for and consideration of public comment." n16

A Dissent in the Ninth Circuit Draws Notice From the Supreme Court

In a dissent specifically referenced in Justice Alito's opinion, n17 Circuit Judge N. Randy Smith noted that the nationwide injunction imposed "severe economic consequences" on the appellants, as well as farmers and distributors across the country. Judge Smith stated that, by affirming the district court's decision not to hold an evidentiary hearing, the majority effectively created "a third exception to the evidentiary hearing requirement." According to Judge Smith, a court may not forego an evidentiary hearing "simply because (1) the injunction may dissolve at some point and (2) the issues, to be raised at the hearing, overlap with the issues the agency must consider." Describing the majority's "deference" to the district court as a "mistake" - particularly in light of the district court's "wholesale rejection" of the agency's position - Judge Smith opined that "[t]here aren't many environmental cases that don't fit into the majority's newly-created exception." n18

The Supreme Court Requires a Showing of Irreparable Harm, Even Under NEPA

The Supreme Court noted that the district court's injunction sought to remedy APHIS' NEPA violation in three ways: (1) by vacating the agency's decision completely deregulating RRA; (2) by enjoining APHIS from deregulating RRA in any fashion until it completed an EIS; and (3) by entering a nationwide injunction prohibiting almost all planting of RRA. n19 In rejecting this approach, the Court made clear that its "traditional four-factor test applies when a plaintiff seeks a permanent injunction to remedy a NEPA violation." n20

In reversing the injunction, the Supreme Court rejected the approach taken by both the Ninth Circuit and the district court. The district court had held that "in the run of the mill NEPA case," an injunction delaying the contemplated government project is proper "until the NEPA violation is cured." n21 Both the district court and Ninth Circuit stated that "in unusual circumstances, an injunction may be withheld, or, more likely, limited in scope" in NEPA cases. n22 While acknowledging that both of those decisions pre-dated the Court's opinion in *Winter*, the Court pointedly noted that the approach taken by both the district court and the Ninth Circuit "invert the proper mode of analysis." n23 Concluding that both lower courts had it backwards, Justice Alito stated:

[T]he statements above appear to presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances. No such thumb on the scales is warranted. ... It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather a court must determine that an injunction *should* issue under the traditional four-factor test set out above. n24

The District Court Acted Prematurely in Enjoining the Agency Before It Exercised Its Authority

The Court also held that the district court abused its discretion in enjoining APHIS from pursuing any deregulation of RRA whatsoever, since the agency had not taken final action in determining the breadth of its deregulation decision. "Until such time as the agency decides whether and how to exercise its regulatory authority, however, the courts have no cause to intervene. Indeed, the broad injunction entered here essentially pre-empts the very procedure by which the agency could determine, independently of the pending EIS process for assessing the effects of a *complete* deregulation, that a *limited* deregulation would not pose any appreciable risk of environmental harm." n25

Standing

In addition to reaffirming the injunctive standards in *Winter* and *eBay*, the Court also rejected challenges advanced by both petitioners and respondents, each of whom argued that the other lacked standing. The Court held that the

possibility that the petitioners could not sell or license RRA to prospective customers and that their injuries could be redressed by an order from the Court constituted a concrete, particularized, imminent injury that was traceable to the challenged action, thereby creating Article III standing. n26 Similarly, the respondents "established a reasonable probability that their organic and conventional alfalfa crops will be infected with the engineered gene" contained in RRA, if it was completely deregulated. n27 The Court held that "[s]uch harms, which respondents will suffer even if their crops are not actually infected with the Roundup ready gene, are sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis." n28

Justice Stevens' Dissent

Justice Steven filed a lone dissent, highlighting that "[w]hen a district court takes on the equitable role of adjusting legal obligations, we review the remedy it crafts for abuse of discretion. "[D]eference, we have explained, 'is the hallmark of abuse-of-discretion review.' Although equitable remedies are 'not left to a trial court's inclination,' they are left to the court's 'judgment.' " n29 Justice Stevens would have sustained the district court's injunction as both an "equitable application of administrative law," and also as a "reasonable response to the nature of the risks posed by RRA." n30 Given the facts, Justice Stevens felt that "it was perfectly reasonable to wait for the EIS" n31 and he would, accordingly, have sustained the district court's approach.

Conclusion

Having reiterated its four-part standard for injunctive relief in both 2006 and again in 2008, the Supreme Court has once again emphasized that those same principles apply across the board, and that NEPA cases do not present an exception to their application.

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n1 Justice Stevens authored the lone dissent. Justice Breyer did not participate because his brother, Northern District of California Judge Charles J. Breyer, authored the district court opinion in the case.

n2 *2010 U.S. LEXIS 4980* (U.S. June 21, 2010).

n3 *129 S. Ct. 365, 380-82, 172 L. Ed. 2d 249 (2008).*

n4 *547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006).*

n5 *Monsanto, 2010 U.S. LEXIS 4980,* at *31.

n6 *See Geertson Seed Farms v. Monsanto Co., 570 F.3d 1130 (9th Cir. 2009).* The Ninth Circuit issued its first decision in *Geertson* in September 2008 before the Supreme Court decided *Winter*, then withdrew that opinion and re-issued the opinion in 2009. Citations are to the later (2009) version of the opinion.

n7 *129 S.Ct. 365 (2008). See* S. Brandt-Erichsen, *Supreme Court Rules on Preliminary Injunction Standard in Environmental Cases*, Marten Law Environmental News (Nov. 13, 2008), *available at* http://www.martenlaw.com/newsletter/20081113-preliminary-injunction-standard.

n8 *Winter, 129 S.Ct. at 380-82.*

n9 For complete coverage of the district and appellate court decisions, see J. Ferrell, *Ninth Circuit Upholds Permanent Injunction in NEPA Case Without Evidentiary Hearing*, Marten Law Environmental News (Sept. 30, 2008), *available at* http://www.martenlaw.com/newsletter/20080930-nepa-injunction-upheld; J. Ferrell, *Faulty NEPA Analysis Results in Injunction Against Planting Genetically Modified Crops*, Marten Law Environmental News (May 2, 2007), *available at* http://www.martenlaw.com/newsletter/20070502-crop-planting-injunction.

n10 *Geertson Seed Farms v. Johanns, 2007 U.S. Dist. LEXIS 14533*, at *37-*38 (N.D. Cal. Feb. 13, 2007).

n11 *Geertson Farms Inc. v. Johanns, 2007 U.S. Dist. LEXIS 21491* (N.D. Cal. Mar. 12, 2007), *reconsideration denied, 2007 U.S. Dist. LEXIS 32701* (N.D. Cal. May 3, 2007), *order and scope of injunctive relief modified (upon Rule 59(e) motion by defendants and defendant-intervenors), 2007 U.S. Dist. LEXIS 48383* (N.D. Cal. June 25, 2007).

n12 *Geertson Seed, 570 F.3d at 1136* (citing e*Bay v. MercExchange, L.L.C., 547 U.S. 388 (2006)).*

n13 *Geertson Seed, 570 F.3d at 1136* (quoting *N. Cheyenne Tribe v. Norton, 503 F.3d 836, 843 (9th Cir. 2007);* e*Bay, 547 U.S. at 391).*

n14 The lower court found the following: (1) with respect to harm, genetic contamination of organic and conventional alfalfa had already occurred; (2) the harm was sufficient to merit "broad injunctive relief"; (3) the harm to growers of non-genetically engineered alfalfa (and consumers) outweighed the financial hardships to Monsanto, Forage Genetics and growers; and (4) it would be in the public interest to enjoin use of RRA before the USDA studies its impact, as failing to do so could make non-genetically engineered alfalfa unavailable in the marketplace. Id.

n15 *Geertson Seed, 570 F.3d at 1139.*

n16 *Geertson Seed, 570 F.3d at 1139.*

n17 *See Monsanto, 2010 U.S. LEXIS 4980,* at *18.

n18 *Geertson Seed, 570 F.3d at 1141-42* (Smith, J., dissenting).

n19 *Monsanto, 2010 U.S. LEXIS 4980,* at *30.

n20 *Monsanto, 2010 U.S. LEXIS 4980,* at *31 (citing *Winter, 129 S. Ct. at 380-82).*

n21 *Monsanto, 2010 U.S. LEXIS 4980,* at *31-*32 (quoting Monsanto's cert. petition, which in turn quoted the district court's permanent injunction).

n22 *Monsanto, 2010 U.S. LEXIS 4980,* at *32 (quoting *Nat'l Parks & Conservation Ass'n v. Babbit, 241 F.3d 722, 737 n.18 (9th Cir. 2001)).*

n23 *Monsanto, 2010 U.S. LEXIS 4980,* at *32.

n24 *Monsanto, 2010 U.S. LEXIS 4980,* at *32-*33 (italics in original opinion).

n25 *Monsanto, 2010 U.S. LEXIS 4980,* at *44 (italics in original opinion).

n26 *Monsanto, 2010 U.S. LEXIS 4980,* at *18-*19.

n27 *Monsanto, 2010 U.S. LEXIS 4980,* at *25 (quoting the appendix to the Petition for Cert., which in turn, quoted the district court's order).

n28 *Monsanto, 2010 U.S. LEXIS 4980,* at *28.

n29 *Monsanto, 2010 U.S. LEXIS 4980,* at *62 (Stevens, J., dissenting) (citing *General Elec. Co. v. Joiner, 422 U.S. 405, 416 (1975)).*

n30 *Monsanto, 2010 U.S. LEXIS 4980,* at *63, *71.

n31 *Monsanto, 2010 U.S. LEXIS 4980,* at *75.

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Marten Law PLLC is an environmental law firm advising companies and public agencies on some of the most challenging aspects of environmental, land use and natural resource legal matters. With experience in nearly every aspect of environmental law, the firm strives to help clients navigate the maze of federal, state, and local regulations in order to resolve disputes and grow their business. Marten Law is a leading legal expert on climate change policy, lending content and ongoing commentary to LexisNexis' *Environmental Law and Climate Change Center*.

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Building Energy Codes

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Building Energy Codes

By J. Cullen Howe

May 25, 2010

SUMMARY: Building energy codes have been used for many years as a cost-effective strategy to overcome barriers to energy efficiency in buildings. In this Emerging Issues Analysis, J. Cullen Howe of Arnold & Porter LLP's New York office provides an overview of building energy codes and examines them from the federal, state & local levels. He also discusses model energy codes and efforts to "green" energy codes to increase energy efficiency and reduce GHGs.

ARTICLE: I. Introduction: What Are Energy Codes

It should come as no surprise that buildings require massive amounts of energy for their construction and operation. The statistics are sobering. Approximately one-third of all energy generated worldwide is used in buildings. n1 In the United States, buildings use approximately 40 percent of all energy generated n2 and three-fourths of all electricity generated. n3 Improving the energy efficiency of buildings can be and often is mandated by state or local energy codes, which typically require that new and substantially renovated buildings comply with increasingly stringent energy efficiency requirements. n4 Building energy codes have been used for many years as a cost-effective strategy to overcome barriers to energy efficiency in buildings.

A building energy code is simply a collection of energy conservation standards for buildings. n5 They are part of overall building codes, which govern the design and construction of buildings. Building energy codes set a baseline for energy efficiency in new construction by establishing minimum energy efficiency requirements. They are typically based on national model codes which are updated every few years. As explained below, separate model energy codes exist for commercial and residential buildings. States establish building energy codes based on these national models by adopting them with or without amendments. States and/or local governments enforce these codes, although compliance can sometimes be difficult to enforce.

This article examines building energy codes from the federal, state, and local levels. It also discusses model energy codes and efforts to "green" energy codes to increase energy efficiency and reduce greenhouse gas (GHG) emissions.

II. Federal Actions to Establish Building Energy Codes

A. Energy Policy Act. In 1992, Congress passed the Energy Policy Act in an attempt to reduce the country's dependence on imported petroleum. n6 With regard to buildings, the Act required states to establish minimum commercial building energy codes and to consider minimum residential energy codes based on current voluntary codes. n7 It also established efficiency standards for commercial heating and air-conditioning equipment, toilets and urinals, electric motors, and light bulbs. n8 In addition, it established a program for providing federal support on a competitive basis for renewable energy technologies. n9

The Act gave impetus to the modification of ASHRAE Standard 90.1, which is an energy conservation standard for most buildings n10 that was initially created by the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) in 1975 and is updated every three years. n11 ASHRAE Standard 90.1 is the most commonly used energy code for commercial and other non-residential buildings. n12 The Standard is broad in its application-in general, its requirements address the design of all building systems that affect the visual and thermal comfort of building occupants. The Standard was last updated in 2007 and is scheduled to be updated in 2010. The Act initially required state and local governments to update their commercial building energy codes to be at least as stringent as ASHRAE Standard 90.1-1989, the most recent version of the Standard in existence at that time. Pursuant to the Act, every time that Standard 90.1 is updated, the federal Department of Energy (DOE) is required to make a determination within one year as to whether the amended version saves energy compared to the previous version. n13 Once such a determination is made, states are required to adopt a commercial energy code at least as stringent as the national model within two years of DOE's determination, or explain why they cannot comply. n14

n15 The MEC/IECC contains energy efficiency criteria for new buildings and additions to existing buildings, and the Act adopted its provisions that relate to residential buildings. The MEC/IECC covers a building's ceilings, walls, and foundations as well as mechanical, lighting, and power systems. n16 Like ASHRAE Standard 90.1, the MEC/IECC is updated every three years. Also like ASHRAE Standard 90.1, DOE is required to determine whether the most recent version of the MEC/IECC saves energy compared to the previous version. n17 If DOE makes such a determination, all states are required to review and consider adopting it within two years, but it does not require that they do so. n18 Currently, the agency is determining whether the 2003 and 2006 versions of the MEC/IECC would save energy compared to the 2000 version. n19 According to at least one estimate, if all states adopted the 2006 IECC, the energy savings would amount to 6.6 quadrillion BTUs over 20 years and would reduce greenhouse gas emissions by more than 100 million metric tons. n20

B. American Clean Energy and Security Act/American Power Act. In June 2009, the U.S. House of Representatives approved H.R. 2424, the American Clean Energy and Security (ACES) Act, by a vote of 219-212. n21 The bill, as passed by the House, would cut U.S. GHG emissions by 17 percent by 2020 and 83 percent by 2050 from 2005 levels by establishing a cap-and-trade system, and it would also impose a renewable electricity standard on states. Significantly, the ACES Act contains a provision that, if enacted, would establish a national energy code for buildings. Section 201 of the ACES Act requires state and local governments to adopt building energy codes that are at least 30 percent above the 2006 IECC, increase this to 50 percent by 2014, and then incrementally increase their building energy codes 5 percent every three years until reaching 75 percent above the 2006 IECC by 2029. n22 Once the law is enacted, states and localities have one year after each increase to certify compliance with the federal targets. States and municipalities can set higher targets than federal minimums in intervening years. n23

However, as of May 2010, the Senate has yet to take up debate on the ACES Act. On May 12, 2010, Senators John Kerry and Joseph Lieberman released a "discussion draft" of the American Power (AP) Act, although it was not formally introduced in the Senate. n24 The AP Act is similar to the ACES Act in that it implements a "cap and trade" regime designed to cut U.S. GHG emissions by 17 percent by 2020 and 80 percent by 2080. As originally drafted, the AP Act does not contain a section similar to Section 201 of the ACES Act, so it is unclear whether this provision would remain if the AP Act passes the Senate and must be reconciled with ACES Act.

III. State Energy Codes

Most states have adopted building energy codes that apply to both commercial and residential buildings. As stated above, pursuant to the Energy Policy Act of 1992, all states are required to adopt ASHRAE Standard 90.1 or explain why they cannot comply. n25 With respect to the IECC, some states have adopted it without modification, while others have adopted some version of it along with state-developed amendments. Still others have adopted the IECC as recommended practice but have no statewide requirement that all new residential construction use it. A full list of states and what they require is available online. n26

A. California. In 1978, California became the first state to include energy requirements in its building code. In 2008, the state adopted a Green Building Standards Code that applies to both public and private buildings, which is effective as of January 1, 2010. n27 The Green Building Standards Code requires that newly constructed buildings reduce energy use by 15% above current Title 24 requirements. n28 The Green Building Standards Code also requires that newly constructed buildings:

- reduce water use by 20%; n29
- reduce water use for landscaping by 50%; n30 and
- recycle or salvage for reuse a minimum of 50% of non-hazardous construction and demolition debris. n31

California municipalities have the authority to enact stricter building energy regulations if they so choose. n32

B. New York. Another representational example of a state energy code is New York. In 1978, the state enacted the Energy Conservation Construction Code, otherwise known as the New York State Energy Code. n33 The most recent version of the Code, adopted in 2007, encompasses commercial provisions based on the text of the IECC 2003 and ASHRAE 90.1-2004, and residential provisions based on the IECC 2004 Supplements. n34 All building-related codes in New York are currently reviewed and updated on a three-year cycle. Once adopted, the modifications become mandatory throughout New York, although municipalities may choose to adopt a more stringent code. n35 The Code applies to new building construction and to renovations of existing buildings only if the renovation is "substantial" - *i.e.*, only if the renovation involves the replacement of more than 50% of a "building subsystem" such as exterior walls, floors, and ductwork. n36 Thus, renovations and building system replacements that do not meet this threshold are not required to comply with it.

IV. Municipal Energy Codes

Municipalities have also enacted building energy codes. Like New York and California, most states allow municipalities to enact stricter energy codes through "home rule" laws. For example, in December 2009, New York City enacted four laws aimed at increasing energy efficiency in existing buildings over 50,000 square feet as part of its Greener, Greater Buildings Plan. n37 One of the laws creates a New York City Energy Conservation Construction Code for new buildings and building renovations that would, among other things, remove the exemption from the State Energy Code for renovations that include less than 50% of a building's subsystems (Intro. No. 564-A). n38

In 2008, the District of Columbia updated its building construction code; it became effective on December 26, 2009. n39 Pursuant to the updated law, the residential portion of the energy code is based on the so-called "30% solution," which is developed to be 30% more efficient than the 2006 IECC. The commercial portion of the energy code adopts the ASHRAE Standard 90.1-2007, with several greening amendments including cool roofs, on-site stormwater retention, and low-flow residential and commercial plumbing fixtures.

V. Other Model Energy Codes

There are a number of model energy codes in existence that seek to raise the bar with respect to energy efficiency and "greening" newly constructed buildings. In January 2009, the International Code Council (ICC) announced the approval of its National Green Building Standard, ICC 700. n40 ICC 700 can be used in new and renovated single-family and high-rise residential construction projects and includes provisions relating to land conservation,

rainwater collection, use of low-VOC materials, and energy performance at 15% above the requirements of the 2006 IECC.

In June 2009, the ICC announced that it was launching an International Green Construction Code (IGCC) Initiative, which would seek to create a model code that would reduce the energy usage and the carbon footprint of commercial buildings by focusing on building design and performance. IGCC Version 1.0 was released in March 2010. n41 According to the ICC, the IGCC emphasizes building performance, including features such as a requirement for building system performance verification and building owner education to ensure the best energy-efficient practices. A key feature of the IGCC is a section devoted to "jurisdictional electives" that will allow customization of the code beyond its baseline provisions to address local priorities and conditions.

ASHRAE, in collaboration with the U.S. Green Building Council (USGBC) and the Illuminating Engineers Society of America (IESNA), is currently developing a standard for the design of high-performance green buildings, referred to as Standard 189.1. n42 This standard provides minimum criteria that apply to new buildings and major renovation projects n43 and, like the USGBC's Leadership in Energy and Environmental Design (LEED) green building rating system, addresses sustainable sites, water use efficiency, energy efficiency, materials and resources, and indoor environmental quality. However, it also provides minimum criteria for a building's greenhouse gas emissions. The standard is to be written in code language and contains a series of mandatory provisions applicable to all projects as well as additional prescriptive and performance options for compliance. It is designed to be adopted by jurisdictions seeking to mandate that all buildings in that jurisdiction be high performance green buildings. It was released in early 2010. n44

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n1 U.N. Environment Programme, *Buildings and Climate Change: Status, Challenges and Opportunities* 4 (2007), *available at* http://smap.ew.eea.europa.eu/media_server/files/R/S/UNEP_Buildings_and_climate_change.pdf.

n2 Energy Information Administration, "Annual Energy Review 2007" at 74 (Figure 2.1a), *available at* http://tonto.eia.doe.gov/FTPROOT/multifuel/038407.pdf.

n3 U.S. Dept. of Energy, *2008 Buildings Energy Data Book* (Sept. 2008), *available at* http://buildingsdatabook.eere.energy.gov/docs%5CDataBooks%5CSEP_2008_BEDB.pdf.

n4 For example, the New York State Energy Conservation and Construction Code, otherwise known as the State Energy Code, encompasses commercial provisions based on the text of the International Energy Conservation Code (IECC) 2003 and ASHRAE 90.1-2004. All building-related codes in New York are currently reviewed and updated on a three-year cycle.

n5 Building energy codes typically specify requirements for "thermal resistance" in the building shell and windows, minimum air leakage, and minimum efficiency for heating and cooling equipment.

n6 Pub. L. No. 102-486, *106 Stat. 2776 (1992), 42 U.S.C. § 13201 et seq.* For a complete discussion of the Energy Policy Act of 1992, see Energy Law and Transactions, Ch. 58 (David J. Muchow & William A. Mogel, eds., LexisNexis Matthew Bender).

n7 Energy Policy Act of 1992, § 101.

n8 Energy Policy Act of 1992, §§ 122, 123, 124, 126.

n9 Energy Policy Act of 1992, Title XII.

n10 The Standard excludes low-rise residential buildings, which are covered by ASHRAE Standard 90.2. Low-rise residential buildings are defined as single-family houses and multifamily structures not exceeding three stories.

n11 ASHRAE Standard 90.1 is available at http://www.ashrae.org/technology/page/548. It is sometimes referred to as the ANSI/ASHRAE/IESNA Standard 90.1, given the fact that the Standard is the result of a collaboration between ASHRAE, the Illuminating Engineering Society of North America (IESNA), and the American National Standards Institute (ANSI).

n12 *See id*.

n13 Energy Policy Act of 1992, § 101(b)(2)(A).

n14 Energy Policy Act of 1992, § 101(b)(2)(B)(i). Information about this determination is available at http://www.energycodes.gov/status/all_about_determinations.stm.

n15 The most recent version of IECC, IECC-2009, is available for purchase at http://www.internationalcodes.net/2009-international-energy-conservation-codes-100-6533-09.shtml.

n16 *See* Energy Policy Act of 1992, § 101(b)(2)(B)(i).

n17 Information about the determination process is available at http://www.energycodes.gov/status/all_about_determinations.stm.

n18 Energy Policy Act of 1992, § 101(a).

n19 Energy Policy Act of 1992, § 304(5). Information about this determination is available at http://www.energycodes.gov/status/determinations_res.stm.

n20 *See* National Action Plan for Energy Efficiency, "Building Codes for Energy Efficiency," Table 1, *available at* http://www.epa.gov/eeactionplan.

n21 H.R. 2454 is available at http://www.climatecasechart.com.

n22 ACES Act § 201. A helpful summary of this section is available at http://www.greenbiz.com/blog/2009/06/26/green-building-guide-waxman-markey.

n23 *See* ACES Act § 201.

n24 The AP Act is available at http://www.law.columbia.edu/centers/climatechange/resources/legislation/senate#apa.

n25 Energy Policy Act of 1992, § 101(b)(2)(B)(i).

n26 This list is available at http://www.energycodes.gov/implement/state_codes/index.stm.

n27 Information about the Green Building Standards Code is available at http://www.energy.ca.gov/title24/2008standards.

n28 Green Building Standards Code § 503.

n29 Green Building Standards Code § 603.

n30 Green Building Standards Code § 604.

n31 Green Building Standards Code § 708.

n32 Green Building Standards Code § 101.

n33 N.Y. Energy Law Art. 11.

n34 Information about the New York Energy Code is available at http://www.dos.state.ny.us/code/energycode/nyenergycode.htm.

n35 N.Y. Energy Law § 11-109.

n36 N.Y. Energy Law § 11-103(b). This "50% rule" is absent in the IECC and ASHRAE 90.1, both of which the New York State Energy Code is based on.

n37 Information about the Greater, Greener Buildings Plan is available at http://www.nyc.gov/html/planyc2030/html/plan/buildings_plan.shtml.

n38 This legislation is available at http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=451298&GUID=B81B9B48-C100-428A-AD34-59616CC28C32&Opti Text &Search=564.

n39 Information about these revisions is available at http://www.energycodes.gov/states/state_info.php?stateAB=DC.

n40 Steve Daggers, "National Green Building Standard Approved," Press Release (Jan. 30, 2009), *available at* http://www.iccsafe.org/news/nr/2009/0130_ICC700.html.

n41 IGCC Version 1.0 is available at http://www.iccsafe.org/cs/IGCC/Pages/default.aspx.

n42 Its official title is the Standard for the Design of High-Performance Green Buildings Except Low-Rise Residential Buildings.

n43 However, it does not apply to residential buildings under three stories.

n44 Additional information about Standard 189.1 is available at http://www.ashrae.org/publications/page/927.

RELATED LINKS: For a comprehensive discussion of green buildings and sustainable development, see
- Environmental Law Practice Guide Ch. 17D.

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California's Sweeping Legislative Waters Package

2009 Emerging Issues 4740

California's Sweeping Legislative Waters Package

By Scott Slater

December 18, 2009

SUMMARY: Get the latest on California's recent landmark waters legislation. Written by expert Scott Slater, the analysis addresses the major aspects of this bill and what practitioners can expect in the coming months and years. This article also appears as the Lead Article for the January 2010 issue of California Environmental Law Reporter (Matthew Bender).

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ARTICLE: In early November 2009, the California Legislature passed five bills that have the potential to cause dramatic effects in the management and use of the state's water resources. Collectively these bills could be among the most significant water legislation in California in decades, and were driven by increasing supply constraints caused by the decline of environmental health in the Sacramento-San Joaquin River Delta and a third consecutive year of extremely dry conditions.

The state's failure to adequately solve the significant and complex environmental and water supply problems of the Delta and the state have fostered a broad-based support for institutional reform among agricultural interests, urban water suppliers, the business community, and environmental advocates. This year's legislation is intended to provide that reform by:

. modifying the administrative structures for managing the Delta;

. issuing a statewide bond for $11.14 billion to fund statewide water storage, conveyance, and conservation projects;

. mandating a 20% reduction in urban per capita water use statewide;

. encouraging improvements in agricultural water efficiency; and

. requiring increased monitoring and reporting of groundwater elevations and surface water diversions.

Whether these objectives are achieved will depend in large degree on (1) whether the statewide bond is actually approved by the voters, and (2) potential litigation that is likely to challenge some of the selected implementation measures. The enhanced monitoring and reporting may also lead to further State Water Resource Control Board (SWRCB) enforcement actions and sustainable groundwater management practices, albeit through regulation or adjudication.

SB7x1 (Delta Management Reform)

This bill enacts the Sacramento-San Joaquin Delta Reform Act of 2009, which establishes the Delta Stewardship Council and tasks that body with developing a comprehensive management plan for the Delta by the end of 2011 (Delta Plan). Under the bill, a state or local agency that proposes to undertake certain types of actions within the boundaries of the Delta must prepare and submit to the council a specified written certification of consistency with the Delta Plan.

The bill establishes the Delta Independent Science Board to develop a scientific program for managing of the Delta, and the Sacramento-San Joaquin Delta Conservancy to implement ecosystem restoration in the Delta, environmental protection, and the economic well-being of Delta residents.

Perhaps of most interest to practitioners, the bill requires the State Water Resources Control Board to establish an effective system of Delta watershed diversion data collection and public reporting, and further requires the board to develop new flow criteria for the Delta ecosystem. The board will also appoint a watermaster for the Delta, with the authority to monitor and enforce SWRCB orders and license and permit terms and conditions, as well as to require monitoring and reporting, to approve temporary urgency changes, and to issue cease and desist orders and civil liability complaints.

SB7x2 (Bond Measure)

This bill has received the lion's share of attention, since, if approved by voters in 2010, it would authorize the issuance of $11.14 billion in bonds to provide funds for water supply and protection facilities and programs. The act contains funding for many types of projects around several central themes. Eligible applicants for this funding, some of which requires matching local funds, include public agencies and investor-owned utilities. Projects proposed by investor-owned utilities that are regulated by the Public Utilities Commission must have a clear and definite public purpose and benefit the customers of the water system.

Although failure to obtain voter authorization for the issuance of the bonds would produce a significant setback in the state's effort to effect much needed upgrades to its water infrastructure, it would have no direct legal impact on the implementation of the other measures in the water bill package, none of which are linked to or dependent on the success of the bond measure.

SB7x6 (Groundwater Monitoring Program)

This portion of the legislation establishes a statewide framework for local groundwater monitoring programs which requires that by 2012 all groundwater basins and sub-basins will be regularly and systematically monitored and the resulting information made publicly available. The bill anticipates that the California Department of Water Resources (DWR) will designate a willing local entity to be responsible for monitoring and reporting groundwater elevations. Eligible entities include:

. court appointed watermasters;

. groundwater management agencies;

. water replenishment districts;

. local agencies that manage all or part of a groundwater basin;

. counties; and

. voluntary cooperative groundwater monitoring associations established by contract, joint powers agreement, memorandum of understanding, or other approved form of agreement.

As a practical matter, within the managed and adjudicated basins, most of which lie within Coastal and Southern California, the monitoring is not new. In fact, many of the adjudicated basins already require the "safe yield" or "sustainable yield" management objectives that supporters of the legislation desire.

However, for those areas where groundwater management is more limited or non-existent, things could change. For example, if DWR determines that no local agency is interested in performing monitoring duties or is competently doing so, DWR itself can perform groundwater monitoring functions. The direct impact is that such a determination by DWR will not only put DWR in control of basin measurements, but also render all local agencies ineligible for state water grants and loans.

A groundwater monitoring program has been sought by some interest groups for many years, but has always failed in the face of resistance by agricultural interests, which are the primary users of groundwater, particularly in the Central Valley. Historically, there has been considerable resistance to state efforts to quantify groundwater use because of concerns that quantification represented the first step towards statewide regulation or adjudication.

Percolating groundwater holds a different legal status than surface water in California: unlike modern appropriations of surface water (post 1914), the use of percolating groundwater is not regulated by the SWRCB or any other state agency with comprehensive management responsibility [*Water Code § 1200* et seq.]. n1 Although cities and counties have sought to enter the void, for the most part, groundwater management has been left to special act agencies and where conflict ensues-the courts.

This bill has been touted as "groundbreaking" in that it represents a serious effort to study and monitor the impact of groundwater use on a statewide scale. While the new law does not change the policy of leaving groundwater management to local agencies, it does create a publicly available database of the impacts of local use on groundwater basins. Presumably, this information may motivate local regulatory action if it reveals that a groundwater basin is in overdraft, but no such mandate is included in the bill. It may also provide important evidence of whether the total quantity of groundwater is being used within the long-term safe or sustainable yield of the particular basin. To the extent that the total quantity of water withdrawn exceeds the safe yield, litigation will almost certainly follow. Under applicable case law [*Pasadena v. Alhambra (1949) 33 Cal. 2d 908, 207 P.2d 17; City of Los Angeles v. City of San Fernando (1975) 14 Cal. 3d 199, 123 Cal. Rptr. 1, 537 P.2d 1250; City of Barstow v. Mojave Water Agency (2000) 23 Cal. 4th 1224, 99 Cal. Rptr. 2d 294, 5 P.3d 853]*, the existence of overdraft creates the potential loss of water rights by prescription. Experience suggests that existing water users will be reluctant to allow their rights to be diminished through inaction.

SB7x7 (Water Conservation)

This bill requires that California achieve a 20% reduction in urban per capita water use by December 31, 2020, with an interim reduction goal of 10% on or before December 31, 2015. The goals do not mandate a reduction in overall use, just per capita use. As a result, they should not threaten any water rights as population growth should compensate for per capita demand reductions. Furthermore, as the bill explicitly states, *Water Code § 2011* protects water rights when water conservation measures have been implemented and overall use is reduced.

This bill also fosters more efficient use of water by agricultural water suppliers by requiring agricultural water suppliers to implement efficient management practices, such as effective measurement of deliveries and pricing structures based on quantities delivered. Agricultural suppliers must also (1) help facilitate better use of water use on

problematic lands, (2) facilitate use of recycled water, (3) finance capital improvements for irrigation systems, and (4) implement incentivized pricing structures (e.g., volume and seasonal based) that promote more effective use of water by agricultural customers.

Agricultural suppliers are also expected to make upgrades to water delivery and recovery infrastructure to improve their control and management of the resource. Such measures include (1) expanding distribution systems, (2) constructing regulatory reservoirs to increase system flexibility and capacity, (3) automating canal control structures, and (4) providing water management services to water users. Of course such upgrades and services require financing, and it will be difficult for agricultural suppliers to implement such upgrades if the bond measure does not pass. Failure to provide bond funds will significantly impact the efficacy of these agricultural water conservation principles unless market based solutions are pursued with outlets to willing buyers.

The conservation bill also requires that agricultural water suppliers prepare Agricultural Water Management Plans (AWMP), which are analogous to Urban Water Management Plans [*Water Code § 10610* et seq.]. Agricultural water suppliers must now prepare and adopt an AWMP before December 31, 2012, and update that plan by 2015 and then every five years thereafter.

AWMPs must contain information regarding a supplier's service area, terrain and soils, climate, delivery measurements, rules and regulations, shortage allocation policies, quantity and quality of supplies, water uses within the service area, drainage, water accounting, and reliability. In addition, the AWMP must include a report on the efficiency management practices that the supplier has implemented under this bill, and the efficiency improvements that have resulted from that implementation.

Failure to adopt an AWMP will render an agricultural water supplier ineligible to receive water grants or loans from the state.

By the end of 2011, DWR, in consultation with the Agricultural Water Management Council, academic experts, and other stakeholders, will use the information acquired from AWMPs and agricultural water suppliers generally to develop a methodology for quantifying the efficiency of agricultural water use. This will be no simple task considering the multiple variables that go into any agricultural use of water, including weather, climate, soils, season, water quality, and even time of use.

SB7x8 (Diversion Reporting)

All persons who divert or store surface water have been required to report those diversions to the state on an annual basis since 1965. However, there is no effective enforcement mechanism for this requirement. It is estimated that over 1,800 agricultural, municipal, and industrial users diverter five percent of the freshwater flows in the Delta under rights that are not subject to SWRCB jurisdiction (i.e., riparian and pre-1914 rights). As a result, there is little or no data regarding the nature, extent, and location of these diversions.

This bill strengthens the reporting requirements for such diversions by instituting civil penalties for failure to file an annual statement of diversion for water diverted or stored after January 1, 2009. All diverters must file a statement of diversion by July 1, 2010, describing their water use. Starting in 2012, all diverters must have implemented best available technologies to measure the amount of water diverted and include monthly diversion totals in all subsequent annual reports.

Increased data from the new reporting requirement should lead to better water rights enforcement and greater certainty in watershed planning. Under the bill, SWRCB will hire 25 enforcement officers to ensure that diverters are complying with the new requirements. Not only must these diverters report their water use, the new law also means that water users may now have to affirmatively demonstrate that they are putting their water right to beneficial and reasonable use under article X, section 2 of the California Constitution, or risk forfeiture.

Conclusion

Real and apparent water reform in California is always difficult to achieve. The sweeping measures approved by the Legislature and signed by the Governor hold promise for facilitating real change. Whether many aspects of that change is more real than apparent may depend on whether the bond measure is passed and the decisions yet to be made during implementation.

A considerable share of the burden, should the bond measure pass, will be funded by the taxpayers as a whole. Will the voters be willing to take on over $11 billion in debt for water-related projects in November 2010 to achieve the sought-after water supply reliability and long-term sustainability? Absent approval of the bond, the most durable legacy of the legislation is likely to be the indirect impact on water use practices and the resulting groundwater management in previously lightly or unmanaged areas.

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n1 Local regulations may apply, as in the case of adjudicated groundwater basins, groundwater management plans, local districts, cities, and counties.

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Scott Slater is a shareholder in the law firm of Brownstein Hyatt Farber Schreck. For 25 years, his practice has been limited exclusively to water rights, water utilities, and water-related matters. He is the author of the two volume treatise California Water Law & Policy (Matthew Bender).

Vroman, Boye-Williams & Strong on Burlington Northern & Santa Fe Ry. v. U.S.

2009 Emerging Issues 3670

Vroman, Boye-Williams & Strong on Burlington Northern & Santa Fe Ry. Co. v. United States

By James Vroman, Patricia Boye-Williams and Michael Strong

June 5, 2009

SUMMARY: In this Emerging Issues Analysis, James Vroman, Patricia Boye-Williams and Michael Strong of Jenner & Blocks Chicago office discuss and analyze the implications of the U.S. Supreme Courts decision in Burlington Northern & Santa Fe Ry. Co. v. U.S., which expanded protection from CERCLA liability for sellers of useful products and addressed the threshold for establishing allocation of response costs among potentially responsible parties.

ARTICLE: Supreme Court Issues Long-Awaited Decision in *Burlington Northern & Santa Fe Ry. Co. v. United States* on CERCLA Liability

On May 4, 2009, in an 8-1 decision, the United States Supreme Court expanded protection from CERCLA liability for sellers of "useful products" and addressed the threshold for establishing allocation of response costs among potentially responsible parties ("PRPs"). *Burlington Northern & Santa Fe Ry. Co. v. United States*, No. 07-1601, 556 U.S. ___ *[129 S. Ct. 1870, 173 L. Ed. 2d 812]* (2009). With its opinion, the Supreme Court resolved a circuit split as to the extent of arranger liability and affirmed that allocation and divisibility-of-harm determinations in the post-*Atlantic Research Co. v. United States, 551 U.S. 128, 168 L. Ed. 2d 827, 127 S. Ct. 2331 (2007)* will be based on the principles set forth in the Restatement (Second) of Torts § 433A. The Court also accorded deference to the district court's conclusion that the evidence supported its allocation determination.

Background

Beginning in 1960, B&B operated a chemical distribution facility on a parcel next to land owned by predecessors to the Burlington Northern & Santa Fe and the Union Pacific railroads ("the Railroads"). In 1975, B&B leased part of the Railroads' property to expand its operations. B&B distributed chemicals which were also classified as hazardous substances: dinoseb, D-D and Nemagon, the latter two of which were manufactured by Shell. In the 1960s, Shell required its distributors to use bulk distribution for D-D. Shell would send the chemicals to B&B by common carrier, with the shipping term "free on board destination." During the transfer from the common carrier to B&B's bulk operation "leaks and spills could--and often did--occur." *Id.* slip. op. at 3. "Aware that spills of D-D were commonplace

among its distributors .. Shell took several steps to encourage safe handling of its products," including site inspections and a program that provided discounts for safety improvements. *Id.*

Over the course of B&B's operations, dinoseb, D-D and Nemagon were allowed "to seep into the soil and upper levels of ground water" at the B&B facility. *Id.* at 3-4. California's Department of Toxic Substances Control ("DTSC") and U.S. EPA both investigated the site. B&B "undertook some efforts at remediation," but it became insolvent in 1989. *Id.* at 4. The facility was added to the National Priorities List and U.S. EPA issued an administrative order forcing the Railroads, as the landlord of a portion of the B&B facility, to undertake certain remedial tasks at the facility. Two CERCLA actions ensued: the Railroads sought cost recovery from B[B] and U.S. EPA and DTSC sought cost recovery from the Railroads and Shell, who, the agencies contended, "arranged" to dispose of hazardous substances at the B&B facility. Shell, in response, argued that it was not an "arranger," as defined in CERCLA, *42 U.S.C. § 9607*(a)(3), but instead was the seller of a useful product that B&B mishandled. Shell had never entered into a contract with B&B to dispose of any hazardous waste or substance.

The Lower Court Opinions

The district court held that Shell was liable at the facility as an arranger, and could not use the "useful products" defense. *See United States v. The Atchison, Topeka & Santa Fe Ry. Co., 2003 U.S. Dist. LEXIS 23130,* *192-*208 (E.D. Cal. Jul 14, 2003). The district court also held that the harms were divisible and thus found the Railroads liable for a portion of the response costs. *Id.* at *250-61. The district court calculated a 9% allocation for the railroads after considering three factors. First, the district court considered the percentage of the land the Railroads leased to B&B relative to the total area of the B&B facility, 19.1%. Second, the district court noted the number of years B&B leased land from the Railroads relative to the total number of years B&B operated, and concluded that B&B leased the Railroads' property 45% of the period of time that it operated. Third, the district court found that only two of the three chemicals, D-D and Nemagon, were stored on the Railroads' property, or 66% of the chemicals that impacted the soil. Multiplying the three percentages together and rounding up, the district court arrived at a 6% allocation of liability for the Railroads, but increased the allocation by three additional percentage points to 9%, after allowing a 50% fudge factor for "calculation errors." *Id.* at *259-61.

The Ninth Circuit affirmed the district court as to Shell's liability as an "arranger," but reversed as to the divisibility-of-harm, or allocation, issue. *United States v. Burlington Northern & Santa Fe Ry., 479 F.3d 1113 (9th Cir. 2007) amended by 502 F.3d 781 (9th Cir. 2007) amended by 520 F.3d 918 (9th Cir. 2008).* With regard to arranger liability, the Ninth Circuit held that Shell was liable under a "broader" concept of arranger liability than one that is based on intentional disposal. *520 F.3d at 948-49.* The Ninth Circuit acknowledged that Shell may not have contracted, or arranged, for the disposal of hazardous substances. However, the Ninth Circuit also noted that Shell had knowledge that transfers of the chemicals it sold involved "disposals," *i.e.*, that spills and leaks that routinely occurred when such products were handled at B&B's facility. The Ninth Circuit was not persuaded by Shell's product stewardship efforts, instead holding that those efforts showed Shell's control of the product handling process. Furthermore, the court held, the "useful product" defense did not apply, because, in this case, "the sale of a useful product necessarily and immediately result[ed] in the leakage of hazardous substances .. the hazardous substances are *never* used for their intended purposes." *Id. at 950.* The Ninth Circuit concluded that because Shell controlled the delivery process and knew about the alleged leaks, it was liable for the releases, as an "arranger." *Id.*

With regard to cost apportionment, the Ninth Circuit acknowledged that CERCLA costs are divisible in some cases and should be divided according to Restatement (Second) of Torts, § 433A. However, the Ninth Circuit held that the evidence relied upon by the district court was insufficiently precise to support the actual percentage it reached, because (1) the B&B site was a single facility, (2) there was no supporting evidence that the operations at the facility were uniform over time to use a percentage of time as a proxy for chemicals released and (3) there was no evidence that the two of the three chemicals stored at the facility were responsible for two thirds of the response costs. *Id. at 943-45.*

The Supreme Court Ruling

On the appeal to the Supreme Court, Justice Stevens, writing for the majority of the Court, first held that Shell was not liable as an arranger within the ordinary meaning of the term. Analyzing the statutory language, the Court noted that CERCLA does not define "arranger," but under its common definition, "the word 'arrange' implies action directed to a specific purpose." 556 U.S. ___, slip. op. at 10. The Court concluded that, although "disposal" could be unintentional, the specific intent required by "arrange" showed that Congress sought to apply arranger liability only to entities that expressly intended to dispose of hazardous substances. *Id.* at 11-12. Thus, held the Court, knowledge that a disposal may occur may be evidence of the requisite intent, but it is not sufficient. *Id.* at 12. The Court noted that although Shell was aware of "minor, accidental spills .. during the transfer of D-D," Shell's extensive product stewardship efforts showed that Shell did not intend for disposal of its product, regardless of the level of success of its stewardship efforts. *Id.* at 12.

Turning to the issue of the Railroads' apportionment of liability, the Supreme Court held that the evidence cited by the district court "reasonably supported" the 9% allocation of liability to the Railroads. The Supreme Court agreed with the Ninth Circuit that the Restatement (Second) of Torts § 433A is the proper beginning point for an allocation analysis, and that the standard under that section was whether the evidence "reasonably supported" apportionment. *Id.* at 14. Although the Court noted that the district court's decision to adjust the allocation because only two of the three chemicals sold by B&B were found on the Railroads' property had "less support in the record," the Court ruled that the 50% margin of error factor the District Court used to raise the allocation from 6% to 9% rendered "any miscalculation on that point .. harmless," observing that had district court omitted the two-thirds factor and the margin-of-error adjustment, it would have arrived at 9% anyway. *Id.* at 18. The Supreme Court thus concluded that the district court's decision to allocate 9% of the liability to the Railroads was reasonably supported by the evidence before it.

Analysis and Practice Pointers

The Supreme Court's treatment of "arranger" liability shows that § 9607(a)(3) liability remains a fact-intensive inquiry in which a CERCLA plaintiff will have to show that the seller of a hazardous substance that is a useful product actually intended its product, or some portion of it, to be disposed pursuant to the normal course of dealing. At the same time, the seller of a useful product can mitigate its potential liability as a potential "arranger" with a good product stewardship program. The Supreme Court also affirmed the standard approach to the allocation of liability under CERCLA, which is based on the Restatement (Second) of Torts § 433A, and which lower courts have used for over 25 years.

Some pointers to assist in CERCLA practice:

- After the Supreme Court's opinion, an involved product stewardship program becomes evidence negating intent to dispose, rather than evidence of control of the transfer process (and the accompanying liability).
- The Supreme Court opinion appears to give very wide discretion to district courts to allocate liability even when parties present a limited factual record. The Court's decision to hold that of the district court's use of a 50% fudge factor was harmless error suggests that parties who do not present evidence on allocation take the risk that the district court can allocate liability with some imprecision and still be sustained on appeal.
- The Supreme Court also affirmed that, post-*Atlantic Research*, allocation determinations in CERCLA § 107 cost-recovery suits will continue to rely on the principles of the Restatement (Second) of Torts § 433A and that district courts should be accorded deference when the evidence provides a reasonable basis to support the divisibility-of-harm allocations.

RELATED LINKS: For a complete discussion of liability under CERCLA for clean up of hazardous waste, see
- The Law of Hazardous Waste Ch. 14.

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Mr. Vroman also has represented clients in dispute resolution proceedings involving allocation issues before mediators and arbitrators. He has counseled transactional clients on environmental considerations in corporate and real estate matters and has supervised environmental due diligence efforts for significant acquisitions and divestitures. Mr. Vroman also has extensive experience in counseling clients remediating or marketing "brownfield" properties.

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Ms. Boye-Williams has written articles regarding the effects of bankruptcy on environmental claims. In particular, she co-authored the *2004 Supplement to Environmental Law in Illinois*, Chapter 12: "Managing Environmental Claims in Bankruptcy," published by Illinois Institute for Continuing Legal Education. While in law school, she authored "Commercial Speech: Trying to Find a New Definition in Light of Modern Day Image Advertising by Commercial Speakers."

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Marten Law Group on Burlington Northern & Santa Fe Railway Co. v. United States

2009 Emerging Issues 3598

Marten Law Group on Burlington Northern & Santa Fe Railway Co. v. United States

By Bradley Marten

May 5, 2009

SUMMARY: In this Emerging Issues Analysis, Brad Marten of Marten Law Group discusses the U.S. Supreme Courts momentous 8-1 decision in Burlington Northern & Santa Fe Railway Co. v. United States. In that case, the Court narrowed arranger liability under CERCLA and held that Superfund liability is not joint and several where a reasonable basis for apportionment exists. Mr. Marten also provides his expert insight into the implications of the decision.

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ARTICLE: U.S. Supreme Court Holds That Superfund Liability Is Not Joint and Several Where A Reasonable Basis for Apportionment Exists; Court Also Narrows Arranger Liability

In *Burlington Northern & Santa Fe Railway Co. v. United States* (*BNSF*), n1 a momentous 8-1 decision with broad implications for cleanups at the nation's hazardous waste sites, the United States Supreme Court held on May 4, 2009: (1) that EPA cannot hold parties liable under CERCLA as arrangers for disposal unless they intended their wastes to be disposed of; and, (2) that liable parties at a multi-party Superfund site are not jointly and severally liable if a reasonable basis exists to apportion their liability. The decision, authored by Justice Stevens, holds that where a portion of the liability at a Superfund rests with defunct or insolvent parties, the government will have to pick up those parties' orphan shares -- in this case 91% of the liability, which was attributed to a defunct chemical distributor.

Although the implications of the *BNSF* decision will take time to sort out, some are already clear:

- There will be fewer Potentially Responsible Parties (PRPs) for EPA and the Justice Department to pursue as arrangers;
- Fewer available arrangers could translate into more liability for owners of contaminated land;
- Litigation regarding whether arrangers actually intended to dispose of hazardous substances is likely to increase;
- There may be fewer parties willing to take on a greater share of liability than they owe, or to conduct independent cleanups of Brownfield sites, because it will be more difficult for them to recover any orphan share they voluntarily paid;

- There will be more litigation in lower courts as to what constitutes a reasonable basis for apportionment;
- There will be more time spent on gathering the facts establishing causation, and less time spent arguing about equities;
- The decision may add urgency to reinstating the Superfund tax;
- There could be greater reliance on state governments to pursue cleanups, especially states whose cleanup laws expressly provide for joint and several liability.

Factual Background

The *BNSF* case arose out of a fairly common fact pattern for CERCLA cases. A small chemical distributor in California, Brown & Bryant, Inc. (B&B) owned and operated a facility that repackaged agricultural chemicals. Its operations were located on a 3.8-acre parcel, of which about a 0.9-acre piece was leased from predecessors to BNSF and the Union Pacific Railroad (collectively, the Railroads). n2 The Railroads played no role in B&B's operations and all parties agreed that the only basis for imposing liability on them was their status as owners under *42 U.S.C. § 9607(a)*. n3

Shell Oil sold a soil fumigant to B&B which was used to kill microscopic worms that attack root crops. The chemical was shipped via commercial carrier FOB destination, meaning that the buyer was responsible for the product once it arrived at the facility. n4 In deciding the case, the district court found that minor spills took place upon the delivery of the chemical, though much larger releases resulted when B&B washed out its equipment.

In 1988, California's Department of Toxics Substances Control ordered B&B to cleanup soil and groundwater contamination on the site. Soon thereafter, B&B went out of business and EPA listed the site on the National Priorities List in 1989. The Railroads and Shell were both named PRPs. The Railroads were ordered to clean up the entire site, even though they owned only a small portion of it, and the portion that they owned did not require remediation. Shell was named a PRP for having delivered chemicals to the site which it knew or should have foreseen would be spilled by B&B. In 1996, the United States and the State of California filed a cost recovery action against the Railroads and Shell, seeking to recover over $8 million in response costs.

District Court Opinion

After a six-week bench trail in 1999, the district court held in a 185-page opinion that the Railroads were liable as owners and agreed with the government that Shell was liable for arranging for the disposal of hazardous substances. However, when it came to the issue of damages, the court determined that liability could be apportioned among Shell, the Railroads and the defunct operator, B&B. While it agreed with the governments that the defendants' burden to show an appropriate basis for apportionment is heavy, and that [t]he evidence supporting divisibility must be concrete and specific, n5 the district court concluded that a reasonable basis for apportionment existed. Even more significantly, it declined to apportion the orphan share attributable to the defunct B&B some 85% of the liability -- to the PRPs, leaving it instead as an unrecovered cost for the government plaintiffs to absorb.

With respect to the Railroad's liability, the district court apportioned liability using three factors -- the percentage of the facility that the Railroads owned, the duration of B&B's business as a percentage of the Railroad's lease, and the percentage of contaminants requiring cleanup that were found on the Railroad's land (two-thirds). It came up with a allocation of 9% for the Railroads. In determining Shell's liability, the district court estimated the amount of material resulting from leaks that occurred during product delivery, and then compared that with the total amount of chemicals spilled. Based on various assumptions, it determined that Shell was liable for 6% of the total cleanup costs. n6

Ninth Circuit Opinion

Reviewing the district court's decision, the Ninth Circuit began by affirming, at least in concept, the validity of the divisibility doctrine, acknowledging that apportionment is available at the liability stage in CERCLA cases. n7 Nevertheless, the Ninth Circuit held that, in this case, the evidence was not sufficiently clear to justify apportionment.

n8 The Ninth Circuit found that the factors the district court used (percentages of land area, time of ownership and types of hazardous products) did not demonstrate what part of the contaminants found at the site were attributable to the Railroads' parcel. The Ninth Circuit rejected the district court's apportionment calculations, and held that the Railroads had failed to prove a reasonable basis for apportioning liability. n9

Turning to Shell, the Ninth Circuit found that Shell had failed to prove whether its chemicals had contaminated the soil in any specific proportion, when compared with other chemicals spilled at the site. Similar to its conclusion with respect to the Railroads, the Ninth Circuit held that Shell's evidence of leakage was insufficient to provide a reasonable basis for apportionment. n10

With respect arranger liability, the Ninth Circuit agreed with the district court that an entity can be an arranger even if it did not intend to dispose of the product, because spillage is disposal and disposal of Shell's chemicals by B&B was foreseeable. n11

The Supreme Court's Decision

a. Arranger Liability. The Supreme Court affirmed that arranger liability has to be determined on a case-by-case basis, but reversed the Ninth Circuit's finding that the standard for liability had been met in this case. The Court posited two ends of a continuum. On one end are cases where an entity entered into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance. In such cases, there is a clear intent to discard the product, and there is liability under Section 9607(a)(3). On the other end of the continuum, [i]t is similarly clear, the Court said that an entity could not be held liable as an arranger merely for selling a new and useful product if the purchaser of that product later, and unbeknownst the seller, disposed of the product in a way that led to contamination. n12 Less clear, said the Court, are the cases in the middle -- the many permutations of arrangements' that fall between these two extremes. In these cases, the Court said, liability may not extend beyond the limits of the statute itself. Based on a plain reading of the CERCLA statute, the Court held that an entity may qualify as an arranger under § 9607(a)(3) *when it takes intentional steps to dispose of a hazardous substance*. n13

Based on the facts in this case, the Court held that there was no evidence that Shell intended for B&B to dispose of its chemicals. To the contrary, Shell took numerous steps to encourage its distributors to *reduce* the likelihood of such spills, providing them with detailed safety manuals, requiring them to maintain adequate storage facilities, and providing discounts for those that took safety precautions. n14 Even if Shell's efforts were less than successful, the Court found that Shell's mere knowledge of the spills did not amount to an intent that they be spilled or otherwise disposed of. Accordingly, the Court reversed both the district court and the Ninth Circuit, and held that Shell was not liable under the Superfund law.

b. Apportionment. The CERCLA statute does not contain joint and several liability language. The notion that PRPs should be held jointly and severally liable is a judicial doctrine grounded in Section 433A of the *Restatement (Second) of Torts*, which states that when two or more persons acting independently caus[e] a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused. But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm.

Seizing on this language, the Supreme Court held -- as have several circuit courts -- that apportionment is proper when there is a reasonable basis for determining the contribution of each cause to a single harm. n15 *See In re Bell Petroleum Services, Inc.*, n16 *United States v. Alcan Aluminum Corp.*, n17 *O'Neil v. Picillo*, n18 and *United States v. Monsanto Co.* n19

In a case in which multiple parties cause a single harm, the burden of proving divisibility of that harm is on the defendants: CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists. n20 In this case, both the district court and the Ninth Circuit had found that

apportionment of the harm was possible. The district court, using a relatively simple formula, came up with a 9 percent allocation to the Railroads. The Ninth Circuit, while agreeing that apportionment was theoretically possible, criticized the evidence on which the district court had relied, finding that it was insufficient to establish the precise proportion of the Railroads' responsibility.

In reversing the Ninth Circuit, the Supreme Court held that the evidence supporting apportionment need not be precise. There must simply be facts contained in the record reasonably support[ing] the apportionment of liability. n21 The district court, as noted above, had used a formula consisting of the percentages of land leased, the period of ownership and the types of hazardous chemicals spilled on the leased land. This approach -- which the Ninth Circuit had characterized as a meat ax n22 -- was good enough for the Supreme Court. It found that the evidence in the record reasonably supported the district court's allocation findings, affirmed its decision and reversed the circuit court. It was the third time in as many tries that the Supreme Court has reversed the Ninth Circuit in an environmental case this year.

Implications of the Supreme Court's Decision

Arranger Liability. Shell successfully made the argument to the Court that arranger liability requires evidence of intent. Among the questions lower courts will have to grapple with are how much and what kind of intent. An entity which sent drummed waste to a landfill probably can be said to have intended that it be disposed of. But the concept of arranger liability has, over the years, become much more elastic. n23 Whether the theories relied on in these pre-*BNSF* cases will survive under the Court's intent standard is much more likely to be tested by Superfund attorneys in the next few years. And if some of those arranger parties cannot be held liable, more responsibility for cleanup will likely fall on other categories of PRPs, including land owners and transporters. Such a result may affect those parties' willingness to take on a cleanup, including the redevelopment of brownfield sites.

Apportionment. From a practical and policy standpoint, even greater implications flow from the Court's holding on apportionment. Those parties, such as traditional arrangers and landowners, who are still liable after the Shell portion of the Court's decision, will have a new and powerful argument to make in negotiations and/or litigation with EPA namely, that they can only be held responsible for the contamination they caused, and not that which was caused by other parties, assuming a reasonable basis for apportionment exists. If some of those parties are defunct -- many tend to be at Superfund sites then the government will have to pick up their share, shifting the cost of cleaning up many sites to the public.

That result, in turn, will not sit well with the public, and may lead to calls for legislation to change the liability standard, or to reinstate the Superfund tax, which lapsed in the 1990s. n24

Another area likely to be impacted by the decision are private contribution actions, in which one party who believes it has paid more than its fair share seeks to recover its costs from others. Contribution actions premised on joint and several liability will have to be reexamined, and insurers who have been picking up orphan shares may be less willing to do so.

One thing that is for sure is that, overnight, Superfund practice has changed.

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n1 *2009 U.S. LEXIS 3306* (U.S. May 4, 2009). The case was consolidated with the case of *Shell Oil Co. v. United States*, No. 07-1607.

n2 *2009 U.S. LEXIS 3306,* at *6.

n3 *2009 U.S. LEXIS 3306,* at *17.

n4 United States v. Atchison, Topeka & Santa Fe Ry. Co., E.D. California Case Nos. CV-F-92-5068 OWW, CV-F-96-6226 OWW, CV-F-96-6228 OWW. The District Court's opinion can be viewed at *2003 U.S. Dist. LEXIS 23130* (E.D. Cal. July 14, 2003). The opinion was delivered by *U.S. District Court Judge Oliver W. Wagner. See 2003 U.S. Dist. LEXIS 23130,* at *4.

n5 *United States v. Atchison, Topeka & Santa Fe Ry., 2003 U.S. Dist. LEXIS 23130,* at *237.

n6 *United States v. Burlington Northern & Santa Fe Ry. Co., 502 F.3d 781, 792 (9th Cir. 2007).*

n7 *United States v. Burlington Northern & Santa Fe Ry. Co., 502 F.3d at 793-95.*

n8 *502 F.3d at 804.*

n9 *502 F.3d at 801-04.*

n10 *502 F.3d at 805-06.*

n11 *502 F.3d at 806-08.*

n12 *Burlington Northern & Santa Fe Railway Co. v. United States, 2009 U.S. LEXIS 3306,* at *18.

n13 *2009 U.S. LEXIS 3306,* at *20 (emphasis supplied).

n14 *2009 U.S. LEXIS 3306,* at *23.

n15 *2009 U.S. LEXIS 3306,* at *26.

n16 *3 F.3d 889 (5th Cir. 1993).*

n17 *964 F.2d 252 (3rd Cir. 1992).*

n18 *883 F.2d 17 (1st Cir. 1989).*

n19 *858 F.2d 160 (4th Cir. 1988).*

n20 *Burlington Northern & Santa Fe Railway Co. v. United States, 2009 U.S. LEXIS 3306,* at *26.

n21 *2009 U.S. LEXIS 3306,* at *30-31.

n22 *United States v. Burlington Northern & Santa Fe Ry. Co., 502 F.3d 781, 803 (9th Cir. 2007).*

n23 *See, e.g., Dedham Water Co. v. Cumberland Farms, Inc., 889 F.2d 1146, 1153-54 (1st Cir. 1989); A&W Smelter & Refiners, Inc. v. Clinton, 146 F.3d 1107, 1110 (9th Cir. 1998). Westfarm Assocs. Ltd. P'ship v. Int'l Fabricare Inst., 846 F. Supp. 422, 430 (D. Md. 1993)* (citing *42 U.S.C. § 9601(22)*; *Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 844-46 (4th Cir. 1992).*

n24 *See* M. MacCurdy, Reinstatement of Superfund Tax Proposed in Congress, Presumed in President Obama's Budget, Marten Law Group, Environmental News (April 22, 2008).

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- The Law of Hazardous Waste Ch. 14.

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Disposal of Electronic Equipment Waste

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Disposal of Electronic Equipment Waste

By Publisher's Editorial Staff 2008

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PDF LINK: Core Emerging Issues Commentary ($)

ARTICLE: Introduction

This commentary provides a comprehensive overview of current and future environmental legal issues pertaining to domestic and international disposal of electronic equipment. Although private sector initiatives will be mentioned where relevant, the primary focus of this commentary is public sector regulatory systems designed to reduce waste by disposal of obsolete equipment. As will be shown, businesses that rely heavily upon electronic equipment through manufacturing, sales, or mere use are coming under increased regulatory pressure to implement environmentally friendly policies.

Rapid changes in technology make this issue of greater importance because businesses and individuals change equipment more frequently. Today, the average PC becomes outdated in about three years. Michael T. Burr, *Electronic Trash; E-Waste Laws Create Confusion among Corporate Consumers and Electronics Manufacturers*, Inside Counsel (Apr. 2006). When faced with outdated computers, most consumers choose to purchase new and improved models rather than upgrade older but functional machines. Rachel Shabi, *The E-Waste Land*, Guardian (Nov. 30, 2002). Junked PCs alone contribute 300 million pounds of lead to the waste stream each year. Burr, *supra*. There are also mobile phones, televisions, and other electronics contributing to the global problem of electronic waste or e-waste.

Many obsolete electronics are dumped in landfills, left to slowly leach hazardous materials into the waste stream. Some e-waste is incinerated, also adding toxic chemicals to the environment. Stephen Leahy, *Environment: Global Group Aims to Curb E-Waste Dumping*, Global Information Network Interpress Service (Mar. 12, 2007). If not managed carefully, the disposal of e-waste can pose threats both to the environment and the people who inhabit it.

Yet international responses and the current methods applied by the United States, European Union, and developing countries are inconsistent when dealing with this problem. Absent a uniform regulatory system of enforcement, e-waste will continue to accumulate because junked electronics are dumped abroad to evade domestic laws that impose strict cleanup requirements.

Efforts are being made and measures taken to address this waste management problem. There are global initiatives

sponsored by the United Nations and directives implemented by the European Union. There are nongovernmental organizations and manufacturers coalitions. There is a growing concern in this area, but a lack of a comprehensive set of rules to follow.

The United States has not yet embraced national legislation to properly dispose of electronic products or to regulate hazardous substances that go into them. DeWight Wallace, *It's About Time for RoHS; U.S. Needs to Implement National RoHS and WEEE Laws*, Design News (Oct. 22, 2007). Many states have proposed and/or enacted laws regulating e-waste, but the laws differ from state to state. Complying with a patchwork of state laws is costly and poses a burden for the electronics industry. *Id*.

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) was set up to prevent transfer of hazardous waste, including e-waste, from developed to less developed countries. It was, and still is to some degree, a very common practice to ship hazardous wastes to developing countries, where environmental standards do not exist. The Basel Convention was signed in 1989 by 116 countries, with many more countries having joined since then. The U.S. is not a full party to the convention.

The European Union (EU) has developed a more uniform set of rules regarding e-waste. In 2002, the EU European Commission (EC) introduced two directives: the Waste Electrical and Electronic Equipment (WEEE) directive, 2002/96/EC, and the Restriction of Hazardous Substances (RoHS) directive, 2002/95/EC. More recently, Solving the E-Waste Problem (StEP), a global public-private initiative, was launched to reduce the amount of toxic e-waste and recycle increasingly valuable metals and components. Leahy, *supra*.

While some argue that there is an urgent need to harmonize rules on the manufacturing and disposal of electronic equipment, others feel that there are enough rules in place but not enough enforcement. Leahy, *supra*. Regardless, inconsistencies in domestic and international policies, combined with the profitability of international e-waste dumping, hinder efforts to develop and enforce environmentally-friendly regulations. However, expected changes in U.S. federal law, combined with existing European Union directives, are likely to make a positive impact on e-waste disposal in the near future.

United States (U.S.) Initiatives

U.S. Federal Law

Domestically, there is no federal regulatory scheme specifically aimed at reducing the effects of e-waste. Federal voluntary programs do exist, but they are relatively ineffective. Boon, *supra*. For example, the U.S. Environmental Protection Agency (EPA) launched a mobile phone recycling campaign in January 2008 but the program is only funded with $175,000 and is strictly voluntary. Claudia H. Deutsch, *E.P.A. Seeks New Life For Old Cellphones*, The New York Times (Jan. 8, 2008). A similar 2003 EPA initiative for computers and other electronics has had no noticeable effect on the e-waste problem. *Id.*

Current federal waste disposal law is based upon industry as it existed more than 30 years ago instead of a country filled with mobile phones, computers, and flat screen televisions. In 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA) to regulate creation and disposal of hazardous wastes. *42 USCS § 6901* et seq. The regulations for wastes disposed within the U.S. are burdensome and strict, so many waste handlers and recyclers prefer to export the waste. RCRA actually provides U.S. generators with several incentives to export hazardous wastes to countries outside the reach of the EPA. Billinghurst, *supra*. RCRA has been amended to provide exemptions for exported materials destined for recycling, so once a U.S. exporter claims the recycling exemption, the EPA loses its authority over the waste. *Id.* In short, this means that U.S. companies have economic incentives to dump their waste in developing countries.

Most Americans think they are helping the planet when they recycle their old electronic equipment but chances are they are contributing to a global trade in electronic trash that endangers workers and pollutes the environment overseas.

Terence Chea, *Worlds Electronic Waste Ends up in China*, Virginian-Pilot (Dec. 2, 2007). Experts estimate that about 70 percent of the 20 to 50 million tons of electronic waste produced globally each year is dumped in China, with most of the rest going to India and poor African nations. Christopher Bodeen, *Chinas e-Waste Nightmare Worsening*, Associated Press Online (Nov. 19, 2007).

For the West, where safety rules drive up the cost of disposal, it is as much as 10 times cheaper to export the waste to developing countries. *Id.* Upwards of 90 percent ends up in dumps that observe no environmental standards, where shredders, open fires, acid baths, and broilers are used to recover gold, silver, copper, and other valuable metals while spewing toxic fumes and runoff into the nation's skies and rivers. *Id.*

U.S. State Laws

Many states are passing their own electronic waste legislation. Matt Slagle, *Texas Plan to Control E-Waste" Could be National Mode*l, Assoc. Press Fin. Wire (Apr. 30, 2007). California's RoHS, modeled on the EU's, limits the amount of hazardous chemicals permitted in the manufacture of electronic equipment. Bart Perkins, *The IT Horizon is Looking Green*, Computerworld (Aug. 13, 2007). The State of California passed legislation in 2003 entitled the Electronic Waste Recycling Act (EWRA), modeled after EUs WEEE and RoHS directives. Billinghurst, *supra*. The EWRA imposes civil liability and fines on those who fail to comply. *Id.* Although it has been criticized, the EWRA has also been described as the most far-reaching attempt to tackle electronic waste in the US. *Id.*

In some states, individual companies are responsible for recycling of e-waste, whereas in others, a statewide fund is set up for such recycling. Slagle, *supra.* For example, state legislators in Hawaii want requirements for big box retail stores to have recycling facilities for e-waste. Mark Niesse, *Democrats Emphasize Environment in 2008 Goals*, The Associated Press State & Local Wire (Jan. 19, 2008). Applying a hybrid cost allocation, a recent Minnesota law requires manufacturers to pay 80 percent of the cost of recycling electronic devices. *Solutions for E-Waste Now Available*, Lake County News-Chronicle (Two Harbors, Minn.) (Jan. 17, 2008). Effective January 1, 2008, Maine requires cell phone companies to recycle old phones at no charge and prohibits consumers from tossing these phones into the trash. Glenn Adams, *Maine cell-phone recycling law kicks in Jan. 1*, The Associated Press (Dec. 31, 2007). In New Jersey, a new law requires television and computer equipment manufacturers to recycle e-waste and imposes an environmental registration fee on manufacturers. Jason Butkowski, *Sen. Smith Recycling Package Signed Into Law, U.S. States News (Jan. 17, 2008). Presumably these costs will be passed along to the consumer in the form of higher prices.*

However, manufacturers want consistent regulations to facilitate standard manufacturing processes and disposal methods. Perkins, *supra*. It has been argued that complying with a patchwork of state laws is extremely costly and already poses a burden for the electronics industry. DeWight Wallace, *It's About Time for RoHS; U.S. Needs to Implement National RoHS and WEEE Laws*, Design News (Oct. 22, 2007).

Because of this, the Consumer Electronics Association is lobbying Congress to create national e-waste standards. Jim Barry, *Trade Issues, DTV Transition Loom Big In '08*, TWICE (Jan. 7, 2008). The Congressional E-Waste Working Group, a bipartisan and bicameral group, is working on e-waste legislation that should be introduced as legislation in 2008. *Expect Federal E-Waste Bill in Early 2008, Hill Aides Say*, Consumer Electronics Daily (Dec. 26, 2007). The working group is focusing on a disposal system that emphasizes manufacturer responsibility, including recycling competitors' products, instead of a fee-based system. *Id.*

Yet the states are not waiting for federal government action on the issue. In addition to Hawaii, Maine, and New Jersey, as described above, Pennsylvania, Illinois and Massachusetts are working on state e-waste laws based on an assumption that the proposed federal legislation might not be forthcoming. *Id.*

As more and more state laws take effect, the cost of tracking and meeting varying local requirements for manufacturers, distributors and recyclers will be too staggering to contemplate. *Id.* Even excluding the costs, with the potential for 50 different states to enact conflicting waste disposal laws, this creates a logistical compliance nightmare.

U.S. Private Sector Initiatives

Companies such as Apple, Dell, Hewlett-Packard and Sony Electronics now take back their products at no charge. Chea, *supra*. Some require consumers to mail in their old gear, while others have drop-off centers. HP says it also now designs its equipment with fewer toxic materials and has made it easier to recycle. *Id.*

Electronic Manufacturers Recycling Management, a new recycling joint venture between Panasonic, Sharp and Toshiba, has e-waste recycling agreements with Hitachi, JVC, Sanyo, Mitsubishi, Philips, Pioneer, and Syntax-Brillian. *E-Waste*, E-Waste Consumer Electronics Daily (Jan. 25, 2008). These manufacturers pay the recycler fees based on their e-waste collection forecasts and actual collection data. However, those fees may be passed onto the consumer by each individual manufacturer. *Id.*

Sony, in partnership with Waste Management Recycle America, is the first TV manufacturer to launch a free national take back program as well as to sign on to the "Manufacturers' Commitment to Responsible E-Waste Recycling." PR Newswire, *'Take Back My TV Campaign' Launched in Time for Holiday Shopping Season; Sony Electronics Signs on to Campaign to Eliminate Toxic Electronic Waste* (Nov. 21, 2007). Sony promised to not only take back old televisions, but also to make sure their recyclers meet a strict set of recycling standards, including not exporting the toxic waste to developing countries. *Id.* While leading computer companies have already established partial recycling programs, Sony is the only consumer electronics company to offer unlimited free take back and recycling for all its products and customers in the U.S. that is not contingent on a new purchase. *Id.* Currently, many television manufacturers, including Sharp, Philips, Toshiba and Panasonic, lobby against state legislation that would mandate the creation of recycling programs, arguing that consumers should pay for recycling through consumer fees. *Id.*

This issue is becoming increasingly crucial in light of the impending FCC-mandated switch to digital TV signal scheduled for next year. *Id.* As the date approaches, the demand for digital televisions will increase, as will the need for a responsible way to manage the disposal of obsolete analog TV sets. *Id.* The Consumer Electronics Association expects at least 30 million digital televisions to be sold in the U.S. in 2007 alone. *Id.*

Other manufacturers and retailers are taking initiative as well. For example, Office Depot launched an electronics recycling program in October 2007. Joe Truini, *Office Products Retailer Launches E-Waste Program*, Crain Comm. (Oct. 29, 2007). Customers can recycle their electronics by purchasing a recycling box for up to $15, depending on size, filling it, and giving it to the store to handle recycling. *Id.*

Yet, as noted previously, federal law creates economic incentives for disposal to occur in developing countries. Initiating a voluntary private sector program that collects electronic waste and ships it elsewhere on the planet is not solving the waste problem but rather shifting it geographically.

If federal law changes, such as amending RCRA to create a uniform electronic waste disposal regulatory system, look for such legislation to be drafted as a hybrid of state laws that work and European Union initiatives.

European Union (EU) Initiatives

The EU is leading the way in promoting uniformity in electronic waste disposal. For example, in 2002, the EU European Commission (EC) introduced the Waste Electrical and Electronic Equipment (WEEE) directive, 2002/96/EC, which shifts the burden of managing and reducing electronic hazardous wastes to manufacturers and producers, and away from government. 1-1A Law of Hazardous Waste § 1A.04**.** In addition, the EC implemented the Restriction of Hazardous Substances (RoHS) directive, 2002/95/EC, which requires the elimination of certain hazardous wastes in computers and computer accessories by July 1, 2006. 1-1A Law of Hazardous Waste § 1A.05**.**

The concept of extended producer responsibility (EPR) is prevalent in both WEEE and RoHS. Under both directives, industry producers are required to cover all the costs for treatment, reuse, and recycling of their products. Billinghurst, *supra*. Producers and government are required to share the costs of financing collection and management

programs. *Id.* It has been noted that consumers will likely bear the costs of the directives through increased prices on new products. *Id.* The theory, however, is that the directives will give producers incentive to create products that are safer and cheaper to recycle and reuse. *Id.*

Despite the WEEE and RoHS directives, the EU still does not have a perfectly uniform e-waste policy. Joel Boon, Note*: Stemming the Tide of Patchwork Policies: The Case of E-Waste, 15 Transnat'l L. & Contemp. Probs. 731 (Spring 2006).* Because they are directives instead of regulations, it is easier for nonuniformity among EU member states to exist. *Id.* Failure to comply with a directive places a member state at risk of prosecution by the EC in the European Court of Justice. However, complaints of noncompliance seldom lead to infringement proceedings. *Id.* In addition, failure to agree on standard testing procedures means that many EU countries are not currently enforcing the new limits. Marcus Hoy & Tom Blass, *Enforcement: Nordic Nations, Britain Launch Actions to Enforce EU Hazardous Substances Law*, 226 DEN A-8 (2007) (Nov. 26, 2007). Overall, however, the WEEE and RoHS Directives do much more to create agreement between EU member states in their management of e-waste than they do to create differences. Boon, *supra*.

A new EU environmental policy was adopted in January 2007, entitled REACH (Registration, Evaluation and Authorization of Chemicals), requiring registration and selective evaluation of more than 30,000 existing chemical substances, as well as new ones. Marty Downs, *EU Outpaces U.S. on Chemical Safety*, U.S. States News (Jan. 2, 2007).

It has been argued that the size of the European market will push manufacturers in the United States and Asia to meet European standards and will increase the availability of "green" products globally. Henrik Selin & Stacy VanDeveer, *Raising Global Standards: Hazardous Substances and E-Waste Management in the European Union*, Environment (Dec. 1, 2006).

Combined with a U.S. federal law that resolves conflicts between existing state waste disposal laws, such a push by private sector manufacturers to meet EU standards would create a de facto uniform e-waste disposal scheme within the developed world.

Developing Countries

Developing countries show few signs of adopting effective e-waste disposal regulations. For instance, Nigeria has become an unabated dumping ground for electronic waste from other countries. *Nigeria; Combating the Danger of E-Waste in Nigeria*, Africa News (Jan. 16, 2008). Experts believe that up to 70 percent of e-waste ends up in China (almost all of it in dumps with no environmental standards), with much of the remainder finding its way to India and African countries. Christopher Bodeen, *Despite International Outcry, World's Electronic Waste Still Ends Up In China*, The Associated Press (Nov. 19, 2007). This is not surprising because it is still profitable for manufacturers in developed countries to export such waste without worrying about the environmental consequences to the recipient countries or the planet. *Id.*

China initiated a RoHS program in 2006 that applies only to products manufactured in China for use in China. Anne Davidson et al., *China RoHS Is Serious Business: A Discussion of China RoHS and a Road Map for Compliance, 37 ELR 10827 (Nov. 2007).* It shares a common purpose with the EU RoHS and many electronic products are subject to both legal regimes, but the process to determine which products fall within the scope of the regulations is different for each law. *Id.*

India currently produces about 150,000 tons of e-waste a year and illegally imports at least that amount from the West. Daniel Pepper, *Poor Indians Recycle Harmful 'E-Waste' Into Cash; Old Computers Stripped; Industry Lacks Regulations*, Wash. Times (Aug. 11, 2007). In New Delhi, about 10,000 people, including many young children, recycle old computers and other equipment searching for gold, copper, palladium, and anything else that can be turned into cash. *Id.* The Indian government has been slow to regulate the recycling industry. Although it bars the import of any used electronics equipment for scrap recycling, insiders say that prohibition is easy to circumvent by simply labeling the material as "mixed scrap metal." *Id.* There are no guidelines as of yet for domestic e-waste in India. *Id.*

If there is going to be progress in developing countries on this issue, it will require taking away the economic incentives for international dumping of e-waste. Until this occurs, U.S. and European Union manufacturers will continue exporting waste as a disposal cost-cutting measure.

International Initiatives

To address the transboundary movements of hazardous wastes from developed to developing nations, there are two international initiatives that one should be aware of that have no legal ramifications at this point: (1) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention); and (2) the Solving the E-Waste Problem (StEP) Initiative.

The Basel Convention was drafted and signed by 116 countries in 1989. United Nations Environment Programme Conference on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes: Final Act and Text of Basel Convention, *28 I.L.M. 649 (1989).* The Convention implemented regulations requiring an exporting state to give written notification to the importing state of the hazardous content of the shipment, prior to the shipment. Betsy M. Billinghurst, Note & Comment: *E-Waste: A Comparative Analysis of Current and Contemplated Management Efforts by the European Union and the United States, 16 COLO. J. INT'L ENVTL. L. & POL'Y 399 (Spring 2005).* The Basel Convention created an oversight board to review such notifications to determine whether the particular product contained a prohibited hazardous waste. *Id.* Although the Basel Convention prohibits shipments of certain wastes, there is an exception for the export of hazardous wastes by developed countries that cannot dispose of their own wastes in an environmentally sound manner. *Id.*

A September 1995 Convention amendment, the Basel ban, or ban amendment, prohibits all forms of hazardous waste exports from the 29 wealthiest and most industrialized countries of the Organization for Economic Cooperation and Development (OECD) to all non-OECD countries. Daniel Pruzin, *Hazardous Waste: Basel Working Group Cites Progress On Initiative to Manage Computer Waste*, BNA Intl Envt. Daily, Sept. 13, 2007. As of September 2007, disagreement still existed among parties to the Convention as to when the ban amendment should take effect. *Id.* While the ban amendment sounds good in theory, it has been argued that such a total ban might cause more long-term economic harm than benefit, because allowing developing countries to import wastes from developed countries injects capital into their countries. Billinghurst, *supra*.

Complementing the Convention is the StEP public-private initiative that aims to standardize recycling processes for electronics and electronic scrap, to extend the life of those products, and to expand markets for their reuse. Linda Roeder, *Recycling: United Nations Joins Industry, Organizations to Develop E-Waste Best Practice Standards*, 44 DEN A-4 (2007). This voluntary initiative was launched in March 2007 with the purpose of harmonizing legislative and policy approaches for dealing with "e-scrap." *Id.* Developed by the United Nations University, U.N. Environment Program, and the U.N. Conference on Trade and Development, there were also participants from the private sector as well as governmental, nongovernmental, and academic institutions. E-scrap is one of the fastest growing components of the global waste stream, and one of the most troublesome, according to the U.N. *Id.* The European Environmental Agency estimates that the volume of e-scrap is rising approximately three times faster than other forms of municipal waste. *Id.* Another objective of StEP is a large-scale project to help certain developing countries, including China and India, safely dismantle and dispose of domestic e-scrap. *Id.* The initiative is also intended to boost the recovery of valuable materials, such as precious metals, from scrap. *Id.*

The lofty aims of both the Basel Convention and StEP are rejected by real world implementation for three primary reasons. First, the United States is a signatory to the Convention, but it is not a full-fledged party. Second, even though it is illegal for parties to the Convention to import hazardous wastes from non-parties, there are no independent enforcement provisions. Billinghurst, *supra*. Third, StEP is a voluntary initiative. Roeder, *supra*. This means that the ability to dispose of electronic waste is not impeded by these international efforts.

Conclusion

The problem of electronic waste disposal continues to grow because it is profitable for both developed and developing countries to cooperate in the shipment and international dumping of e-waste. U.S. companies currently are overburdened by conflicting state waste disposal laws that should be resolved soon by a uniform federal law to specifically address e-waste disposal. United States private sector manufacturer initiatives to comply with EU directives in exchange for access to the European market, combined with a uniform federal law, will likely create a de facto common e-waste disposal scheme for developed countries in the near future. This will, in turn, reduce the shipment of e-waste to developing countries. Until the federal law is passed, however, U.S. companies will continue to export e-waste restricted only by conflicting state laws.

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RELATED LINKS: For a discussion of E-waste management, see

- 1-1A Law of Hazardous Waste § 1A.04;
- 2-6 Law of Hazardous Waste § 6.02.

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Green Roofs

2008 Emerging Issues 3069

Green Roofs

By J. Cullen Howe

November 5, 2008

SUMMARY: In this Emerging Issues Analysis, J. Cullen Howe of Arnold & Porter LLPs New York office explains the basics of green roofs and their myriad benefits. He also discusses municipals laws that require or encourage their use in certain instances, including provisions enacted in Chicago, Seattle, New York and Cincinnati.

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ARTICLE: This article explains the basics of green roofs and their myriad benefits. It also describes municipal laws that require or encourage their use in certain instances. It is a companion piece to a prior article that summarized the concept of green buildings, examined the background and development of the U.S. Green Building Councils Leadership in Energy and Environmental Design (LEED), surveyed the different types of green building laws passed at the state and municipal level that have incorporated LEED standards, and provided practical advice on steps that attorneys should take when advising clients about the costs and benefits of green buildings. n1

Green Roof Basics. A green roof is a roof of a building that is partially or completely covered with vegetation and soil, or a growing medium, planted over a waterproofing membrane. It may also include additional layers such as a root barrier and drainage and irrigation systems. Green roof systems can be modular with drainage layers, filter cloth, and vegetation already prepared in movable, interlocking grids. Alternatively, each component of the system may be installed separately. The layers of a typical green roof, from top to bottom are: vegetation, growing medium, filter membrane, drainage layer, waterproof/root repellant layer, support panel, thermal insulation, vapor control layer, and structural support. n2

There are two basic types of green roofs: intensive and extensive. *Intensive* green roofs are traditional-style roof gardens, with large trees and shrubs. They have the following characteristics: they require a minimum of one foot of soil depth; they accommodate large trees, shrubs, and well-maintained gardens; they add 80-150 pounds per square foot of load to the building structure; they require significant maintenance; and they include complex irrigation and drainage systems. In contrast, *extensive* green roofs are not designed for public use but are primarily for environmental benefits. They have the following characteristics: they require only 1 to 5 inches of soil depth; they are capable of including many kinds of vegetative ground cover and grasses; they add only 12-50 pounds per square foot depending on soil characteristics and the type of substrate; regular maintenance is minimal; and irrigation and drainage systems are simple in design. n3

Currently, the up-front cost of an extensive green roof starts at about $5 per square foot and can go as high as $35 per square foot or higher depending on the material used; this estimate includes materials, preparation work, and installation. In comparison, the cost of a traditional roof starts at about $1.25 per square foot. n4 However, taking into account future energy savings brings the cost of a green roof closer to that of a traditional roof. Extensive green roofs generally cost more than traditional roofs because they require more material and labor for installation. In addition, the number of green roof contractors are somewhat limited, although their numbers are growing. As the demand for green roofs increases, and as additional contractors come into the field, up-front costs will likely decrease.

Benefits of Green Roofs. Green roofs have many benefits. First, they provide amenity space for building users. Second, they can increase the life span of the roof by two to three times. Third, they reduce the heating and cooling loads on a building. A study by the Florida Department of Environmental Protection and the University of Central Florida found that when a green roof was installed on a building, it resulted in an 18-43% energy savings in the summer months when compared to a conventional roof. n5

From a public policy perspective, green roofs do even more. First, they reduce the urban heat island effect. n6 Traditional building materials soak up the suns radiation and re-emit it as heat. This can make urban areas as much as 7-12F hotter than surrounding areas. n7 However, temperatures on green roofs are much cooler. For example, Chicagos City Hall, which features a green roof, has measured temperatures that are as much as 2580F cooler than they are on traditionally roofed buildings nearby. n8 Green roofs also reduce stormwater runoff. In areas with combined sewer-stormwater systems, heavy storms can overload the wastewater system and cause it to flood, dumping raw sewage into local waterways. Green roofs decrease the total amount of runoff and slow the rate of runoff from the roof. Green roofs have been found to retain up to 75% of rainwater, gradually releasing it back into the atmosphere via condensation and transpiration, while retaining pollutants in their soil. n9 They are also aesthetically pleasing and even provide habitat for birds and butterflies. Even in high-rise urban settings, green roofs attract beneficial insects, birds, bees and butterflies. Rooftop greenery complements wild areas by providing stepping stones for songbirds, migratory birds and other wildlife that face shortages of natural habitat. Green roofs can also provide a local source of food production. n10 This aspect of green roofs could become more important if energy and transportation costs continue to rise. Finally, and perhaps most importantly, green roofs filter pollutants and remove carbon dioxide from the air. n11

Some well-known examples of buildings that have green roofs include the Chicago, Illinois and Atlanta, Georgia City Hall buildings; an Ikea store in Stoughton, Massachusetts; the Silvercup Film Studio in New York City; and the new Goldman Sachs world headquarters, also in New York City.

Municipal Laws Concerning Green Roofs. Green roofs have been required in Germany and parts of Switzerland for many years. Green roofs are less popular in the United States. However, in recent years they have become more popular, and construction of green roofs in the United States grew by 30% in 2007. n12 Currently, there is no federal law mandating the use of green roofs, nor has any state enacted a similar law. Several cities have passed laws or regulations requiring or encouraging their use in certain instances. n13

Chicago is generally recognized as the city that has done the most to encourage the installation of green roofs. In keeping with its City in a Garden motto, Chicago has established an innovative program that promotes the use of rooftop gardens on top of private and public buildings to reduce energy consumption. Referred to as the Chicago Standard, the citys program requires, among other things, a minimum 50% green roof and LEED certification for all public projects in Chicago, except community centers and schools. n14 Community centers and schools must either have a minimum 25% green roof or LEED certification plus a minimum 10% green roof, and must also focus on indoor air quality and daylighting. The Chicago City Hall green roof is one of the earliest and most well-known examples of green roofs in the United States. It was planted in 2000 to determine the effects a green roof would have on the microclimate of the roof. The green roof contains 20,000 plants of more than 100 species, including shrubs, vines and two trees.

In 2007, Seattle enacted a green factor ordinance. Administered by the citys Department of Planning and

Development, the ordinance requires all new commercial structures over 4,000 square feet, all residential structures of more than four units, and all parking lots with more than 20 parking spaces in neighborhood business districts to meet a landscaping target using landscaping strategies to achieve a certain green factor. Green roofs can be used to satisfy this requirement. n15 The ordinance was designed to improve air quality, reduce energy consumption, cool the city in the summer and insulate it in the winter, and reduce stormwater runoff.

In August 2008, New York enacted a law allowing building owners in New York City who install green roofs on at least 50% of available rooftop space to apply for a one-year property tax credit of up to $100,000. n16 The credit would be equal to $4.50 per square-foot of roof area that is planted with vegetation, or approximately 25% of the typical costs associated with the materials, labor, installation and design of the green roof. According to the text of the law, the credit is designed to defray about 35% of the cost of installing a green roof on a standard roof. Building owners will be able to apply for the credit starting January 1, 2009, which will expire after March 15, 2013 unless extended. n17 The Natural Resources Defense Council, an environmental advocacy organization, stated that the energy saved by installing green roofs could be more than $5 million annually.

In October 2008, the City Council of Cincinnati, Ohio approved a grant program to encourage the construction of green roofs. The program will be administered by the citys Metropolitan Sewer District and, if approved by the Ohio Environmental Protection Agency, will use money from the EPA Clean Water Revolving Loan Fund. Applicants for the program, which is expected to begin in early 2009, could receive below-market bank loans from participating banks. n18

Conclusion. The green roof movement, like the green building movement in general, is in its infancy. Given the many benefits they provide, it is likely that in the coming years many states and municipalities will enact legislation that encourages or mandates the installation of green roofs.

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n1 *See* J. Cullen Howe, *LEED Standards in Green Building Laws, 2008 Emerging Issues 412.*

n2 *See* National Research Council, Institute for Research in Construction.

n3 *See* Katrin Schloz-Barth, *Green Roofs: Stormwater Management From the Top Down*, Environmental Design & Construction (Jan. 15, 2001).

n4 *See* U.S. EPA, Green Roofs, *available at* http://www.epa.gov/hiri/strategies/greenroofs.html.

n5 *See* http://www.dep.state.fl.us/secretary/news/2007/11/1105_02.htm.

n6 The heat island effect is caused by the large number of buildings, sidewalks and other non-natural surfaces in high density urban environments that absorb heat.

n7 *See* U.S. EPA, Heat Island Effect, *available at* http://www.epa.gov/heatisland/index.htm.

n8 *See* Donald Dawson, *Plant Covered Roofs Ease Urban Heat*, National Geographic (Nov. 15, 2002), *available at* http://news.nationalgeographic.com/news/2002/11/1115_021115_GreenRoofs.html.

n9 *See id*.

n10 For example, the Fairmount Waterfront Hotel in Vancouver used to grow herbs, flowers, and vegetables on its roof, saving an estimated $30,000 a year in food costs.

n11 Additional information about green roofs is available at http://www.epa.gov/ord/NRMRL/news/news042006.html.

n12 *Green Roofs Flourish in Eco-Conscious Cities*, Chicago Tribune (Oct. 1, 2008).

n13 Dusty Gedge, *Life at the Top*, 16 Our Planet 28-29 (2005), *available at* http://www.ourplanet.com/imgversn/161/images/Our_Planet_16.1_english.pdf.

n14 City of Chicago, The Chicago Standard 1, *available at* http://egov.cityofchicago.org/city/webportal/portalContentItemAction.do?contentOID=536910321&contenTypeName=COC_ED

n15 Additional information about Seattles program is available at http://www.seattle.gov/dpd/Permits/GreenFactor.

n16 L. 2008, ch. 461; N.Y. Real Prop. Law § 467(a). A copy of the law is available at http://assembly.state.ny.us/leg/?bn=S07553&sh=t.

n17 A copy of this bill is available at http://www.assembly.state.ny.us/leg/?bn=S07553.

n18 *Cincinnati Wants to Lead Green Roof Movement in U.S.*, Associated Press (Oct. 2, 2008).

RELATED LINKS: For complete coverage of the green building revolution as well as legislative and regulatory efforts to guide its course, see

- Environmental Law Practice Guide, Ch. 17D, "Green Buildings and Sustainable Development."

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Prior to joining Arnold & Porter, Mr. Howe practiced for six years at two litigation boutiques in Manhattan, where he focused on commercial litigation and employment law.

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Wetland Subject to Federal Regulation

2008 Emerging Issues 71

Wetland Subject to Federal Regulation

By Publisher's Editorial Staff 2008

October 2, 2008

SUMMARY: This Emerging Issues Commentary addresses the U.S. Supreme Court's decision in *Rapanos v. United States, 126 S. Ct. 2208 (U.S. 2006),* deciding the issue of whether "waters of the United States" under the Clean Water Act, *33 USCS § 1251* et seq., included four separate wetlands that lay near ditches or man-made drains that eventually emptied into traditional navigable waters.

PDF LINK: Core Emerging Issues Commentary ($)

ARTICLE: ARTICLE: Introduction

In *Rapanos v. United States, 126 S. Ct. 2208 (U.S. 2006),* the United States Supreme Court confronted the issue of whether "waters of the United States" under the Clean Water Act, *33 USCS § 1251* et seq., included four separate wetlands that lay near ditches or man-made drains that eventually emptied into traditional navigable waters. A man-made berm separated one of the wetlands from a ditch. The United States Army Corps of Engineers had asserted jurisdiction to regulate the filling of all four wetlands. The district court in each case upheld the exercise of jurisdiction by the Corps, and the United States Court of Appeals for the Sixth Circuit affirmed. Five justices of the Supreme Court voted to vacate the judgments and remand the cases, but a majority did not agree on any of the five opinions.

Section 404 of the Clean Water Act grants the Corps authority to control the discharge of dredged or fill material over the "waters of the United States." *33 USCS § 1344*. This authority encompasses wetland habitats that are adjacent to such waters. *United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (U.S. 1985).* The *Rapanos* case presented the question of whether jurisdiction under the Clean Water Act extended to wetlands that were adjacent to non-navigable tributaries of traditional navigable waters.

This is an emerging issue chiefly because of the debate over which standard courts and regulators should apply in determining whether a wetland is subject to federal regulation. The facts of *Rapanos* and subsequent cases give some idea of the effects on real estate development. Among those effects is the uncertainty in determining whether to seek a permit before proceeding to develop property that could be considered a wetland within federal jurisdiction under the Clean Water Act. The lack of a clear regulatory standard also complicates a regulating agency's decision of whether a permit should be granted and increases the likelihood of litigation. An examination of the relevant statutes and regulations, the opinions in *Rapanos*, the application of the decision by lower courts, and the impact on federal and state

regulation will enhance understanding of such issues.

Statutes and Regulations

With exceptions, a permit is required for the discharge of dredged or fill material into the navigable waters at specified disposal sites. *33 USCS § 1344*. The Corps defines the term "waters of the United States" as encompassing, inter alia, all interstate waters including interstate wetlands; all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce; tributaries of identified waters; and wetlands adjacent to such waters (other than waters that are themselves wetlands). *33 CFR 328.3(a)*.

Under the regulation, the term "wetlands" includes those areas that are inundated or saturated by surface or ground water at a sufficient frequency and duration to support and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions; swamps, marshes, bogs, and similar areas are generally included. *33 CFR 328.3(b)*. The term "adjacent" means bordering, contiguous, or neighboring, and wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands." *33 CFR 328.3(c)*. The United States Environmental Protection Agency (EPA) has similarly defined the terms "adjacent," "waters of the United States," and "wetlands" are similar to those of the Corps. *40 CFR 122.2*; *40 CFR 230.3*.

The 1987 Wetland Delineation Manual is intended to provide users with guidelines and methods to determine whether an area is a wetland for purposes of § 404 of the Clean Water Act. Except where otherwise noted in the Manual, positive evidence of hydrophytic vegetation, hydric soils, and wetland hydrology is required for a determination that an area is a wetland. The scope of the Manual is limited to wetlands that are a sub.

***Rapanos* Opinions**

In addition to the plurality opinion of Justice Scalia, Chief Justice Roberts and Justice Kennedy wrote concurring opinions, and Justices Stevens and Breyer wrote dissenting opinions. Of the five opinions, three have emerged as the most significant.

Justice Scalia wrote the opinion for the four-member plurality in *Rapanos*. The plurality opinion, which construed the Clean Water Act narrowly, applied a two-part test that required both that the adjacent channel contain a water of the United States and that there be a continuous surface connection to establish jurisdiction over wetlands such as those involved in the case. Channels containing permanent flow are plainly within the definition of "waters of the United States," according to the plurality, whereas channels containing merely intermittent or ephemeral flow are excluded. *Rapanos v. United States, 126 S. Ct. 2208, 2221 (U.S. 2006).*

The concurring opinion of Justice Kennedy, who concurred in the judgment but rejected the plurality's limitations on the Clean Water Act, offered a less restrictive test to determine whether the wetlands in issue were subject to the Corps' authority. The framework for deciding *Rapanos*, wrote Justice Kennedy, was established in *United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (U.S. 1985)* and *Solid Waste Agency v. United States Army Corps of Eng'Rs, 531 U.S. 159 (U.S. 2001);* the existence of federal jurisdiction under the Clean Water Act depends upon whether there is a significant nexus between wetlands and navigable waters. *Rapanos v. United States, 126 S. Ct. 2208, 2241 (U.S. 2006).* Justice Kennedy concluded that the case should be remanded for consideration of whether the wetlands possessed a significant nexus to navigable waters. *Rapanos v. United States, 126 S. Ct. 2208, 2252 (U.S. 2006).*

Justice Stevens, with whom three other justices joined, wrote a dissenting opinion that would have upheld the jurisdiction of the Corps over wetlands adjacent to tributaries of traditionally navigable waters. Federal jurisdiction under the Clean Water Act was, according to Justice Stevens, broad enough to include all of the wetlands in the case.

Rapanos v. United States, 126 S. Ct. 2208, 2265 (U.S. 2006). The dissent of Justice Stevens noted that a majority of the Supreme Court would have upheld the jurisdiction of the Corps if the test of either the plurality or Justice Kennedy had been satisfied. *Rapanos v. United States, 126 S. Ct. 2208, 2265 (U.S. 2006).*

Subsequent Application by Lower Courts

The Seventh Circuit adopted Justice Kennedy's proposed standard in remanding a case for further factfinding. *United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006).* The court reasoned that Justice Kennedy would be in a majority of five with the four dissenters if he favored federal authority over wetlands in a future case and with the plurality in future such cases in which he found no federal authority.

The Ninth Circuit has agreed with the Seventh Circuit that Justice Kennedy's concurrence provides the controlling rule of law in *Rapanos. N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007). Northern California River Watch* arose out of a discharge of sewage into a rock quarry that contained wetlands and bordered additional wetlands to which a navigable river was adjacent. The court determined that the rock quarry possessed a significant nexus to navigable water because its waters seeped into the river and also significantly affected the river's physical, biological, and chemical integrity. *N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 995 (9th Cir. 2007).* In a prior case, the Ninth Circuit applied Justice Kennedy's standard but found no significant nexus because mere adjacency to navigable waters provided no basis for Clean Water Act jurisdiction where the relevant body of water was not a "wetland." *San Francisco Baykeeper v. Cargill Salt Div., 481 F.3d 700 (9th Cir. 2007).*

The First Circuit has followed the approach of Justice Stevens and remanded a case to a district court for a determination of whether federal jurisdiction could be established under the test of either the plurality or *Justice Kennedy. United States v. Johnson, 467 F.3d 56 (1st Cir. 2006).* The court declined to use the formula of *Marks v. United States, 430 U.S. 188 (U.S. 1977)* in determining how *Rapanos* should be applied.

The Eleventh Circuit adopted Justice Kennedy's "significant nexus" test as the governing definition of "navigable waters" under *Rapanos. United States v. Robison, 2007 U.S. App. LEXIS 24825 (11th Cir. 2007).* The court found that, although a jury instruction in a criminal case under the Clean Water Act was erroneous, the error was harmless.

The United States District Court for the District of Connecticut followed the "common-sense analysis" of the First Circuit and applied the standards of both the plurality or Justice Kennedy in granting summary judgment in an action that arose out of alleged violations of § 402 of the Clean Water Act, *33 USCS § 1342. Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc., 472 F. Supp. 2d 219 (D. Conn. 2007).* The court determined that the plaintiffs had failed to adequately rebut the defendant's evidence that pollutants were not being discharged into navigable waters.

The United States District Court for the Eastern District of Pennsylvania applied Justice Kennedy's test in finding the defendants in contempt of a permanent injunction. *United States v. Pozsgai, 2007 U.S. Dist. LEXIS 23450 (D. Pa. 2007).* The court found that the scope of wetlands subject to the Clean Water Act fairly encompassed property that the defendants had filled without a permit from the Corps.

Because Justice Kennedy failed to elaborate on the "significant nexus" requirement, the United States District Court for the Northern District of Texas applied the Fifth Circuit's prior interpretation of "the waters of the United States" under the Oil Pollution Act of 1990, *33 USCS § 2701* et seq., to the *Clean Water Act. United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605 (D. Tex. 2006).* The court stated that, as a matter of law in the Fifth Circuit, the connection of generally dry channels and creek beds did not suffice to create a "significant nexus" to navigable water simply because one fed into the next during the rare times of actual flow. *United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605, 613 (D. Tex. 2006).*

The United States District Court for the Western District of Kentucky adopted the First Circuit's approach and concluded that the federal government could establish jurisdiction over a site if it met the standard of either the plurality or *Justice Kennedy. United States v. Cundiff, 480 F. Supp. 2d 940 (D. Ky. 2007).* The court concluded that the wetlands

at issue constituted "waters of the United States" subject to the Clean Water Act under both standards because they significantly affected the chemical, physical, and biological integrity of a river and there was a continuous surface connection.

The United States District Court for the District of Minnesota has also followed the *First Circuit. United States v. Bailey, 2007 U.S. Dist. LEXIS 71188 (D. Minn. 2007).* The court granted summary judgment and enforced an order to restore a wetland because the property was adjacent to a lake under Justice Kennedy's test even though there was no hydrological connection.

Effects of *Rapanos*

On June 5, 2007, the Corps and the EPA published a guidance memorandum, *Clean Water Act Jurisdiction following the U.S. Supreme Court's Decision in* Rapanos v. United States & Carabell v. United States, to ensure that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions are consistent with the *Rapanos* decision. The *Rapanos* guidance provides that a continuous surface connection is not required to establish adjacency for the purpose of asserting jurisdiction over wetlands. Jurisdiction over ephemeral tributaries that flow only in response to precipitation and intermittent streams that do not typically flow year-round or have continuous flow at least seasonally, neither of which are considered "relatively permanent" waters, will be evaluated under a significant nexus standard.

There has been speculation about whether the Corps and the EPA will issue new regulations in response to *Rapanos*, but serious disagreements between developers and conservationists about the scope of the Clean Water Act remain a serious obstacle. *40 Ind. L. Rev. 291.* In his concurring opinion, Justice Roberts lamented the failure of to the Corps and the EPA to develop proposed regulations in the wake of *Solid Waste Agency v. United States Army Corps of Eng'Rs, 531 U.S. 159 (U.S. 2001). Rapanos v. United States, 126 S. Ct. 2208, 2236 (U.S. 2006).* Justice Breyer's dissent explicitly called for the Corps to write new regulations. *Rapanos v. United States, 126 S. Ct. 2208, 2265 (U.S. 2006).* Regulatory modifications could include a new definition of "significant nexus" and a changed jurisdictional provision. *22 Nat. Resources & Env't 13.*

State Regulation

The possibility of increased post-*Rapanos* state regulation of wetlands should not be overlooked. The Supreme Court's decision in *Solid Waste Agency v. United States Army Corps of Eng'Rs, 531 U.S. 159 (U.S. 2001)* had already created a regulatory void with respect to isolated wetlands and inspired responses by states. *56 Baylor L. Rev. 281, 11 Southeastern Envtl. L.J. 91.*

Unless otherwise expressly provided, the Clean Water Act preserves the authority of states to adopt or enforce standards or limitations for discharges of pollutants or requirements respecting control or abatement of pollution as long as any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is not less stringent than the relevant federal provision. *33 USCS § 1370.* State legislatures could act to protect isolated wetlands in light of limitations that *Rapanos* has placed on the jurisdiction of the federal government. Unsuccessful legislation in South Carolina, in fact, has addressed the regulatory gap after *Rapanos*. *18 S. Carolina Lawyer 24.* Regulation by states could lack uniformity and further burden the development of isolated wetlands.

Conclusion

Justice Kennedy attempted to strike a middle ground between the plurality's strict interpretation of jurisdiction under the Clean Water Act and the broad reading of Justice Stevens, but the "significant nexus" standard is imprecise. As Chief Justice Roberts observed, lower courts and regulated entities now have to feel their way on a case-by-case basis in deciding whether wetlands such as those in *Rapanos* are subject to federal regulation under the *Clean Water Act. Rapanos v. United States, 126 S. Ct. 2208, 2236 (U.S. 2006).*

The lack of a clear standard may tempt developers to proceed with projects and fill wetlands with no surface connection to traditional navigable waters without seeking a permit rather than go through the lengthy regulatory process. It may also, on the other hand, discourage development of property where the circumstances create doubt over the applicability of the Clean Water Act. The unsettled nature of the law is likewise burdensome for environmental protection due to the uncertainty over which wetlands qualify for federal protection.

Familiarity with the current guidance from the Corps and the EPA and with the case law, in addition to any state statutes and regulations that respond to *Rapanos* by expanding upon the scope of the Clean Water Act, is indispensable in the absence of clarifying federal regulations or a definitive outcome in the courts. The significant nexus standard, however, is inherently complex. Although it might seem that the safest course for the time being would be to seek a permit under the Clean Water Act if the status of a wetland is in doubt, the process can be time-consuming and expensive, and litigation may yet result if a permit is denied.

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Reach of the Endangered Species Act

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Reach of the Endangered Species Act

By Publisher's Editorial Staff 2008

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SUMMARY: This Emerging Issues Commentary examines how federal courts have interpreted § 7 of the Endangered Species Act, which prohibits federal agencies from taking action likely to jeopardize a listed species or destroy its critical habitat and requires agencies to adopt conservation plans. The broad reach of § 7 and the enforcement power that the citizen suit provision places in the hands of the public have sparked litigation to block development.

PDF LINK: Core Emerging Issues Commentary ($)

ARTICLE: ARTICLE: Introduction

The Endangered Species Act of 1973, *16 USCS § 1531* through *16 USCS § 1544* ("the Act"), was Congress' first attempt to comprehensively protect endangered species. 4-24 Environmental Law Practice Guide § 24.03. In broad terms, the Act prohibits the taking of any endangered species as well as acts that jeopardize them. 4-24 Environmental Law Practice Guide § 24.03. The Act has four main operative sections. Section 4 governs the listing of endangered and threatened species and also requires the Fish and Wildlife Service, which administers the Act, to designate critical habitat and adopt recovery plans; § 5 empowers the government to acquire land to aid in species preservation; § 7 prohibits federal agencies from taking action likely to jeopardize a listed species or destroy its critical habitat and requires agencies to adopt conservation plans; and § 9 generally prohibits the "taking" of endangered species, with limited exceptions. 4-24 Environmental Law Practice Guide § 24.03.

Recently, there has been substantial debate over the reach of § 7 of the Act, *16 USCS § 1536*. Over the past year, a number of federal appellate courts and the United States Supreme Court have addressed issues regarding § 7. This article will examine recent legal developments involving the requirements and reach of § 7 and will identify critical rulings and what they may mean for the future.

Part 1 of this article will discuss, by way of background, the general substantive and procedural safeguards that § 7 imposes on federal agencies as part of the Act's effort to further wildlife conservation efforts. This section will also follow the development of jurisprudence interpreting § 7 and examine how courts have applied this section in the past.

Part 2 of this article will examine the nature of the controversy over the applicability of § 7's requirements. This section will explore the way in which § 7 interacts with other environmental statutes and discuss the unintended

consequences raised by often conflicting requirements that the Act and other statutes place on federal agencies.

Part 3 of this article will survey appellate and Supreme Court opinions decided over the last year that deal with the Act in an effort to provide some resolution to the controversy that has surrounded the application of § 7 of the Act for years. By examining the cases, this section will show how the courts have approached the issue and provide some context for how § 7 of the Act will apply going forward, especially in the light of a Supreme Court decision. The goal of this section is to provide an analytical framework that will clarify the reach of § 7 of the Act and the types of situations to which it applies so that, going forward, it will be easier to identify circumstances where the Act's procedural and substantive requirements are likely to arise.

Part 1 -- Background

The Endangered Species Act was enacted with wide support. It passed the House of Representatives with a vote of 355 to 4 and had the Senate's unanimous approval. 13 Hastings W.-N.W. J. Env. L. & Pol'y 1. When he signed the Act, President Nixon proclaimed:

Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed. It is a many-faceted treasure, of value to scholars, scientists, and nature lovers alike, and it forms a vital part of the heritage we all share as Americans. 13 Hastings W.-N.W. J. Env. L. & Pol'y 1.

It is unclear whether Congress or the White House fully understood the scope of the Act or the consequences that it would have in the years to come. But history has revealed several important features of the Act. The Act committed the government to protection of all threatened and endangered species, meaning that in addition to charismatic megafauna like eagles and pandas, the Act protected every plant, fish, crustacean, insect, or bird that the Fish and Wildlife Service placed onto its lists. 13 Hastings W.-N.W. J. Env. L. & Pol'y 1. The Act's broad coverage imposed a mandatory duty on the Fish and Wildlife Service to list both protected species and their critical habitats and it prohibited the federal government from taking any action to jeopardize protected species, no matter where they could be found. 13 Hastings W.-N.W. J. Env. L. & Pol'y 1. Congress included citizen suit provisions to encourage public participation in the enforcement of the Act. 13 Hastings W.-N.W. J. Env. L. & Pol'y 1. Finally, the Act does not allow the government to balance competing interests such as costs or economic growth, instead making all regulatory actions subject to the principal legislative goal of protecting every endangered or threatened species anywhere on the planet, regardless of the cost. 13 Hastings W.-N.W. J. Env. L. & Pol'y 1.

Early jurisprudence reflected the Act's stated goals. In Tennessee *Valley Auth. v. Hill, 437 U.S. 153 (U.S. 1978),* the Supreme Court affirmed a judgment enjoining the completion and operation of the nearly-finished Tellico Dam because the facts showed that the dam would eradicate the Tennessee Snail Darter, a two-inch fish that lived in the vicinity of the dam. The Court found that the statute clearly mandated the protection of the fish population regardless of the fact that Congress had already appropriated, and continued to appropriate, federal money to the project and regardless of the fact that its decision effectively killed the project. Chief Justice Burger wrote:

Concededly, this view of the Act will produce results requiring the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds. But examination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities. Tennessee *Valley Auth. v. Hill, 437 U.S. 153 (U.S. 1978).*

Finding that endangered species were entitled to the highest protection by the clear language of the statute, the Court determined that Congress had given the survival and recover of endangered species priority over the primary missions of federal agencies. Tennessee *Valley Auth. v. Hill, 437 U.S. 153 (U.S. 1978).* Even in so ruling, the Court noted that perhaps Congress' enthusiasm for the Act had masked unintended consequences, though it declined to address them:

Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is

to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. Tennessee *Valley Auth. v. Hill, 437 U.S. 153 (U.S. 1978).*

Hill forced Congress to take a close look at the Act and resulted in a number of 1978 amendments, including the creation of the Endangered Species Committee, a so-called "God Squad" that was authorized to green-light federal projects despite a determination that doing so would jeopardize a protected species. *16 USCS § 1536(e)*-(o). Congress has also authorized or directed specific acts that would otherwise have violated the Act, such as ordered completion of the Tellico Dam notwithstanding any other laws, authorized timber harvesting in the habitat of the northern spotted owl, and prohibited the Secretary of the Interior from reallocating water usage to comply with the Act. *96 P.L. 69, Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (U.S. 1992), 108 P.L. 137.* Subsequent amendments have created "incidental take permits," which allow the taking of individual members of a protected species as unavoidable incidents to otherwise lawful activities subject to regulation under the Act so long as the takings complied with an approved habitat conservation plan. *16 USCS § 1539(a).*

The amendments to the Act and Congress' exercise of its authority to legislatively control the operation of the Act reflect a trend away from strict application of the Act without regard to competing interests but the Act continues to impose mandatory requirements on federal agencies that often conflict with other laws.

Section 7 of the Act imposes two major requirements on federal agencies. Section 7(a)(1) requires agencies to carry out programs for the conservation of listed species and to use all methods necessary to bring a species to the point where it no longer needs the Act's protection. *16 USCS § 1536(a)(1).* Section 7(a)(2) also requires agencies to review their actions to ensure that they are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of its critical habitat. *16 USCS § 1536(a)(2).* These requirements, in combination with the power of the Act's citizen suit provisions, have led to controversies as to the scope of the § 7 requirements and apparent conflicts with other statutes due the statute's broad reach.

Part 2 Recent Section 7 Controversies

The broad reach of § 7 and the enforcement power that the citizen suit provision places in the hands of the public have contributed to the uncertainty over the reach of § 7 by sparking litigation to block development. The *Hill* case arose when opponents of the Tellico Dam project forced the listing of the Tennessee Snail Darter and used the § 7 requirements to block construction they viewed as environmentally destructive. 13 Hastings W.-N.W. J. Env. L. & Pol'y 1. Some advocates used litigation to protect the Northern Spotted Owl's habitat to force protection of old growth forests where the owl lived by prohibiting issuance of logging permits that would harm the critical habitat of a listed species. 13 Hastings W.-N.W. J. Env. L. & Pol'y 1. As a result, the reach of § 7 has become of critical interest on both sides of the larger environmental protection debate.

Section 7 is often considered to be the heart of the Act. *26 Rev. Litig. 487.* Specifically, § 7(a)(2) seeks to ensure that the government does not take actions, such as building a dam or a highway, that incidentally jeopardize a protected species. *26 Rev. Litig. 487.* The statute states:

Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Department of the Interior], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, ... to be critical. *Florida Key Deer v. Stickney, 864 F. Supp. 1222 (D. Fla. 1994),* citing *16 USCS § 1536(a)(2).*

This language is very broad because it applies by its own terms to all federal agencies, though it also clearly does not cover non-federal agencies, states, or individuals and likely does not reach federally created programs that have

been transferred to state jurisdiction. *26 Rev. Litig. 487.* However, it does apply equally to threatened and endangered species and covers projects initiated by private, local, or state agencies that require a federal permit, license, or approval or that receive federal funding. 6-81 California Environmental Law & Land Use Practice § 81.14. Types of actions subject to § 7 requirements include federal projects like highway construction, federally funded projects like a local or state housing project that receives federal money, state or local projects that require federal authorization, such as the discharge of landfill materials into water subject to a permit from the Army Corps of Engineers, or any other action requiring federal permits or involvement, such as obtaining a permit from the Federal Energy Regulatory Commission to operate a private hydroelectric plant. The consultation requirement applies equally to threatened and endangered species and covers projects initiated by private, local, or state agencies that require a federal permit, license, or approval or that receive federal funding. 6-81 California Environmental Law & Land Use Practice § 81.14. Joint regulations interpreting and applying § 7 provide a similarly broad definition of "action" and include actions intended to conserve protected species and their habitat; promulgation of regulations; issuance of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; and direct or indirect modifications of land, water, or air. 6-81 California Environmental Law & Land Use Practice § 81.14. Courts have also broadly interpreted the term "action" to include "management guidelines" developed to protect the northern spotted owl, Forest Service land and resource management plans issued before species listings, and actions in foreign countries or on the high seas that may impact listed species, although they have excluded advice to state agencies on endangered species enforcement efforts, advice to private parties on how to avoid the § 9 taking prohibition, and the grant of a right-of-way over federal lands for logging operations before enactment of the Act. 4-24 Environmental Law Practice Guide § 24.03.

Section 7 requires federal agencies to determine whether a proposed action may affect a protected species or its critical habitat. *26 Rev. Litig. 487.* An affirmative finding triggers the formal consultation process, in which the Fish and Wildlife Service or, for marine species, the National Marine Fishery Service, issues a biological opinion on whether the proposed action is likely to jeopardize a protected species or its habitat. *26 Rev. Litig. 487.* A biological opinion must include: (1) a summary of the basis of the opinion; (2) a detailed discussion on the direct and indirect effects of the action, including effects of other interrelated or interdependent activities and the past and present impacts of all Federal, State, or private action and other human activities in the action area; and (3) whether the action is likely to jeopardize a protected species or its habitat. *26 Rev. Litig. 487.*

The biological opinion is the end of the formal consultation process, in which the Service discusses whether the proposed action is likely to violate the act. 4-24 Environmental Law Practice Guide § 24.03. An opinion finding jeopardy must also include a discussion of reasonable proposed alternatives that will avoid the identified harm to a protected species or habitat. 4-24 Environmental Law Practice Guide § 24.03. An opinion finding no jeopardy may be invalidated if it failed to consider the effects of the action and the cumulative impacts on the listed species. 4-24 Environmental Law Practice Guide § 24.03. Biological opinions are final agency actions that are reviewed to determine whether they are arbitrary and capricious, and agencies must disclose the reasons for their decisions, including reasonable alternatives. 4-24 Environmental Law Practice Guide § 24.03.

Recent Environmental Species Act controversies have led to substantial appellate litigation involving two major § 7 issues: the reach of the § 7(a) obligation to determine whether or not a federal action is likely to jeopardize a protected species or hits habitat and the nature of what constitutes a valid; and the scope of what constitutes a valid biological opinion. These issues have come up repeatedly because they are critical to the determination of whether the Act will affect a proposed project. Environmental advocates seeking to use the Act to stop a development and developers who want to avoid Endangered Species Act entanglements all have different goals and positions with respect to the reach of § 7 and the broad scope of the statute has provided ample opportunities for courts to weigh in on the issue.

Part 3 Survey of Cases

Over the past year, the Supreme Court and the Ninth and Tenth Circuits have each addressed issues involving § 7. In *Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (U.S. 2007), San Bernardino Valley Audubon Soc'y v. FERC, 2007 U.S. App. LEXIS 16805 (9th Cir. 2007),* and *Forest Guardians v. Forsgren, 478 F.3d 1149 (10th*

Cir. 2007), the Supreme Court, Ninth Circuit, and Tenth Circuit clarified the true reach of § 7 by determining what constituted an "action" subject to the requirements of § 7. In *Columbia Snake River Irrigators Ass'n v. Nat'l Wildlife Fed'n, 230 Fed. Appx. 659 (9th Cir. 2007)* and *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 481 F.3d 1224 (9th Cir. 2007),* the Ninth Circuit addressed disputes over the contents of biological opinions. Together, these cases provide valuable guidance on how to determine the applicability of § 7 to a particular scenario and on how to comply with § 7 in situations where it applies.

In *Home Builders*, the Environmental Protection Agency appealed a Ninth Circuit decision holding that the transfer of permitting authority under the National Pollution Elimination Discharge System ("NPDES") to a state was arbitrary and capricious due to the EPA's failure to comply with § 7 of the Act. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (U.S. 2007).* At issue was whether the transfer of permitting authority from the EPA to the State of Arizona constituted an action subject to § 7.

Congress originally vested the EPA with sole supervisory authority over the NPDES, which governed discharge of pollutants into the water, as part of the Clean Water Act ("CWA"). *26 Rev. Litig. 487.* However, the CWA allows a state to apply to the EPA for permission to take over administration of the NPDES system within its borders. *26 Rev. Litig. 487.* The CWA requires the EPA to grant a state's application if it meets nine specific criteria relating to whether the state agency that will be responsible for permitting has the requisite authority under state law to administer the NPDES program. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (U.S. 2007).*

The EPA had found that the transfer of the NPDES program to the state would result in the loss of § 7 protection for protected species likely to be impacted by the transfer. *26 Rev. Litig. 487.* Finding that the transfer would not result in substantive changes to the permitting process, but only a loss of enforcement mechanisms for protecting listed species in Arizona, the EPA approved the transfer. *26 Rev. Litig. 487.* Defenders of Wildlife filed a lawsuit arguing that the EPA failed to properly consider the transfer's impact on protected species. *26 Rev. Litig. 487.* The conflict was clear. As a federal agency, § 7 of the Act required the EPA to ensure that any action it authorized, controlled, or funded would be unlikely to jeopardize any protected species, but the CWA required it to transfer NPDES authority to a state meeting the listed criteria regardless of any other concerns. *26 Rev. Litig. 487.* The Ninth Circuit concluded that § 7 constituted a tenth requirement, independent of the provisions of the CWA, that the EPA had to comply with before approving the NPDES transfer. *26 Rev. Litig. 487.*

The Supreme Court reversed, making two important holdings. First, it concluded that the NPDES transfer process imposed a non-discretionary duty on the EPA once it found that the applying state had satisfied the nine CWA criteria; second, it held that the no-jeopardy language of § 7 applied only to discretionary actions and did not cover actions, like NPDES transfers, that an agency was required to take once specified triggering events had occurred. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (U.S. 2007).* The Court distinguished the *Hill* case's apparent "no exceptions" holding, concluding that in *Hill*, Congress had funded, but had not mandated construction of the *Tellico Dam. Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (U.S. 2007).*

In *San Bernardino Valley Audubon Soc'y v. FERC, 2007 U.S. App. LEXIS 16805 (9th Cir. 2007),* several environmental groups appealed the Federal Energy Regulatory Commission's ("FERC") decision to re-license a hydroelectric power plant. Among other things, the groups argued that the FERC failed to comply with § 7 of the Act because it failed to consider whether the operation of the project would jeopardize the continued existence of the endangered southwestern willow flycatcher in the project area or adversely affect the bird's critical habitat before it reissued the license. When the original license issued, the FERC and the Fish and Wildlife Service had concluded that operation of the dam would be unlikely to jeopardize the flycatcher, and the Audubon Society had provided no evidence to undermine the agencies' decision by the time of the reissuance of the license. The court rejected plaintiffs' argument that FERC should have re-initiated consultation regarding the project's effects on the flycatcher, holding that while granting a license constituted an "action" within the meaning of § 7, the operation of the project pursuant to the license was not. Therefore FERC did not have to re-initiate consultation under *50 CFR 402.16*, which required a new consultation where the agency retained or was authorized to exercise discretionary federal involvement or control over

the action and a new species was listed or critical habitat designated that the action might affect because FERC no longer retained discretionary authority or control over the project. This holding indicates that re-licensing a project that has become private and is no longer subject to federal oversight does not constitute an "action" due to the lack of federal involvement. *San Bernardino Valley Audubon Soc'y v. FERC, 2007 U.S. App. LEXIS 16805 (9th Cir. 2007).*

The Tenth Circuit addressed the reach of § 7 in *Forest Guardians v. Forsgren, 478 F.3d 1149 (10th Cir. 2007).* In *Forest Guardians*, environmental groups sued to compel the United States Forest Service to consult with the Fish and Wildlife Service on the question of whether Land and Resource Management Plans for two national forests would jeopardize the continued existence of a threatened species of lynx. The complaint alleged that § 7 of the Act mandated a consultation because implementation of the Plans would constitute agency actions subject to the § 7 requirements. The Forest Service argued that the Plans did not constitute ongoing agency action subject to § 7. The court held that, although the approval, amendment, or revision of a Plan constituted an agency action subject to § 7, a Plan unto itself did not constitute an ongoing action. Rather, it was specific projects undertaken pursuant to a Plan that might constitute an agency action. Once the Plan was approved, no further consultation was required until a federal action implementing one of the policies set out in the Plan was proposed. The court disagreed with the Ninth Circuit decision in *Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994),* which held that a Plan was an action unto itself. The court instead determined that Plans were a set of guidelines that informed future agency actions, which could themselves be subject to § 7 of the Act, but did not of themselves constitute actions once approved.

The *Defenders of Wildlife*, *San Bernardino Audubon Society*, and *Forest Guardians* cases brought clarity to the reach of § 7 by emphasizing that mandatory agency actions triggered by the occurrence of specified events do not trigger a consultation requirement even if they could affect a protected species, by holding that once transferred to the supervision of a private entity, operation of a federally licensed project did not constitute "agency action," and by holding that a Land and Resource Management Plan, once approved, did not constitute ongoing agency action requiring consultation under § 7, but that individual projects undertaken pursuant to the Plan would. These holdings clarify the reach of what is, on its face, an exceptionally broad statute, although in the *Forest Guardians* case, there is disagreement with Ninth Circuit case law that may call for further review by the Supreme Court.

Determining that an action is subject to § 7 of the Act and the completion of the consultation process does not foreclose further controversy over the outcome. In *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 481 F.3d 1224 (9th Cir. 2007)* and *Columbia Snake River Irrigators Ass'n v. Nat'l Wildlife Fed'n, 230 Fed. Appx. 659 (9th Cir. 2007),* the Ninth Circuit has addressed challenges to the validity of biological opinions issued after § consultation. These cases are important because a biological opinion that contains a jeopardy determination or a finding of likely harm to a critical habitat can force an agency to adopt a reasonably practicable alternative to its proposed project or refuse to take the action if it cannot get an exemption. 6-81 California Environmental Law & Land Use Practice § 81.14. A defective biological opinion can defeat the purposes of the Act, so case law clarifying the requirements is highly useful.

In *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 481 F.3d 1224 (9th Cir. 2007),* the issue was whether the National Marine Fisheries Service issued a flawed biological opinion. The Service found that the proposed operations of the Federal Columbia River Power System would neither jeopardize certain protected fish species nor harm their critical habitat. Its opinion included in the environmental baseline (a list of specific information used to evaluate a project's effect on protected species and their critical habitat, including past and present impacts of all federal, state, or private actions and other human activities in the action area; anticipated impacts of all proposed federal projects in the action area that have already undergone formal or early § 7 consultation; and impacts of state or private actions that are contemporaneous with the consultation process, which create a snapshot of protected species' health prior to the start of the proposed action, 6-81 California Environmental Law & Land Use Practice § 81.14) the existing operation, various supposedly non-discretionary dam operations, and all past and present impacts from discretionary operations. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 481 F.3d 1224 (9th Cir. 2007).* The Service also adopted a "reference operation" consisting of the dams and a hypothetical regime of operation. Finally, the Service chose not to determine whether the fish would be jeopardized by the aggregate of the proposed agency action, the environmental baseline, cumulative effects, and current status of the species. It instead segregated its analysis, first evaluating whether the

proposed discretionary operation of the system would have an appreciable net effect on a species. It considered additional context only if it found such an effect. By using this so-called comparative approach rather than a more holistic, aggregate approach, the Service found no jeopardy even though the opinion showed no improvement in the fishes' status or the impacts of operations. This new approach attributed only a much smaller portion of the fishes' perilous condition to the proposed operations under review. The jeopardy analysis also omitted any clear consideration of the impact of proposed operations on listed species' chances of recovery, which had been a prominent feature of earlier opinions. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 481 F.3d 1224 (9th Cir. 2007).*

The court rejected this approach as structurally flawed. The court held that it was impermissible to rely on a hypothetical "reference operation" to exclude from potential impacts the effects of related operations deemed to be "nondiscretionary," even if they were part of admittedly discretionary actions. Such an approach was contrary to the mandate of the Act. Because the supposedly nondiscretionary operations, which included mandates for flood control, irrigation, and power generation, were not quantified by law, the court found that the agencies retained some discretion as to how to implement them, which brought them squarely within reach of the Act. The court noted that the inability of the appellants to define the limits of their discretion indicated that they had discretion as to how to implement their competing mandates and still comply with the Act. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 481 F.3d 1224 (9th Cir. 2007).*

The court also refused to allow the Service to conduct its jeopardy analysis in a vacuum by evaluating the effects of the proposed action as compared to an imaginary "reference operation" rather than considering the effects of the proposed action in conjunction with actual environmental baseline conditions. The court held that the biological opinion had to consider the effects of the proposed action in their actual context. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 481 F.3d 1224 (9th Cir. 2007).*

Finally, the court held that it was improper for the biological opinion to consider only impacts on the survival of the protected species without also considering impacts on their ability to recover from their threatened or endangered condition. Prior to issuance of the opinion, the Service had consistently interpreted its duty to involve considering both the survival and recovery of the species. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 481 F.3d 1224 (9th Cir. 2007).* In sum, the court held: (1) an agency could not use a hypothetical "reference operation" to exclude from its jeopardy analysis the effects of related operations deemed to be nondiscretionary; (2) a jeopardy analysis had to account for degraded baseline conditions; and (3) a biological opinion had to consider impact on both survival and recovery of a protected species.

In *Columbia Snake River Irrigators Ass'n v. Nat'l Wildlife Fed'n, 230 Fed. Appx. 659 (9th Cir. 2007),* a companion case to *National Wildlife Federation,* the court addressed a challenge to a biological opinion brought by irrigators. The opinion included expected future tribal and state-regulated fishing operations in its analysis of baseline environmental conditions on the effects of power system operations on protected fish species. These activities constituted the present effects of past federal actions and thus belonged in the analysis. The court rejected the argument that the opinion could not consider the impact of non-federal action in its jeopardy analysis. To the contract, the court held that agencies had to consider impacts in the present and future, in both human and natural contexts, thus inherently including federal and non-federal actions.

The *National Wildlife Federation* and *Columbia Snake River* cases provide useful guidance when preparing and analyzing environmental opinions. They stand for the proposition that agencies must consider real-world environmental baseline conditions that account for both federal and non-federal actions and that they must evaluate jeopardy in the context of the real facts, not some hypothetical. They also suggest that a biological opinion must also account for related operations' impacts. Even if they are supposedly nondiscretionary, their impacts on protected species form part of the factual context against which the effects of the proposed action must be measured. Finally, a biological opinion's jeopardy analysis should not attempt to segregate factors in order to minimize the number of factors included as consequences of a proposed action; rather, the Ninth Circuit favors a more holistic approach that more accurately assesses the reality of the situation.

Conclusion

Due to its broad scope and its citizen-suit provisions, the Endangered Species Act has been controversial since its enactment. It enables parties with the resources and dedication to exercise a great deal of oversight on projects that may impact protected species and the environments that they live in, so an understanding of the true reach of the Act, especially with respect to the § 7 requirements, is key to determining the extent to which the public can act to protect listed species and their critical habitats. Early cases exposed many of the issues that the broad scope of the Act raised, and courts are still grappling with many of those issues today.

In the past year, the courts have had taken advantage of opportunities to clarify the reach of § 7 of the Act both in terms of what kinds of actions trigger its requirements and what is required once the Act applies to a particular action.

This year's cases emphasized that § 7 only applies to discretionary federal actions. Actions mandated by statute upon the occurrence of specified events, even though they constitute federal action, do not trigger an independent § 7 consultation requirement regardless of the likely effects on protected species. Actions taken with respect to a project not subject to federal discretionary authority, such as reissuing licenses for private operations, do not trigger § 7 obligations because they are not "federal actions." And though there is still debate over this issue, the most recent appellate court pronouncement holds that general policies, once implemented, that require further acts to carry out their goals, do not constitute ongoing actions requiring § 7 consultation.

The cases also addressed what to expect from a proper consultation. Specifically, a biological opinion must consider real-world environmental baseline conditions that account for all actions, federal, state, local, or private, that have directly or indirectly affected the well-being of the protected species. Further, the opinion must review these facts in the aggregate, rather than segregating them in order to minimize the number of environmental factors under consideration.

These cases have provided valuable insight into the reach of § 7, both in terms of the actions to which it applies and the kinds of information that can be considered in determining whether a particular action complies with the Act's mandate to protect endangered and threatened species. As time passes, courts will likely continue to grapple with the Act as they apply these cases and discover new issues, but these cases offer the latest round of clarification in the Act's controversial history.

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Nanotechnology and Environmental Law

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Nanotechnology and Environmental Law

By Publisher's Editorial Staff 2008

October 2, 2008

SUMMARY: This Emerging Issues Commentary surveys some of the recent exciting developments in nanotechnology, such as remediation of contaminated groundwater and strengthening everyday products. The commentary then examines the implications of this new technology for environmental law practitioners.

PDF LINK: Core Emerging Issues Commentary ($)

ARTICLE: Introduction

Nanotechnology is the understanding and control of matter at dimensions of roughly 1 to 100 nanometers, where unique phenomena enable novel applications. Encompassing nanoscale science, engineering and technology, nanotechnology involves imaging, measuring, modeling, and manipulating matter at this length scale. At the nanoscale, the physical, chemical, and biological properties of materials differ in fundamental and valuable ways from the properties of individual atoms and molecules or bulk matter. Nanotechnology research and development is directed toward understanding and creating improved materials, devices, and systems that exploit these new properties. A nanometer is one-billionth of a meter; a sheet of paper is about 100,000 nanometers thick. http://www.nano.gov/html/facts/whatIsNano.html.

The nanoscale is a size that can influence such characteristics as conductivity, hardness, or melting point. "Top-down nanofabrication creates nanostructures by taking a large structure and making it smaller, whereas bottom-up nanofabrication starts with individual atoms to build nanostructures." Lindsay V. Dennis, Comment: *Nanotechnology: Unique Science Requires Unique Solutions, 25 Temp. J. Sci. Tech. & Envtl. L. 87, 90 (Spring 2006).*

There are three distinct classes of technology. First, nanoscale science and engineering, wherein nanomaterials are either fixed as part of larger objects or are free, as in pharmaceuticals, is currently in use and is the starting point for concerns about safety and consequences. Second, productive nanosystems raise the possibility of using nanotechnology to make other nanoscale materials or devices. Third, replicators are the most advanced and distant form of the technology. Albert C. Lin, *Size Matters: Regulating Nanotechnology, 31 Harv. Envtl. L. Rev. 349, 354 (2007).*

Nanotechnology is only beginning to be used in real-life applications such as some auto parts, paints and coatings, sunscreens and cosmetics, stronger or longer-lasting tennis balls and tennis racquets, stain free materials, burn and

wound dressings, and ink, to name a few. http://www.nano.gov/html/facts/appsprod.html**.** But, it is anticipated that nanotechnology will shortly improve the strength and usefulness of many already-existing products, such as quantum dots for medical diagnostics, display technology, water filtration and purification, and coatings. http://www.nano.gov/html/facts/MoreProds.htm.

The potential environmental benefits of nanotechnology include remediation, monitoring, and green production, that is, creating less waste and hazardous byproducts from the manufacturing process. Linda K. Breggin and Leslie Carothers, *Governing Uncertainty: The Nanotechnology Environmental, Health, and Safety Challenge, 31 Colum. J. Envtl. L. 285, 290 (2006).*

Work has been done to show that arsenic can be removed from drinking water with nano-sized activated alumina, nanoscale particles can decontaminate groundwater, and nanotechnology has applications in solar energy conversion, thermoelectric converters, power transmission lines, and high-performance batteries. 1-1 *Treatise on Environmental Law § 1.09.*

For example, Paul G. Tratnyek and Richard L. Johnson in *Nanotechnologies for Environmental Cleanup,* Oregon Health & Science University, Department of Environmental and Biomolecular Systems, (2006), write that "remediation of contaminated groundwater using nanoparticles containing zero-valent iron (nZVI) is one of the most prominent examples of a rapidly emerging technology with considerable potential benefits."

In *Nanostructures in Environmental Pollution Detection, Monitoring, and Remediation,* A. Vaseashta, M. Vaclavikova, S. Vaseashta, G. Gallios, P. Roy, and O. Pummakarnchana discuss their results of sorption on advanced nanomaterials-based sorbents that have been found effective in the removal of cadmium and arsenic from water streams.The discovery of unexpected magnetic interactions between ultrasmall specks of rust is leading scientists at Rice University's Center for Biological and Environmental Nanotechnology (CBEN) to develop a revolutionary, low-cost technology for cleaning arsenic from drinking water.

And, internationally, the hope is that nanotechnology will further water purification techniques to reduce the number of deaths attributed to water contamination. See, for example, Aditi Risbud, *Cheap Drinking Water from the Ocean,* in which it is stated that carbon nanotube-based membranes will dramatically cut the cost of desalination.

Discussion

While research regarding the uses and applications of nanotechnology proceed at full speed, the conversation about whether and how to limit or regulate it is only just beginning. A number of interests are participating in the discussion but the principal actors, U.S. federal agencies currently tasked to investigate and control the use of nanotechnology, appear to be in the information-gathering stage and definitive action or direction seems distant.

Role of the Federal Government

"The federal government 'regulates' nanotechnology by controlling the federal budget for research and development projects." Lindsay V. Dennis, Comment: *Nanotechnology: Unique Science Requires Unique Solutions, 25 Temp. J. Sci. Tech. & Envtl. L. 87, 110 (Spring 2006).*

The 21st Century Research and Development Act, *15 USCS § 7501* et seq., established the National Nanotechnology Program (NNP) and identified the National Nanotechnology Coordination Office of the Nanoscale Science Engineering and Technology (NSET) Subcommittee of the National Science and Technology Council (NSTC) as an important part of the national nanotechnology effort. The Office's National Nanotechnology Initiative (NNI) involves 25 federal agencies and helps to coordinate funding. In addition, the Act directed that a National Nanotechnology Advisory Panel (NNAP) periodically review the work of the NNI. The NNAP consists of the President's Council of Advisors on Science and Technology (PCAST). The Nanotechnology Environmental and Health Implications Working Group under NSET focuses on the dissemination of information to governmental and

non-governmental entities regarding the environmental and health impacts of nanotechnology, standards, and occupational health and safety issues. Linda K. Breggin and Leslie Carothers, *Governing Uncertainty: The Nanotechnology Environmental, Health, and Safety Challenge, 31 Colum. J. Envtl. L. 285 (2006).*

The federal agency that is the most active in the field is the Environmental Protection Agency. It funds grants through the Science to Achieve Results (STAR) and Small Business Innovation Research programs. The Nanoscale Materials Stewardship Program is a voluntary project looking into the relationship between nanochemicals and the Toxic Substances Control Act, *15 USCS § 2601* et seq. That relationship is also the subject of attention from EPA's National Pollution Prevention and Toxics Advisory Committee. The Nanotechnology Workgroup of EPA's Science Policy Council announced that it was issuing its "Final Nanotechnology White Paper" on February 15, 2007, at *72 FR 7435*, which identified its approach to the subject. Other active federal agencies include the National Science Foundation, which funds many nanotechnology-related projects, the Food and Drug Administration's Nanotechnology Interest Group (NTIG), and the National Institute for Occupational Safety and Health (NIOSH), which is looking to establish a database on the impact of worker exposure to nanotechnology production methods. Linda K. Breggin and Leslie Carothers, *Governing Uncertainty: The Nanotechnology Environmental, Health, and Safety Challenge, 31 Colum. J. Envtl. L. 285 (2006).*

State Involvement

Some states have started to identify nanotechnology as a business worth fostering and have passed legislation to attract research and manufacturing interests. Those states include Arkansas, California, Massachusetts, New York, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, and Virginia. http://www2.eli.org/research/nanotech.

International Activity

The subject has also been noticed at the international level. The European Union, the International Council on Nanotechnology (ICON), the Organization for Economic Cooperation and Development (OECD), along with multiple research groups in Great Britain have begun to consider the impact of nanotechnology. Linda K. Breggin and Leslie Carothers, *Governing Uncertainty: The Nanotechnology Environmental, Health, and Safety Challenge, 31 Colum. J. Envtl. L. 285 (2006).*

Private and Non-Governmental Interest

Private trade groups and non-governmental organizations in the U.S. have already begun to participate in the effort to understand the promise and the limits of nanotechnology, for example, the Environmental Law Institute's Nanotechnology Initiative. In addition, voluntary guidelines and standards are being proposed by the American National Standards Institute (ANSI), ASTM International, the Foresight Nanotech Institute, and the International Organization for Standardization (ISO). Linda K. Breggin and Leslie Carothers, *Governing Uncertainty: The Nanotechnology Environmental, Health, and Safety Challenge, 31 Colum. J. Envtl. L. 285 (2006).* Other efforts include the "industry collaborations" discussed by the NNI.

Proposals for Regulation

Although the regulatory aspects of nanotechnology have been much slower to develop than the technology itself, some authors have offered ideas for consideration.

1. Peter J. Tomasco, Note: *Manufactured Nanomaterials: Avoiding TSCA and OSHA Violations for Potentially Hazardous Substances, 33 B.C. Envtl. Aff. L. Rev. 205 (2006),* asserts that the two federal laws, the Toxic Substances Control Act (TSCA), *15 USCS § 2601* et seq. and the Occupational Health and Safety Act (OSHA), *29 USCS § 651* et seq., are the principal, currently available regulatory avenues. He discusses both laws in detail and how nanotechnology could be addressed by them; however, he also points out how the technology could avoid regulation by these laws. As a result, he states that there should be "some form of manufacturer-initiated testing before mass production," such as

using a combination of 4(a)(1)(B) of TSCA, the B policy, which authorizes EPA to require testing of substances with unknown toxicity, and voluntary testing consent agreements with the nanomanufacturing industry.

2. Paul C. Lin-Easton in *It's Time for Environmentalists to Think Small--Real Small: A Call for the Involvement of Environmental Lawyers in Developing Precautionary Policies for Molecular Nanotechnology, 14 Geo. Int'l Envtl. L. Rev. 107 (Fall 2001),* advocates adoption of the precautionary principle as a method for analyzing the "safety measures and regulatory proposals" involved in nanotechnology. When applied to nanotechnology, that principle has four elements: "(1) proponents of nanotechnology bear the burden of proving its safety, rather than opponents having to prove its harmfulness; (2) before nanotechnology is used, all alternatives must be examined, including, perhaps, the alternative of "no action" (i.e. relinquishment); (3) governments, businesses, and individual researchers have a duty to take anticipatory action to prevent harm from nanotechnology; and (4) the process of applying the precautionary principle must be 'open, informed and democratic,' and must include all parties that will be affected by nanotechnology." Lin-Easton asserts that the precautionary principle encompasses more than just risk assessment, which is the "favored approach of most industry scientists and government agencies for making policy decisions in the face of scientific uncertainty," and places less emphasis on the ability of science to predict and manage harm. The Foresight Guidelines Version 6.0: Foresight Guidelines for Responsible Nanotechnology Development (1999-2006) by Neil Jacobstein is suggested as a starting point for self-regulation by the nanotechnology industry.

3. Lindsay V. Dennis, in *Nanotechnology: Unique Science Requires Unique Solutions, 25 Temp. J. Sci. Tech. & Envtl. L. 87 (Spring 2006),* opines that, based on existing regulations, there are three avenues for the regulation of nanotechnology: stopping all nanoscience research and development, restricting the technology to military matters, and modest regulation with robust civilian research, for example, expanding the use of TSCA. However, the author asserts that a comprehensive plan of regulation with a functional approach is needed. That approach "categorizes nanotechnology applications by their uses," and regulates the products accordingly. As a result, "Congress should implement product-dependent regulatory controls." In addition, "one regulatory approach to international nanotechnology regulation is the creation of an international monitoring agreement," but this approach is described as "very impractical, especially because of the U.S.'s history of resisting similar conventions." Another regulatory approach, the precautionary principle, is described as requiring "an evaluation of the possible effect and full range of alternatives to the proposed action, then taking anticipatory action to avoid potential threats," but its likelihood of adoption is rated as "not very likely to come to fruition."

To address the insufficiency of the options, Dennis recommends the creation of an Emerging Technologies Department, using the NNI framework with an independent governing board, which would address biotechnology, stem cell research, and cloning, in addition to nanotechnology, and add other break-through technologies as they develop. The Department would "actively anticipate and address problems" with controls to "be based upon risk assessments." It would also perform the central role in information dissemination, standard setting, data gathering, and cost-benefit analyses, with a role for the precautionary principle.

4. In the article, *Size Matters: Regulating Nanotechnology, 31 Harv. Envtl. L. Rev. 349 (2007),* Albert C. Lin identifies the general health and environmental statutes that may apply to nanotechnology as including the Toxic Substances Control Act, Clean Air Act, Clean Water Act, and Occupational Safety and Health Act, but claims that these and other laws, taken together, are quite inadequate because they would allow the introduction of many nanomaterials into commerce without further testing or approval. Lin states that the applicability of the "harm principle" to the risks posed by nanotechnology is limited but that consideration of the "precautionary principle" is appropriate.

While EPA is the most logical federal agency to take the lead, it has taken a voluntary, self-regulatory approach to the subject of nanotechnology that, the author says, is too passive in light of the risks involved. As a regulatory alternative that promotes transparency and confidence, the author proposes a new statute, to be administered by EPA that, in addition to existing tort law, would contain notification and labeling requirements for products containing embedded nanomaterials, with additional screening, monitoring, and bonding rules for products containing free nanomaterials. The distinction between free and embedded is important because "within the universe of nanomaterials,

those found in a free form, as opposed to those embedded in composite materials, pose the greatest potential for negative health and environmental effects."

The notification process would be similar to TSCA's premanufacture notice (PMN) process, define all nanomaterials as "new chemical substances," and require "the development of standard terminology and nomenclature." Labeling would require all manufacturers and distributors of products containing nanomaterials to identify their products as such, to specify the nanomaterial involved, and to provide a brief comparison with the bulk version of the material, along with available risk data accessible by website information on the label.

Screening involves "tests to exclude the use of certain materials that appear most likely to be toxic" such as *in vitro* and *in vivo* toxicity tests. A substance that passes screening requirements could be introduced into commerce, subject to monitoring and bonding requirements. For a substance that fails to pass, "the burden would shift to the manufacturer to demonstrate through more extensive research that the substance can be used in a safe manner." Monitoring rules would involve one or more studies of the risk of long-term exposure or environmental damage caused by a nanomaterial.

The unique aspect of Lin's proposal is the bonding requirement, which demands that any manufacturer or distributor of a product containing free nanomaterials to post a "dated assurance bond that would cover damages that may arise as a result of the company's operations for each year. EPA would set the value of the bond at an amount adequate to cover the most damaging scenario deemed plausible under a worst-case analysis." That analysis "would be assigned to an independent scientific advisory board." "The term of the bond would be fifteen years, or a period long enough to generate a reasonable amount of short-term and long-term toxicity information, and its value could be revised upward or downward periodically to reflect new information. The bond would be refundable in whole or part, with interest, at the end of the term if the company could demonstrate lower damages, or lower expected damages, than those estimated by EPA in setting the bond. The unrefunded portion of the bond, intended to cover expected damages that have not yet occurred, would be deposited in a trust fund." The bonding proposal is based on the author's belief that insurance, governmental or private, or a liability cap would be inadequate.

Lin states that to assess the risk of workplace exposure, "especially rigorous" screening and "regular" physical examinations for workers are needed, along with the use of "closed systems, to the extent possible." He asserts that the risks posed by nanotechnology on an international level could be realistically addressed by a convention, rather than an agreement. His proposal deals with "uncertainty through a bonding requirement that gives companies using nanotechnology an incentive to conduct health and safety research and assures the existence of funding to cover damages that may later arise. While the bonding mechanism is by no means a perfect solution, it is a superior alternative to the status quo and to the conventional approach of responding only to demonstrated harm."

5. Linda K. Breggin and Leslie Carothers, in the article, *Governing Uncertainty: The Nanotechnology Environmental, Health, and Safety Challenge, 31 Colum. J. Envtl. L. 285 (2006),* posit that it is unlikely that new laws will be written to address nanotechnology anytime soon, so it will be necessary "to use existing legal authorities and adapt current programs" to address the problems presented by nanotechnology. They suggest a "multi-pronged approach" that includes "elements of regulatory and voluntary programs under existing environmental statutes; corporate stewardship; tort liability; federal, state, and local legislation; voluntary standards; disclosure; liability insurance; and international measures." The Environmental Protection Agency would lead the federal government's effort to regulate nanotechnology, with assistance from the Food and Drug Administration (FDA), the Occupational Health and Safety Administration (OSHA), and the Consumer Product Safety Commission (CPSC). But, until the relevant statutes can be re-written, a combination of the Toxic Substances Control Act, *15 USCS § 2601* et seq., the Resource Conservation and Recovery Act, *42 USCS § 6901* et seq., the Comprehensive Environmental Response, Compensation, and Liability Act, *42 USCS § 9601* et seq., the Clean Water Act, *33 USCS § 1251* et seq., and the Clean Air Act, *42 USCS § 7401* et seq., is the most likely method of regulation.

The authors state that "non-regulatory mechanisms such as voluntary programs are likely to be an important component" of any governance scheme. In addition, options such as "economic incentives, insurance, tort liability,

pollution prevention, voluntary data collection programs, and disclosure," along with voluntary industry standards could be used. A technical cooperation agreement between the National Science Foundation and the European Commission would facilitate information exchange on an international level. And, unlike other proposals, the authors describe the public's involvement in regulating nanotechnology as "pivotal."

6. In addition, a number of seminar participants have addressed the subject. They include James Chen, *Regulatory Efforts Regarding Nanotechnology in the U.S.*, SM028 ALI-ABA 249; Don Sadowsky, *Regulation of Nanotechnology: A TSCA Perspective*, SM028 ALI-ABA 299; Douglas T. Nelson, *Keeping Pace with Innovation: Nanopesticide Research & Regulation*, SM028 ALI-ABA 323; Steven K. Russell, Esq., *The Influence of EU Environmental Law: Reach Impacts on Products*, SM065 ALI-ABA 647; and Paul E. Hagan and K. Russell LaMotte, *Key International Agreements and Initiatives Addressing Chemicals, Wastes and Heavy Metals*, SM083 ALI-ABA 81.Keeping current with comments and proposals is aided by articles such as *FDA Nanotechnology Task Force Finds Agency Expertise Lacking*, 16-9 Mealey's Emerg. Toxic Torts 17 (2007), and *Emerging Nanotechnologies Report Urges EPA to Conduct Research for Future RCRA, CERCLA Response*, 16-9 Mealey's Emerg. Toxic Torts 15 (2007).

CONCLUSION

There seems to be no disagreement that, because of our experience with such disasters as Three Mile Island and thalidomide, the regulation of nanotechnology requires careful thought and planning and that reliance on current statutory schemes is insufficient. Therefore, the discussion seems not to center on whether to regulate, but how to do so. That discussion is just beginning and will likely significantly lag behind the development and use of nanotechnology.

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Reed Rubinstein on API v. Johnson

2008 Emerging Issues 2911

Reed Rubinstein on American Petroleum Institute v. Johnson, 541 F. Supp. 2d 165 (D.D.C. 2008)

By Reed Rubinstein

September 12, 2008

SUMMARY: In this Expert Commentary, Reed Rubinstein of Greenberg Traurig LLPs Washington, D.C. office provides insight into American Petroleum Institute v. Johnson, a case in which EPAs efforts to circumvent by administrative rule two U.S. Supreme Court decisions limiting the reach of the agencys Clean Water Act powers were rebuffed by a federal district court. The case affirms that EPAs Clean Water Act jurisdiction is relatively narrow.

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: U.S. Environmental Protection Agency (EPA) efforts to circumvent by administrative rule two U.S. Supreme Court decisions n1 limiting the reach of the agencys Clean Water Act powers were rebuffed and repelled by the U.S. District Court for the District of Columbia in *American Petroleum Institute v. Johnson*. n2

American Petroleum is salient for environmental practitioners because it clearly affirms that the EPAs Clean Water Act jurisdiction is relatively narrow, and to administrative law practitioners because it provides a clear road-map for challenges to the arbitrary exercise of bureaucratic authority. The District Court rejected EPAs claim of power extending to the farthest outer boundaries of Congress Commerce Clause authority as unreasoned and unqualified, then struck down the Agencys regulatory definition of the term navigable waters and vacated the challenged rule. n3 Stating that the outer limits of Clean Water Act jurisdiction remain a difficult issue, the District Court nevertheless held that EPA was obligated to provide more than conclusory explanations for its determination of legal authority, and to affirmatively justify the obvious disconnect between its determination of jurisdiction and the decision and reasoning of the Supreme Court . n4

EPAs SPCC Rule. Section 311(j) of the Clean Water Act, in relevant part, authorized the EPA, to issue regulations establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore and offshore facilities [into navigable waters of the United States], and to contain such discharges. n5 In 1973, the EPA promulgated a rule requiring oil-producing facilities that could reasonably be expected to discharge oil into navigable waters to develop spill prevention, control and counter-measure (SPCC) plans. n6 The 1973 SPCC Rule included a regulatory definition of the statutory term navigable waters. The purpose of this definition was to clarify which waters -- and thus, which oil-producing facilities near such waters -- were subject to the EPAs regulatory authority under Section 311(j). The 1973 SPCC Rule defined navigable waters as:

The term navigable waters of the United States means navigable waters as defined in Section 502(7) of the [Clean Water Act], and includes:

(1) all navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments of the [Clean Water Act] and tributaries of such waters;

(2) interstate waters;

(3) intrastate lakes, rivers, and streams that are utilized by interstate travelers for recreational or other purposes; and

(4) intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce. n7

EPA revised the SPCC Rule in 2002 n8 to define navigable waters as follows:

Navigable waters means the waters of the United States, including the territorial seas.

(1) The term includes:

(i) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce including any such waters: (A) That are or could be used by interstate or foreign travelers for recreational or other purposes; or (B) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (C) That are or could be used for industrial purposes by industries in interstate commerce;

(iv) All impoundments of waters otherwise defined as waters of the United States under this section;

(v) Tributaries of waters identified in paragraphs (1)(i) through (iv) of this definition;

(vi) The territorial sea; and

(vii) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraph (1) of this definition. n9

Challenge to SPCC Rule and District Courts Findings. Plaintiffs American Petroleum Institute and Marathon Oil Company challenged the new rule, contending that the EPAs regulatory definition of the statutory term navigable waters extended the EPAs authority beyond the limits of both the Clean Water Act and the Commerce Clause, and that the EPA failed to offer a rational explanation for its new definition of navigable waters, consequently rendering it arbitrary and capricious under the Administrative Procedure Act (APA). In response, the EPA argued that its explanation was short, but still sufficiently clear and rational to satisfy the APAs requirement of reasoned decision-making. n10 The State of New York, the Natural Resources Defense Council, and the Sierra Club -- who all intervened as defendants to support the EPA -- argued that plaintiffs lacked standing to challenge the new regulatory definition of navigable waters, and that, even if they did have standing, their claims were not ripe.

The District Court conclusively disposed of the standing and ripeness claims. It held that plaintiffs are typically presumed to have constitutional standing when they are directly subject to a proposed rule, and that regulatory influences on a firms business decisions may confer standing when they give rise to cognizable economic injuries or even a sufficient likelihood of such injuries. n11 It further held that the plaintiffs claims were ripe because the central

legal issue -- whether the EPA violated the APA -- was presumptively reviewable, and because the plaintiffs were faced with a choice between spending money on compliance with an illegal rule or facing possible legal sanctions. n12

The District Court then proceeded to review -- and find wanting -- the EPAs explanation for the new navigable water definition. The EPAs entire explanation for expanding its power and authority was:

Navigable waters are not only waters on which a craft may be sailed. Navigable waters include all waters with a past, present or possible future use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide. Navigable waters also include intrastate waters which could affect interstate or foreign commerce. The case law supports a broad definition of navigable waters, such as the one published today, and that definition does not necessarily depend on navigability in fact. n13

The Plaintiffs argued that the EPAs definition of Clean Water Act navigable waters went far beyond the limits set by the Supreme Court in *SWANCC*, thus violating the APA because the EPA failed to address highly relevant recent [court] decisions and reached a conclusion at odds with those decisions. n14 The District Court agreed, concluding that the EPAs explanation and justification were too conclusory to permit [evaluation of agency] rationality, and that the EPA had impermissibly failed to address (let alone justify) the disconnect between its conclusion and the decision and reasoning of the Supreme Court in SWANCC. n15 Consequently, the District Court vacated the rule, and remanded the matter to the EPA for additional proceedings.

Significance of Case and Practice Pointers. *American Petroleum* has salience in two key respects for environmental and administrative law practitioners. First, the decision helpfully provides additional definition for the jurisdictional limits of the EPAs Clean Water Act authority. The District Court cites two potential jurisdictional tests -- one by Justice Scalia, defining navigable waters to mean interstate waters that are navigable in fact, relatively permanent, standing, or flowing waters connected to interstate navigable waters, and wetlands with a continuous surface connection thereto; and one slightly more generous view by Justice Kennedy, defining navigable waters to mean interstate waters that are navigable in fact and all other waters with a significant nexus thereto -- and points out that it is not entirely clear whether Justice Scalias test or Justice Kennedys test now establishes the outer limits of Clean Water Act jurisdiction. n16 However, *American Petroleum* clearly stated that the EPAs efforts to reach as far as the Commerce Clause might allow failed both of these jurisdictional tests. n17

Second, *American Petroleum* reaffirms the vitality of the rule that the EPA -- and all other federal administrative agencies -- must provide a reasoned explanation for regulatory action. The District Court acknowledged that agencies need not publish law review articles to justify the legal bases for a rule. Nevertheless, the District Court made it absolutely clear that much more than conclusory statements of law are needed to justify, support, and authorize the exercise of bureaucratic authority. n18

American Petroleum suggests that environmental practitioners representing owners or developers threatened with or subject to actions, sanctions or duties arising under the federal Clean Water Act should closely evaluate and consider if the regulator -- whether the EPA or the U.S. Army Corps of Engineers or a state environmental agency operating under delegated Clean Water Act authority -- actually has legal jurisdiction. Jurisdictional challenges can prove difficult, expensive, and risky. Nevertheless, both the Scalia and the Kennedy jurisdictional tests significantly roll back the reach of the EPAs Clean Water Act authority. n19

Administrative law practitioners should find *American Petroleum*s standing, ripeness, and APA analyses of particular value. Challenges to rulemakings have historically been complicated by the broad deference accorded to administrative agencies, particularly regarding administrative interpretations of jurisdictional statutory provisions. n20 However, the District Court decision gives teeth to the traditional requirement that agencies must support a rule with reasoned decision-making by providing some firm metrics for testing the sufficiency of an agencys determination of its jurisdictional authority, including disclosure of the cases an agency has relied upon in determining jurisdiction and an explanation of how the agency derived its support for the definitions contained in the rulemaking. n21

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n1 See *Rapanos v. United States, 547 U.S. 715 (2006); Solid Waste Agency of N. Cook County v. U.S. Army Corps. of Engrs, 531 U.S. 159 (2001)* (SWANCC).

n2 *541 F. Supp. 2d 165 (D.D.C. 2008).*

n3 *541 F. Supp. 2d at 182-183.*

n4 *541 F. Supp. 2d at 184-185.*

n5 Clean Water Act § 311(j)(1)(C), *33 U.S.C. § 1321(j)(1)(C).*

n6 See *Non-Transportation Related Onshore and Offshore Facilities, 38 Fed. Reg. 34,164* (Dec. 11, 1973).

n7 *38 Fed. Reg. at 34,165.*

n8 See *Oil Pollution Prevention & Response; Non-Transportation-Related Onshore & Offshore Facilities, 67 Fed. Reg. 47042* (July 17, 2002); 40 C.F.R. § 112.

n9 *40 C.F.R. § 112.2.*

n10 *541 F. Supp. 2d at 172.*

n11 *541 F. Supp. 2d at 176-177.* The District Court seemed to place great weight on the fact that the plaintiffs asserted that they would not incur the costs of developing SPCC plans at certain facilities but for the new definition -- that is, but for what they perceive to be an expansion of the scope of EPAs regulatory jurisdiction as a result of the new definition. Consequently, the District Court concluded that the plaintiffs injuries were fairly traceable to the proposed rule. *541 F. Supp. 2d at 176.* The District Court also noted that because the plaintiffs injury was the result of an expansion of regulatory authority through a new rule, it seems likely, as opposed to merely speculative, that [plaintiffs] injury will be redressed by a favorable decision vacating that rule. *Id.*, citing *Center For Energy & Econ. Dev. v. EPA, 398 F.3d 653, 657 (D.C. Cir. 2005)* (Where an agency rule causes the injury, the redressability requirement may be satisfied by vacating the challenged rule.).

n12 *541 F. Supp. 2d at 178* (citations omitted).

n13 *67 Fed. Reg. at 47075.*

n14 *541 F. Supp. 2d at 179.*

n15 *541 F. Supp. 2d at 184.*

n16 *541 F. Supp. 2d at 180 n.9* (citations omitted).

n17 See *Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001); United States v. Newdunn, 195 F. Supp. 2d 751* (E.D. Va.) *revd, 344 F.3d 407 (4th Cir. 2003).*

n18 *541 F. Supp. 2d at 182-183.*

n19 *541 F. Supp. 2d at 179-181.*

n20 See *Chevron USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984); Reno v. Flores, 507 U.S. 292 (1993).*

n21 *541 F. Supp. 2d at 182.*

RELATED LINKS: For an Explanation of How Cap-and-Trade Programs Work, see
- Environmental Law Practice Guide § 18B.01.

For Discussion of Federal Jurisdiction of Navigable Waters Under the Clean Water Act, Including Coverage of the SWANCC and Rapanos Cases, see
- Treatise on Environmental Law § 3.03 (specifically § 3.03[2][b], [c] & [6A]);
- Environmental Law Practice Guide § 19.03 (specifically § 19.03[3]).

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*The views and opinions expressed in this article are those of the author, and not necessarily Greenberg Traurig LLP.

LEED Standards in Green Building Laws

2008 Emerging Issues 412

LEED Standards in Green Building Laws

By J. Cullen Howe

July 7, 2008

SUMMARY: As green buildings become more prevalent, more and more states and municipalities are adopting laws and regulations that either require or recommend that new buildings incorporate the U.S. Green Building Councils Leadership in Energy and Environmental Design, commonly known as LEED. In this Emerging Issues Commentary, J. Cullen Howe of Arnold & Porter LLPs New York office describes the concept of green buildings and explains the background and development of LEED. He also reviews the different types of green building laws passed at the state and municipal level and provides numerous examples to illustrate the range of laws that have been adopted to encourage green buildings in the public and private sector. Finally, Mr. Howe recommends steps that attorneys should take when advising clients about the costs and benefits of green buildings, as well as what they should be aware of when beginning construction.

PDF LINK: Premium Emerging Issues Commentary ($)

ARTICLE: As green buildings become more prevalent, more and more states and municipalities are adopting laws and regulations that either require or recommend that new buildings incorporate the U.S. Green Building Councils Leadership in Energy and Environmental Design, commonly known as LEED. Many of these so-called green building laws require that public and/or private buildings be built to LEED standards. While relatively new, these laws are becoming more common, and it is not unreasonable to expect that in the near-future most states and municipalities will have some kind of green building law on the books.

This article will summarize the concept of green buildings and explain the background and development of LEED. It will also look at the different types of green building laws passed at the state and municipal level. Finally, the article will recommend steps that attorneys should take when advising clients about the costs and benefits of green buildings, as well as what they should be aware of when beginning construction.

Green Building Basics

Buildings have a major impact on the environment. Buildings not only use resources such as energy and raw materials, they also generate waste and potentially harmful atmospheric emissions. A recent study by the Environmental

Protection Agency (EPA) found that buildings account for 39% of total energy use, 12% of total water consumption, 68% of total electrical consumption, and 38% of greenhouse gas (GHG) emissions. n1

Green building is the practice of increasing the efficiency of buildings and their use of energy, water and materials, and reducing building impacts on human health and the environment through better siting, design, construction, operation, maintenance and removal. Green buildings are built to efficiently use land and energy, conserve water, improve indoor and outdoor air quality, conserve resources, and increase the use of recycled materials. Many green building practices are incorporated into building rating systems. One advantage of these systems is that they provider buyers, sellers and lenders an objective standard to measure the environmental impacts of new and existing buildings. The most widely-used building-rating system is the U.S. Green Building Councils (USGBC) Leadership in Energy and Environmental Design, otherwise known as LEED. n2

The LEED Standard

USGBC, formed in 1993, is a private non-profit organization based in Washington, D.C. It is the most prominent green building rating body in the United States. In 1999, the USGBC promulgated its first standard, referred to as the Leadership in Energy and Environmental Design (LEED) Standard Version 1.0. According to the USGBC, LEED is a voluntary, consensus-based national standard for developing high-performance buildings. LEED was created to accomplish the following: define the term green building by establishing a common standard of measurement; promote integrated, whole-building design practices; recognize environmental leadership in the building industry; stimulate green competition; raise consumer awareness of green building benefits; and transform the building market. It has become the most widely recognized standard for green design in the United States and is continuously modified by professionals in the green building industry.

The USGBC promulgated LEED-NC (New Construction) Version 2.1 in 2001 and Version 2.2, the most recent version, in 2004. It is expected that LEED 3.0, currently in development, will include a requirement for a carbon footprint and a significant reduction of GHGs beyond a baseline level as well as life-cycle analyses of building materials, types of energy used, etc. The reduction in carbon dioxide will be measured based on the direct and indirect carbon dioxide emitted and equivalent reductions. These include emissions related to the consumption of grid delivered electricity, on-site combustion of fossil fuels, and fugitive refrigerant emissions.

Different LEED rating systems are available for specific project types. The two most widely used rating systems are LEED-NC, which applies to both new construction and major renovations, and LEED-EB, which applies to existing buildings. Although LEED-NC is more widely used, LEED-EB has by far the most potential impact given the current building stock versus the relatively small number of new buildings built each year. Other LEED rating systems currently in use include the following: *LEED-CI:* Commercial Interiors; *LEED-CS*: Core-and-Shell projects; *LEED for Schools*; and *LEED-Homes* (as of January 2008).

How LEED Works

LEED uses a points system for specific steps taken in connection with a project in six general categories: (1) site selection; (2) water efficiency; (3) energy and atmosphere; (4) materials and resources; (5) indoor environmental air quality; and (6) innovation and design quality. Project developers must satisfy a number of prerequisites in most of the six categories and achieve a certain number of points before a building can attain LEED certification. Projects are awarded specific ratings depending on the number of points achieved. Different LEED rating systems have varied scoring systems based on a set of required prerequisites and a variety of credits in the six major categories listed above. For example, LEED-NC 2.2 has 69 possible points and buildings can qualify for four levels of certification: Certified: 2632 points; Silver: 3338 points; Gold: 3951 points; and Platinum: 5269 points. One of the primary aspects of LEED is that it allows owners and builders to choose the most cost-effective way to achieve a certain level of LEED certification.

Thus, if a particular project calls for a LEED-Silver rating (meaning that it must obtain at least 33 points), there are wide variety of ways to achieve this rating.

The points criteria under LEED-NC is a good example of how the system works:

(1) *Sustainable sites* (14 possible points): This category concerns the location of the building and the land uses associated with it. It requires the building owner to consider appropriate site selection, urban redevelopment, and brownfield development. It also encourages the use of alternative transportation to the facility, reducing site disturbance and storm water management. For example, if the buildings site is a brownfield, one point is awarded. If the site is not prime farmland in a floodplain, habitat for any threatened or endangered species, within 100 feet of any wetland, within 50 feet of a water body, or former parkland, one point is awarded. Additional points are awarded if the project encourages public transportation, fuel efficient vehicle parking, has a well-designed stormwater system, and uses paving and roofing materials that do not absorb a high amount of heat. In addition, a point is awarded for certain efforts to reduce light pollution in the form of excess nighttime exterior lighting. A prerequisite for receiving any points in this category is that a developer must prevent the loss of soil during construction, prevent soil sedimentation into storm sewers and streams, and prevent air pollution in the form of dust or particulate matter.

(2) *Water efficiency* (5 possible points): This category requires the efficient use of water in building operation. Points are awarded for water efficient landscaping -- one point is awarded if potable water consumption for irrigation is reduced by 50% and another point is awarded if no potable water is used for irrigation. Points are also awarded for innovative wastewater technologies, such as using water-conserving plumbing fixtures or non-potable water to reduce potable water use by 50%. Additional points are awarded for 20% and 30% reductions, respectively, in water use in the building.

(3) *Energy and atmosphere* (17 possible points): There are three prerequisites to achieving any points in this category. First, the buildings energy systems must be installed, calibrated and perform as designed. Second, the building and building systems must meet energy efficiency standards that surpass the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) Energy Standard 90.1-2004 by at least 14%. n3 Third, there must be no chlorofluorocarbon (CFC)-based refrigerants in the building. One to ten points are awarded on a sliding scale based on the overall energy savings as compared to a typical building. Additional points are awarded for using renewable energy either onsite or pursuant to an agreement with an energy provider, managing refrigerants properly, and measuring energy savings.

(4) *Materials and resources* (13 possible points): This category requires that collection and storage of recyclables is provided for in building design and operations. It also encourages the use of recycled materials, locally manufactured environmentally responsible materials, and certified wood. Points can be obtained for minimizing construction waste and for using recycled and locally-manufactured materials. In addition, major renovation projects are eligible for points for reusing the existing walls, floors and roof and for reusing interior non-structural elements.

(5) *Indoor environmental quality* (15 possible points): This category seeks to ensure that green buildings have optimal lighting, thermal comfort, and healthy indoor air quality for their occupants. The category requires as a prerequisite that the building meets a minimum indoor air quality (IAQ) performance standard, and, generally speaking, prohibits smoking in the building. Points are awarded for a number of indoor air quality matters, including increased ventilation, avoiding building materials that emit formaldehyde or VOCs, providing a certain number of individual lighting and temperature controls, and providing daylight and exterior views within most of the building. Credits are given for carbon dioxide monitoring; increased ventilation effectiveness; indoor air quality management during and after construction; the use of low emitting materials, coatings, paints and finishes; and allowing occupants to control the systems in their personal workspace.

(6) *Innovation and design process* (5 possible points): This category encourages project planning and design to improve the coordination and integration of the various elements in a green building. Using a LEED-accredited

professional is worth one point. Up to four additional points can be awarded for developing and implementing strategies that address sustainability issues in ways that are either not covered in the LEED guidelines or that substantially exceed LEED requirements.

After registering their project, construction teams that seek LEED certification must document that they have satisfied the requirements needed to earn the desired points. In 2005, the application process for certification was streamlined electronically via a set of active PDFs that automated the process of filing the documentation. This change made it faster and less expensive to apply for LEED certification. Project teams that are not satisfied with the rating obtained after final LEED review can appeal credits that were denied.

Green Globes

Another rating system is Green Globes from the Green Building Initiative (GBI). Green Globes is an online building assessment tool for both residential and commercial structures. Green Globes helps both with the new construction of commercial buildings and with the maintenance and improvement of existing buildings. It is questionnaire driven and is generally acknowledged to be less cumbersome and less expensive to administer than LEED, although not as well known or rigorous. In 2004, GBI acquired the rights to distribute Green Globes, which began in Canada, in the United States. Based on a 1,000 point scale, projects can earn between one and four Globes, with four indicating the highest level of sustainability within the system. n4 While the Green Globes rating system is gaining traction in the U.S., it is used far less frequently than LEED.

State Building Laws and Regulations

In the absence of comprehensive federal legislation concerning green buildings, many states have adopted their own green building laws and regulations. Some states have passed legislation requiring that public and/or private entities incorporate LEED or other green building standards into new or existing buildings, while others have adopted only aspirational goals. n5 Practitioners should note that, because most states have some type of incentives to promote green building, it is not practical to list them all here. Instead, this section lists representative examples of legislation and initiatives that illustrate the range of laws that states have adopted to encourage green buildings in the public and private sector.

On April 8, 2005, Washington Governor Christine Gregoire signed into law the nations first state-enacted green building legislation. n6 Pursuant to the law, all major public agency facilities with a floor area exceeding 5,000 square feet, including state-funded school buildings, and any remodeling over 5,000 square feet when the cost is greater than 50 percent of the assessed value, are required to meet or exceed a LEED-Silver rating. State-funded affordable housing projects are also required to adopt a system for measuring building performance. The law exempts projects for which the agency and the design team determine the standards to be not practicable and projects for various types of laboratory facilities, hospitals, pumping stations, hospitals and research facilities.

That same month, Maryland passed its own green building law. n7 Marylands law requires that state-funded building projects meet certain high-performance building standards, defined as one of the following: (1) achieving at least a LEED Silver rating; (2) achieving at least a two globe rating pursuant to GBIs Green Globes program; (3) achieving at least a comparable numeric rating according to a nationally recognized, accepted, and appropriate numeric sustainable development rating system, guideline, or standard; or (4) meeting nationally recognized, consensus-based, and accepted green building guidelines, standards, or systems approved by the state.

Nevada adopted a law in June 2005 that requires state-funded buildings to achieve either a LEED Certified rating or an equivalent standard adopted by the Director of the Office of Energy. n8 In addition, the law requires that every two years at least two state-funded buildings must achieve either a LEED Silver rating or an equivalent standard adopted by the Director of the Office of Energy.

In July 2005, then-Colorado Governor Bill Owens signed Executive Order D005-05, which adopted LEED-EB and

incorporated LEED-NC for all state buildings. n9 In May 2006, the Colorado Senate passed Joint Resolution 06-032 concerning the greening of state buildings. n10 The resolution supports use of LEED as the design and construction guideline for all private and public facilities, promotes LEED Silver certification where cost-effective over a 20-year period, and supports E.O. D005-05. Similar orders have been issued by other governors. n11

In May 2006, Connecticut passed a law which requires the adoption of regulations to adopt building construction standards that are consistent with or exceed a LEED Silver rating for new commercial construction and major renovation projects or an equivalent standard. n12 The alternative standard must at least include a two globe rating under the Green Globes program.

In May 2007, Minnesota enacted a bill entitled the Next Generation Energy Act of 2007. n13 The wide-ranging law sets a state goal of certifying 100 commercial buildings to the Green Globes or LEED standard by December 31, 2010, and mandates utilities to include in their conservation improvement plans programs that facilitate professional engineering verification to qualify a building as Green Globes-certified, Energy Star-labeled, n14 or LEED-certified.

In August 2007, the Dormitory Authority of the State of New York launched an initiative to promote the construction of energy efficient, state-owned buildings. n15 Pursuant to the initiative, all new state construction projects and major renovations managed by the Authority beginning in 2008 will be required to meet the LEED-Silver certification standard.

In January 2008, New Jersey passed a law requiring high performance green building standards for new buildings greater than 15,000 square feet constructed solely for use by a state government entity. n16 The law requires that these buildings meet either a LEED-Silver rating, a two-globe rating pursuant to Green Globes, or a comparable rating designated by the state.

Municipal Building Laws and Regulations

From 2003 to 2007, the number of U.S. cities with green building programs rose dramatically, from 22 to 92, an increase of more than 400 percent. n17 This includes more than 25 cities that have established some type of goals for new public buildings to meet some level of LEED standards. n18 Municipalities have enacted green building policies by **resolution** (Eugene and Portland, Oregon; Bowie, Maryland); **executive order** (Albuquerque, New Mexico; Salt Lake City, Utah); **legislation** (Baltimore County, Maryland); and **ordinance** (Chapel Hill, North Carolina; Cincinnati, Ohio; San Mateo County, California). In addition, many municipalities have adopted or are proposing to adopt mandatory or aspirational goals for private buildings. Like the preceding section concerning state initiatives, this section does not attempt to be comprehensive but merely gives examples of the types of laws and regulations that cities and municipalities have adopted to require or encourage green buildings in the public and private sector. Practitioners are strongly encouraged to investigate green buildings laws or ordinances that may be applicable in a particular municipality.

Atlanta, Georgia requires that construction of city facilities and buildings larger than 5,000 square feet or having a total cost of more than $2 million achieve a LEED-Silver rating. n19 Seattle, Washington requires all city-funded projects and renovations with over 5,000 square feet of occupied space to achieve a LEED-Silver rating. n20 Houston, Texas requires that all city-owned buildings over 10,000 square feet use LEED to the greatest extent practical and reasonable, with a target of LEED-Silver certification. n21 Boston, Massachusetts requires that all public and private development projects over 50,000 square feet meet the LEED-NC Certified standard. n22 In 2006, it became the first major city in the U.S. to require adherence to the LEED Certified standard as part of the private development process. n23 Montgomery County, Maryland requires that county-built or funded buildings achieve a LEED Silver rating and that private nonresidential or multifamily buildings achieve a LEED Certified rating. n24 The countys new regulations will take effect no later than September 1, 2008. Like Boston, Montgomery County requires private-sector,

nonresidential, or multi-family residential buildings of at least 10,000 square feet to achieve LEED certification or equivalent certification. n25

In 2004, Chicago adopted a set of standards known as the Chicago Standard for public buildings, which was derived from the LEED rating system. n26 The Chicago Standard addresses site considerations, water conservation, energy efficiency, smart materials (including recycled materials), and high indoor air quality. Chicago also has established an innovative program that promotes the use of rooftop gardens on top of private and public buildings to reduce energy consumption. A minimum 50% green roof and LEED certification are required for all public projects in Chicago, except community centers and schools. Community centers and schools must either have a minimum 25% green roof or LEED certification plus a minimum 10% green roof, and must also focus on indoor air quality and daylighting.

In December 2006, the Washington, D.C. City Council passed a comprehensive green building law that requires public and private buildings to meet certain green building standards. n27 The law requires that developers adhere to LEED standards. By 2008, all District-owned nonresidential buildings of 10,000 square feet or more that are new or substantially renovated must be designed to achieve 75 points on EPAs Energy Star program. By 2010, new and substantially improved private commercial buildings of 50,000 square feet or more will have to fulfill or exceed the LEED Certified rating. To ease the transition for developers, the law does not mandate specific features. Instead, credits are awarded in categories, such as site selection, energy and water efficiency and materials. A building must then collect a certain number of credits to be certified. The law also establishes an incentive program for early adopters that is paid through the Districts Green Building Fund.

In 2007, New York City enacted Local Law 86, otherwise known as the New York City Green Buildings Act. n28 The law requires that non-residential capital projects with estimated construction costs of $2 million or more (*i.e.*, projects undertaken by city agencies or projects that receive at least 50% public financing) be designed and constructed to achieve a LEED-Silver or higher rating. Schools must achieve a LEED-Certified rating. The law also requires that capital projects with an estimated construction cost of more than $12 million but less than $30 million be designed and constructed so as to reduce energy costs by a minimum of 20 percent. Projects with an estimated construction cost of greater than $30 million must be designed and constructed so as to reduce energy costs by a minimum of 25%.

In December 2007, the town of Greensburg, Kansas, which was wiped out by an F-5 tornado in May 2007, approved a resolution requiring all city building projects over 4,000 square feet to be certified LEED Platinum and achieve all 10 energy optimization points, which will result in a 42% reduction in energy consumption over standard buildings. Greensburg is the first city in the United States to approve such a stringent green building law. n29

In March 2008, San Francisco enacted an ordinance that imposes strict green-building requirements on new residential and commercial buildings, as well as structures slated for renovation. n30 New commercial buildings larger than 5,000 square feet, residential buildings taller than 75 feet, and renovated buildings bigger than 25,000 square feet must comply with LEED. The ordinance effectively requires most of the citys large buildings to meet the LEED Gold or Silver rating by 2012.

In April 2008, Dallas passed a green building law that applies to both residential and commercial construction. The law will be implemented in two phases. Phase I will be implemented in 2009 and Phase II will be implemented in 2011. For residential construction, Phase I will require homes to use 15% less energy than ASHRAE 90.1 mandates and to meet four out of six high-efficiency water reduction strategies. Phase 2 will require all homes to achieve LEED-Homes certification, the Green Built North Texas standard n31 or an approved equivalent standard, and achieve at least one point for water efficiency and four points for energy reduction. For commercial construction less than 50,000 square feet, Phase I will require them to be 15% more efficient than ASHRAE 90.1 and to use 10% less water than required by the current plumbing code. For commercial projects over 50,000 square feet, Phase I will require them to meet 85% of the points required to achieve LEED-Certified status, and must include points for water use reduction and energy efficiency. Phase II will require all commercial projects to achieve LEED-Certified status (or an equivalent standard),

and must include points for water use reduction and energy efficiency. n32

Practice Pointers

Green Certification. Contracts must be drafted so that they clearly and accurately reflect each project stakeholders role in earning the desired level of green building certification and allocate that responsibility accordingly. Thus, with respect to obtaining certification pursuant to any green building rating system, it should be clarified which party will be responsible for tracking, collecting, assembling, and submitting the supporting documentation. Contracts should also clearly define who is responsible if the project fails to achieve the desired sustainable rating and the damages that flow from such a failure. With respect to large-scale commercial and residential projects, owners should specifically address the buildings green certification goal. For example, they must decide whether their bid packages provide for the acceptability of a minimum LEED certification standard and state precisely what level must be achieved. They should also consider whether a higher than normal liquidated damages provision is appropriate given that damages for failure to achieve a specific certification level may be much higher than normal.

Accurate Survey of Existing State and Local Green Building Legislation. It is important for all parties to accurately understand what a project needs to do to comply with state and local green building legislation, as well as what grants and tax incentives are available. Many municipalities begin the greening of their administrative code with carrots, offering incentives as outlined above. Thus, practitioners should conduct a thorough survey of existing and proposed legislation in a particular jurisdiction before commencing any project.

Selection of Building and Design Professionals. Owners should select building professionals and consultants who have participated on other green projects and are familiar with sustainable design, green building rating systems, and the corresponding certification process. Designers, contractors and consultants with such experience are somewhat limited, but their ranks are growing. Due diligence by owners in order to engage a green-savvy project team is critical to executing a successful project that achieves the desired sustainable result.

Incorporating Green Elements into Construction Adds Additional Layer of Complexity. The construction process on even the most traditional construction project has the potential for complications and litigation. Green project stakeholders should obviously be mindful of this and treat the projects sustainable elements as adding an extra layer of complexity to the process. Accordingly, budgeting extra time and dollars--where possible--makes sense, and stakeholders should be even more careful when evaluating proposed schedules and budgets and negotiating the terms of their contracts. If the project is attempting to gain LEED certification, the time frame for completion of the project should recognize the length of time and inspection process associated with such certification. Contractors in charge of such projects should pursue knowledgeable subcontractors who are familiar with green construction techniques and are strongly advised to consider hiring a green building expert on large-scale project.

Return to Text

n1 U.S. Environmental Protection Agency, Buildings and the Environment: A Statistical Summary (Dec. 2004), *available at* http://www.epa.gov/greenbuilding/pubs/gbstats.pdf.

n2 Additional information about USGBC and LEED is available at http://www.usgbc.org.

n3 ASHRAE 90.1 is the most commonly used energy code for commercial and other non-residential buildings. The Standard is formally updated every three years. The last update was in 2007. The current versions of LEED reference the 2004 Standard.

n4 Additional information about Green Globes is available at http://www.thegbi.org/home.asp.

n5 A comprehensive list of states that have adopted LEED initiatives is available at http://www.usgbc.org/showfile.aspx?documentID=691.

n6 *See* Wash. Senate Bill 5509 (2005), 2005 Wa. ALS 12; see also article entitled Washington State Law Mandates Green Building, April 21, 2005, *available at* http://www.renewableenergyworld.com/rea/news/story?id=25765.

n7 *See* Md. Code Ann., State Fin. & Proc. § 3-602.

n8 *See* Nev. Rev. Stat. § 338.001.

n9 A copy of this Executive Order is available at http://www.colorado.gov/governor/eos/d00505.

n10 A copy of this Joint Resolution is available at http://www.leg.state.co.us/CLICS2006A/csl.nsf/fsbillcont3/20DE9B97833078058725715300660441?Open&file=SJR032_enr.pd

n11 *See, e.g.*, California Executive Order S-20-04; Maine Executive Order Regarding the Use of LEED Building Standards for State Buildings (Nov. 24, 2003); Massachusetts Executive Order No. 484, Leading by Example--Clean Energy and Efficient Buildings; Michigan Executive Directive No. 2005-4, Energy Efficiency in State Facilities and Operations; New Jersey Executive Order #24 (July 29, 2002); New Mexico Executive Order 2006-001, State of New Mexico Energy Efficient Green Building Standards for State Buildings; Rhode Island Executive Order 05-14, Energy and Environmental Performance Standards for New Public Buildings; Virginia Executive Order 48 (2007), Energy Efficiency in State Government; Wisconsin Executive Order #145, Relating to Conserve Wisconsin and the Creation of High Performance Green Building Standards and Energy Conservation for State Facilities and Operations (Apr. 11, 2006).

n12 *See* Conn. Gen. Stat. § 1-205(b).

n13 *See* Minn. Stat. § 123B.65 *et seq.*

n14 Energy Star is a voluntary program that rates certain products for energy efficiency. Among other things, the program rates commercial buildings for energy efficiency and provides Energy Star qualifications for new homes that meet their standards for energy efficient building design. EPA has created an on-line energy rating system for commercial buildings, referred to as Portfolio Manager, which is an interactive energy management tool that allows users to track and assess energy and water consumption across their entire portfolio of buildings and compare them with other buildings of the same type and size across the country. Portfolio Manager is available at http://www.energystar.gov/index.cfm?c=evaluate_performance.bus_portfoliomanager.

n15 Information about this initiative is available at http://www.ny.gov/governor/press/fl_0828071.html.

n16 *See* N.J. Stat. Ann. § 52:32-5.3 *et seq.*

n17 B. Rainwater, *Local Leaders in Sustainability: A Study of Green Building Programs in Our Nations Communities*, American Institute of Architects (2007), *available at* http://www.aia.org/SiteObjects/files/LLinSustain(full)_final.pdf.

n18 A listing of government LEED initiatives, which includes counties, cities and towns as well as states, is available at https://www.usgbc.org/ShowFile.aspx?DocumentID=2021.

n19 Information about Atlantas ordinance is available at http://www.atlantaga.gov/client_resources/forms/energy%20conservation/adopted%20ordinance.pdf.

n20 Building a Better City, City of Seattle Sustainable Building Program 5 Year Report, at 5, *available at* http://www.seattle.gov/dpd/static/5-year_report_LatestReleased_DPDP_009930.pdf.

n21 An announcement about Houstons ordinance is available at http://www.houstontx.gov/buildingservices/press/20040623a.html.

n22 This amendment to Bostons zoning code is available at http://www.cityofboston.gov/bra/gbtf/documents/Boston%20Zoning%20Code%20Green%20Bldg%20Amendments.pdf.

n23 Bostons announcement is available at http://www.cityofboston.gov/bra/gbtf/documents%5CCity%20of%20Boston%20Announce%20Grn%20Bldg%20Stnd%202006-

n24 Information about Montgomery Countys green building standards is available at http://www.montgomeryschoolsmd.org/departments/facilities/schools2green/pdf/MC_GreenBuildingBillFactSheet.pdf.

n25 Montgomery Countys requirements for buildings over 10,000 square feet is available at http://permittingservices.montgomerycountymd.gov/17-06.pdf.

n26 City of Chicago, The Chicago Standard 1, *available at* http://egov.cityofchicago.org/webportal/COCWebPortal/COC_ATTACH/ChicagoStandard.pdf.

n27 *See* D.C. Code § 6-1451.01 *et seq*.

n28 This legislation is available at http://www.nyc.gov/html/dob/downloads/pdf/ll_86of2005.pdf.

n29 This resolution is available at http://www.bnim.com/greensburg/Greensburg-LEED-Resolution.pdf.

n30 This ordinance is explained in more detail in San Franciscos Environmental Plan 2008, *available at* http://www.sfgov.org/site/uploadedfiles/mayor/SForwardFinal.pdf.

n31 Information about Green Built North Texas is available at http://www.greenbuiltnorthtexas.com.

n32 More information about Dallas green building law is available at http://www.dallascityhall.com/pdf/OEQ/green_building_ordinance040908.pdf.

RELATED LINKS: For complete coverage of the green building revolution as well as legislative and regulatory efforts to guide its course, see

- Green Buildings and Sustainable Development (Pamphlet)

For an article discussing the challenges of creating a lease for space within a green building, see

- Jenner & Block: Green Leasing -- The Changing Environment of Leasing

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Herson and Bass on Ebbetts Pass Forest Watch

2008 Emerging Issues 2394

Albert I. Herson and Ronald E. Bass on Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection, 2008 Cal. LEXIS 6207 (Cal. May 22, 2008)

By Albert I. Herson and Ronald E. Bass

June 18, 2008

SUMMARY: Get expert commentary on the California Supreme Court decision finding that Timber Harvest Plans for logging on private forest lands adequately addressed both cumulative impacts and the use of herbicides.

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ARTICLE: Cite as: Herson, Albert I., and Bass, Ronald E. *Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection*. LexisNexis Expert Commentary, *(Insert date you accessed the document online).*

Commentary by Albert I. Herson. The California Supreme Court has taken a number of CEQA-related cases in the last two years, and it will be interesting to see if a trend developments. In last year's Vineyard Area Citizens case *[Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal. 4th 412, 53 Cal. Rptr. 3d 821, 150 P.3d 709],* the Supreme Court was an aggressive CEQA enforcer in overturning a county EIR. In contrast, in the Ebbetts Pass Forest Watch case *[Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection, 2008 Cal. LEXIS 6207* (Cal. May 22, 2008)], the Supreme Court took a more deferential tack in upholding CDF's THP (the functional equivalent a CEQA document).

The court of appeal had rejected the THP on two narrow grounds. First, the cumulative impact analysis did not explicitly comply with a Forest Practice Rules requirement that each species have its own separate cumulative impact study area. Second, though the THP evaluated herbicide use impacts, the THP and a CDF response to comments stated incorrectly that CDF was under no legal obligation to evaluate herbicide use impacts, and that such impacts were speculative.

The California Supreme Court, refreshingly, believed that substance is more important than form, at least in this case, and upheld the THP. The THP cumulative impact analysis did effectively look at different impact areas for different wildlife species; it just not did not invoke the magic words of the Forest Practice Rules (biological assessment areas will vary with each species). And the THP did present an adequate (though generalized) analysis of the impacts of herbicide use, notwithstanding CDF's contradictory and therefore confusing claims that the analysis was not legally required and speculative.

Has the Supreme Court started a trend of interpreting CEQA's procedural requirements in a practical manner? Time will tell.

Commentary by Ronald E. Bass. Although the California Supreme Court affirmed some important CEQA principles, the Justices seem to have cut the Department of Forestry and Fire Protection (CDF) some slack when it comes to implementation of their CEQA-equivalent certified regulatory program. In reviewing both CDF's cumulative impact analysis and its herbicide use evaluation, the Supreme Court granted the agency considerable leeway in what is acceptable environmental impact analysis.

Although this decision deals specifically with CDF's Timber Harvest Plan (THP) rules under its certified regulatory program, some of the Supreme Court's pronouncements will undoubtedly be valuable beyond the narrow world of THPs. For example, CDF's rules recognize that the appropriate cumulative impact assessment areas of impact are likely to vary depending on individual species (or other resource) being evaluated. This is an important general concept in environmental impact assessment that would be applicable to all lead agencies implementing CEQA--a concept that should get wider attention as a result of this decision.

In practice, some agencies have simply adopted a single study area for cumulative impacts without regard to the nature of the resource being evaluated or the behavior of the impact. This decision clearly supports CDF's approach to evaluating cumulative impacts using scientifically relevant geographic areas, rather than artificially limited areas. As the Court points out, although CDF stated that it was using a watershed boundary for its study area, in fact, it discussed the impacts on a much broader geographic basis that corresponded to the particular ranges of the species in question.

In reaching its conclusion that CDF's analytical method was legally adequate, the Supreme Court relied on the agency's regulations, which direct that the evaluation of cumulative impacts should be guided by standards of practicality and reasonableness [14 Cal. Code Reg. § 898]. Interestingly, the Court used these principles to condone CDF's failure to comply with its own technical rules. As the Supreme Court noted, adherence to the technical rules would have required the agency to follow a detailed, seven-step process of evaluation. Nevertheless, the Court held that the cumulative impact analysis could be reasonably tailored so as not to require rigid adherence to a particular analytical process *[Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection, 2008 Cal. LEXIS 6207* *25 (Cal. May 22, 2008)].

Although the Supreme Court relied on the specific language of the CDF regulations, the twin concepts of practicality and reasonableness are well-established concepts found in the CEQA Guidelines [14 Cal. Code Reg. § 15000 et seq.] and in prior court decisions. Perhaps, the message of this decision is that if a CEQA document contains a practical and reasonable evaluation of cumulative impacts, the courts should not be so picky when it comes to the details of the analysis. Could this decision mean, for example, that a seemingly practical and reasonable analysis would trump, or at least temper, the specific requirements found in the CEQA Guidelines for evaluating past, present, and reasonably foreseeable future projects?

Since many CEQA practitioners still struggle with how to properly evaluate cumulative impacts, if this decision stands for allowing greater flexibility, it will certainly receive accolades from some corners of the CEQA world.

With regard to the herbicide issue, in upholding CDF's approach the Court affirmed the distinction between when an impact is reasonably foreseeable versus speculative--the key factor being timing. Based on this distinction, the Court held that CDF's analysis was adequate even though it only evaluated herbicide use at a very general level and did not include a more detailed, site specific analysis of impact and mitigation measures *[Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection, 2008 Cal. LEXIS 6207* *39 (Cal. May 22, 2008)].

However, the Court re-affirmed the principles that neither the technical analysis conducted when pesticides are originally registered, nor mere use in accordance with pesticide labeling, are substitutes for project-specific analysis as a part of a timber harvest plan. Fortunately for CDF, the Court agreed that they had actually conducted some, albeit not

much, additional analysis for the particular timber sales in question. Although the Court's reaffirmation of CEQA principles is solid, as with the cumulative impact analysis, however, the Supreme Court appeared to have bent over backwards to come down in favor of CDF.

After years of losing cases arising under its THP Certified Regulatory Program, CDF will certainly rejoice in light of this decision.

Cross References

For coverage of the facts, procedures, and holdings in *Ebbetts Pass Forest Watch*, *see* the July 2008 issue of California Environmental Law Reporter (Matthew Bender).

For detailed discussion of the California Forest Practice Act and the states Forest Practice Rules and Timber Harvest Plans, *see* Manaster & Selmi, California Environmental Law & Land Use Practice, Ch. 80, *Forestry Development,* §§ 80.1080.13 (Matthew Bender).

For discussion of cumulative impact analysis under the Forest Practice Act and the California Environmental Quality Act, *see* Manaster & Selmi, California Environmental Law & Land Use Practice, Ch. 80, *Forestry Development,* § 80.13[9][c] (Matthew Bender).

The applicability of cumulative impact analysis to agencies with certified regulatory programs is discussed in Manaster & Selmi, California Environmental Law & Land Use Practice, Ch. 21, *Preliminary Review, Exemptions, and Negative Declarations,* § 21.07[7] (Matthew Bender).

For general coverage of cumulative impacts under CEQA, *see* Manaster & Selmi, California Environmental Law & Land Use Practice, Ch. 22, *Environmental Impact Reports,* § 22.04[6][b] (Matthew Bender).

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particular situation, you should obtain the services of a qualified attorney licensed to practice law in your state.

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Bass and Herson on In re Bay Delta

2008 Emerging Issues 2395

Ronald E. Bass and Albert I. Herson on In re Bay Delta Programmatic Environmental Impact Report Coordinated Proceedings, 2008 Cal. LEXIS 6737 (Cal. June 5, 2008)

By Ronald E. Bass and Albert I. Herson

June 18, 2008

SUMMARY: Get expert commentary on the California Supreme Court decision finding that the final Programmatic Environmental Impact Statement/Environmental Impact Report for the CALFED Program to address water quality issues in the Sacramento-San Joaquin Delta complied with the requirements of the California Environmental Quality Act. These commentaries first appeared in the July 2008 issue of CALIFORNIA ENVIRONMENTAL LAW REPORTER (Matthew Bender)

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Commentary by Ronald E. Bass. Despite the complex fact situation underlying the CALFED Bay-Delta Program, this decision actually deals with two relatively straight-forward and well-established CEQA principles: alternatives and tiering. (NOTE: Although the document was a joint EIS/EIR, the litigation and the California Supreme Courts decision only addressed the CEQA issues.)

Alternatives. Under the CEQA Guidelines [14 Cal. Code Reg. § 15000 et seq.], three factors form the basis of selecting an appropriate range of alternatives to include in an EIR:

. The projects objectives;

. The need to avoid or reduce significant impacts; and

. Feasibility.

Simply stated, for a project to be included in an EIR, it must meet the objectives, avoid one or more of the significant impacts, and be feasible as that term is defined in CEQA. An EIR need not include an alternative that does not satisfy these three screening criteria.

Against this well-established regulatory framework, the California Supreme Court held that the CALFED Progam EIR was adequate even though it excluded a reduced-export alternative from detailed evaluation. The Court found that

the CALFED agencies properly eliminated this alternative because it would not achieve the four fundamental objectives of the CALFED program: ecosystem quality, water supply, water quality, and vulnerability of delta functions. Nor, according to the Court, would it achieve the underlying purposes of the program: To develop and implement a long-term, comprehensive plan that will restore ecological health and improve water management for beneficial uses of the Bay-Delta system and to reduce the conflicts and provide a solution that competing interests could support .

The key principle derived from the Courts alternatives holding is that an EIR need not analyze a project alternative that would preclude meeting one or more objectives when the success of the agencys program depends on meeting all its objectives. Thus, the decision seems to go beyond Section 15126.6(a) of the CEQA Guidelines [14 Cal. Code Reg. § 15126.6(a)], which provides that an EIR need only examine in detail alternatives that could feasibly attain most of the basics objectives of the project.

In view of this holding, Lead Agencies should be very careful about which alternatives they decide to include in an EIR and which they decide to eliminate. Importantly, agencies should provide detailed explanations of their screening criteria and discussions of how those criteria apply to the possible alternatives. As this case illustrates, an agencys range of alternatives is far more likely to be on firm legal ground if there is a clear link to the projects objectives.

Tiering. In dealing with the tiering issue, the Court first reviewed the fundamental rules regarding program EIRs and tiering. As the Court noted, Section 15168(a) of the CEQA guidelines [14 Cal. Code Reg. § 15168(a)] allows an agency to prepare a program EIR on a series of actions that can be characterized as one large project. That section further explains that the advantage of preparing a program EIR is that the agency can consider broad policy alternatives and program wide mitigation measures at an early time then the agency has great flexibility to deal with basic problems of cumulative impacts. A program EIR is distinct from a project EIR in which impacts are typically evaluated on a detailed, site-specific basis. The CALFED Bay-Delta Program is a classic example of the type of activity for which a program EIR is appropriate.

As the California Supreme Court also pointed out, a program EIR typically forms the foundation for tiering as provided in Section 15152 of the CEQA Guidelines [14 Cal. Code Reg. § 15152]. Tiering allows the agency to prepare a broad EIR (e.g., first-tier EIR) at a more general level of analysis and larger geographic scope, and then to prepare more detailed, site-specific environmental documents (e.g., second-tier EIRs or Negative Declarations) for individual activities occurring in the future under the program. When second-tier documents are prepared, agencies can incorporate by reference certain information from the first-tier document, thereby saving time, effort, and the unnecessary duplication of analysis.

When tiering is used, the agency must, nevertheless include currently foreseeable impacts in the first-tier document. However, site-specific details that are not currently foreseeable can be deferred to later tiers.

The entire CALFED program was premised on the use of tiering, where the CALFED program EIR evaluated the conceptual impacts, alternatives, and mitigation measures of the overall program, but deferred site-specific details to future-tier documents. Specifically, in the first-tier document the CALFED agencies described the future sources of water very conceptually to include: purchases from willing sellers, water conservation by agricultural and urban users, and new or expanded surface or underground storage. However, the program EIR did not elaborate on the specific sources, or their impacts. Nevertheless, the first-tier EIR specifically explained that such analysis would be included in future-tier documents.

The EIR treated the Environmental Water Account in a similar manner, evaluating the components and their impacts at a very general level, and deferring detailed impact evaluation to the future.

In reviewing the CALFED Program EIR, the California Supreme Court affirmed the agencies approach to tiering and deferral of site-specific details to the future documents. In doing so, the Court pointed out that the CALFED Program was to be implemented over a 30-year period and that the level of detail in the document was consistent with

its first-tier, programmatic nature.

Although tiering is a well-estabished approach to CEQA compliance, recent court decisions (including the appellate court decision in this case) have cast a shadow of uncertainty over its use. Thus, the Supreme Courts decision should go a long way toward solidifying the use of tiering as a fundamental approach to CEQA, especially for complex, long-range programs, covering broad geographic areas.

Commentary by Al Herson. This unanimous California Supreme Court decision is very important for effective implementation of the CALFED program. While CALFED Programmatic EIS/EIR lawsuits were working their way through the courts over almost eight years, the program continued to be implemented by federal, state, and local agencies. CEQA documents being prepared for these second-tier implementing actions are using the Programmatic EIS/EIR as a first tier document or at least a reference document. If the Programmatic EIS/EIR had been overturned, a large number of second-tier CEQA documents prepared for CALFED implementing actions would have been legally vulnerable, and program implementation could have been significantly slowed.

The Supreme Courts holdings on alternatives and tiering are good news for Lead Agencies seeking to integrate CEQA with their planning processes. In clear and unambiguous language, the Court held that an EIR does not need to evaluate project alternatives that do not achieve basic project objectives; neither does an EIR need to evaluate alternatives that improve pre-existing conditions but do not mitigate project-specific significant impacts. On tiering, the Court reaffirmed that first-tier EIRs can provide generalized impact analysis, with project-specific analysis deferred to second tier CEQA documents as specific projects are proposed.

The latter holding applies even when information on second-tier projects (in this case, Environmental Water Account projects) becomes publicly available before the first-tier EIR is certified. However, to avoid public confusion, it is better practice for Lead Agencies designing a tiering program to avoid public work on second-tier projects until a Program EIR is certified. Alternatively, if planning for a second-tier project is far enough along, a combined Program/Project EIR can be prepared.

Cross References

For coverage of the facts, procedures, and holdings in *In re Bay-Delta*, *see* the July 2008 issue of California Environmental Law Reporter (Matthew Bender).

See also Manaster and Selmi, California Environmental Law & Land Use Practice, Ch. 22, *Environmental Impact Reports,* §§ 22.02[1][b] (EIRs--Tiering), 22.02[3] (Program EIRs), 22.04[8] (Contents of EIRs--Project Alternatives).

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Green Buildings and Sustainable Development

2008 Emerging Issues 282

CURRENT CRITICAL ISSUES IN ENVIRONMENTAL LAW: Green Buildings and Sustainable Development

By Mark J. Bennett, J. Cullen Howe and James L. Newman

May 16, 2008

SUMMARY: The era of green building has arrived! Buildings have a major impact on the environment and use large amounts of energy and other resources. A recent study found that buildings in the United States account for 39% of total energy use, 12% of total water consumption, 68% of total electricity consumption, and 38% of greenhouse gas (GHG) emissions. Green buildings, on the other hand, are built to efficiently use land and energy, conserve water, improve indoor and outdoor air quality, conserve resources, and increase the use of recycled materials, all of which lead to reduced operating costs that enhance the overall value of such buildings.In this new work written by Mark J. Bennett of Miller Canfield, J. Cullen Howe of Arnold & Porter LLP, and James L. Newman of Newman Consulting Group, LLC, youll get an overview of some of the leading drivers behind the green building revolution as well as legislative and regulatory efforts to guide its course. -- Find out what makes buildings green; -- Review examples of green building practices; -- Learn about the pros and cons of the Leadership in Energy and Environmental Design (LEED) rating system; -- Familiarize yourself with the federal, state and local initiatives applicable to green building; and -- Get practical advice on avoiding risks before entering into green building projects. Along with discussion of the legal issues, youll also get handy reference materials including a bibliography of relevant books and articles and a directory of useful websites such as those of the United States Green Building Council and the Energy Star Program.

ARTICLE: § 1.01 Introduction

[1] What Makes Buildings Green?

Green building, also referred to as high performance building and sustainable architecture, is the practice of increasing the efficiency of buildings and their use of energy, water and materials, and reducing building impacts on human health and the environment through better siting, design, construction, operation, maintenance and removal. Green buildings are built to efficiently use land and energy, conserve water, improve indoor and outdoor air quality, conserve resources, and increase the use of recycled materials. The increased costs of initial construction, if any, are generally recouped through reduced operational costs over the life of the building. The recent trend of rapidly escalating energy costs has increasingly made green building economically feasible through shorter payback periods associated with necessary capital investment premiums. Against the backdrop of continually evolving international climate change policy and regulation, green buildings will likely become broadly entrenched and commonplace in the real estate

industry in the very near term. When indirect costs such as those associated with carbon emissions related to a buildings energy consumption are incorporated, the economic payback becomes even more compelling.

Although the term green building is constantly evolving, green buildings typically incorporate the following six principles: (1) the optimization of site potential; (2) the optimization of energy use; (3) the protection and conservation of water; (4) the use of environmentally preferable products to reduce air pollution; (5) the enhancement of indoor air quality; and (6) the optimization of operational and maintenance practices.

[2] Environmental Impact of Buildings

Buildings have a major impact on the environment. Buildings not only use resources such as energy and raw materials, they also generate waste and potentially harmful atmospheric emissions. The statistics are compelling. The United Nations Environment Programme recently reported that 3040% of all primary energy is used in buildings worldwide. n1 According to a report by the U.S. Department of Energy (DOE), in 2005 (the most recent year that data is available), buildings in the United States used 72% of all electricity generated and accounted for 80% of all electricity expenditures. n2 This report also estimated that in 2005 buildings in the U.S. emitted 630 million metric tons of greenhouse gas (GHG) emissions, approximately equal to the combined emissions of the United Kingdom, France and Japan. n3 A 2004 study by the Environmental Protection Agency (EPA) found that buildings account for 39% of total energy use, 12% of total water consumption, 68% of total electrical consumption, and 38% of greenhouse gas (GHG) emissions. n4 Combined, buildings in the United States use more energy and emit more GHGs than the U.S. transportation sector. In fact, U.S. buildings by themselves emit more GHGs than any other country in the world except China. n5 Sixty percent of the nations electrical production is utilized to operate commercial buildings, including those used for education, mercantile, office, storage, and warehouse purposes. n6

In addition to buildings energy and resource use, other building-related impacts include the following:

. *Indoor air pollutants*: Indoor levels of pollution may be two to five times higher, and occasionally more than 100 times higher, than outdoor air pollution levels. n7

. *Lead-based paint*: n8 EPA estimates that 64 million homes have lead-based paint somewhere in their premises. Twelve million of these homes are occupied by families with children under the age of 12.

. *Construction and demolition waste*: Building-related construction and demolition (C & D) debris totals approximately 136 million tons a year, accounting for nearly 60 percent of total non-industrial waste generation in the U.S. (1996 figures). n9

[3] Benefits of Green Buildings

There are numerous environmental, social, and economic benefits to green buildings. The environmental benefits of green buildings are many. First, such buildings enhance and protect biodiversity and ecosystems because they use fewer resources than conventional buildings. Second, green buildings typically incorporate clean, renewable forms of energy and use less energy overall, thus reducing GHG emissions compared with normal buildings. n10 Third, these buildings reduce waste streams and conserve natural resources**.**

Green buildings also have a number of social benefits. They enhance occupant comfort and health. They heighten aesthetic qualities of the neighborhoods in which they are located. They also minimize strain on local infrastructure and improve the overall quality of life for individuals who use them and live near them.

Perhaps most important for building owners and builders, green buildings have a number of important economic benefits. First and foremost, green buildings have reduced operating costs, which can lead to a better return on investment and overall building value. While green buildings may cost somewhat more up front, a fact that is becoming less true as green buildings become more commonplace, they recoup this cost through lower operating costs over their lives. n11 These lifecycle savings are the result of lower electricity, heating, cooling, water, and waste disposal costs. This savings can be as much as 10 times the initial investment over the 20-year life span of a building. n12 Significant economic benefits are also gained through lower operations and maintenance costs and health benefits like increased productivity and reduced absenteeism due to illness because of better indoor air quality, n13 as well as positive impacts on employee recruiting as sustainability becomes increasingly important to potential employees, particularly younger ones just entering the workforce. Green buildings also create, expand and shape markets for green services. This has led to competition and innovation amongst green building supply companies which has resulted in lower costs, shorter pay-back periods, and subsequently higher demand for green buildings. In addition, as commercial and residential tenants become more familiar with green buildings, building owners are increasingly being required to supply green space to meet their customers needs.

§ 1.02 Green Building Practices

Green building brings together a wide array of practices and techniques to reduce the impacts of buildings on the environment. The basic philosophy of green architecture and sustainable design is to design a building that is in harmony with the natural features and resources surrounding the site. Energy efficiency over the entire life cycle of a building is the most important single goal of green architecture. Life cycle analysis includes assessing the environmental impacts from inputs and outputs related to raw materials acquisition, manufacturing, distribution and transport, use, reuse and maintenance, recycling and waste management.

Architects and engineers use many different techniques to reduce the energy needs of buildings and increase their ability to capture or generate their own energy. Green architecture reduces waste of energy, water and materials, both during the construction phase by reducing the amount of material going to landfills, as well as when the building is occupied by reducing the amount of waste generated by providing onsite solutions such as recycling containers, and by using waste haulers that recycle.

Listed below are examples of common green building practices:

Siting:

. A building site is selected to take advantage of mass transit and/or placed within a master plan of a community.

. Brownfield sites are cleaned up and reused.

. Existing landscaping and natural features of the site are retained.

. Plants and other vegetation are selected that have low water, fertilization and pesticide needs and generate minimum plant trimmings. Compost and mulches are used to reduce the need for irrigation.

. Recycled content building and paving materials are used.

. The landscape is designed to detain or retain water so that the stress on the municipal stormwater system is reduced.

. Roof and non-roof surfaces are designed to minimize the heat island effect caused by heat-absorbing surfaces that can cause urban areas to be 610 degrees F warmer than suburban areas.

. Night sky light pollution is reduced.

Energy Efficiency:

. Natural lighting is used wherever possible to minimize the need for electric lighting.

. High-efficiency lighting systems are installed with advanced lighting controls, including motion and/or photo-sensors tied to electronically dimmable lighting controls.

. Task lighting is used to reduce general overhead light levels.

. Properly-sized and energy-efficient heating/cooling systems are used in conjunction with a thermally efficient building shell.

. Light colors are used for roofing and wall finish materials; high R-value wall and ceiling insulation is installed; and minimal glass is used on east and west exposures.

. Electric loads from lighting, equipment, and appliances are minimized.

. Alternative energy sources such as photovoltaics and fuel cells are used in new products and applications.

. Computer modeling is used to optimize the design of lighting, electrical, and mechanical systems and the building shell.

Materials Efficiency:

. Sustainable construction materials and products are selected by evaluating characteristics such as reused and recycled content, zero or low off-gassing of harmful air emissions, zero or low toxicity, sustainably harvested materials, high recyclability, durability, longevity, and local production.

. Dimensional planning and other material efficiency strategies are used to reduce the amount of building materials needed and to reduce construction costs.

. Construction and demolition materials are reused and recycled, such as using inert demolition materials as base courses for parking lots and roadways.

. Plans are developed for managing materials through deconstruction, demolition, and construction.

. Buildings are designed to provide adequate space to facilitate recycling collection and to incorporate a solid waste management program that prevents waste generation.

Water Efficiency:

. Dual plumbing is designed to use recycled water for toilet flushing or a gray water system that recovers rainwater or other nonpotable water for site irrigation.

. Wastewater is minimized by using ultra low-flush toilets, low-flow showerheads, and other water conserving fixtures.

. Recirculating systems are used for centralized hot water distribution.

. Point-of-use hot water heating systems are installed for more distant locations.

. A water budget approach is implemented that schedules irrigation at certain times of the day. State-of-the-art

irrigation control systems are used that not only measure the amount of moisture in the various irrigation zones, but also check the weather reports to ascertain if rain is in the forecast so as not to waste water by watering before a rainstorm.

. Micro-irrigation is used to supply water in nonturf areas.

Occupant Health and Safety:

. Construction materials and interior finish products are chosen with zero or low volatile organic compound (VOC) emissions to improve indoor air quality.

. Building materials and cleaning/maintenance products with VOCs and formaldehyde are minimized and eliminated whenever possible.

. Building design ensures adequate ventilation and a high-efficiency, in-duct filtration system.

. Indoor microbial contamination is minimized through selection of materials resistant to microbial growth.

. Effective drainage is provided from the roof and surrounding landscape.

. Adequate ventilation is installed in bathrooms.

. Air-conditioning coils are drained properly, drain pans are cleaned regularly, and filters are inspected regularly and cleaned or changed as required.

§ 1.03 Green Rating Systems

Many of these green building practices are incorporated into building rating systems. The most widely-used building-rating system is the United States Green Building Councils (USGBC) Leadership in Energy and Environmental Design, otherwise known as LEED. USGBC developed LEED in 1998. LEED is a green building--rating system that addresses six major areas: sustainable sites, water efficiency, energy and atmosphere, materials and resources, indoor environmental quality, and innovation and design process. LEED for New Construction, referred to as LEED-NC, has four progressive levels of certification: Certified, Silver, Gold, and Platinum. Since its inception, LEED has grown to encompass over 14,000 projects in 50 states and 30 countries covering 3.2 billion square feet of development area. n14 Registration is the first step toward certification. The third-party certification process has made the LEED system an attractive mechanism for state and local governments to measure the energy and environmental performance of new buildings. LEED is discussed in more detail in § 1.04 below.

Another rating system is Green Globes from the Green Building Initiative (GBI). Green Globes is an online building assessment tool for both residential and commercial structures. Green Globes helps both with the new construction of commercial buildings and with the maintenance and improvement of existing buildings. It is questionnaire driven and is generally acknowledged to be less cumbersome and less expensive to administer than LEED, although not as well known or rigorous. In 2004, GBI acquired the rights to distribute Green Globes, which emanated in Canada, in the United States. Based on a 1,000 point scale, projects can earn between one and four Globes, with four indicating the highest level of sustainability within the system. n15 With its Canadian roots, Green Globes appears well established in that country and its ability to gain a foothold in the United States remains to be seen given the increasing dominance of LEED.

In addition, the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE), in collaboration with USGBC and the Illuminating Engineers Society of America (IESNA), is currently developing a standard for the design of high-performance green buildings, referred to as Proposed Standard 189. n16 This standard provides minimum criteria that apply to new buildings and major renovation projects n17 and, like LEED, addresses

sustainable sites, water use efficiency, energy efficiency, materials and resources, and indoor environmental quality. However, it also provides minimum criteria for a buildings GHG emissions. The standard will be written in code language and will contain a series of mandatory provisions applicable to all projects as well as additional prescriptive and performance options for compliance. It is expected that forward-thinking jurisdictions may add it to their building codes either for all new buildings or only for new buildings which have some jurisdictional participation, such as public financing. It is expected that the first version of this standard will be released in late 2008. n18

Other regional initiatives such as the UK-based BRE Environmental Assessment Method (BREEAM) should be considered for transactions in their respective locales. n19 Further, as rating systems begin to take hold, they provider buyers, sellers and lenders an objective standard to measure the environmental impacts of new and existing buildings.

§ 1.04 Leadership in Energy and Environmental Design (LEED)

[1] Background and Development of LEED

The United States Green Building Council (USGBC), a private non-profit organization based in Washington, D.C., was formed in 1993. The stated goal of the USGBC is to promote and standardize green building methods as well as to raise the bar for these methods by continually adopting more rigorous green building standards.

In 1999, the USGBC promulgated its first standard, referred to as the Leadership in Energy and Environmental Design (LEED) Standard Version 1.0. n20 According to the USGBC, LEED is a voluntary, consensus-based national standard for developing high-performance buildings. LEED was created to accomplish the following: define the term green building by establishing a common standard of measurement; promote integrated, whole-building design practices; recognize environmental leadership in the building industry; stimulate green competition; raise consumer awareness of green building benefits; and transform the building market. It has become the most widely recognized standard for green design in the United States and is continuously modified by professionals in the green building industry.

The USGBC promulgated LEED-NC (New Construction) Version 2.1 in 2001 and Version 2.2, the most recent version, in 2004. It is expected that LEED 3.0, currently in development, will include a requirement for a carbon footprint and a significant reduction of GHGs beyond a baseline level as well as life-cycle analyses of building materials, types of energy used, etc. The reduction in carbon dioxide will be measured based on the direct and indirect carbon dioxide emitted and equivalent reductions. These include emissions related to the consumption of grid delivered electricity, on-site combustion of fossil fuels, and fugitive refrigerant emissions.

[2] LEED Rating Systems

Different LEED rating systems are available for specific project types. The two most widely used rating systems are LEED-NC, which applies to both new construction and major renovations, and LEED-EB, which applies to existing buildings seeking LEED certification. Although LEED-NC is more widely used, n21 LEED-EB has by far the most potential impact given the current building stock versus the relatively small number of new buildings built each year. n22

Other LEED rating systems currently in use include the following:

. *LEED-CI:* Commercial Interiors;

. *LEED-CS:* Core-and-Shell projects;

. *LEED-Homes* (as of January 2008).

LEED rating systems currently in development include the following:

. *LEED-ND:* Neighborhood Development;

. *LEED for Schools*;

. *LEED for Retail*;

. *LEED for Healthcare.*

[3] LEED Certification

LEED uses a points system for specific steps taken in connection with a project in six general categories:

(1) site selection;

(2) water efficiency;

(3) energy and atmosphere;

(4) materials and resources;

(5) indoor environmental air quality; and

(6) innovation and design quality.

At the end of construction or renovation, a project must submit verification that the particular design elements were actually implemented to receive certification. In addition, project developers must satisfy a number of prerequisites in some of the six categories and achieve a certain number of points before a building can attain LEED certification. Projects are awarded specific ratings depending on the number of points achieved. Different LEED rating systems have varied scoring systems based on a set of required prerequisites and a variety of credits in the six major categories listed above. For example, LEED-NC 2.2 has 69 possible points and buildings can qualify for four levels of certification:

. *Certified:* 26-32 points

. *Silver:* 33-38 points

. *Gold:* 39-51 points

. *Platinum:* 52-69 points

The points criteria under LEED-NC is a good example of how the system works and is explained below:

(1) *Sustainable sites* (14 possible points): This category concerns the location of the building and the land uses associated with it. It requires the building owner to consider appropriate site selection, urban redevelopment, and brownfield development. It also encourages the use of alternative transportation to the facility, reducing site disturbance, and storm water management.

For example, if the buildings site is a brownfield, one point is awarded. If the site is not prime farmland in a floodplain, habitat for any threatened or endangered species, within 100 feet of any wetland, within 50 feet of a water

body, or former parkland, one point is awarded. Additional points are awarded if the project encourages public transportation, fuel efficient vehicle parking, has a well-designed stormwater system, and uses paving and roofing materials that do not absorb a high amount of heat. In addition, a point is awarded for certain efforts to reduce light pollution in the form of excess nighttime exterior lighting.

A prerequisite for receiving any points in this category is that a developer must prevent the loss of soil during construction, prevent soil sedimentation into storm sewers and streams, and prevent air pollution in the form of dust or particulate matter.

(2) *Water efficiency* (5 possible points): This category requires the efficient use of water in building operation. Points are awarded for water efficient landscaping -- one point is awarded if potable water consumption for irrigation is reduced by 50% and another point is awarded if no potable water is used for irrigation. Points are also awarded for innovative wastewater technologies, such as using water-conserving plumbing fixtures or non-potable water to reduce potable water use by 50%. Additional points are awarded for 20% and 30% reductions, respectively, in water use in the building.

(3) *Energy and atmosphere* (17 possible points): There are three prerequisites to achieving any points in this category. First, the buildings energy systems must be installed, calibrated and perform as designed. Second, the building and building systems must meet minimal energy efficiency standards. Third, there must be no chlorofluoro-carbon (CFC)-based refrigerants in the building.

One to ten points are awarded on a sliding scale based on the overall energy savings as compared to a typical building. Additional points are awarded for using renewable energy either onsite or pursuant to an agreement with an energy provider, managing refrigerants properly, and measuring energy savings.

(4) *Materials and resources* (13 possible points): This category requires that collection and storage of recyclables is provided for in building design and operations. It also encourages the use of recycled materials, locally manufactured environmentally responsible materials, and certified wood.

Points can be obtained for minimizing construction waste and for using recycled and locally-manufactured materials. In addition, major renovation projects are eligible for points for reusing the existing walls, floors and roof, and for reusing interior non-structural elements.

(5) *Indoor environmental quality* (15 possible points): This category seeks to ensure that green buildings have optimal lighting, thermal comfort and healthy indoor air quality for their occupants. The category requires as a prerequisite that the building meets a minimum indoor air quality (IAQ) performance standard, and, generally speaking, prohibits smoking in the building.

Points are awarded for a number of indoor air quality matters, including increased ventilation, avoiding building materials that emit formaldehyde or VOCs, providing a certain number of individual lighting and temperature controls, and providing daylight and exterior views within most of the building. Credits are given for carbon dioxide monitoring, increased ventilation effectiveness, indoor air quality management during and after construction, the use of low emitting materials, coatings, paints and finishes, and allowing occupants to control the systems in their personal workspace.

(6) *Innovation and design process* (5 possible points): This category encourages project planning and design to improve the coordination and integration of the various elements in a green building. Using a LEED-accredited professional is worth one point. Up to four additional points can be awarded for developing and implementing strategies that address sustainability issues in ways that are either not covered in the LEED guidelines, or that substantially exceed LEED requirements.

LEED certification is obtained after submitting an application documenting compliance with the requirements of the rating system. Recently, the application process for new construction certification has been streamlined

electronically via a set of active PDFs that automates the process of filing the documentation. This change has made it faster and less expensive to apply for LEED certification.

[4] Criticisms of LEED

There have been several criticisms of LEED. One such criticism is the amount of money and paperwork that is required to register a project, complete the many templates and narratives required for the various points, and conduct a LEED rating audit at the end of construction. In addition, it is impossible to know precisely how many points will be obtained until construction is completed. The USGBC has tried to remedy this problem somewhat in LEED-NC 2.2 by allowing developers to submit to it the design portion of the LEED certification application to it prior to construction. Although actual credits are not awarded at this stage, a project developer is notified of the likelihood that portions of the project will achieve a LEED credit if the construction activity is consistent with the design phase plan.

Another criticism is that all environmental improvements under LEED are assigned one value, even though some improvements cost much more and have far greater environmental benefits than others. n23 Critics note that the emphasis on procedure and points sometimes ignores actual environmental benefits. n24 For example, a development could conceivably get one point for installing an energy-efficient HVAC system costing millions of dollars and one point for installing a bicycle rack costing several hundred dollars. A future version of LEED may revise the one improvement-one vote scoring system by using weighted scoring or something similar.

A third criticism of LEED is that, while the rating system is sensitive to local environmental conditions, its checklist system does not vary enough to take into account local environmental conditions. For example, a building in Maine receives the same credit as a building in Arizona for water conservation, even though water conservation is more important in the latter case. It is likely that this will be remedied in LEED 3.0.

A fourth criticism of LEED has been that the USGBC takes too long to certify buildings, thus creating a backup of applications. n25 This has been somewhat remedied by the use of internet-based submittals rather than paper-based submittals. However, backups still occur given the increase in building owners seeking LEED certification.

A fifth criticism of LEED, with respect to energy efficiency, has been that a building could be LEED certified even though it used as much or more energy than another building of the same type and size that was not LEED certified. USGBC remedied this on all projects registered after June 26, 2007, by requiring that all LEED certified projects must get a minimum of 2 energy points in the Energy and Atmosphere section of the credits. This meant that LEED-NC required bettering the American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE) Energy Standard 90.1-2004 n26 by 14%, and LEED-EB required bettering the standard by 7%. ASHRAE 90.1 is the most commonly used energy code for commercial and other non-residential buildings.

[5] Transactional LEED Considerations

[a] Introduction

As LEED certification has become increasingly attractive to stakeholders in real estate transactions, practitioners should be cognizant of the considerations that should be addressed in translating concepts and goals originating in a Letter of Intent, which often contains vague references such as a LEED building will be delivered, to actual legal

documents governing a transaction. These considerations, which are discussed below, are: (1) determining which LEED rating system applies; (2) determining which LEED version applies; (3) determining the rating goal within the particular LEED rating system; and (4) determining the extent of long-term compliance with the rating system.

[b] First Consideration--Which LEED Rating System Applies?

Many projects have the capability of incorporating more than one LEED rating system (such as LEED-EB and LEED-CI) which potentially require additional time and investment in both the design and construction process. However, incorporation of multiple rating systems can enhance the value of the overall project from the end-user and lender perspective. Thus, the first consideration in the real estate transaction is determining which rating systems are applicable. To definitively answer such a question, the parties to the transaction--most likely the architect and the owner and possibly the lender--will have to commit time and potentially dollars to determining the cost-benefit scenarios applicable to the various combinations of rating systems which can be applied.

[c] Second Consideration--Which Version of LEED Applies?

As each version of LEED is continuously evolving by way of formal releases from USGBC, the second consideration is determining which version of the selected rating system(s) applies. With a new real estate development, the design through construction phase can span 2-3 years or more, a period during which the selected rating system will likely have evolved through one or more officially updated versions. As the building owner or tenant wants a *building on delivery* that is most current and competitive in the green building marketplace, the primary parties in the transaction including the developer, architect, lender and tenant/owner (the Parties) need to agree on the point in time when the then current version of the selected rating system will apply and which party or parties will assume the risk and cost for assuring compliance with the agreed upon version.

Alternatively, the Parties could agree on a specific version (*e.g.*, LEED-NC 2.2) that has been released at the time of contracting leaving to a future date renegotiation of possible design and/or construction modifications reflecting subsequently released rating systems. Further complicating this issue is that drafts of soon-to-be released rating system updates are often available to the public for comment which, although not yet official, could provide the Parties with knowledge of potentially significant changes that may need to be incorporated at the time of contracting even though they are not part of the rating system officially in place at that time. Changes that have been made to a particular version of the standard being used as of the date of registration of the project with USGBC are a part of the requirements for certification of that project.

[d] Third Consideration--What Is the Rating Goal Within the Particular Rating System?

As discussed above, each LEED rating system has four point levels which can be met by achieving a certain number of points (*see* § 1.04[2]). For example, LEED-NC 2.2 has the levels and corresponding point requirements for Certified, Silver, Gold and Platinum. As outlined in the LEED-NC 2.2 -- Registered Project Checklist**,** n27 there are six categories, each with a number of subcategories. Each subcategory has a corresponding number of points which are gained by fulfilling the obligations of that subcategory. The sum of the points from the various categories corresponds to the overall point total, which in turn corresponds with each of the four levels outlined above. Four of the six categories have one or more required subcategories, referred to as prerequisites. Beyond these, however, given that each category has multiple subcategories with corresponding points that can be utilized to achieve the desired point totals, there is significant variability in how the final point total can be calculated. These various combinations can have a wide range of cost and time of execution associated with them in the form of design, initial development, as well as long-term operations and maintenance costs.

Accordingly, even if after the Parties agree upon the level of certification, *e.g.*, LEED-NC Silver, they must then agree upon the combination of credits used to achieve that point total. Failure to do so could result in the contract containing significant ambiguity on its precise terms leading to subsequent varying interpretations, significant cost overruns, and time delays.

[e] Fourth Consideration--Long-Term Compliance

Assuming the Parties have successfully agreed upon the precise terms that will govern the level of LEED achievement and certification process as outlined above, the fourth consideration is to what extent will the building maintain compliance with the agreed upon rating system and/or new versions of the rating system that are subsequently released after delivery of the building. For example, if the landlord is responsible for maintaining a mechanical system that was originally incorporated into the LEED certification process, and such maintenance is lacking, does the tenant have a right perform said maintenance and offset its rent accordingly? This is just one example of issues that need to be addressed in the new era of the Green Lease. n28

§ 1.05 Federal Government Initiatives

[1] Overview

The federal government owns approximately 445,000 buildings with a total floor space of over 3 billion square feet. It leases an additional 57,000 buildings comprising 374 million square feet. n29 State and local governments own even more. Various initiatives have been implemented at each level of government to conserve energy and other resources in these buildings. Besides saving energy, these initiatives help to create markets for green products, materials, and sources of energy.

[2] EPAs Energy Star Program

Perhaps the most well known of the federal government initiatives is EPAs Energy Star program, administered by the Department of Energy (DOE) and EPA. n30 Energy Star is a voluntary program to identify and promote energy-efficient products and buildings in order to reduce energy consumption, improve energy security, and reduce pollution through voluntary labeling of, or other forms of communication about, products and buildings that meet the highest energy conservation standards. n31

In 1992, these agencies introduced Energy Star as a voluntary labeling program designed to identify and promote energy-efficient products to reduce greenhouse gas emissions. Computers and monitors were the first labeled products. In 1995, the program was expanded to include additional office equipment products as well as residential heating and cooling equipment. In 1996, particular product categories were included in the program. Section 104 of the Energy Policy Act of 2005 n32 requires that when procuring an energy-consuming product, federal agencies shall procure an Energy Star or Federal Emergency Management Program (FEMP) designated product. In November 2007, the federal government published a final rule that will significantly impact manufacturers and suppliers that produce or sell energy-consuming products and equipment used by federal agencies. n33 The new rule, which became effective on December 24, 2007, requires federal agencies to purchase only those energy-consuming products that are designated as

meeting Energy Star or FEMP specifications for energy consumption.

Most significantly, the program has been extended to cover new homes and commercial and industrial buildings. In this context, the program rates commercial buildings for energy efficiency and provides Energy Star qualifications for new homes that meet their standards for energy efficient building design. EPA has created an on-line energy rating system for commercial buildings, referred to as Portfolio Manager, which is an interactive energy management tool that allows users to track and assess energy and water consumption across their entire portfolio of buildings and compare them with other buildings of the same type and size across the country. n34 As of October 2007, Portfolio Manager also includes greenhouse gas (GHG) emissions factors. The updated ratings show that Energy Star buildings, which use an average of 35% less energy than typical buildings, also emit 35% less carbon dioxide into the atmosphere.

If a building achieves an Energy Star rating of 75, meaning that it uses less energy than 74.9% of other buildings in its category, it receives an Energy Star designation and is listed on the EPA web site as a superior user of energy. Although Energy Star provides a first step towards the benchmarking process, its relatively small number of rated buildings n35 raises questions as to the statistical significance and practical application of the rating.

Submission of data to a government agency may also present confidentiality concerns that must be addressed. In addition, Energy Star only focuses on U.S. buildings. This provides little value in benchmarking international facilities that may be covered by another standard. For example, the European Union adopted the Energy Performance Building Directive in 2002. This directive requires the implementation of a system to rate buildings for energy efficiency by 2009 and to provide this information to investors and potentially to tenants through the issuance of a rating certificate that runs with the building. n36 This directive is a likely harbinger of a U.S. system that will allow real estate financiers, investors, risk managers, and tenants to have an objective and quantifiable rating system to determine the financial impact of climate change regulation in addition to a buildings overall energy efficiency relative to its peer group. For example, in October 2007, California passed a law requiring that nonresidential building owners or operators disclose this energy benchmarking data and ratings for the most recent 12-month period to prospective buyers, lessees, or lenders. n37

[3] Energy Policy Act of 1992

In 1992, Congress passed the Energy Policy Act in an attempt to reduce the countrys dependence on imported petroleum. n38 With respect to buildings, the Act requires states to establish minimum commercial building energy codes and to consider minimum residential codes based on current voluntary codes. It also establishes efficiency standards for commercial heating and air-conditioning equipment, toilets and urinals, electric motors, and light bulbs. In addition, it establishes a program for providing federal support on a competitive basis for renewable energy technologies.

The Act gave impetus to the modification of an energy conservation standard for buildings (except low-rise buildings) that had been created by the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) in 1975, referred to as ASHRAE Energy Standard 90.1. ASHRAE 90.1 is the most commonly used energy code for commercial and other non-residential buildings. The Standard is formally updated every three years. The last update was in 2007. The current versions of LEED reference the 2004 Standard.

The Act also gave impetus to a new version of the Model Energy Code (MEC), referred to since 1998 as the International Energy Conservation Code (IECC). The MEC/IECC was originally developed jointly under a number of building organizations under a contract funded by the U.S. Department of Energy. The MEC/IECC contains energy efficiency criteria for new residential and commercial buildings and additions to existing buildings. It covers a buildings ceilings, walls and foundations as well as mechanical, lighting and power systems. Some states have adopted the MEC/IECC without modification, while other states have adopted one of the editions with state-developed amendments.

Still others have adopted the MEC/IECC as recommended practice but have no statewide requirement that all new construction use it. n39

[4] Executive Order 13123

On June 3, 1999, President Bill Clinton signed Executive Order (E.O.) 13123, Greening the Government Through Efficient Energy Management. n40 This Order, which was revoked in 2007, n41 directed the federal government to improve its energy efficiency. Pursuant to the Order, the federal government was directed to promote energy efficiency, water conservation, and the use of renewable energy products, and help foster markets for emerging technologies.

E.O. 13123 set specific goals for federal agencies. Pursuant to the Order, each agency was required, through life cycle cost effective energy measures, to reduce energy consumption per gross square foot of its facilities by 30 percent by 2005 and 35 percent by 2010 relative to 1985. Industrial and laboratory facilities were required to, through life cycle cost effective energy measures, to reduce energy consumption per square foot, per unit of production, or per other unit as applicable, by 20 percent by 2005 and 25 percent by 2010 relative to 1990.

E.O. 13123 directed the Secretary of Energy to appoint an advisory committee consisting of representatives from federal agencies; state governments; energy service companies; utility companies; equipment manufacturers; construction and architectural companies; environmental, energy and consumer groups; and other energy-related organizations. The advisory committee was charged with providing input on federal energy management, including how to improve use of utility energy efficiency service contracts, improve procurement of Energy Star and other energy efficient products, improve building design, reduce process energy use, and enhance applications of efficient energy technologies at federal facilities.

The Department of Energy and the Department of Energys Federal Energy Management Program (FEMP) were responsible for working with other federal agencies to ensure that they met the goals of the Executive Order. DOE was also responsible for helping federal agencies in identifying products in the upper 25 percent of energy efficiency, providing technical assistance to federal agencies, issuing guidelines to clarify how agencies determine the life cycle costs for investments, and administering and managing the Super Energy Service Companies (SECOs) and the Energy Savings Performance Contracts (ESPCs).

The Executive Order was vague in the identification of specific technologies, *i.e.*, lighting controls. By not specifying certain technologies, federal agencies were not required to buy certain products, but instead were required to evaluate the life cycle cost effectiveness of products and building improvements.

[5] Energy Policy Act of 2005

On August 8, 2005, President George W. Bush signed into law the Energy Policy Act of 2005. n42 Among other things, the Act provides tax incentives and loan guarantees for energy production of various types. The Act contains provisions for commercial buildings that make improvements to their energy systems. Energy improvements completed in the years 2006-2008 are eligible for tax deductions up to $1.80 per square foot. The incentives focus on improvements to lighting; heating, ventilation and air-conditioning (HVAC); and the building envelope (the separation between the interior and the exterior environments of a building). Improvements are compared to a baseline of American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) Energy Standard 90.1-2001 standards (*see* § 1.05[3]). Many buildings are eligible for tax deductions for improvements completed within the normal course of business. These tax deductions can be used to improve the payback period of a prospective energy improvement investment. For municipal buildings, benefits are passed through to the primary designers/architects in an attempt to encourage innovative municipal design.

[6] Sustainable Buildings Memorandum of Understanding (MOU)

The Sustainable Buildings Memorandum of Understanding (MOU) is a federal initiative to develop a single green building standard and to provide leadership in the design, construction, operation, and maintenance of high-performance and sustainable federal buildings. n43 The MOU is a voluntary agreement among federal agencies to establish and follow a common set of sustainable guiding principles for integrated design, energy performance, water conservation, indoor environmental quality, and materials for federal agencies. The five principles of the MOU include: (1) employing integrated design principles; (2) optimizing energy performance; (3) protecting and conserving water resources; (4) enhancing indoor environmental quality; and (5) reducing the environmental impact of materials. In January 2006, 16 federal agencies signed the Sustainable Buildings MOU and have begun to implement its requirements.

[7] Executive Order 13423

On January 24, 2007, President George W. Bush signed Executive Order 13423, Strengthening Federal Environmental, Energy, and Transportation Management. n44 E.O. 13423 sets goals in the areas of energy efficiency, acquisition, renewable energy, toxics reductions, recycling, renewable energy, sustainable buildings, electronics stewardship, fleets, and water conservation. In addition, the Order requires more widespread use of Environmental Management Systems as the framework in which to manage and continually improve these sustainable practices. The Order revoked E.O. 13123 (*see* § 1.05[4]).

E.O. 13423 directs federal agencies to implement sustainable practices for energy efficiency, greenhouse gas emissions, and petroleum use reductions; renewable energy; acquisition of recycled content, energy efficient, biobased, and environmentally preferable products and services; pollution prevention and recycling; reduction or elimination of toxics and hazardous chemicals; high performance buildings vehicle fleet management; electronics stewardship; and water conservation.

Regarding buildings, the Order requires each federal agency to reduce building energy consumption per square foot by 30% by 2015 (relative to a 2003 baseline), reduce GHG emissions by 30% by 2015, and reduce water consumption intensity 2% a year through 2015. It also requires federal agencies that are undertaking new construction or major renovations to do so in accordance with 2006 Guiding Principles for Federal Leadership in High Performance and Sustainable Buildings set forth in the Sustainable Buildings Memorandum of Understanding (*see* § 1.05[6]).

[8] Energy Independence and Security Act of 2007

On December 19, 2007, President George W. Bush signed into law the Energy Independence and Security Act of 2007. n45 The Act contains a number of provisions related to green buildings and energy efficiency. Title IV of the Act contains provisions designed to green federal and private buildings and to require more energy efficient heating and cooling devices for buildings, including the following:

. establishing an Office of High-Performance Green Buildings (OHPGB) in the U.S. General Services Administration; this office will promote green building technology implementation in federal buildings;

. requiring improved federal and commercial building energy efficiency, with green building standards for new federal buildings;

. requiring that, beginning in 2010, federal buildings that are remodeled or newly constructed reduce fossil fuel generated energy consumption by 55% by 2010 as compared to 2003 and 100% by 2030 (Section 433);

. establishing a zero--net energy initiative to develop technologies, practices, and policies to reach the goal of having all commercial buildings use no net energy by 2050;

. establishing new incentives to promote industrial energy efficiency through converting waste heat into electricity; and

. directing the Secretary of Energy to identify a green building certification for federal buildings.

In addition, the Act contains a number of provisions that promote energy efficiency for government buildings, appliances, and the development of new efficiency standards. These provisions are located in Title III of the Act and include the following:

. requiring all general purpose lighting in federal buildings to use Energy Star products or products designated under the Energy Departments Federal Energy Management Program (FEMP) by the end of Fiscal Year 2013;

. amending the Energy Policy and Conservation Act (EPCA) to prescribe or revise standards affecting regional efficiency for heating and cooling products, procedures for new or amended standards, energy conservation, residential boiler efficiency, electric motor efficiency, and home appliances;

. requiring the Energy Department to act on energy efficiency in a timely manner; if the Department takes more than 2 years to finalize new efficiency standards, states are allowed to enact their own standards;

. requiring the federal government to substitute energy-efficient lighting for incandescent bulbs.

The Act also contains several provisions regarding energy efficiency in general. These are located in Title V and include the following:

. reauthorizing state energy grants to address states energy priorities and adopt emerging renewable energy and energy efficiency technologies through Fiscal Year 2012;

. establishing an Energy and Environment Block Grant to be used for seed money for innovative local best practices to fund local initiatives, including building and home energy conservation programs, energy audits, fuel conservation programs, building retrofits to increase energy efficiency, Smart Growth planning and zoning, and alternative energy programs;

. promoting the purchase of energy efficient products, and procurement of alternative fuels with lower carbon emissions, by the federal government, with reports on the success of those efforts, along with taxpayer savings.

Given the significant purchasing power of the federal government as both a buyer and tenant of commercial building and its ability to have scale impacts on the real estate community, commercial real estate developers and investors--even those not focused on the government marketplace--should closely track these initiatives as they are likely to find their way into the non-government marketplace in the near term, especially given the economic advantages offered in an era of increasing energy costs.

§ 1.06 State Initiatives

[1] Introduction

In the absence of comprehensive federal legislation concerning green buildings, many states have adopted their own green building laws and regulations. Some states have passed legislation requiring that public and/or private entities incorporate LEED or other green building standards into new or existing buildings, while other states have adopted only aspirational goals. In addition, some states have passed tax incentives to encourage the construction of green buildings. Practitioners should note that, because most states have some type of incentives to promote green building, it is not practical to list them all here. Instead, this section lists representative examples of legislation and initiatives that illustrate the range of laws that states have adopted to encourage green buildings in the public and private sector.

[2] Publicly Owned or Financed Buildings

[a] Aspirational Legislation

In April 2005, the Arkansas House of Representatives passed the Arkansas Energy and Natural Resources Conservation Act, a bill to promote conservation in the design of state building projects through the use of sustainable building rating systems. n46 The bill encourages, but does not require, state agencies conducting or funding a public building project or rehabilitation project to refer to and utilize whenever possible LEED or Green Globes rating systems (*see* § 1.03). The bill also establishes a Legislative Task Force on Sustainable Building Design and Practices. The Arkansas Department of Environmental Quality has also instituted a number of green building initiatives in the following areas: sustainable sites, water efficiency, energy and atmosphere, materials and resources, and indoor environmental quality. n47

[b] Laws and Initiatives Mandating Implementation of Green Building Standards

On April 8, 2005, Washington Governor Christine Gregoire signed into law ESSB 5509, the nations first state-enacted green building legislation. n48 The bills preamble states that:

The legislature finds that public buildings can be built and renovated using green/high-performance methods that save money, improve school performance, and make workers more productive. Green/High-performance public buildings are proven to increase student test scores, reduce worker absenteeism, and cut energy and utility costs.

Pursuant to the law, all major public agency facilities with a floor area exceeding 5,000 square feet, including state-funded school buildings, and any remodeling over 5,000 square feet when the cost is greater than 50 percent of the assessed value, are required to meet or exceed a LEED-Silver rating. State-funded affordable housing projects are also required to adopt a system for measuring building performance. The law exempts projects for which the agency and the design team determine the standards not practicable and for various types of laboratory facilities, hospitals, pumping stations, hospitals, and research facilities.

That same month, Maryland passed its own green building law. n49 Marylands law requires that state-funded building projects meet certain high-performance building standards, defined as one of the following: (1) achieving at least a LEED Silver rating; (2) achieving at least a two globe rating pursuant to GBIs Green Globes program; (3) achieving at least a comparable numeric rating according to a nationally recognized, accepted, and appropriate numeric

sustainable development rating system, guideline, or standard; or (4) meeting nationally recognized, consensus-based, and accepted green building guidelines, standards, or systems approved by the state.

Nevada adopted a law in June 2005 that requires state-funded buildings to achieve either a LEED Certified rating or an equivalent standard adopted by the Director of the Office of Energy. n50 In addition, the law requires that every two years at least two state-funded buildings must achieve either a LEED Silver rating or an equivalent standard adopted by the Director of the Office of Energy.

In July 2005, then-Colorado Governor Bill Owens signed Executive Order D005-05, which adopted LEED-EB and incorporated LEED-NC for all state buildings. n51 The Order also creates a Colorado Greening Government Coordinating Council to develop and implement conservation policies. In May 2006, the Colorado Senate passed Joint Resolution 06-032 concerning the greening of state buildings. n52 The resolution supports use of LEED as the design and construction guideline for all private and public facilities, promotes LEED Silver certification where cost-effective over a 20-year period, and supports E.O. D005-05.

On July 13, 2007, Florida Governor Charlie Crist signed Executive Order 07-126, entitled Leadership by Example: Immediate Actions to Reduce Greenhouse Gas Emissions From Florida State Government. n53 Pursuant to this Order, the state is required to first measure GHG emissions and develop a governmental carbon scorecard. The state is then required to reduce emissions 10% by 2012, 25% by 2017, and 40% by 2025. To achieve these goals, state buildings constructed in the future are required to be energy efficient and include solar panels whenever possible. Office space leased in the future must be in energy-efficient buildings as well.

In August 2007, the Dormitory Authority of the State of New York launched an initiative to promote the construction of energy efficient, state-owned buildings. n54 Pursuant to the initiative, all new state construction projects and major renovations managed by the Authority beginning in 2008 will meet the LEED-Silver certification standard.

In January 2008, New Jersey passed a law requiring high performance green building standards for new buildings greater than 15,000 square feet constructed solely for use by a state government entity. n55 The law requires that these buildings meet either a LEED-Silver rating, a two-globe rating pursuant to Green Globes, or a comparable rating designated by the state.

[3] Privately-Owned or Financed Buildings

[a] Aspirational Legislation

In May 2007, Minnesota passed a bill entitled the Next Generation Energy Act of 2007. n56 The wide-ranging law sets a state goal of certifying 100 commercial buildings to the Green Globes or LEED standard by December 31, 2010, and mandates utilities to include in their conservation improvement plans programs that facilitate professional engineering verification to qualify a building as Green Globes-certified, Energy Star-labeled, or LEED-certified.

[b] Legislation Mandating Implementation of Green Building Standards

In May 2006, Connecticut passed a law which requires the adoption of regulations to adopt building construction standards that are consistent with or exceed a LEED Silver rating for new commercial construction and major renovation projects or an equivalent standard. n57 The alternative standard must at least include a two globe rating under the Green Globes program. The Commissioners of Public Works, Environmental Protection, and Public Safety were required to create such regulations before January 1, 2007. Pursuant to the law, the Secretary of the Office of

Policy and Management, in consultation with the Public Works Commissioner and the Institute for Sustainable Energy, may exempt a facility from the regulations if the Institute finds that the cost of compliance significantly outweighs the benefits of compliance.

[4] Legislation Affecting Both the Public and Private Sectors

On December 14, 2004, Governor Arnold Schwarzenegger signed an Executive Order establishing that California considers energy and resource-efficient high performance buildings a priority. n58 The Executive Order sets a goal of reducing energy use in state-owned buildings by 20 percent by 2015 (from a 2003 baseline) and encourages the private commercial sector to set the same goal. The Order also directs compliance with the Green Building Action Plan, which details the measures the state will take to meet these goals**.** n59 The Executive Order and Green Building Action Plan assigned the California Energy Commission to: (1) develop and propose by July 2005 a simple building efficiency benchmarking system for all commercial buildings in the state; (2) develop commissioning and retro-commissioning guidelines for commercial buildings; (3) further develop and refine building energy efficiency standards applicable to the commercial building sector to result in 20 percent savings by 2015 using standards adopted in 2003 as the baseline; (4) report to the Legislature on energy and peak demand savings opportunities for Californias existing buildings; and (5) consult and collaborate with the Department of General Services, the Department of Finance, and the California Public Utility Commission on a variety of other tasks.

[5] Green Building Tax Incentives

New York offers a tax incentive program for developers and builders of environmentally-friendly buildings through its Green Building Tax Credit (GBTC) program, which was enacted in 2000. n60 The GBTC program regulations, n61 which establish the standards that must be met in order to qualify for the tax credits during the first period of the program, were enacted in May 2002. The program offers developers tax credits of up to $2 million dollars for using green building techniques when building structures. The program is in place until 2014. The program is run by the New York State Department of Environmental Conservation (DEC). In 2005, the GBTC Program was amended by providing an additional $25 million in credits with the aggregate amount of credit components permitted for each such building capped at $2 million.

Maryland offers similar tax credits and also offers a sales tax exemption for certain energy-efficient equipment. n62 The Oregon Department of Energy offers a business energy tax credit to those who invest in energy conservation, recycling, renewable energy resources, and less-polluting transportation fuels. n63

[6] State Energy Codes

In 2002, New York enacted the Energy Construction Conservation Code (ECCC). n64 Based on the 2000 International Energy Conservation Code (ICCC), the ECCC was formally adopted on March 6, 2002. It has been updated since then and the most recent version was released in 2007. The ECCC requires minimum standards of energy efficiency in new residential and commercial buildings. The purpose of the ECCC is to provide statewide uniform regulations for the design of building envelopes to ensure adequate thermal performance, and for the design of and selection of mechanical, electrical, and lighting systems and equipment that will enable the efficient use of energy.

§ 1.07 Local Initiatives

[1] Introduction

From 2003 to 2007, the number of U.S. cities with green building programs rose dramatically, from 22 to 92, an increase of more than 400 percent. n65 This includes more than 25 cities that have established some type of goals for new public buildings to meet some level of LEED standards. n66 Municipalities have enacted green building policies by **resolution** (Eugene and Portland, Oregon; Bowie, Maryland); **executive order** (Albuquerque, New Mexico; Salt Lake City, Utah); **legislation** (Baltimore County, Maryland); and **ordinance** (Chapel Hill, North Carolina; Cincinnati, Ohio; San Mateo County, California). In addition, many municipalities have adopted or are proposing to adopt mandatory or aspirational goals for private buildings.

Like the preceding state section concerning state initiatives, this section does not attempt to be comprehensive but merely gives examples of the types of laws and regulations that cities and municipalities have adopted to require or encourage green buildings in the public and private sector.

[2] Municipal Laws and Regulations Regarding Public Buildings

Atlanta, Georgia requires that construction of city facilities and buildings larger than 5,000 square feet or having a total cost of more than $2 million achieve a LEED-Silver rating. n67 Seattle, Washington requires all city-funded projects and renovations with over 5,000 square feet of occupied space to achieve a LEED-Silver rating. n68 Houston, Texas requires that all city-owned buildings over 10,000 square feet use LEED to the greatest extent practical and reasonable, with a target of LEED-Silver certification. n69

In 2007, New York City enacted Local Law 86, otherwise known as the New York City Green Buildings Act. n70 The law requires that non-residential capital projects (excluding schools) with estimated construction costs of $2 million or more be designed and constructed to achieve a LEED-Silver or higher rating. The law also requires that capital projects (again excluding schools) with an estimated construction cost of more than $12 million but less than $30 million be designed and constructed so as to reduce energy costs by a minimum of 20 percent. n71

In 2004, Chicago adopted a set of standards known as the Chicago Standard for public buildings, which was derived from the LEED rating system. The Standard attempts to guide the design, construction and renovation of municipal facilities in a manner that provides healthier indoor climates, reduces operating costs and conserves energy and resources. n72 The Chicago Standard address site considerations, water conservation, energy efficiency, smart materials (including recycled materials), and high indoor air quality. Chicago also has established an innovative program that promotes the use of rooftop gardens on top of private and public buildings to reduce energy consumption. A minimum 50% green roof and LEED certification are required for all public projects in Chicago, except community centers and schools. Community centers and schools must either have a minimum 25% green roof or LEED certification plus a minimum 10% green roof, and must also focus on indoor air quality and daylighting.

[3] Municipal Laws and Regulations Regarding Private Buildings

Many local governments have instituted incentive programs with the aim of encouraging private developers to adopt green standards. These incentives include reducing the time requirement for zoning approvals, permitting, and inspections; waiving or refunding permit fees; waiving property taxes; or modifying land use codes to allow greater density or size for green buildings. For example, Baltimore County, Maryland gives a property tax credit for 10 years to

any commercial building that achieves LEED Silver certification. n73 Honolulu provides a one-year exemption from real estate taxes for all new commercial, resort, hotel, and industrial construction that achieves a LEED Certified rating. n74 King County, Washington has established a green building grant program that offers from $15,000 to $25,000 in grants to developers who meet a minimum of a LEED Silver rating. n75 Several municipalities have programs that reward projects that meet LEED standards with density incentives. n76 The programs allow developers to request a larger building than is normally allowed under municipal codes if the project receives a specified level of LEED certification.

Seattles LEED incentive applies only to commercial and residential buildings in downtown zoning areas. n77 Seattle allows greater heights and/or greater maximum floor area if a project achieves a LEED Silver rating, along with contributing to affordable housing and other public amenities. The project applicant submits a letter of intent to achieve Silver certification, and permits are issued based on this commitment. If the applicant fails to submit documentation that verifies LEED certification, the city assesses a substantial penalty.

In addition to its Chicago Standard for public buildings, discussed above in § 1.07[2], Chicago has also adopted a private sector agenda whose mission statement states that the program is designed to develop policy, codes, and regulations that promote sustainable development in Chicago, and to stimulate demand for green buildings, green roofs and renewable energy technologies through incentives and education campaigns targeted at developers, construction professionals and citizens. n78 The programs initiatives include direct subsidies for certain affordable housing projects, weatherization materials for housing units on Chicagos west side, energy and water audits for local industry groups, and low-interest loans.

In 2006, Boston, Massachusetts announced that it would become the first major city in the United States to require adherence to the LEED Certified standard as part of the private development process. n79 Similarly, private-sector, nonresidential, or multi-family residential buildings of at least 10,000 square feet in Montgomery County, Maryland are required to achieve LEED certification or equivalent certification. n80

All single-family homes over 3,500 square feet in Marin County, California are required to meet stringent energy efficiency requirements. n81

In December 2007, San Francisco Mayor Gavin Newsome introduced an ordinance that would impose strict green-building requirements on new residential and commercial buildings, as well as structures slated for renovation. n82 New commercial buildings larger than 5,000 square feet, residential buildings taller than 75 feet, and renovated buildings bigger than 25,000 square feet would have to comply with LEED. If approved, the ordinance would effectively require most of the citys large buildings to meet the LEED Gold or Silver rating by 2012.

[4] Municipal Laws Affecting Both Public and Private Buildings

Boston requires that all public and private development projects over 50,000 square feet meet the LEED-NC Certified standard. n83 Montgomery County, Maryland requires that county-built or funded buildings achieve a LEED Silver rating and that private nonresidential or multifamily buildings achieve a LEED Certified rating. n84 The new regulations will take effect no later than September 1, 2008.

In December 2006, the Washington, D.C. City Council passed a comprehensive green building law that requires public and private buildings to meet certain green building standards. n85 The law requires that developers adhere to LEED standards. By 2008, all District-owned nonresidential buildings of 10,000 square feet or more that are new or substantially renovated must be designed to achieve 75 points on EPAs Energy Star program. By 2010, new and substantially improved private commercial buildings of 50,000 square feet or more will have to fulfill or exceed the LEED Certified rating. To ease the transition for developers, the law does not mandate specific features. Instead, credits are awarded in categories, such as site selection, energy and water efficiency, and materials. A building must then

collect a certain number of credits to be certified. The law also establishes an incentive program for early adopters that is paid through the Districts Green Building Fund.

§ 1.08 Non-Governmental Initiatives

Non-governmental and private foundations are increasingly incorporating sustainability principles into the basis upon which they issue grants. For example, the Enterprise Foundations Green Communities program offers grant dollars specifically focused on motivating sustainability efforts in the affordable housing industry. n86 The Kresge Foundations Green Building awards grants in the planning and design phase and specifically references LEED as one basis upon which to achieve such grants. n87 The following is a partial list of organizations that have green building and/or sustainability issues as their focus:

American Indoor Air Quality Council:

http://www.iaqcouncil.org

American Institute of Architecture -- Committee on the Environment (COTE):

http://www.aia.org/cote_sponsorship

American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE):

http://www.ashrae.org

American Solar Energy Society:

http://www.ases.org

Architects, Designers and Planners for Social Responsibility (ADPSR):

http://www.adpsr.org

Better Bricks:

http://www.betterbricks.com

Boston Area Solar Energy Association:

http://www.basea.org

Boston Building Materials Co-op (BBMC):

http://www.bbmc.com/bbmc/index.html

Boston Building Materials Resource Center (BMRC):

http://www.bostonbmrc.org/bostonbmrc/index.html

Building Concerns:

http://www.buildingconcerns.com/nocal/index.htm

Building Materials Reuse Association (BMRA):

http://www.buildingreuse.org

Business for Social Responsibility (BSR):

http://www.bsr.org

Climate Action Network (CAN):

http://www.climatenetwork.org

Community Greenhouse Foundation:

http://www.communitygreenhouse.org

Congress for the New Urbanism:

http://www.cnu.org

Construction Materials Recycling Association:

http://www.cdrecycling.org

Development Center for Appropriate Technology:

http://www.dcat.net

Ecological Design Institute (EDI):

http://www.ecodesign.org

Education Design Showcase:

http://www.educationdesignshowcase.com

Florida Green Building Coalition:

http://www.floridagreenbuilding.org/db

Global Environmental Options (GEO):

http://www.globalenvironmentaloptions.org

Global Green USA:

http://www.globalgreen.org

Green Building Alliance (Pittsburgh):

http://www.gbapgh.org

Green Roundtable: Sustainable Architecture and Design:

http://www.greenroundtable.org

Healthy House Institute (HHI):

http://www.healthyhouseinstitute.com

Metropolitan Partnership for Energy:

http://www.buildsagreen.org

National Association of Home Builders Green Building Program:

http://www.nahb.org

National Association of State Energy Officials (NASEO):

http://www.naseo.org

Natural Step (US):

http://www.naturalstep.org/com/nyStart

New Urban Guild:

http://www.newurbanguild.com

Northeast Sustainable Energy Association (NESEA):

http://www.nesea.org

Northwest Energy Efficiency Alliance:

http://www.nwalliance.org

Second Nature:

http://www.secondnature.org

Society of Building Science Educators:

http://www.sbse.org

Soil and Water Conservation Society (SWCS):

http://www.swcs.org

Solar Living Institute:

http://www.solarliving.org

Sustainable Buildings Industry Council (SBIC):

http://www.sbicouncil.org

Sustainable Energy Coalition:

http://www.sustainableenergycoalition.org

Urban Ecology:

http://www.urbanecology.org

Wisconsin Green Building Alliance (WGBA):

http://www.wgba.org

World Green Building Council:

http://www.worldgbc.org

§ 1.09 Common Legal Issues Involved in Green Construction

[1] Background

Because green construction is a relatively new phenomenon, there is little legal analysis regarding green building disputes. Perhaps the most common issue faced by contractors, design professionals and owners is that they do not understand that there is a difference between a normal construction project and a green construction project. Consequently, parties often rely on standard contracts that do not necessarily address the risks unique to such projects. Failure to recognize such risks creates the potential for disputes and litigation at some point in the process. The following are examples of the types of risks that parties to green projects often fail to address. This is not a checklist and

stakeholders are strongly advised to consult with the appropriate professionals before entering into any such agreement.

[2] Green Certification

Contracts must be drafted so that they clearly and accurately reflect each project stakeholders role in earning the desired level of green building certification and allocate that responsibility accordingly. Thus, with respect to obtaining certification pursuant to any green building rating system, it should be clarified which party will be responsible for tracking, collecting, assembling, and submitting the supporting documentation. Contracts should also clearly define who is responsible if the project fails to achieve the desired sustainable rating and the damages that flow from such a failure. Some contracts are utilizing principles traditionally incorporated for adherence to building codes as a model to establish obligations for obtaining LEED certification or other sustainability goals.

[3] Liability for Design Professionals

Design professionals should be careful that, when signing credit submittal templates, they do not trigger an exclusion in their professional liability policy. It is possible for a design professional to trigger an exclusion in his or her policy by signing the submittal templates required by rating systems such as LEED. This possibility exists because the standard exclusion in a professional liability policy states that this policy does not apply to warranties and guarantees and any claim(s) based upon or arising out of express warranties and guarantees. The situation that design professionals want to avoid is where their insurer disclaims coverage on the grounds that the design services in dispute were referenced in the submittal template but affirmed through the certification process by the design professional.

Accordingly, design professionals should insist on contract language that clearly indicates that the signing of submittal templates is solely for the satisfaction of the particular rating system credit and does not constitute any warranty or guarantee.

[4] Selection of Design Professionals

Owners should select design professionals and consultants who have participated on other green projects and are familiar with sustainable design, green building rating systems, and the corresponding certification process. Designers, contractors, and consultants with such experience are somewhat limited, but their ranks are growing. Due diligence by owners in order to engage a green-savvy project team is critical to executing a successful project that achieves the desired sustainable result.

[5] Accurate Survey of Existing State and Local Green Building Legislation

It is important for stakeholders to accurately understand what a project needs to do to comply with state and local green building legislation, as well as what grants and tax incentives are available. Many municipalities begin the greening of their administrative code with carrots, offering incentives as outlined above. Failure to take advantage of these can lead to a less than optimal outcome for the client.

In addition, some state or local legislation can go beyond LEED or other industry certifications to incorporate local sustainability provisions related to:

- regional sourcing of materials with a goal of minimizing carbon emissions associated with transportation of materials from remote locations;

- emissions controls on construction equipment including requiring specially designed particulate filters on diesel powered equipment in order to minimize emissions; and
- building materials which meet recycled content requirements including wood products that are harvested from sustainable forests. n88

Thus, practitioners should conduct a thorough survey of existing and proposed legislation in a particular jurisdiction before commencing any project.

[6] Incorporating Green Elements into Construction Adds Additional Layer of Complexity

The construction process on even the most benign of traditional projects has the potential for complications and litigation. Green project stakeholders should obviously be mindful of this, and treat the projects sustainable elements as adding an extra layer of complexity to the process. Accordingly, budgeting extra time and dollars where possible makes sense, and stakeholders should be even more scrupulous when evaluating proposed schedules and budgets and negotiating the terms of their contracts. If the project is attempting to gain LEED certification, the time frame for completion of the project should recognize the length of time and inspection process associated with such certification. In addition, green building tax credits often require triggering events to occur in specific tax years or when certain certifications are issued, including when the building is put in service, requiring an integrated design process to avoid ineligible costs or rejected tax credits.

[7] Warranty and Guaranty Language

The warranty and guaranty contract language should be checked to confirm that new green construction procedures, installation materials or techniques do not void the warranty or guaranty for a product. In addition, stakeholders should determine if any intellectual property infringements will result from utilizing these green techniques and who will be responsible for dealing with any infringement that may arise.

[8] Negotiating Agreements

Green construction can potentially alter what constitutes a design defect (*i.e.*, a defect that is covered by the design professionals professional liability insurance) and what constitutes a construction defect (*i.e.*, a defect that is covered by the contractors warranty). Equipment being incorporated into buildings may require licenses, post-construction maintenance or pose challenges for integration with other building systems. These issues can potentially require entering into contracts with equipment providers, architects, contractors, lenders, environmental and other governmental agencies, and others to secure adequate insurance, performance bonds and warranties.

[9] Performance Contracts

Green construction has popularized the concept of performance contracting. Performance contracting enables money that will be saved as a result of the introduction of a new energy-efficient technology to be used to offset the cost of financing, installing, and operating that technology. By definition, the future savings must be greater than the costs. Performance contracting, also known as third party financing or contract energy management, can be used to pay for measures to reduce energy costs and waste disposal costs, or to recover materials. A third-party contractor designs, installs, finances, and, if required, operates a new technology. The contractor is then paid according to the savings achieved--*i.e.*, the performance. n89 Some performance contractors will offer to pay upfront the design and construction costs otherwise borne by the builder in return for a financing charge. Such guaranteed energy savings may

be secured by letters of credit and performance bonds, and may constitute inadvertent warranties requiring special expertise to address. However, practitioners should be aware that such contracts may have significant compliance obligations for their clients.

§ 1.10 Bibliography

[1] Books

M. Gerrard, ed., Environmental Law Practice Guide, Chs. 17C & 18B (LexisNexis Matthew Bender).

P. Gevorkian, Sustainable Energy Systems in Architectural Design: A Blueprint for Green Building (McGraw-Hill 2006)

Global Climate Change and U.S. Law (Michael B. Gerrard ed., Am. Bar Assn 2007)

K. Hall & R. Nicholls, The Green Building Bible (Green Building Press 2006)

C. Kilbert, Sustainable Construction: Green Building Design and Operation (John Wiley & Sons, Inc. 2005)

R. Spiegel, Green Building Materials: A Guide to Product Selection and Specification (John Wiley & Sons, Inc. 2006)

T. Woolley, Green Building Handbook: A Guide to Building Products and Their Impact on the Environment (Taylor & Francis 2005)

J. Yudelson, Green Building A to Z: Understanding the Language of Green Building (New Society Publishers 2007)

J. Yudelson, The Green Building Revolution (Island Press 2008)

[2] Articles

S. Anchin, *Breathing Easy: Improving Indoor Air Quality Through Green Building as Public Policy, 36 Envtl. L. Rep. 10553 (July 2006)*

B. Anderson, *Legal and Business Issues of Green Building, 79 Wis. L. Rev. 10 (Aug. 2006)*

M. Bennett, *The Evolution of Climate Change Due Diligence Standards*, 231 Envtl. Due Diligence Guide Rep. (BNA) 1911 (Oct. 18, 2007).

T. Bowen, *Constructive Criticism: LEED Green Building Program Confronts Critics and Growing Pains*, Grist Magazine (Oct. 26, 2005)

C. Circo, *Using Mandates and Incentives to Promote Sustainable Construction and Green Building Projects in the Private Sector: A Call for More State Land Use Policy Initiatives, 112 Penn. St. L. Rev. 3 (2008)*

S. Del Percio, *The Skyscraper, Green Design, and the LEED Green Building Rating System: The Creation of Uniform Sustainable Standards for the 21st Century or the Perpetuation of an Architectural Fiction*?, 28 Environs:

Envtl. L. & Poly J. 117 (2004-2005)

J. Dunec, *Environmental Aspects of Real Estate and Commercial Transactions: From Brownfields to Green Buildings, 20 Nat. Resources & Envt 68 (Summer 2005)*

R. Holzman, *New Tax Incentives for Green Buildings Have Owners Seeing Green*, 27 Constr. Law 24 (2007)

C. Kilbert, *Green Buildings: An Overview of Progress*, 19 J. Land Use & Envtl. L. 491 (2003-2004)

C. Kilbert, *Policy Instruments for a Sustainable Built Environment, 17 J. Land Use & Envtl. Law 379 (2002)*

N. King & B. King, *Creating Incentives for Sustainable Buildings: A Comparative Law Approach Featuring the United States and the European Union, 23 Va. Envtl. L.J. 397 (2005)*

C. Lockwood, *Building the Green Way*, Harv. Bus. Rev. 129 (June 2006)

J. Masters & J. Musitano, *Managing Liability Risks in Green Construction, The Los Angeles Lawyer*, Vol. 30, No. 9 (Dec. 2007)

C. McChesney, *Focus on AU: Green Buildings, 5 Sustainable Dev. L. & Poly 68 (2005)*

D. Miller, *An Inconvenient Trend: Environmentally-Conscious Owners Force Reluctant Builders Into Going Green*, CAM Magazine 1 (Oct. 2006)

C. Montez & D. Olsen, *The LEED Green Building Rating System and Related Legislation and Governmental Standards Concerning Sustainable Construction*, 25 Constr. Law 38 (2005)

C. Perzan, *What You Should Know About Green Building*, 20 CBA Rec. 38 (Nov. 2006)

B. Rainwater, *Local Leaders in Sustainability: A Study of Green Building Programs in Our Nations Communities*, American Institute of Architects (2007)

R. Reis, *The Economic Benefits of Green Buildings: A Comprehensive Case Study* (Engg Economist 2006)

E. Sussman, *Building Stock Offers Opportunities to Foster Sustainability and Provides Tools for Climate Change Mitigation and Adaptation*, 7 Sustainability Dev. L. & Poly J. 17 (Spring 2007)

E. Sussman, *Reshaping Municipal and County Laws to Foster Green Building, Energy Efficiency, and Renewable Energy, 16 N.Y.U. Envtl. L.J. 1 (2008)*

§ 1.11 Internet Directory

American Institute of Architects:

http://www.aia.org

American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE):

http://www.ashrae.org

BRE Environmental Assessment Method (BREEAM):

http://www.breeam.org

Energy Star Program:

http://www.energystar.gov

Green Globes:

http://www.thegbi.org/home.asp

Sustainable Buildings Industry Council (SBIC):

http://www.sbicouncil.org

United States Green Building Council:

http://www.usgbc.org

World Green Building Council:

http://www.worldgbc.org

Return to Text

n1 U.N. Environment Programme, Buildings and Climate Change: Status, Challenges and Opportunities (2007).

n2 U.S. Dept. of Energy, 2007 Buildings Energy Data Book (Sept. 2007), *available at* http://buildingsdatabook.eere.energy.gov/?id=view_book.

n3 *See also* Global Climate Change and U.S. Law (Michael B. Gerrard ed., Am. Bar Ass'n 2007).

n4 U.S. Environmental Protection Agency, Buildings and the Environment: A Statistical Summary (Dec. 2004), *available at* http://epa.gov/greenbuilding/pubs/gbstats.pdf.

n5 Kinzey, *The Federal Buildings Research and Development Program: A Sharp Tool for Climate Policy*, 2000 ACEEE Proceedings, Sec. 9.21.

n6 *See* U.S. Energy Information Admin., Commercial Buildings Energy Consumption Survey, *available at* http://www.eia.doe.gov.

n7 M. Baum, Green Building Research Funding: An Assessment of Current Activity in the United States 1 (2007), *available at* http://www.usgbc.org/ShowFile.aspx?DocumentID=2465. *See also* M. Gerrard, ed., Environmental Law Practice Guide, Ch. 17A (LexisNexis Matthew Bender).

n8 *See also* M. Gerrard, ed., Environmental Law Practice Guide, Ch. 36A (LexisNexis Matthew Bender).

n9 U.S. Environmental Protection Agency, Buildings and the Environment: A Statistical Summary (Dec. 2004), *available at* http://epa.gov/greenbuilding/pubs/gbstats.pdf.

n10 It has been estimated that green buildings can cut energy use and GHG emissions by up to 50 percent when compared with similar, non-green buildings. *The Rise of the Green Building*, The Economist (Dec. 2, 2004).

n11 *The Costs and Benefits of Green Buildings*, The Sustainable Building Task Force (Oct. 2003). *See also* R. Reis, The Economic Benefits of Green Buildings: A Comprehensive Case Study (Engineering Economist 2006).

n12 G. Kats, *The Costs and Financial Benefits of Green Buildings*, A Report to Californias Sustainable Building Task Force (2003).

n13 A 1997 joint study between the U.S. Department of Energy and Lawrence Berkley National Laboratory estimated total costs due to poor indoor air quality to the U.S. economy range as high as $168 billion a year. J. Fisk & A. Rosenfeld, Estimates of Improved Productivity and Health From Better Indoor Environments (1997). The report attributed $6 to $19 billion from increased respiratory disease, $1 to $4 billion from increased allergies and asthma, $5 to $10 billion from sick building syndrome, and a potentially huge amount, $12 to $125

billion, from reduced productivity.

n14 USGBC, Green Building By the Numbers (Jan. 2008), *available at* http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1718.

n15 Additional information about Green Globes is available at http://www.thegbi.org/home.asp.

n16 Its official title is the Standard for the Design of High-Performance Green Buildings Except Low-Rise Residential Buildings.

n17 However, it does not apply to residential buildings under three stories.

n18 Additional information about Standard 189 is available at http://www.ashrae.org/pressroom/detail/13571.

n19 Additional information about BREEAM is available at http://www.breeam.org.

n20 Additional information about USGBC and LEED is available at http://www.usgbc.org.

n21 This trend may be changing given that USGBC has reduced documentation for LEED-EB and has clarified ambiguous language and cut overlap with LEED-NC. *See* A. Burr, *CoStar Green Report: The Big Skodowski*, CoStar Group (Jan. 30, 2008), *available at* http://www.costar.com/News/Article.aspx?id=AB06F083AAD0809BB084F315F87D3425.

n22 As of 2000, there were approximately 116 million residential buildings in existence. Census Bureau, General Housing Characteristics: 2000 (U.S. Dept. of Commerce). On average, 1.8 million residential buildings are built every year. Census Bureau, Annual Housing Starts (1978-2003) (U.S. Dept. of Commerce, Sept. 2004). 4.7 million commercial buildings existed as of 1999. Energy Information Admin., 1999 Commercial Buildings

Energy Consumption Survey (U.S. Dept. of Energy 2002). It is estimated that approximately 170,000 commercial buildings are built annually. Census Bureau, C-Series Reports: Manufacturing and Construction Division (U.S. Dept. of Commerce 1999).

n23 T. Bowen, *Constructive Criticism: LEED Green Building Program Confronts Critics and Growing Pains*, Grist Magazine (Oct. 26, 2005), *available at* http://www.grist.org/cgi-bin/printthis.pl?uri=/news/maindish/2005/10/26/leed/index.html.

n24 *See, e.g.*, N. Malin, *The Going Rate*, Architecture (Apr. 2003), at 45 (characterizing the LEED system as confusing, cumbersome, and in come cases oversimplified).

n25 *See, e.g.*, R. Udall & A. Schendler, *LEED is Broken--Lets Fix It*, iGreenBuild.com (Aug. 9, 2005), *available at* http://www.igreenbuild.com/cd_1706.aspx.

n26 For a description of this Standard, see § 1.05[3] below.

n27 This checklist is available at http://www.usgbc.org/DisplayPage.aspx?CMSPageID=220.

n28 *See, e.g.*, M. Bennett, *The Evolution of Climate Change Due Diligence Standards*, 231 Envtl. Due Diligence Guide Rep. (BNA) 1911 (Oct. 18, 2007).

n29 General Services Admin.--Office of Government-Wide Policy, Federal Real Property Profile (Sept. 30, 2002).

n30 More information about the Energy Star program is available at http://www.energystar.gov.

n31 *See 42 U.S.C. § 6294a(a).*

n32 Pub. L. No. 109-58, *119 Stat. 593, 609 (2005).*

n33 *72 Fed. Reg. 65868* (Nov. 24, 2007).

n34 Portfolio Manager is available at http://www.energystar.gov/index.cfm?c=evaluate_performance.bus_portfoliomanager.

n35 As of February 2008, the Energy Star program has rated less than 2,000 buildings.

n36 Directive 2002/91/EC of the European Parliament on the Energy Performance of Buildings, as reprinted in the Official Journal of the European Communities 4.1.2003 L 1/65. This document is available at http://www.buildingsplatform.org/cms/index.php?id=7&no_cache=1. For more information, see M. Bennett, *The Evolution of Climate Change Due Diligence Standards*, 231 Envtl. Due Diligence Guide Rep. (BNA) 1911 (Oct. 18, 2007).

n37 *See* Cal. Pub. Res. Code § 25402.10.

n38 Pub. L. No. 102-486, *106 Stat. 2776 (1992).* For a complete discussion of the Energy Policy Act of 1992, see Energy Law and Transactions Ch. 58 (David J. Muchow & William A. Model, eds., LexisNexis Matthew Bender).

n39 A full listing of states and what they require is available at http://www.energycodes.gov/implement/state_codes/index.stm.

n40 Executive Order 13123 (June 3, 1999). The text of E.O. 13123 is available at http://www.nepa.gov/nepa/regs/eos/eo13123.html.

n41 Executive Order 13423, which was signed by President George W. Bush on January 24, 2007, revoked Executive Order 13123 (*see* § 1.05[7]).

n42 Pub. L. No. 109-58, *119 Stat. 594 (2005).* For a complete discussion of the Energy Policy Act of 2005, see Energy Law and Transactions Ch. 59 (David J. Muchow & William A. Mogel, eds., LexisNexis Matthew Bender).

n43 A copy of this MOU is available at http://www.epa.gov/greeningepa/documents/sustainable_mou_508.pdf.

n44 Executive Order 13423 (Jan. 24, 2007). A copy of E.O. 13423 is available at http://www.whitehouse.gov/news/releases/2007/01/20070124-2.html.

n45 Pub L. No. 110-140, *121 Stat. 1492 (2007).*

n46 *See* Ark. Code Ann. § 22-3-1801 *et seq*.

n47 More information about these green building initiatives is available at http://www.adeq.state.ar.us/poa/pdfs/adeq_green_building_initiatives.pdf.

n48 *See* Wash. Rev. Code §§ 28A.150; 28B.10; 39.04. A copy of the bill is available at http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5509.

n49 *See* Md. Code Ann., State Fin. & Proc. § 3-602.

n50 *See* Nev. Rev. Stat. § 338.001.

n51 A copy of this Executive Order is available at http://www.colorado.gov/governor/eos/d00505.

n52 A copy of this Joint Resolution is available at http://www.leg.state.co.us/CLICS2006A/csl.nsf/fsbillcont3/20DE9B97833078058725715300660441?Open&file=SJR032_enr.pd

n53 A copy of this Executive Order is available at http://www.dep.state.fl.us/climatechange/files/200707_13_eo_07_126.pdf.

n54 Information about this initiative is available at http://www.ny.gov/governor/press/fl_0828071.html.

n55 *See* N.J. Stat. Ann. § 52:32-5.3 *et seq*. Text of the law is available at http://www.njleg.state.nj.us/2006/Bills/S1000/843_R1.pdf.

n56 *See* Minn. Stat. § 123B.65 *et seq.*

n57 *See* Conn. Gen. Stat. § 1-205(b).

n58 Governor of California Executive Order S-20-04 (Dec. 14, 2004), *available at* http://gov.ca.gov/executive-order/3360.

n59 Information about Californias Green Building Action Plan is available at http://www.fypower.org/pdf/green_bldg_action_plan.pdf.

n60 N.Y. Tax Law § 19.

n61 These regulations are available at http://www.dec.ny.gov/regs/4475.html. Additional information about

this program is available at http://www.epa.gov/solar/documents/4_20_06_Austin_GBTC_paper_Kneeland.pdf.

n62 Md. Code Ann., Tax-Gen. § 10-722 (income tax credit); Md. Code Ann., Tax-Prop. § 9-242 (property tax credit).

n63 Information about this tax credit is available at http://www.oregon.gov/ENERGY/CONS/BUS/BETC.shtml.

n64 Information regarding the ECCC is available at http://www.dos.state.ny.us/code/energycode/nyenergycode.htm.

n65 B. Rainwater, *Local Leaders in Sustainability: A Study of Green Building Programs in Our Nations Communities*, American Institute of Architects (2007), *available at* http://www.aia.org/SiteObjects/files/LLinSustain(full)_final.pdf.

n66 A listing of government LEED initiatives, which includes counties, cities and towns as well as states, is available at https://www.usgbc.org/ShowFile.aspx?DocumentID=2021.

n67 Information about Atlantas ordinance is available at http://www.atlantaga.gov/client_resources/forms/energy%20conservation/adopted%20ordinance.pdf.

n68 Building a Better City, City of Seattle Sustainable Building Program 5 Year Report, at 5, *available at* http://www.seattle.gov/dpd/static/5-year_report_LatestReleased_DPDP_009930.pdf.

n69 Information about Houstons ordinance is available at http://www.houstontx.gov/environment/reports/leedinhouston.pdf.

n70 This legislation is available at http://www.nyc.gov/html/dob/downloads/pdf/ll_86of2005.pdf.

n71 The law further requires that capital projects, excluding schools, with an estimated construction cost of more than $30 million be designed and constructed to reduce energy costs by a minimum of 25 percent. Capital projects that include the installation or replacement of a boiler at an estimated cost of $2 million or more must be designed to reduce energy costs by a minimum of 10 percent. Similarly, capital projects that include the installation or replacement of lighting systems with an estimated cost of $1 million or more must be designed to reduce energy costs by a minimum of 10 percent. In addition, projects involving the installation or replacement of an HVAC system with an estimated cost of $2 million or more must be designed to reduce energy costs by a minimum of 5 percent. Finally, capital projects involving the installation or replacement of plumbing systems with an estimated cost of $500,000 or more must be designed to reduce energy costs by a minimum of 30 percent.

n72 City of Chicago, The Chicago Standard 1, *available at* http://egov.cityofchicago.org/webportal/COCWebPortal/COC_ATTACH/ChicagoStandard.pdf.

n73 Information about Baltimore Countys property tax credit is available at http://www.baltimorecountymd.gov/Agencies/economicdev/edd_brownfields.html.

n74 Honolulus tax exemption is available at http://www.honolulu.gov/refs/bill/text/2004/b069.htm.

n75 Information about King Countys grant program is available at http://www.metrokc.gov/dnrp/swd/greenbuilding/incentives/commercial.asp.

n76 These municipalities include Seattle; Nashville; Acton, Massachusetts; Bar Harbor, Maine; Cranford, New Jersey; Portsmouth, New Hampshire; and Arlington County, Virginia.

n77 Additional information about these incentives is available at http://www.seattle.gov/dpd/GreenBuilding/OurProgram/PublicPolicyInitiatives/DevelopmentIncentives/default.asp.

n78 City of Chicago, Environmental Action Agenda: Building the Sustainable City 2006, *available at* http://egov.cityofchicago.org/webportal/COCWebPortal/COC_ATTACH/ActionAgenda.pdf.

n79 Bostons announcement is available at http://www.massclimateaction.org /GreenBuildings/MeninoGreenBldgPR1206.pdf.

n80 Montgomery Countys requirements for buildings over 10,000 square feet is available at http://permittingservices.montgomerycountymd.gov/17-06.pdf.

n81 Information about Marin Countys energy efficiency requirements is available at http://www.co.marin.ca.us/depts/CD/main.

n82 This proposed ordinance is available at http://www.sfgov.org/site/uploadedfiles/mayor/SForwardFinal.pdf.

n83 This amendment to Bostons zoning code is available at http://www.cityofboston.gov/bra/gbtf/documents/Boston%20Zoning%20Code%20Green%20Bldg%20Amendments.pdf.

n84 Information about Montgomery Countys green building standards is available at http://www.montgomeryschoolsmd.org/departments/facilities/schools2green/pdf/MC_GreenBuildingBillFactSheet.pdf.

n85 *See* D.C. Code § 6-1451.01 *et seq*.

n86 *See* http://www.greencommunitiesonline.com for additional information.

n87 *See* http://www.kresge.org for additional information.

n88 *See, e.g.*, Sustainable Guide Reference Manual, as adopted by the Lower Manhattan Development Authority for the World Trade Center Redevelopment Project, *available at* http://www.renewnyc.com.

n89 One example of this is the Energy Efficiency Partnership of Greater Washington, which is being spearheaded by Virginia Tech University. The stated goals of the partnership are to provide financing for building retrofits in the Washington, D.C. metropolitan area and to repay costs from accrued energy savings over time. Additional information about this partnership is available at http://www.eep.ncr.vt.edu.

RELATED LINKS: For a discussion of global climate change, see
- Environmental Law Practice Guide § 17C.01 et seq.

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Mr. Bennett has written several publications relating to climate change, property valuation, environmental risk, and environmental due diligence. He is a frequent lecturer on climate change, environmental and real estate topics.

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Mr. Newman co-chaired ASHRAEs (American Society of Heating, Refrigerating and Air Conditioning Engineers) Technical Committee on Industrial Air Conditioning for four years. During that time, he was responsible for the updating and revisions to 10 chapters in the ASHRAE Applications Handbook. He is a member of ASHRAEs Technical Committee on Air-to-Air Energy Recovery and is a trainer for the ANSI/ASHRAE/IESNA Energy Standard 90.1,

which is a part of the Building Codes of most states. He is also a member of ASHRAEs Energy Position Document Committee, which developed the new policy on energy for ASHRAE to recommend as national public policy in 2008 and for ASHRAEs commitment to this policy.

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Along with being a frequent guest on educational radio and television programs, Mr. Newman has had articles published in local and national journals. He writes monthly columns for the local ASHRAE Newsletter on LEED Design, and is writing a reference book on Fans and Systems. He is a visiting lecturer on these and other HVAC and Sustainable topics at many local colleges and universities.

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Bass and Herson on Citizens for Responsible and Open Government

2008 Emerging Issues 2249

Ronald E. Bass and Albert I. Herson on Citizens for Responsible and Open Government v. City of Grand Terrace, 160 Cal. App. 4th 1323, 2008 Cal. App. LEXIS 359 (4th Dist., Feb. 21, 2008, cert. for part. pub. March 13, 2008)

By Ronald E. Bass and Albert I. Herson

April 29, 2008

SUMMARY: Review additional commentaries from California Environmental Quality Act experts Ronald Bass and Albert Herson on the California appellate court decision in Citizens for Responsible and Open Government v. City of Grand Terrace, a case that illustrates that the fair argument standard under CEQA establishes an extremely low bar for determining the significance of environmental impacts.

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Cite as: Bass, Ronald E., and Herson, Albert I. *Citizens for Responsible and Open Government v. City of Grand Terrace*. LexisNexis Expert Commentary, *(Insert date you accessed the document online*

Commentary by Ronald E. Bass. n1 This case illustrates, once again, that the fair argument standard establishes an extremely low bar for determining the significance of impacts.

After admonishing the city for using an erroneous density determination in its Mitigated Negative Declaration (MND), the court agreed with the opponents that a fair argument could be made that a 60 unit per acre density would result in significant environmental impacts. Specifically, the opponents presented citizen testimony as well as photographic evidence that the higher density project would result in physical and aesthetic incompatibility impacts vis a vis the surrounding low density development. As far as the aesthetic impacts, the court distinguished the facts from those in *Bowman v. City of Berkeley [(2004) 122 Cal. App. 4th 572, 18 Cal. Rptr. 3d 814, 2004* California Environmental Law Reporter 421 (Matthew Bender)] and *Bankers Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego [(2006) 139 Cal. App. 4th 249, 42 Cal. Rptr. 3d 537, 2006* California Environmental Law Reporter 247 (Matthew Bender)], which held that obstruction of a few private views in a projects immediate vicinity is not generally regarded as a significant environmental impact. On the contrary, the court followed the rule in *Mira Mar Mobile Community v. City of Oceanside [(2004) 119 Cal. App. 4th 477, 14 Cal. Rptr. 3d 308, 2004* California Environmental Law Reporter 272 (Matthew Bender)], in which a fair argument was made that adverse aesthetic impacts on public views would be a significant environmental impact.

The court was also convinced that the opponents made a fair argument, based on substantial evidence, that the proposed projects air conditioning unit would result in significant noise impacts. The opponents based their fair

argument, in part, on the testimony of a heating, ventilation, and air conditioning (HVAC) expert who claimed that the 24/7 operation of the units would likely result in significant noise impacts. The court reached its conclusion despite the citys reliance on several noise abatement mitigation measures in the MND. Those measures required compliance with applicable standards in the General Plan Noise Element and mandated minimum setbacks from the surrounding uses. However, the opponents pointed out that the MND contained neither specifications about the noise level that would emanate from the HVAC equipment, nor any evidence that the city would actually monitor and enforce the noise standards.

Although public controversy by itself does not trigger the need for a lead agency to prepare an EIR, this case demonstrates that when a project is controversial, even a modicum of substantial evidence should be of concern. Even a well-meaning agency, wanting to develop a much-needed senior housing project, can easily trip on the very low fair argument bar.

Commentary by Albert I. Herson. Regardless of the technical merits of this case, it will fuel CEQA criticisms by proponents of infill development and high density housing, and increase calls for broader CEQA statutory exemptions for infill housing. Infill high density projects are typically desirable from citywide and regional land use perspectives, and in this case the project provided the added benefit of senior housing.

However, infill high density projects across the state continue to be vocally opposed as undesirable land uses by neighboring residents in lower density housing, and a CEQA lawsuit is the most convenient and effective legal tool available for neighbors to slow or stop these projects. A similar case, *Pocket Protectors v. City of Sacramento [(2004) 124 Cal. App. 4th 903, 21 Cal. Rptr. 3d 791, 2005* California Environmental Law Reporter 20 (Matthew Bender)], was similarly criticized as an example of neighbors who opposed an infill housing project using CEQA aesthetics and design challenges to slow or stop infill housing. In both cases, the higher density projects literally abutted the neighbors back yards. The aesthetics holding of both cases appears inconsistent with *Bowman v. City of Berkeley [(2004) 122 Cal. App. 4th 572, 18 Cal. Rptr. 3d 814, 2004* California Environmental Law Reporter 421 (Matthew Bender) (obstruction of a few private views by multi-story building not a significant environmental impact)], notwithstanding both courts attempt to distinguish the Bowman case.

As Mr. Bass points out, in this case, the public controversy about the projects environmental impacts created an extremely low bar for a fair argument supporting EIR preparation. The quality of the neighbors substantial evidence of significant impacts was weak: public observations about aesthetic incompatibility and noisy air conditioners. Nevertheless, when the city was confronted with such evidence in the context of public controversy, the wisest course would have been to prepare an EIR. The EIR could have evaluated the feasibility of alternative building designs, and presented quantitative evidence demonstrating the projects air conditioners would meet city noise standards.

Cross References

. Manaster and Selmi, California Environmental Law and Land Use Practice, § 21.09[2] (Determining Whether Effects Are Significant) (Matthew Bender).

. **For a discussion of the facts, procedures, and holdings in this case**, *see* the May 2008 issue of California Environmental Law Reporter (Matthew Bender).

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n1 . These Expert Commentaries originally appeared in the May 2008 issue of California Environmental Law Reporter (Matthew Bender).

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Bernhardt on Citizens for Responsible and Open Government

2008 Emerging Issues 2240

Professor Roger Bernhardt on Citizens for Responsible and Open Government v. City of Grand Terrace, 160 Cal. App. 4th 1323, 2008 Cal. App. LEXIS 359 (4th Dist., Feb. 21, 2008, cert. for part. pub. March 13, 2008)

By Roger Bernhardt

April 28, 2008

SUMMARY: Review expert commentary on the California appellate courts decision in Citizens for Responsible and Open Government v. City of Grand Terrace, where the court found that a city was required to prepare an environmental impact report under the California Environmental Quality Act for a project because there was a fair argument that the project would present significant environmental impacts.

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Cite as: Bernhardt, Roger. *Citizens for Responsible and Open Government v. City of Grand Terrace*. LexisNexis Expert Commentary, *(Insert date you accessed the document online)*.

This project was set back significantly because its supporters elected to deal with its environmental concerns by way of a mitigated negative declaration rather than by a full dress environmental impact report (EIR). That development strategy backfired because it allowed the project opponents to argue--both in the trial court and in the Court of Appeal--that fair arguments could be made that three potential environmental impacts of the project were not adequately reduced by the mitigations proposed. This fair argument standard is one that works very much in favor of project opponents who can create almost any plausible environmental concerns.

Had these same three environmental issues been dealt with by way of an EIR rather than by a mitigated negative declaration, then even if the lead agency had then reached the same conclusion--i.e., that the environmental impacts could be satisfactorily mitigated--the judicial review standard would have changed from fair argument to substantial evidence, that is, from whether there was a fair argument for concern about the environment to whether there was substantial evidence supporting the conclusion that the concerns had been mitigated. This latter standard is obviously more forgiving towards proponents of projects that have been approved over neighborhood opposition, even in the face of conflicting data [*see* Cal. *Pub. Res. Code § 21168.5*; *Laurel Heights Improvement Assn. v. Regents of the University of California (1988) 47 Cal. 3d 376, 764 P.2d 278, 253 Cal. Rptr. 426]*. Furthermore, that strategy would have allowed the city council to find that the existence of overriding considerations had outweighed the environmental effects, a defense not available under the fair argument test.

The project was first officially proposed in June 2005, undoubtedly after significant unofficial groundwork had

already been done. The proposal and the accompanying mitigated negative declaration were approved by the City Council three months later in September. At that point it was clear that there was opposition (and indeed, the lawsuit was filed the next month). One year later--August 2006--a writ of mandate was issued calling for an EIR. And, finally, a year and a half after that--March 2008--the issuance of the writ was affirmed by the Court of Appeal. This means that the environmental review will only now commence. Overall, this project has been delayed over two and one half years by the attempt to save the probably far smaller amount of time that a bona fide environmental review would have taken.

Cross References

. Manaster and Selmi, California Environmental Law and Land Use Practice, § 21.09[2] (Determining Whether Effects Are Significant) (Matthew Bender).

. For a discussion of the facts, procedures, and holdings in this case, as well as additional expert commentary, see the May 2008 issue of California Environmental Law Reporter (Matthew Bender).

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Bernhardt on Holdgrafer v. Unocal Corp.

2008 Emerging Issues 2241

Professor Roger Bernhardt on Holdgrafer v. Unocal Corp. (2d Dist., March 4, 2008) 160 Cal. App. 4th 907, 2008 Cal. App. LEXIS 315

By Roger Bernhardt

April 28, 2008

SUMMARY: Professor Roger Bernhardt comments on *Holdgrafer v. Unocal Corp. 2008 Cal. App. LEXIS 315*, where a California appellate court found that in deciding whether a punitive damages award violates the constitutional prohibition of arbitrary or grossly excessive punishment, the most important factor to be considered is the reprehensibility of the defendant's conduct.

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Cite as: Bernhardt, Roger. *Holdgrafer v. Unocal Corp.*. LexisNexis Expert Commentary, *(Insert date you accessed the document online)*.

Attorneys representing landowners whose property has been contaminated by nearby oil spills will not learn very much from this decision concerning any distinctions between nuisance, trespass, and negligence. However, as long as such attorneys can get their client to a jury where the defendant is a major oil company, they probably did not need to worry about the niceties of their theory. Any one of those grounds will do, and there seems little doubt that a leaky pipeline owner will be held liable to neighboring landowners for the harm caused.

What will be important to those attorneys from this decision, however, is that they will not be able to obtain a punitive damages award merely by showing that the defendant covered up spills on *other* property in the past. The limitation set by the United States Supreme Court five years ago in *State Farm Mutual Automobile Insurance Company v. Campbell (2003) 538 U.S. 408, 155 L. Ed. 2d 585, 123 S. Ct. 1513*, excluding dissimilar evidence in calculating the size of such punitive damage awards, here extends to exclude such evidence entirely in determining whether the plaintiff can get to a jury at all on the question of malice. Without such outside evidence, there may be no punitive damages at all. In *Holdgrafer*, if the plaintiff cannot show there was a cover up as to this spill, the defendants bad acts elsewhere will not help.

Cross References

. **For a thorough discussion of the facts, procedures, and holdings in this case**, *see* the May 2008 issue of California Environmental Law Reporter (Matthew Bender).

. Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.23 (Matthew Bender).

. California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender).

. Manaster and Selmi, California Environmental Law & Land Use Practice, Ch. 3, *Toxic Torts and Environmental Litigation*, § 3.48 (Punitive Damages) (Matthew Bender).

. For California civil jury instructions on punitive damages, see Judicial Council of California Civil Jury Instructions (CACI), CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 (LexisNexis Matthew Bender, Official Publisher).

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Climate Change and Greenhouse Gas Regulation

2008 Emerging Issues 65

Climate Change and Greenhouse Gas Regulation

By Jonathan Martel and Clara Vondrich

March 20, 2008

SUMMARY: On April 2, 2007, the U.S. Supreme Court decided *Massachusetts v. EPA, 127 S. Ct. 1438 (2007)*, ruling that states had standing to challenge inaction by the Environmental Protection Agency (EPA) on greenhouse gas (GHG) emission regulation of motor vehicles, that carbon dioxide and other GHGs were air pollutants as defined by the Clean Air Act, and that EPA's decision not to regulate in the area was inconsistent with statutory requirements.

PDF LINK: Enhanced Emerging Issues Commentary ($)

ARTICLE: Introduction

The future of greenhouse gas controls in the United States is the subject of an intensifying interplay among all three branches of the federal government and the states. The Executive Branch, Congress, and the federal courts have all been engaged to varying degrees in defining the scope of legal authority by which EPA and/or the states may regulate issues related to global warming. Advocates of a federal solution would deny states the right to regulate in this arena on the grounds that national uniform standards are superior to a patchwork of state regulations, while advocates of state action argue that the federal governments pace is simply far too slow. As litigation, regulation and legislation continue to create uncertainty, the stakes for industry and the public are high, and caution in business planning now and in the future is critical.

On April 2, 2007, the U.S. Supreme Court decided *Massachusetts v. EPA, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007)*, ruling that states had standing to challenge inaction by the Environmental Protection Agency (EPA) on greenhouse gas (GHG) emission regulation of motor vehicles, that carbon dioxide and other GHGs were air pollutants as defined by the Clean Air Act, and that EPAs decision not to regulate in the area was inconsistent with statutory requirements. The 5-4 decision was accompanied by dissents from Chief Justice Roberts, challenging the recognition of standing, and from Justice Scalia, opposing the majoritys conclusion that carbon dioxide is an air pollutant under the Clean Air Act as well as the Courts rejection of EPAs decision not to regulate. The result of *Massachusetts v. EPA* is that EPA must make a determination of whether GHG emissions from automobile tailpipes endanger public health and welfare; if it does so find, the Clean Air Act mandates that EPA take regulatory action. Because under current technologies GHG emissions are controllable primarily through increased fuel economy, EPA previously indicated it would coordinate with the U.S. Department of Transportation, particularly the National Highway Transportation Services Administration (NHTSA), in crafting a greenhouse gas emissions standard for motor vehicles. More recently,

the enactment of new energy legislation requiring substantial increases in fuel economy standards and the use of renewable fuels (Energy Independence and Security Act of 2007), has cast some doubt on EPAs proposed rulemaking under pre-existing Clean Air Act authority. Nevertheless, should EPA decide to act, its obligation to make an endangerment finding for carbon dioxide for motor vehicles could have broader implications for other sources, including large and even moderate-sized stationary sources.

The legislative arena is also active. On December 3, 2007, the United States became the last developed nation declining to ratify the Kyoto Protocol, *37 I.L.M. 22*, the international agreement to reduce global greenhouse gas emissions. *Australia's Rudd Approves Kyoto Protocol*, Wall Street Journal, Dec. 4, 2007. With a growing sense of urgency that the United States (and the world) must act or face cataclysmic results and the dismay in many quarters regarding the United States refusal to participate in the Kyoto protocol, climate change-related activities in Congress have also been accelerating. With concentrated activity in both EPA and Congress, the question of whether EPA will be first to promulgate GHG emissions regulations under the Clean Air Act, or whether Congress will pass sweeping legislation that potentially takes the issue outside the scope of Act altogether, may well be answered in the coming year, and more certainly during the first year of a new Administration.

In the meantime, there is also considerable activity by state legislatures frustrated with the pace of federal action. Climate change and the perceived culprit, GHG emissions, have captured the attention of the general public in a way that few environmental issues have. There are several environmental advocacy groups that are not only pushing for legislative and regulatory solutions to the GHG emissions problem, but are also encouraging individuals and businesses to change their habits in relation to fuel consumption and to find ways to reduce their carbon footprints.

Business is watching these developments carefully, mindful that the course of regulatory action could have major impacts on the economy. Already, many companies are anticipating the new regime through a variety of green initiatives, including voluntary emissions reductions and offsetting, and marketing these achievements to consumers. Still, the uncertain regulatory landscape creates substantial risks and companies must do their best to predict which investments are likely to be recognized in the future. In addition, as environmental marketing claims promise to face closer scrutiny from the Federal Trade Commission (FTC) and state regulators, business must take care to ensure that any green claims conform to current legal standards for responsible advertising.

Discussion

1. Environmental Protection Agency Regulation

On May 16, 2007, in response to the Supreme Courts decision in *Massachusetts v. EPA*, President Bush issued an executive order stating it to be the policy of the United States to ensure the coordinated and effective exercise of the authorities of the President and the heads of the Department of Transportation, the Department of Energy, and the Environmental Protection Agency to protect the environment with respect to greenhouse gas emissions from motor vehicles, nonroad vehicles, and nonroad engines, in a manner consistent with sound science, analysis of benefits and costs, public safety, and economic growth. Exec. Order No. 13,432, *72 Fed. Reg. 27717* (May 16, 2007).

In keeping with this directive, EPA indicated it would issue a finding as to whether vehicle tailpipe GHG emissions endanger public health and welfare by the end of 2007. *Activists Vow Suit If EPA Offers Narrow Risk Finding in GHG Rules,* Clean Air Report, Nov. 29, 2007. EPA signaled its intention for rulemaking as early as May 14, 2007 in a briefing by EPA Administrator Stephen Johnson. In the briefing, Johnson indicated that -- because no on-board technology currently existed to limit GHG emissions -- EPA would seek to limit GHG emissions via improvements in fuel economy and limitations in the carbon dioxide content of transportation fuels. Dawn Reeves, *EPA, NHTSA to Align*

GHG Auto Rules to Ensure Joint Compliance, Environmental Policy Alert, Aug. 29, 2007.

The Executive Order specifically directed EPA to coordinate its GHG rulemaking efforts with the Department of Energy (DOE) and the National Highway Traffic Safety Administration (NHTSA), a subdivision of the Department of Transportation which regulates motor vehicle fuel economy under the Corporate Average Fuel Economy (CAFE) program. *Id.* Until the passage of the new energy bill (H.R. 6) on December 19, 2007, EPA had been proceeding with this rulemaking. According to one report, EPA wrestled in particular with whether to incorporate global ramifications of GHG regulation in its cost-benefits analysis, or to limit such analysis to the domestic arena. Doug Obey, *EPA Struggles To Define Scope Of Benefits From GHG Controls*, Clean Air Report, Sept. 6, 2007. The rationale for expanding the analysis beyond U.S. borders is that there is little short-term domestic benefit to curbing GHG emissions; yet, acting or failing to act could have significant global effects that ultimately will affect the domestic economy. *Id.* Nevertheless, the White House reportedly has been resistant to a globally-based analysis, and there is some question whether EPA even has the authority to conduct such an analysis in the first place. *Id.*

Another hot button arising out of EPAs efforts to craft a GHG rule is the alleged focus on low-carbon fuels, including a $1 per gallon fee for failing to meet a proposed annual 35 billion gallon low-carbon fuel mandate. The oil industry has voiced concerns that these requirements would not only be financially onerous, but technologically infeasible as well. The industry notes that current low-carbon fuel production, in the form of biofuels and corn-based ethanol, will only meet half of such mandate and that the technology for cellulosic ethanol, which is needed to make up for the shortfall, is not commercially viable. *Industry, Enviros Worry As EPA Crafts Low-Carbon Fuel Standard*, Greenwire, Nov. 15, 2007.

EPA has been keeping the details of its rulemaking activities close to the vest, declining to provide specifics. *Activists Vow Suit If EPA Offers Narrow Risk Finding in GHG Rules*, Carbon Control News, Nov. 19, 2007. The enactment of new energy legislation on December 19, 2007, the Energy Independence and Security Act of 2007, mandating the first increase in fuel economy standards since 1975 as well as significant increases in the use of renewable fuels, further casts doubt on the direction of EPAs actions. Key provisions of the new law include:

. a phased-in increase (starting in 2011) of the average fleet fuel economy standards for cars and light trucks to 35 miles per gallon by 2020, an increase in the Renewable Fuels Standard, which sets annual requirements for the amount of renewable fuels produced and used in motor vehicles, to 9 billion gallons in 2008 and 36 billion gallons by 2022;

. an increase in the proportion of renewable fuels that are advanced biofuels, such as cellulosic ethanol, with a 3 billion gallon standard for advanced biofuels in 2016 and a 21 billion gallon standard in 2022; and

. a requirement that conventional biofuels, produced from new facilities that commence construction after the enactment of the law, emit 20 percent fewer lifecycle greenhouse gas emissions as compared to a baseline set by EPA Administrator for traditional transportation fuels, such as diesel or gasoline.

The new renewable fuels standards are codified at Section 211(o) of the Clean Air Act, *42 U.S.C. § 7545(o)*, and EPA is required to pass implementing regulations within one year of enactment. The changes to the fuels provisions of the Clean Air Act are the most substantial changes to the statute since the major overhaul of the 1990 Amendments. Although there is some overlap with broader energy policy and security interests, it seems fair to regard the new fuel economy standards and renewable fuels requirements of the energy bill as the first major climate change legislation out of Congress.

EPA Administrator Stephen Johnson has announced that, at least in part based on the fuel economy requirements of the energy bill, EPA will deny Californias request for a waiver of federal preemption under the Clean Air Act to implement its own standards for greenhouse gas emissions from motor vehicles. While the Clean Air Act generally prohibits states from adopting or attempt[ing] to enforce their own emission standards, Section 209 allows states to seek a waiver if the State determines that the State standards will be, in the aggregate, at least as protective of public health

and welfare as applicable Federal standards. *42 U.S.C. § 7543(b)*. EPA must, however, deny a waiver request if California does not need such State standards to meet compelling and extraordinary conditions. *Id*. California is the only state eligible to seek a Section 209 waiver but other states may opt in to Californias standards pursuant to Section 177 of the Clean Air Act if a waiver is granted. Californias program targeting greenhouse gas emissions from motor vehicles was set to commence in model year 2009 and many other states have already indicated their intent to opt in. EPAs announcement that it will deny Californias waiver request has touched off investigations in Congress and litigation by California, other states, and environmental organizations (as discussed further below in 3. State Legislation). Although EPA has yet to issue a document explaining the basis for its decision, Administrator Johnson has stated publicly that Californias regulations are unwarranted in light of the uniform national approach afforded by the new energy bill. Environmental groups were already concerned that EPAs coordination with NHTSA would result in a watered down EPA rule that merely mirrors the fuel economy standards established by NHTSA. *Industry, Enviros Worry As EPA Crafts Low-Carbon Fuel Standard*, Greenwire, Nov. 15, 2007. EPAs reliance on the energy bill to deny the California waiver only amplifies concerns in this regard, and raises questions about how or even whether EPA will proceed with further rulemaking to regulate greenhouse gases from motor vehicles and fuels under pre-existing Clean Air Act authority. (As noted above, however, EPA must at least promulgate new regulations for renewable fuels to achieve the GHG emissions reductions specified in amended Section 211(o) of the Clean Air Act, which was adopted as part of the energy bill.)

In addition, EPAs action or inaction in regulating greenhouse gases from motor vehicles or fuels could have a spillover effect on stationary sources. Environmentalist groups are urging EPA to extend its regulations to include stationary sources as well as motor vehicles, threatening litigation if it does not. *Activists Vow Suit If EPA Offers Narrow Risk Finding in GHG Rules*, Carbon Control News, Nov. 19, 2007. Opposing such regulation, industry officials are seeking ways for EPA to limit its endangerment finding to vehicle emissions, excluding stationary sources of GHG emissions. *Id.* Most recently, anti-regulation conservatives have used the passage of the energy bill as an opportunity to lobby the White House to block EPA's release of an endangerment finding altogether. *White House Faces Conservative Push to Block EPA Climate-Risk Finding*, Inside Washington Publishers, Jan. 7, 2008. Publicly, EPA appears to be holding course in its view that, while climate change is an important issue, the proper approach to reducing GHG emissions is through policy that encourages voluntary reduction in emissions, reflecting the stance of the Bush administration. See National Goal to Reduce Emissions Intensity, EPA Climate Change U.S. Climate Policy website (describing basis of policy as promotion of voluntary programs and partnerships).

Practice Tip: Watch Out for Impacts on PSD Permitting. EPAs Prevention of Significant Deterioration Program (PSD) permitting program is another flashpoint for dispute after *Massachusetts v. EPA.* PSD permitting applies to new construction and modifications of major sources of air pollutants in areas already attaining the National Ambient Air Quality Standards (NAAQS). Major sources are those with 100 or 250 tons per year of emissions of the pollutant in question (depending on the source category). PSD permitting requires installation of best available control technology (BACT) based on the maximum degree of reduction of *each pollutant subject to regulation* deemed achievable for the facility**.** *42 U.S.C. § 7479*(3) (emphasis added). Specifically at issue post-*Massachusetts* is whether greenhouse gases, particularly carbon dioxide, are or will be considered subject to regulation, thereby triggering BACT. An affirmative response could have leviathan implications, since the carbon dioxide emissions from combustion of fossil fuels is so large that even the larger major source threshold of 250 tons would easily be exceeded for a wide range of facilities. For example, according to EPA officials, the furnace or boiler of a commercial building emits roughly 250 tons of carbon dioxide per year. Additionally, for purposes of deciding what constitutes a significant increase for purposes of triggering PSD for source modifications, regulations indicate that any emissions increase will do for pollutants for which a significance threshold has not yet been determined. *40 C.F.R. § 52.21(23)(ii)*. Although some environmental advocates contend that carbon dioxide is already regulated under the Clean Air Act following *Massachusetts v. EPA*, the Agency has disagreed based on its position that a pollutant is not regulated until actual standards have been set. An EPA rule on carbon dioxide from motor vehicles or fuels would seem to put the issue beyond doubt, though it remains to be seen whether the new provisions of Section 211(o) requiring EPA to set emissions standards for renewable fuels will prove sufficient in this regard. Thus, the stakes are high for stationary

sources and mobile sources alike as EPA proceeds to implement the new fuels provision and also considers its original pledge to regulate GHG emissions from motor vehicles.

2. Congress

It is difficult to say that, on the whole, Congressional action in the area of GHG emissions is a response to the Supreme Courts decision in *Massachusetts v. EPA*. There are numerous bills pending in Congress dealing with greenhouse gas emissions and some predate the Court's landmark decision. Among the most notable bills are: *2007 S. 2191,* America's Climate Security Act of 2007; *2007 S. 280,* The Climate Stewardship and Innovation Act; *2007 S. 309,* Global Warming Pollution Reduction Act; *2007 S. 317,* The Electric Utility Cap and Trade Act, *2007 S. 1766,* Low Carbon Economy Act of 2007; *2007 S. 485,* Global Warming Reduction Act; *2007 H.R. 620,* The Climate Stewardship Act; and *2007 H.R. 1590,* The Safe Climate Act. Some bills are more comprehensive than others, covering different multiple emission sources, while others target only the power generation industry or motor vehicles.

One of the leading GHG emission bills, *2007 S. 2191,* America's Climate Security Act of 2007, also known as the Lieberman-Warner bill, was introduced after *Massachusetts v. EPA* and passed by the full Committee on Environment and Public Works on December 5, 2007. The measure would reduce GHG emissions in the power, gas, industrial and upstream oil sectors, capping emissions at 2005 levels in 2012, and then further reducing those levels 20% by 2020 and 70% by 2050. The bill would furthermore allow emitters to trade allowances to emit the GHGs carbon dioxide, methane, sulfur hexafluoride, hydrofluorocarbons and perfluorocarbons. It would allocate some free allowances to industry at first, but gradually shift to auctioning all allowances.

Senator Barbara Boxer, Chair of the Committee on Environment and Public Works, called passage of the bill a historic moment for our country and the greatest legislative accomplishment of my political career of thirty years. *See* Press Release, U.S. Senate Committee on Environment and Public Works, Majority page, *Boxer says Passage of Historic Global Warming Bill Puts the Wind at Our Backs*, December 5, 2007. Finally, America is taking bold steps to avert the catastrophe that awaits our children and grandchildren if we do nothing. Our bill has two goals to fight global warming and to do it in a way that keeps our economy strong. That will be my focus in the coming weeks and months as we move the bill forward to the Senate floor. This bill is the most far reaching global warming bill in the world and I am grateful to Senators Lieberman and Warner for breaching the partisan divide and unleashing a spirit of cooperation that puts the wind at our backs." *Id.*

Nevertheless, the bill passed by a narrow margin of 11-8, with bill co-sponsor John Warner the only Republican voting in favor. The committees ranking Republican, James Inhofe of Oklahoma, moreover, promised an enormous floor fight, saying: This bill will strike a devastating blow to American families, American jobs and the American way of life. *See* Press Release, U.S. Senate Committee on Environment and Public Works, Minority page, *Committee Mark-Up Exposes Serious Flaws in Lieberman-Warner Bill*, Dec. 5, 2007. Inhofe chastised Democrats for rejecting an amendment to promote nuclear plant construction through tax credits and loan guarantees. You simply cannot ignore the world's largest source of emission-free energy if you plan to cut carbon emissions and still keep the lights on, he said. *Id.* Republicans also criticized the lack of incentives for producing natural gas, which will be needed in greater quantities if power plants switch from coal.

The bill enjoys broad support from environmental groups, including the Sierra Club, the Apollo Alliance, Defenders of Wildlife, Environmental Defense, League of Conservation Voters, National Environmental Trust, National Wildlife Federation, Natural Resources Defense Council, The Nature Conservancy, Union of Concerned Scientists and The Wilderness Society. Upon passage of the bill out of subcommittee in November, the Union of Concerned Scientists described the vote as a turning point in the debate over global warning. Climate: Lieberman-Warner Bill Squeaks through Senate Subcommittee, Greenwire, Nov. 1, 2007. A number of national religious coalitions have also publicly endorsed the measure. *See* Press Release, U.S. Senate Committee on Environment and Public Works, Majority page, Religious Coalitions Call Lieberman Warner Bill A Significant Step in Addressing Global Warming, December 4, 2007.

Former critics of the bill include Independent Senator Bernie Sanders of Vermont, a subcommittee member who voted against approving the bill after being denied several concessions he was seeking. *Id.* While conceding it was a strong bill, Sanders had previously stated that the bill did not go far enough, according to the scientific community, in giving us a chance to reverse global warming, contending that the bill would allow major polluters to avoid reducing emissions until 2036. 153 Cong Rec S 14257, 14263. However, Sanders was mollified when two of his proposed amendments were passed during the full committee markup, including a $300 billion commitment over the next four decades to encourage the development of renewable sources energy like solar, wind and geothermal power. *See* Press Release, Office of Senator Bernie Sanders, *Global Warming Bill Advances to Full Senate*, Dec. 5, 2007. In addition, Democratic presidential candidate, Senator John Edwards, formerly denounced the bills giveaway of pollution permits as a corporate windfall, prompting revisions to the bill. *Edwards Statement on Global Warming Legislation in the Senate*, Targeted New Service, Nov. 1, 2007. Senator Boxer warned about taking a stance against an admittedly strong bill because it was not perfect. *Clinton's Campaign Platform Puts Squeeze on Lieberman-Warner Bill*, Environment and Energy Daily, Nov. 6, 2007. As Senator Boxer explained, the end result could be no legislation addressing the issue. *Id*.

The Committee on Environment and Public Works was originally expected to act on the bill in time for a full Senate vote by the end of 2007. However, substantial revisions were made to the bill in November in an effort to broaden support, pushing back the schedule. Avery Palmer, *Changes Could Improve Chances for Global Warming Bill*, *Congressional Quarterly Today*, Nov. 29, 2007. One of the key changes was an increase in the percentage of emission allowances to be auctioned to industry instead of given away, addressing the criticism of Senator Edwards and other legislators, as well as many environmental groups. *Id.* Under the revision, one quarter of the available allowances would be auctioned in 2012, increasing gradually to 70 percent in 2031, thus providing a higher starting point and sharper rate of increase than the previous version. *Id.* In addition, the legislation will encompass around 80 percent of the GHG emissions generated from the U.S. economy, up from the 75 percent encompassed previously. *Climate: Global Warming Bill on Track for Senate Committee Passage*, Environment and Energy Daily, Dec. 3, 2007.

Efforts are also being made to determine the economic impact of the Lieberman-Warner bill. The co-sponsors of the bill, Senators John Warner and Joseph Lieberman, requested that both the Department of Energy Information Administration and EPA meet with their staffs to establish methods of assessing the potential costs of the legislation. *Sen. Barbara Boxer Holds a Hearing on S. 2191, America's Climate Security Act of 2007*, Political Transcript Wire, Nov. 15, 2007 (statement of Sen. John Warner of Virginia). Senator George Voinovich of Ohio is independently asking EPA to assess the impact of the Lieberman-Warner bills carbon cap-and-trade program on EPAs existing air quality regulations. Voinovich may also introduce alternative climate change legislation. *Economic Analyses Frame Debate for Upcoming Senate Climate Markup*, Clean Air Report, Inside Washington Publishers (Nov. 29, 2007).

Practice Tip: Undertake Thorough Diligence for Offsets Projects. While Congress continues to deliberate, many businesses are beginning to plan for a carbon-constrained world. In addition to evaluating their carbon footprints and cost-effective means to reduce emissions through efficiency or other improvements, some companies are voluntarily seeking to participate in various carbon offset regimes with the hope of improving their position for future regulation. Under a typical carbon offset program, a company purchases credits or options from a third party who undertakes activities (such as controlling landfill gas emissions or preserving forests) to reduce greenhouse gas emissions elsewhere. However, investment presents substantial risks in light of the current absence of national standards, and companies must consider whether the offsets they purchase are likely to be considered valid in the future. Offset quality is of critical importance because the entire concept relies on the premise that offsets result in real, quantifiable emissions reductions. In particular, attention is being focused on whether the reductions generated are permanent and additional, meaning that they would not have occurred but for the purchase of the offset. Businesses interested in offset programs should conduct careful due diligence, looking to the standards currently under development by such entities as the California Climate Action Registry, the Chicago Climate Exchange, and the International Emissions Trading Association. In addition, the Kyoto Protocol includes offset standards under its Clean Development Mechanism (CDM) which are proving particularly influential. Standards for additionality should receive particularly close scrutiny.

3. State Legislation

California has passed a comprehensive climate change law, the California Global Solutions Warming Act, codified at Cal Health & Safety Code § 38500 *et seq.*, and other states and localities are taking independent action. For example, Florida governor Charlie Crist signed three executive orders in 2007 designed to reduce the states greenhouse gas emissions from a variety of sources. Press Release, Office of the Governor of Florida, Governor Crist Signs Executive Orders to Reduce Greenhouse Gases, July 13, 2007. In addition, at least four other states -- Hawaii, New Jersey, Minnesota, and Washington -- passed global warming laws modeled on Californias legislation in 2007 alone. Pamela M. Prah, *States Forge Ahead on Immigration, Global Warming*, Stateline.org, July 30, 2007.

In addition to individual state laws, states are forming regional coalitions to address GHG emissions. In 2004, the governors of California, Oregon, and Washington, later joined by Arizona, New Mexico, Utah, and the Canadian provinces of British Columbia and Manitoba, formed the Western Climate Initiative (WCI), agreeing to a series of actions to address GHG emissions. *Western Region Plan to Reduce GHG Emissions Has Energy Suppliers Waiting for Specifics*, Electric Utility Week, Aug. 27, 2007. The WCI will seek to limit GHG emissions from all sources, including transportation, power generation, and the commercial, residential, and industrial sectors. *Id.* Joining as observers to the initiative are Alaska, Colorado, Idaho, Kansas, Nevada, Wyoming; the Canadian provinces of Ontario, Quebec, and Saskatchewan; and the Mexican state of Sonora. *Id.* In 2005, seven northeastern states, Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York and Vermont, formed the Regional Greenhouse Gas Initiative (RGGI) to create a regional cap-and-trade system for carbon dioxide emissions from power plants. Scott Greenberger, *7 States Sign Emissions Pact*, Boston Globe, Dec. 21, 2005. Massachusetts and Rhode Island originally opted out of the pact, but have since rejoined. *See Rhode Island Joins Regional Greenhouse Gas Initiative*, Department of Energy Office of Energy Efficiency and Renewable Energy News, January 31, 2007. Additionally, Maryland Governor Martin OMalley signed an agreement to join in March 2007, making Maryland the tenth state to join the initiative. Press Release, Office of the Governor, *Governor Martin OMalley Signs Greenhouse Gas Agreement, Climate Change Executive Order*, April 20, 2007. The RGGI Memorandum of Understanding (MOU) calls for states to cap power sector carbon dioxide emissions at roughly current levels for the first six years of the program (2009-2014), before initiating an emissions decline of 2.5 percent per year for the four years 2015 through 2018. Thus, the program calls for states to reduce carbon dioxide emissions by a full 10 percent by 2019. Under the agreement, moreover, each state is given discretion in the allocation of emissions allowances, although RGGI mandates that 25 percent of each states allowances be reserved for a consumer benefit or strategic energy purpose. *See Overview of RGGI CO2 Budget Trading Program*. On August 15, 2006, participating states issued a model rule for the RGGI program, which will form the basis of individual state regulatory and/or statutory proposals to implement the program.

It remains to be seen whether Congress will acquiesce to continued state regulation of GHG emissions or will create legislation that supersedes state authority. Neither the recent energy bill nor the current version of the Lieberman-Warner bill would preempt state rules.

As discussed above, California has adopted regulations for GHG emissions from motor vehicles that a number of other states have also adopted, and for which EPA has announced that it will reject a waiver of preemption under the Clean Air Act. EPAs decision is already being challenged by states and environmental organizations in a lawsuit filed on January 2, 2008, in the United States Court of Appeals for the Ninth Circuit. See Press Release, Environmental Defense, *Environmentalists Sue to Challenge EPA Ruling on Clean Cars*, January 2, 2008. *See also* Petition for Review, California v. EPA (Jan. 2, 2008). Regardless of the outcome of Clean Air Act appeal, however, it should be noted that the auto industry has also challenged state standards on the basis of the Energy Policy and Conservation Act (EPCA), which establishes fuel economy standards administered by NHTSA. Two federal district courts have rejected the auto industrys claims in this regard, concluding that the state standards are not separately preempted under the *EPCA. Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295 (D. Vt. 2007); Cent. Valley Chrysler-Jeep, Inc. v. Goldstone, 529 F. Supp. 2d 1151 (D. Cal. 2007).*

Although these decisions, and associated appeals to the Second Circuit and Ninth Circuit, respectively, would not

have practical significance in light of EPAs decision to refuse Californias GHG emissions waiver under the Clean Air Act, arguments related to EPCA preemption could become relevant once more if the legal challenges to EPAs waiver decision are successful or the next Administration reverses the waiver decision. One federal district court has recently found that EPAs waiver decision does not, in fact, defeat the viability of claims brought by the auto industry seeking to invalidate state standards under the EPCA. *Lincoln Dodge, Inc. v. Sullivan, 2007 U.S. Dist. LEXIS 94618* (D.R.I. Dec. 21, 2007). In that case, the district court denied Rhode Islands motion to dismiss the auto industrys suit challenging the States adoption of Californias GHG emissions standards. The State argued the suit was not yet ripe in light of the then-possibility, now-reality, that EPA might deny Californias GHG emissions waiver, thereby nullifying the effect of Rhode Islands regulations as well. The district court order, issued after EPAs waiver decision, nevertheless concluded that the suit was ripe, in part, because EPAs decision could be reversed on appeal. *Id.* at *18.

Practice Tip: Ensure Validity of Green Marketing Claims. In the 1990s, focus on a wave of new marketing terms like recycled, recyclable, and biodegradable prompted the Federal Trade Commission to publish the Green Guides, setting forth federal standards for environmental advertising claims. *57 Fed. Reg. 36,363* (Aug. 13, 1992). Todays green issue is climate change and the new marketing buzzwords are carbon offsets, carbon friendly, and carbon neutral. Consumers are interested in exploring ways to reduce their carbon footprint, either through reduced energy use or by purchasing products and services from companies that are doing so. But similar to the green claims of the 1990s, there is a potential for abuse and the FTC is taking notice. Basic FTC policy is that advertisers must have a reasonable basis for making objective claims. The level of substantiation required depends on several factors, including the type of claim, the type and availability of evidence adequate to substantiate the claim, and the extent of consumers reliance on the claim. For environmental claims, competent and reliable scientific evidence is also typically required as part of the substantiation process. Carbon-related claims are surely complex enough that the FTC would be inclined to issue specific criteria for their use (as it did in 1992 for claims relating to biodegradability, etc.) rather than resort to more general guidance. That being said, all three types of claims face common questions regarding their effective definition and substantiation. For example, if a company claims to be carbon neutral because it purchases carbon offsets in an amount equal to the carbon emissions it puts out, do consumers understand that the company may well be emitting large quantities of greenhouse gases, other than carbon dioxide, which are not offset? Should the carbon footprint of a user include upstream emissions, suppliers, construction of a manufacturing facility or use of the product by the consumer? Are offsets relied upon to achieve neutrality permanent and additional to what would have occurred notwithstanding the investment in the offset, and is their magnitude well-established scientifically? What independent verification is necessary prior to making advertising claims? The FTC convened a workshop on January 8, 2008, to begin addressing these issues. *See* Letter from Deborah Platt Majoras to Rep. Edward Markey (Aug. 9, 2007). In the meantime, businesses should take care to ensure that their marketing claims are well-substantiated, understandable to consumers, and consistent with current legal standards for advertising.

Conclusion

Congress appears poised to issue sweeping legislation that at least in part acknowledges the concern that the Clean Air Act does not provide an adequate framework for the regulation of GHG emissions. However, some commentators have expressed doubts that anything concrete could occur before the inauguration of the next president in January of 2009. In addition, because of EPAs imminent actions in GHG regulations, the House of Representatives, planning to send a final energy bill to President Bush in December, has been forced to negotiate with EPA so that the bill will not undermine EPAs authority to regulate GHG standards for vehicles.

EPA is already responding to the Supreme Courts mandate in *Massachusetts v. EPA* and must either make a determination on whether GHG emissions endanger public health and welfare or provide a reasonable explanation why not. It remains unclear what if any step EPA will take to regulate GHGs under the Clean Air Act and when Congress might act with more comprehensive legislation. In the interim, states are moving forward with their own initiatives, debate and litigation over EPAs actions and inaction will continue, and business will continue to have to navigate a landscape of significant uncertainty with attendant risks and opportunities.

For Detailed Discussion and Analysis of Californias Air Regulatory Program, see 2-42 California Environmental Law & Land Use Practice § 42.01 *et seq.* (LexisNexis Matthew Bender). Climate Change and Global Warming, including coverage of Californias emission standards, are discussed in 6-85 California Environmental Law & Land Use Practice § 85.01 *et seq.* (LexisNexis Matthew Bender).

For Discussion and Analysis of *Massachusetts v. EPA*, see 2-1A *Treatise on Environmental Law § 1A.02* (LexisNexis Matthew Bender); 3-17 Environmental Law Practice Guide § 17.10A; and Michael B. Gerrards Expert Commentary accompanying the case on lexis.com at *127 S. Ct. 1438 (2007).*

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Expert Commentary on Engine Mfrs. Ass'n v. S. Coast Air Quality Maint. Dist.

2008 Emerging Issues 897

Expert Commentary on Engine Mfrs. Ass'n v. S. Coast Air Quality Maint. Dist., 498 F.3d 1031 (9th Cir

By Fran M. Layton and Winter King

November 8, 2007

SUMMARY: Review expert commentary on the federal Ninth Circuits important decision that the fleet rules adopted by Californias South Coast Air Quality Management District are not preempted by the federal Clean Air Act to the extent they direct state and local governmental entities purchasing, procuring, leasing, and contracting decisions. The commentary originally appeared in the October 2007 issue of CALIFORNIA ENVIRONMENTAL LAW REPORTER (Matthew Bender).

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ARTICLE: Returning to the Ninth Circuit Court of Appeals for the second time in seven years, the South Coast Air Quality Management District (SCAQMD or District) has achieved a major victory in its effort to defend its Fleet Rules from a preemption challenge by the Engine Manufacturers Association (EMA) and Western States Petroleum Association. The August 20, 2007, unanimous decision from the three-judge panel affirms a lower court decision holding that garbage trucks, street sweepers, school and city buses, and other publicly funded fleets can be required to purchase less-polluting, alternative fuel vehicles when adding to or replacing vehicles in their existing fleets. The District adopted the Fleet Rules in 2000 and 2001 as part of its continuing effort to reduce air pollution in the South Coast Air Basin, one of the most polluted air basins in the country.

In *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, the Ninth Circuit was presented with a question of first impression: whether the Clean Air Act preempts state and local government clean vehicle purchasing requirements. The Ninth Circuit held that the District's Fleet Rules, insofar as they direct the purchasing and contracting decisions by all levels of government operating in the vast area administered by the SCAQMD, constitute state proprietary activity and thus are exempt from preemption under the market participant doctrine. This ruling could significantly enhance cleanup efforts nationwide, including protecting the scores of state and local government clean vehicle purchasing programs that have been adopted across the country.

A long line of cases, beginning in 1976, have established the contours of the market participant doctrine [*see, e.g., Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976)*; *Bldg. & Constr. Trades Council v. Associated Builders & Contrs., 507 U.S. 218, 226227 (1993)* (Boston Harbor)]. Today it is well accepted that, unless Congress has enacted preemption provisions that clearly provide to the contrary, a state may buy and sell goods, contract for services, and manage its own property just like any other private party. Thus, the two principal and novel questions before the Ninth

Circuit were: (1) whether anything in the Clean Air Act suggested that Congress intended to preempt state proprietary action, in addition to state regulation of mobile source emissions, and; (2) if not, whether the Fleet Rules were essentially proprietary activity.

Looking to the Clean Air Act's overarching goal of preserving the states' traditional role in preventing air pollution, the court could find nothing, express or implied, in the Clean Air Act to suggest that Congress intended to preempt state proprietary action. The decision for the first time affirmed the application of the market participant doctrine to the Clean Air Act.

Turning to the second question, the court noted that the only test it had adopted to date to distinguish regulatory from proprietary activity had been developed in *Chamber of Commerce of the United States v. Lockyer [463 F.3d 1076 (9th Cir. 2006)]*, a case analyzing whether certain conditions on state funding were preempted by the National Labor Relations Act (NLRA). In that case, the court identified two categories of state proprietary action: action that essentially reflects the state=s interest in efficient procurement of needed goods and services, as measured by comparison to the typical behavior of private parties in similar circumstances; and action that is so narrow in scope as to defeat an inference that the state's primary goal was to encourage a general policy rather than address a specific proprietary problem *[463 F.3d at 1084]*. Because Congressional intent is key to determining the scope of preemption, and because this intent varies from statute to statute, the court forewarned against mechanically applying a test developed in one statutory context to the facts arising in a different statutory context. This warning opens the door to future litigants to propose a statute-specific test for distinguishing regulatory from proprietary action.

Although the court opened this door, it did not feel the need to walk through it. Instead, it held that the provisions of the Fleet Rules directing the purchasing, procuring, leasing, and contracting decisions of state and local governmental entities fall squarely within the first category of state proprietary action identified in *Lockyer*: action that essentially reflects the state's interest in efficient procurement of goods and services. In reaching this conclusion, the court rejected a series of arguments by industry appellants that would have significantly limited the scope of the doctrine.

First, and most significantly, the court rejected appellants= contention that the Fleet Rules are not concerned with the efficient procurement of goods and services because the *motive* of the state and the District in adopting them was to reduce air pollution. As long as the state directly enters the market to buy or sell goods, or contract for services, an environmental motive does not render that action regulatory. Indeed, the court went on to clarify that efficient does not merely mean cheap. Rather, efficient procurement means procurement that serves the state's purposes--which may include purposes other than saving money. In support of this proposition, the court cited evidence in the record that two large private fleet operators, FedEx and UPS, have, of their own volition, begun to purchase less-polluting vehicles for their fleets. This holding is critical for states and local governments seeking to use their purchasing and contracting power to achieve environmental and other policy goals.

Second, the court rejected EMA's argument that the Fleet Rules are regulatory because they involve the state directing the expenditure of local funds. As the court noted, its holding in *Big Country Foods, Inc. v. Board of Education [952 F.2d 1173 (9th Cir. 1992)]* foreclosed this argument. The court in *Big Country Foods* concluded that the State of Alaska was acting as a market participant when it directed how local school districts used federal funds to purchase milk *[952 F.2d at 1179 & n.5]*.

Finally, the court dismissed EMA's argument that the Fleet Rules are regulatory because they are enforceable by criminal sanctions and fines. The Court first noted that it is unclear whether these enforcement provisions could even be used against government entities. However, even if they could, the Court did not believe that these provisions have the effect of transforming the Rules from proprietary to regulatory action.

After affirming the district court decision that the provisions of the Fleet Rules governing public fleets are valid under the market participant doctrine, the Ninth Circuit remanded the case to the lower court to determine whether any of the remaining provisions are invalid. This portion of the opinion attempts to harmonize two apparently contradictory

lines of reasoning governing how courts should review a plaintiff's facial challenge to a state statute. In *United States v. Salerno [481 U.S. 739 (1987)]*, the Supreme Court held that, in order to prevail on a facial challenge to a legislative act, a plaintiff must establish that no set of circumstances exists under which the [challenged] Act would be valid *[481 U.S. at 745]*. In other cases, however, courts have used the doctrine of severability to uphold some provisions of a multifaceted statute, while striking down other provisions as facially invalid [*see, e.g., Nat'l Collegiate Athletic Ass=n v. Miller, 10 F.3d 633 (9th Cir. 1993)]*. Interpreting these two lines of cases, the court held that, in order to prevail on a facial challenge to a statute containing multiple, severable provisions, a plaintiff is not required to show that every provision of the statute is invalid. Rather, the reviewing court should uphold the unobjectionable provisions that are separable from those found to be unconstitutional [quoting *Nat'l Collegiate Athletic Ass'n, 10 F.3d at 640]*. Thus, on remand, the parties and the district court must determine what provisions of the Fleet Rules have yet to be analyzed, and whether any of these provisions is invalid under the Clean Air Act.

Cross References

Manaster & Selmi, California Environmental Law & Land Use Practice, Ch. 42, *Federal and State Regulation of Motor Vehicles*, § 42.30 (federal preemption of state standards) (Matthew Bender)

Grad, Treatise on Environmental Law, Ch. 2, *Air Pollution*, §§ 2.03, 2.04 (Matthew Bender)

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Israel on State of New Mexico v. General Electric Company, et al

2008 Emerging Issues 859

Israel on State of New Mexico v. General Electric Company, et al

By Brian D. Israel

November 5, 2007

SUMMARY: In State of New Mexico v. General Electric Company, the Tenth Circuit ruled that CERCLA's comprehensive natural resource damages (NRD) scheme preempts any state remedy that seeks something other than restoration, replacement, or acquisition of the resource, and thereby dismissed a claim by the State of New Mexico for damages based on an allegedly inadequate EPA remedy. This commentary, written by Brian D. Israel, environmental lawyer and partner at Arnold & Porter, discusses the significance of this decision for NRD trustees.

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Tenth Circuit Examines Preemptive Effect of CERCLAs NRD Provisions on State Claims

State of New Mexico v. General Electric Company, et al., affirmed an important principle of modern environmental law: that its focus and purpose is to protect the public interest in a healthy functioning environment, and not to provide a windfall to the public treasury (citation omitted). In so doing, the Tenth Circuit addressed (1) the preemptive effect of CERCLA, (2) the relationship between a Superfund cleanup and a claim for natural resource damages (NRD), and (3) the ability of a trustee to seek compensation for the lost use of groundwater.

The State of New Mexico brought a claim in 1999 seeking $**5 billion in natural resource damages resulting from contaminated groundwater at the South Valley Superfund Site in Albuquerque, New Mexico. The Site has been undergoing groundwater remediation since the late 1980s under the direction of the U.S. EPA (and with the concurrence of the New Mexico environmental agency). Notwithstanding these cleanup efforts, New Mexico asserted that it had suffered, or would suffer in the future, significant natural resource damages, for which it was entitled to compensation. The State sought to recover funds not for restoration but for the general treasury.**

The State Attorney General put forward a number of theories in both federal and state court. In federal court, the State filed a claim for NRD pursuant to CERCLAs statutory provisions. Interestingly, the natural resource trustee of New Mexico apparently did not wish to assert a claim, so the State named its own trustee as an involuntary plaintiff. Ultimately, the State dismissed its statutory NRD claim. In state court, New Mexico sought the same damages pursuant to state statutory and common law theories. The state law claims were

removed to federal district court, which retained jurisdiction even after the federal claims were dismissed.

Conflict Preemption. The Tenth Circuit first examined whether New Mexicos common law NRD claims were preempted by CERCLAs NRD provisions. The State argued that its claims were not preempted due to CERCLAs two saving provisions. The first protects a states ability to impose additional requirements beyond those required by CERCLA. The second protects the rights of those exposed to hazardous substances. In light of these provisions, the Court analyzed the issue pursuant to principles of the narrower preemption doctrine of conflict preemption. Conflict preemption would only preclude a claim that stands as an obstacle to the accomplishment of congressional objectives encompassed in CERCLA. *Lopez, 467 F.3d at 1244.*

The natural resource damages provisions of CERCLA provide that money recovered is available for use only to restore, replace, or acquire the equivalent of such natural resources *42 U.S.C.S. § 9607(f)(1)*. In other words, a State may not use an NRD claim to obtain funds for purposes unrelated to the natural resource injury. To the extent that New Mexico was seeking an unrestricted award of money damages, the Tenth Circuit held that its claim was preempted by the CERCLA NRD regime. Otherwise, according to the Court, States could recover natural resource damages but fail to achieve the restoration purposes inherent in the statute.

The Tenth Circuit also indicated that it would be improper to use NRD recoveries to pay attorney fees. This holding may call into question the use of private lawyers by trustees in some states, including New Jersey.

Impermissible Attack on the Remedy. Having found that CERCLAs NRD provisions preempt any state remedy that seeks something other than restoration, replacement, or acquisition of the resource, the Court then addressed whether the States claim could survive within those limitations. The gravamen of the States claim was its assertion that the CERCLA groundwater remediation at the site was inadequate. The Tenth Circuit held that the States claim was an impermissible attack on the EPA remedy and that it therefore lacked jurisdiction to hear the challenge. The basis of this holding was Section 9613(h) of CERCLA, which provides (with certain exceptions) that once a remedy has been selected, no challenge to the cleanup may occur prior to the completion of the remedy.

Importantly, the Court was unconvinced by the States argument that the State was not challenging the EPA remedy since it merely sought money damages and did not seek injunctive relief. The Court stated that to allow such a dichotomy could prejudice companies who could be held liable for monetary damages for simply complying with an EPA cleanup plan. While the Courts discussion was clearly within the NRD context, the same logic may apply to certain private tort actions. That is, some may argue that the Tenth Circuit provides further support for the proposition that a toxic tort lawsuit that stems from dissatisfaction with a CERCLA remedy must wait until the remedy is completed even if it seeks only monetary damages.

The Courts language, in part, suggests that because an NRD claim is residual to a CERCLA remedy, *all* NRD claims must wait until the remedy is complete. This language, however, is probably overly broad, because the Court also noted that Section 9613(h)(1) does not preclude NRD claims brought pursuant to Section 9607. Of course, even in such a statutory claim, the damages calculation must fully account for the remediation so as not to result in a double recovery.

Loss of Use. Trustees often claim compensatory damages for the lost use of a natural resource from the time of the damage until the time of the restoration. The Tenth Circuit accepted the general proposition that the State was entitled to such damages. However, since the resource in question was the ability to appropriate groundwater, and since it was uncontested that the maximum extraction of groundwater was being accomplished from the area, the Court found that there was no lost use resulting from contamination. Accordingly, the Court affirmed the lower courts grant of summary judgment on the States loss-of-use damages theory.

Conclusion. This case may represent a perfect storm for NRD trustees: a claim for unrestricted funds *combined with* a direct attack on an ongoing CERCLA remedy *combined with* a complete absence of proof for interim lost use.

Even if this lethal combination of flaws may be rare, the decision provides significant arguments to companies confronted with any one of those situations. Trustees will take some solace in the fact that the Court accepted the principle of interim lost use under state law.

For a thorough discussion of natural resource damages law, see *Environmental Law Practice Guide*, Ch. *32B*: *Natural Resource Damages*, and *The Law of Hazardous Waste*, § 14.01[10].

For a review of all 50 states NRD programs, see *Environmental Law Practice Guide*, § 32B.12: *A State-by-State Guide to NRD Programs in All 50 States.*

For a one-stop source for all environmental research needs, see the Environment Research Tasks Page.

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Gerrard on Massachusetts v. U.S. Environmental Protection Agency

2008 Emerging Issues 860

Gerrard on Massachusetts v. U.S. Environmental Protection Agency

By Michael B. Gerrard

November 5, 2007

SUMMARY: In Massachusetts v. EPA, the United States Supreme Court held that the U.S. Environmental Protection Agency has authority under the Clean Air Act to regulate greenhouse gas emissions from motor vehicles. This is the first Supreme Court decision on the issue of global climate change. This commentary, written by Michael B. Gerrard, author of the renowned Environmental Law Practice Guide, discusses the potential implications of this important decision.

PDF LINK: Click Here for Enhanced PDF of Commentary

ARTICLE: Supreme Court Confronts Global Warming

On April 2, 2007, the United States Supreme Court issued its 5-4 decision in *Massachusetts v. U.S. Environmental Protection Agency*, ruling that the Environmental Protection Agency (EPA) has authority under the Clean Air Act to regulate greenhouse gas emissions from motor vehicles. This is the first time that the Supreme Court has looked at the issue of global climate change.

This commentary begins with the background of the case, and then summarizes the majority and dissenting opinions. It then discusses the direct effects of the decision on motor vehicle regulation; the indirect effects on stationary source regulation; the effects on other pending and contemplated litigation; and the implications for Congressional action.

Background. In 1998 and 1999, two successive EPA general counsels issued legal opinions stating that EPA had the authority under the Clean Air Act to regulate carbon dioxide emissions. In 1999, a group of 19 private organizations filed a rulemaking petition with EPA to regulate greenhouse gas emissions from new motor vehicles under the Clean Air Act. EPA requested public comments on the petition and received more than 50,000 comments. EPA also commissioned a report from the National Research Council, which concluded that greenhouse gases are accumulating in the atmosphere as a result of human activities and are causing temperatures to rise.

EPA did not rule on the petition by the end of the Clinton presidency, and the new EPA general counsel under President Bush issued an opinion disagreeing with his predecessors about EPAs authority. On September 8, 2003, EPA denied the rulemaking petition, finding that the Clean Air Act does not authorize EPA to issue mandatory regulations to

address global climate change, and that even if EPA had the authority, it would be unwise to do so at this time. EPA found that extensive Congressional attention to climate change, without the enactment of a specific regulatory scheme, meant Congress did not intend for one to be adopted. Moreover, EPA found that there was still scientific uncertainty over whether human activities were really contributing to global warming.

The petitioners, joined by several states and local governments, asked the U.S. Court of Appeals for the D.C. Circuit to overturn the order. The three judges on the D.C. Circuit panel each issued different opinions, but two of them found that EPA had properly denied the petition. *415 F.3d 50 (D.C. Cir. 2005).*

The Supreme Court granted *certiorari* and heard argument on November 29, 2006. Much of the argument was devoted to the question of whether the plaintiffs had standing to sue. Most observers of the argument came away convinced that a 5-4 decision would result, with Justice Kennedys vote the only uncertainty. They were correct.

Majority Opinion. Justice Stevens delivered the opinion of the Court, joined by Justices Kennedy, Souter, Ginsburg and Breyer. Citing the National Research Council report and the declarations of several scientists, the Court found that [t]he harms associated with climate change are serious and well recognized and that EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming. Addressing the plaintiffs standing, the Court declared that [o]nly one of the petitioners needs to have standing to permit us to consider the petition for review, and noted that a sovereign state, Massachusetts, was among the plaintiffs. Petitioners uncontested affidavits showed that the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. Though an EPA decision to regulate greenhouse gas emissions from new motor vehicles might have only a small benefit to the Massachusetts coastline, that is enough to confer standing. Michael B. Gerrard on *Massachusetts v. EPA* LexisNexis Expert Commentaries The Court found that EPAs argument against standing rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum.

With standing established, the Court turned to the merits. The Court said it had little trouble concluding that the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a judgment that such emissions contribute to climate change. The Clean Air Act has a sweeping definition of air pollutant that embraces all airborne compounds of whatever stripe.

The Court took issue with EPAs reasoning. Rather than relying on statutory text, the Court stated, EPA invokes postenactment congressional actions and deliberations it views as tantamount to a congressional command to refrain from regulating greenhouse gas emissions. The Court also rejected EPAs conclusion that even if it does have statutory authority to regulate greenhouse gases, it would be unwise to do so, finding that this rests on reasoning divorced from the statutory text.

The Court found that [u]nder the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. It declared that EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change, and that therefore its action was arbitrary, capricious, or otherwise not in accordance with law. The Court explicitly did not reach the question of whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPAs actions in the event that it makes such a finding.

Dissenting Opinions. Two members of the Court filed dissenting opinions: Chief Justice Roberts on standing, and Justice Scalia on the merits. Both dissenting opinions were joined by all four dissenting members (Chief Justice Roberts and Justices Scalia, Thomas and Alito).

Chief Justice Roberts expressed alarm that the majority opinion was opening up standing too broadly. He said there was no basis for giving special solicitude to states as plaintiffs. He declared that there was no evidence that

Massachusetts was really losing coastal land as a result of climate change, or that such loss was caused by EPAs failure to regulate greenhouse gases from motor vehicles, or that any injury they suffer would be redressed by a victory in this case.

Justice Scalia found no requirement in the Clean Air Act that the Administrator of EPA make a judgment about whether to regulate greenhouse gases, as opposed to deferring any decision. He also found that EPA had looked at the science and reasonably concluded that there is too much scientific uncertainty to regulate greenhouse gases. Moreover, he disagreed with the majoritys reading of the term air pollutant in the Clean Air Act, and said that EPAs judgment that greenhouse gases do not qualify should receive deference.

Next Steps. The Supreme Court remanded the matter to EPA to make an endangerment finding with respect to greenhouse gases. If EPA finds no endangerment, litigation is certain. If it does find endangerment, EPA must then decide what to do. Normally, an endangerment finding for an air pollutant is followed by the promulgation of a national ambient air quality standard (NAAQS) for that pollutant, keyed to the concentration level below which there is no expected adverse impact on public health or welfare. It is not clear how that would work here, because the danger from greenhouse gases derives not from

breathing them (the sort of impact that can be gauged in toxicological or epidemiological studies) but rather from their cumulative global impact.

The day after the Supreme Court decision, President Bush was asked about it at a Rose Garden news conference. He said, I have said that it is a serious problem. I recognize that man is contributing greenhouse gases. He added, Its going to require new technologies, which tend to be expensive. And its easier to afford expensive technologies if youre prosperous. He also said, Unless there is an accord with China, China will produce greenhouse gases that will offset anything we do in a brief period of time.

The Supreme Court did not set a timetable for EPA action, and there are no deadlines in the text of the Clean Air Act. It ordinarily takes several years for EPA to promulgate a NAAQS. Thus there is a good chance that EPA will take no definitive action before President Bush leaves office in January 2009.

Sen. Barbara Boxer (D-CA), chair of the Senate Committee on Environment and Public Works, said she would summon EPA officials before her committee this month to explain how they would follow the Supreme Court ruling. Rep. John Dingell (D-MI), chair of the House Energy and Commerce Committee, released a statement saying, While I still believe Congress did not intend for the Clean Air Act to regulate greenhouse gases, the Supreme Court has made its decision and the matter is now settled. Todays ruling provides another compelling reason why Congress must enact, and the President must sign, comprehensive climate change legislation. Thus, intense Congressional activity will continue, but there is no clear veto-proof majority.

Effect on Stationary Sources. The ruling directly applies only to new motor vehicles. The Clean Air Act regulates stationary sources of air pollution (such as power plants and factories) differently than it does mobile sources such as vehicles. However, a case pending in the D.C. Circuit, *Coke Oven Environmental Task Force v. EPA*, concerns whether the Clean Air Act gives EPA authority to regulate greenhouse gases from stationary sources. That case was stayed pending the outcome of *Massachusetts v. EPA. 2006 U.S. App. LEXIS 23499 (D.C. Cir. 2006).* The *Coke Oven* case will now proceed. The Supreme Court has settled the issue of the plaintiffs standing (ten states are among the plaintiffs in *Coke Oven*), but other issues are open.

Effect on Pending Motor Vehicle Litigation. Under the Clean Air Act and the Energy Policy and Conservation Act (EPCA), regulation of tailpipe emissions and fuel economy from new motor vehicles is vested in the federal government, except that California may adopt its own rules if EPA grants a waiver, and other states may adopt the California rules. In 2004 the California legislature adopted a law, called the Pavley Amendment, that mandated rules limiting greenhouse gas emissions from new motor vehicles sold in California beginning in the 2009 model year, and in

2004 the California Air Resources Board adopted implementing regulations. The automobile industry challenged these rules in a case called *Central Valley Chrysler-Jeep Inc. v. Witherspoon*, currently pending in the U.S. District Court for the Northern District of California. EPA had refused to consider Californias request for a waiver, but immediately after the Supreme Court decided *Massachusetts v. EPA*, EPA announced that it would issue a notice for a 60-day public comment period about a potential waiver. The public hearing will likely take place this summer. Both the plaintiffs and defendants in the California case are claiming that the *Massachusetts* decision helps them. The district court will likely consider these arguments shortly.

Thirteen other states have adopted Californias standards, and lawsuits have been filed in several of those states. The suit that is furthest along is in Vermont: *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*. As of April 2007, that case was going to trial in the U.S. District Court in Vermont. Two days after the *Massachusetts* ruling, lawyers for the state asked the trial judge to dismiss the case on the grounds that the Supreme Court had settled the matter. The automobile industrys counsel countered that the Supreme Court had not resolved the central question of whether Vermonts regulations amount to fuel economy standards rather than emissions limitations and are therefore preempted by EPCA. The court refused to dismiss the case and said it would proceed toward trial. A week earlier, the court had rejected a motion by the automobile industry to close the trial to the press because trade secrets would be divulged.

Effect on Pending Public Nuisance Cases. There are at least three pending suits that claim that greenhouse gases are a public nuisance:

- *Connecticut v. American Electric Power* is a suit by eight states and New York City against five large electric utilities. The U.S. District Court for the Southern District of New York dismissed the case on the grounds that it presented political questions that should not be resolved by the courts. *406 F. Supp.2d 265 (S.D.N.Y. 2005).* The plaintiffs appeal was argued before the U.S. Court of Appeals for the Second Circuit in June 2006. Counsel for both sides in the *Connecticut* case are also apparently making submissions to the Second Circuit responding to *Massachusetts v. EPA.*

- *Comer v. Murphy Oil USA, Inc.* is a suit brought by several property owners in Mississippi against a broad range of industrial interests claiming that greenhouse gas emissions worsened the effects of Hurricane Katrina. The U.S. District Court for the Southern District of Mississippi is considering motions to dismiss.

- *People of the State of California ex rel. Lockyer v. General Motors Corp.* is a suit by the California Attorney General against several automakers. The U.S. District Court for the Northern District of California heard oral arguments on March 6, 2007. The day after the *Massachusetts* ruling, attorneys for the automakers asked the court to dismiss on the grounds that the Supreme Court decision grants authority to regulate automobile emissions to the federal government, not to the states. The new Attorney General of California, Jerry Brown, countered that the decision helps California because the Supreme Court strengthened the authority of states to protect their citizens from climate change.

Conclusion. Before the ruling in *Massachusetts v. EPA*, Congress was the hub of U.S. activity aimed at framing solutions to global climate change. Hearings were being held almost daily, and the general view was that mandatory greenhouse gas regulation in the United States was only a matter of time, though it would probably not be enacted until after the inauguration of the next President. That is still the case. The *Massachusetts* decision is spurring a great deal of administrative and judicial activity, and it will probably lead to more litigation because it has shown a clear path for plaintiffs to have standing to sue. But the governmental activity that will have by far the greatest impact will almost certainly be in the legislative branch.

For a thorough discussion of the Clean Air Act, see *Environmental*

Law Practice Guide, Ch. 19.

For a one-stop source for all environmental research needs, see theEnvironmental Law tab.

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Michael B. Gerrard heads the New York office of Arnold & Porter LLP. He has practiced environmental law in New York City since 1979 and has tried numerous cases and argued many appeals in federal and state courts and administrative tribunals. He was the 2004-2005 chair of the American Bar Associations 10,000-member Section of Environment, Energy and Resources. He has also chaired the Executive Committee of the Association of the Bar of the City of New York, and the Environmental Law Section of the New York State Bar Association. Gerrard has also taught environmental law as a member of the adjunct faculties of Columbia Law School and the Yale School of Forestry and Environmental Studies. Gerrard is the editor of two books that were named Best Law Book of the Year by the Association of American Publishers: Environmental Law Practice Guide (twelve volumes, 1992) and Brownfields Law and Practice: The Cleanup and Redevelopment of Contaminated Land (four volumes, 1998), both of which were published by LexisNexis. His other works for LexisNexis are Environmental Impact Review in New York (two volumes, 1990) and the monthly newsletter Environmental Law in New York. Legal Media Groups *Guide to the Worlds Leading Environment Lawyers*, based on 4,000 questionnaires, reported that Gerrard received more personal nominations for this guide than any other lawyer in the world. He has also been rated by *Chambers USA* and by *Whos Who Legal* as the leading environmental lawyer in New York.