

ABSTRACT SUMMARY

19th Section Fall Meeting October 12-15, 2011 Indianapolis, IN

THURSDAY, OCTOBER 13, 2011

8:20 a.m. – 10:00 a.m.

Plenary Session: Nuclear Safety—Expecting the Unexpected

Resilience and Coherency: The Regulatory Challenge after Fukushima

Stephen G. Burns, U.S. Nuclear Regulatory Commission, Rockville, MD

A devastating earthquake and ensuing tsunami struck northeastern Japan on March 11, 2011, that, in addition to widespread destruction and loss of life, caused the worst nuclear power plant accident since the Chernobyl accident in 1986. Three plants then operating at the Fukushima-Dai-ichi site experienced a meltdown to some degree of their reactor cores, which has required the Japanese government to establish a 20-kilometer evacuation zone around the site. The Fukushima accident precipitated a swift response in the international community and in the United States. Some nations, such as Germany, have decided to abandon nuclear power. Several ministerial conferences have discussed the accident's implications and measures to enhance nuclear safety worldwide. A special meeting of the Convention on Nuclear Safety is scheduled next year. In the United States, the Nuclear Regulatory Commission established a task force to identify relevant lessons for U.S. plants and the regulatory system. The Task Force's July report offers a number of proposals and poses some provocative questions about the regulatory framework. This paper provides an overview of the international response to the Fukushima accident and focuses on the issues facing the Nuclear Regulatory Commission in assessing the safety of nuclear power plants.

10:30 a.m. – 12:00 p.m.

Climate Change Litigation after American Electric Power v. Connecticut

Climate Change Litigation after AEP v. Connecticut

Machelle Lee Hall, F. Gerald Maples, P.A., New Orleans, LA

In Am. Elec. Power Co., Inc. v. Connecticut (“AEP v. Conn.”), the U.S. Supreme Court unanimously held that the Clean Air Act (“CAA”) displaced federal common law nuisance claims for injunctive GHG abatement relief, after affirming in a split decision that at least some of the state, city and land trust plaintiffs had standing. By so ruling, the Court focused responsibility and pressure on Congress and the EPA to regulate GHG emissions, which provides fuel for CAA administrative litigation to heat up. The AEP v. Conn. decision did not directly dispose of either state nuisance claims or federal nuisance claims that seek damages or declaratory relief rather than GHG abatement. But the Court may have the opportunity to address these issues soon, because they are currently winding their way through the district and circuit courts in other lawsuits, including Kivalina and the remanded AEP v. Conn.

10:30 a.m. – 12:00 p.m.

E-Waste and Beyond: How Far Will and Should Product Stewardship Go?

The Evolving Product Stewardship Policy Landscape in the United States:

A State Perspective

Garth T. Hickle, Product Stewardship Team Leader, Minnesota Pollution Control Agency, St. Paul, MN

Product stewardship is emerging as a principal state policy strategy to achieve, not only a reduction in the environmental footprint of certain products and materials, but to engage brandowners and others along the product chain to assume greater responsibility for the financing and management of recycling programs. Product stewardship programs for waste electronics have been enacted in 24 states since 2004 and this experience is being applied to other products such as mercury-containing lamps and leftover paint. As product stewardship as a policy innovation evolves, key questions are emerging, for example, how to ensure a greater degree of consistency of the programs between states, balance program flexibility with access to collection and recycling options for residents, engaging brandowners in management of programs beyond providing financial resource and lastly, how to create an overall policy blueprint that creates a transparent process for selecting products and articulating expectations for all of the players along the product chain. The paper will provide an overview of product stewardship in the U.S. including the principle drivers for policy activity, a summary of existing statutes and an identification of key learnings.

From Birth to Rebirth: Will Product Stewardship Save Resources?

Chaz Miller, Director, State Programs, National Solid Wastes Management Association (NSWMA), Washington, DC

Product stewardship laws have been enacted in 32 states. These laws cover nine categories of products, most of which contain hazardous components such as mercury. Electronics products, automobile switches and thermostats are the most commonly covered products. Recently states have begun to extend product stewardship to cover paint and carpets and are considering extension to clearly non-hazardous products such as packaging and printed materials. The most commonly cited objectives for product stewardship laws are to internalize a product's waste management costs, create incentives for improved product design and reduce the cost of solid waste management currently borne by local governments. This paper examines the status of current product stewardship laws and whether or not they have met product stewardship objectives. The paper questions the wisdom of extending these laws to more traditionally recycled materials such as packaging and printed materials without additional experience from current programs throughout the world. Finally, the paper examines the impact of product stewardship laws on traditional oversight of solid waste management by state and local governments.

10:30 a.m. – 12:00 p.m.

Social Cost of Carbon

The Social Cost of Carbon in U.S. Climate Policy, in Plain English

Ruth Bell Greenspan, Senior Fellow, World Resources Institute (WRI) and Public Policy Scholar, Woodrow Wilson International Center for Scholars (WWC), Washington, DC

Presidents since Ronald Reagan have required that significant rules issued by the federal government be accompanied through intra-governmental review by a cost-benefit analysis. In addition, the Obama administration (like the Bush administration before it) has imposed a requirement to assess climate regulation through the lens of a figure (or range of figures) known as the "social cost of carbon" (SCC). The SCC

ABSTRACT SUMMARY

19th Section Fall Meeting October 12-15, 2011 Indianapolis, IN

estimates the benefit to be achieved, expressed in monetary value, by avoiding the damage caused by each additional metric ton (tonne) of carbon dioxide (CO₂) put into the atmosphere. In 2009 an interagency team of U.S. government specialists, tasked to estimate the SCC, reported a range of values from \$5 to \$65 per tonne of carbon dioxide. This paper discusses the limitations that the special nature of climate change imposes on cost-benefit analysis and its constituent parts, primarily focusing on the estimation of the SCC. It explains in plain English the various steps in calculating the SCC, the weaknesses and strengths of those calculations, and how they are used to inform climate policy. The paper explores the current debate within the economics community as to whether climate policy is a special case for which standard cost-benefit and SCC tools of the trade are not adequate to assess policy options.

1:30 p.m. – 3:00 p.m.

Making Products Greener: What is the Lawyer's Role?

Making Products Greener: What Is the Lawyer's Role?

Submitted by Charles L. Franklin, Lynn L. Bergeson, Robert W. Hamilton and Joe W. (Chip) Pitts, III

Consumer product manufacturers, especially manufacturers of products with a significant chemical component, are challenged today as never before. Materials selection for consumer products in particular invites a dizzying range of considerations -- are the chemicals hormone disruptors, carcinogens, or PBTs? What toxicogenomic biomarkers might make the product the next celebrity tort case? What labeling requirements apply? What are the implications of genetic variations among the demographic to which the product is to be marketed? These considerations, in turn, invite legal, marketing, and ethical issues that go well beyond questions of core compliance with the law. What exactly is the lawyer's role? How are regional differences in regulatory standards, consumer perceptions, ingredient restrictions, and related factors to be addressed? Given the global complexity of the issues and the high stakes involved, what must a lawyer do to remain professionally competent, socially aware, and scientifically proficient? This session explores these thorny questions, not to resolve them as much as to flag them, and urge lawyers to remain vigilant and as prepared as possible in recognizing the constantly shifting demands on lawyers as professionals.

1:30 p.m. – 3:00 p.m.

Doing a Renewable Energy Project on an Indian Reservation: Top Ten Myths

Renewable Energy on Tribal Lands: Key Agreements and Terms for Successful Project Development
Douglas C. MacCourt, Ater Wynne LLP, Portland, OR

Indian tribes and Alaska Natives in the United States (hereafter "tribes") are well positioned to take advantage of renewable energy development opportunities as a result of the vast amount of land and energy resources controlled by tribes. Tribes are actively exploring new business models to own and invest in energy assets, and to develop and produce power, either for consumption by their own people or for economic development purposes as a commodity for sale to utilities and industry on the wholesale power market. There are a number of reasons why a tribe might decide to partner with a non-tribal business entity for development of an energy project, including energy project development expertise; access to project financing; and the benefit of federal incentives (e.g., tax credits). This paper explores some of the key energy-related agreements needed for utility-scale and community-scale projects for successful renewable energy development.

Governance and Jurisdictional Considerations for Renewable Energy Development in Indian Country

Pilar Thomas, Deputy Director, Office of Indian Energy and Policy and Programs, U.S. Department of Energy, Washington, DC

Indian tribes are eager, and poised, to take advantage of their abundant energy resources—renewable as well as fossil energy. As tribal leaders and officials assess their energy development opportunities, fundamental governance and jurisdictional issues pose threshold questions in the evaluation of these opportunities. Tribal governments have the inherent sovereign authority to govern—through positive law, regulations, and taxation, among other sovereign rights—where and how this development will occur on tribal lands. Many—although, unfortunately not most—tribes have exercised this sovereign authority by adopting comprehensive environmental review, land use and planning, and tax codes. Non-Indian commercial project developers and owners that build and operate energy projects on Indian lands are subject to triple sovereign authorities, but to very different degrees. This paper outlines some of the key principles and concepts behind governance and jurisdiction over energy projects in Indian Country, and proposes some thoughts on reducing some of the major conflicts in the exercise of jurisdiction by the three sovereigns.

1:30 p.m. – 3:00 p.m.

How to Keep the Lights On: Is NEPA up to the Challenge?

Sustaining Renewable Energy: Lighting the way with PEIS's

Ted Boling, Deputy Solicitor, U.S. Department of the Interior, Washington, DC

The Programmatic Environmental Impact Statement (PEIS) can be an effective means of developing program alternatives and defining the ways in which “broad Federal actions such as the adoption of new agency programs or regulations” may significantly affect the quality of the human environment. In the development of renewable energy development programs for the public lands of the United States, the Department of the Interior has relied upon the PEIS to facilitate more efficient environmental review of renewable energy project proposals, thereby eliminating the need for repetitive discussion of common issues and to focus on the issues that are ripe for environmental review in the project decision. The Department of the Interior has used a PEIS to support its wind energy program and is developing a PEIS for its solar energy program. In supplementing its draft PEIS for its solar energy program, the Department of the Interior is changing its PEIS approach to address the rapidly-evolving issues associated with solar projects while developing a program that actively encourages solar energy development on landscapes managed for sustained yield of multiple resources.

Programmatic NEPA Analysis for Renewable Energy Development on the Public Lands – A Structure to Build Upon

Nada Wolff Culver, Senior Counsel and Director, BLM Action Center, The Wilderness Society, Denver, CO

The Bureau of Land Management has taken a new approach to energy development on the public lands, using programmatic analysis under the National Environmental Policy Act (NEPA) to set out and analyze the main aspects of programs for wind, geothermal and solar energy development that involve large landscapes managed by the BLM. Programmatic NEPA can provide an effective and efficient path forward to implementing broad-scale agency priorities if completed in a manner that is commensurate with the proposed program and adequately addresses environmental impacts. Acknowledging the need to evaluate the environmental consequences of these broad policy undertakings represents significant progress toward thoughtfully designing a program that will affect substantial acreage and protect sensitive resources. However, the BLM has yet to take full advantage of the opportunities presented by programmatic NEPA to more fully define a renewable energy development program, which would lead to more targeted development and better

ABSTRACT SUMMARY

19th Section Fall Meeting October 12-15, 2011 Indianapolis, IN

protection of the many other resources of the public lands. Specifically, BLM should use this situation to define appropriate locations and methodologies for responsible development. Since the programmatic analysis for solar energy development is still in progress, the BLM can improve upon its previous efforts and get the most out of programmatic NEPA for evaluating environmental consequences and developing solar energy.

Renewable Energy Programmatic Environmental Impact Statements: Why Should A Project Developer Care?

Janice M. Schneider, Latham & Watkins LLP, Washington, DC

The federal government has prioritized the development of renewable energy and multiple programmatic environmental impact statements related to renewable energy have now hit the streets or are currently in development. This paper discusses the benefits, some of the potential negatives, and the overall usefulness of these renewable energy programmatic environmental impact statements issued under the National Environmental Policy Act from the perspective of a project developer.

3:30 p.m. 5:00 p.m.

Navigating the Emerging National and International Patchwork of Biomass Legislation and Regulation

Navigating the Emerging National and International Patchwork of Biomass Legislation and Regulation: California's Low Carbon Fuel Standard and the Federal Renewable Fuel Standard Is prudent biomass energy regulation possible?

Stephen Kaffka, Director California Biomass Collaborative, Extension Specialist Department of Plant Sciences, University of California, Davis, CA

New biofuel regulations at the federal and state level attempt to reduce the green house gas emissions from the use of transportation fuels, and stimulate the development of alternative transportation fuels. Green House Gas (GHG) reduction, in the form of lower fuel carbon intensity (CI) measured in g CO₂ MJ⁻¹ of energy, is the primary criteria for fuels to qualify under both laws, and other objectives are subsidiary. The Federal Renewable Fuel Standard mandate the production and use of 36 billion gals per year of alternative fuels on an energy equivalent basis. These are derived from distinct categories of biomass, each with different minimum performance advantages over petroleum gasoline and diesel. California's low carbon fuel standard requires a reduction in fuel carbon intensity and is nominally indifferent to the fuels used to achieve this reduction. These regulations differ in goals, methods and fuel assessments yet fuel providers in California must meet both. The current situation fails the test of prudence, a significant practical and moral character of effective law, and may not result in adequate levels of public benefit.

Greenhouse Gas Permitting Advantages for Biomass Projects

David D. Streicker, Polsinelli Shughart PC, Chicago, IL

Ground breaking greenhouse gas regulation, know as the Tailoring Rule, has recently been implemented at the federal level. The Tailoring Rule will have far reaching impacts on industries that produce significant amounts of carbon dioxide emissions. While this may prove to be a heavy burden to established industries using fossil fuels, the Tailoring Rule contains three year exclusion for projects utilizing a qualifying biomass feedstock. Accordingly, the Tailoring Rule's biomass exclusion may provide a window of opportunity for the biomass

industry to compete on a more level playing field with fossil fuel based projects. This paper will provide background regarding the Tailoring Rule and explore its specific implications on the biomass industry.

3:30 p.m. – 5:00 p.m.

When the Walls Come Tumbling Down—The Impact of Coal Ash Regulation and Emerging Litigation

A Mountain of Environmental Injustice: Coal Ash Regulation Under RCRA Subtitle D

Jeff Stant, Director, Coal Combustion Waste Initiative, Environmental Integrity Project, Indianapolis, IN

The U.S. Environmental Protection Agency (EPA) seemed poised to resolve a 30-year old question - how to ensure the safe disposal of the second largest industrial waste stream in the nation under the Resource Conservation and Recovery Act (RCRA). Past administrations dodged the question through avoidance and delay. However, the catastrophic collapse of the TVA dam in December 2008 made delay and avoidance no longer an option. In the face of one of the greatest environmental disasters in U.S. history, with houses torn from their foundations and 20-foot ash bergs still floating in the Emory River, EPA Administrator Lisa Jackson, in January 2009, rightly committed the agency to regulatory action under RCRA. However, somewhere on the path to implementing federally enforceable regulations, EPA lost its way and is now considering the option of regulating coal ash under RCRA Subtitle D.

The states are under no obligation to adopt subtitle D standards, they are unenforceable by EPA and the proposed criteria are even less effective than the current subtitle D program. Moreover, there are significant environmental justice implications to regulating coal ash under subtitle D. By EPA's own admission, coal plants and their accompanying coal ash ponds and landfills, pose significant risks to public health and the environment, and are disproportionately located in low-income communities. Almost 70% of ash ponds in the U.S. are in areas where household income is lower than the national median. Yet, based on entrenched state resistance to regulating ash, more than half of the total coal ash generated in the US will be unregulated if disposal standards are not made mandatory under subtitle C. Finally, industry scare tactics of “stigma” are unfounded and provide no basis for failing to protect public health and environment as required by RCRA.

A Portrait of Unintended Consequences: Coal Ash Recycling Falls Victim to Liability Fears Over Pending Coal Ash Disposal Regulation

John N. Ward, Chairman, Citizens for Recycling First, Denver, CO

One of America's largest recycling industries is suffering because of federal regulations that are neither final nor directly applicable to it. In June 2010, the U.S. Environmental Protection Agency proposed options for regulating coal ash disposal. One of those options would designate coal ash as “hazardous waste” when disposed, but exempt recycling activities from regulation. The surrounding public debate, which generated more than 450,000 formal comments to the EPA, has highlighted liability concerns of coal ash users and stigmatized the material with a steady stream of “toxic” publicity. This paper provides background on coal ash and coal ash recycling, reviews the regulatory and legislative history related to the material, and provides detailed information on the material's actual toxicity and environmental risk. Discussion is also provided concern the impacts of stigma, regulatory uncertainty, and liability fears on recycling markets.

ABSTRACT SUMMARY

19th Section Fall Meeting October 12-15, 2011 Indianapolis, IN

3:30 p.m. – 5:00 p.m.

Emissions Control Requirements and Impacts: EPA's Power Plant, Boiler, and Solid Waste Combustion Regulations Under the Clean Air Act

Proposed Federal Regulation of Mercury Emissions

Faith Bugel, Senior Attorney, Environmental Law & Policy Center, Chicago, IL

In December of 2000, the United States Environmental Protection Agency concluded that mercury limits for Electric Generating Units were “appropriate and necessary.” Subsequently, the Agency finalized the Clean Air Mercury Rule, a New Source Performance Standard that included a cap and trade program, to regulate mercury. That regulation was vacated, but not until a number of states proposed state-level mercury regulations in response to the federal rule. In the current context of the finalization of a Maximum Achievable Control Technology standard for mercury and other toxics from electric generating units, the experience from the implementation of Illinois regulations limiting mercury is informative. The Illinois experience shows that the proposed federal standard is both technologically feasible and economically achievable.

FRIDAY, OCTOBER 14, 2011

10:30 a.m. – 12:00 p.m.

Promoting Clean Energy at the State Level: The Role and Relevance of Feed-In Tariffs

Aftermath of the California FiT Orders: Is a Litigation Storm Brewing?

Jennifer L. Key, Steptoe & Johnson LLP, Washington, DC

In 2010 and 2011, FERC issued a series of orders on feed-in tariffs which contained two crucial rulings. First, FERC affirmed that a state commission may not set wholesale power prices outside of PURPA. Second, FERC affirmed that multi-tiered avoided cost rates were permissible under PURPA. This paper addresses the aftermath of those FERC orders and their potential impact on feed-in tariffs already adopted by FERC-jurisdictional public utilities as well as the future development of feed-in tariffs by states and utilities. The paper describes why such decisions already have, and are expected to continue, to spawn regulatory and federal litigation that will largely fall into three types – preemption litigation, avoided cost litigation, and Commerce Clause litigation. Such litigation can be avoided, but likely only will be in situations where states, utilities, and generators are of a like-mind with regard to underlying policies and engage in careful drafting of feed-in tariffs.

California's Success in Crafting a “Feed-In Tariff”

Frank Lindh, General Counsel, California Public Utilities Commission, San Francisco, CA

This paper discusses California's recent groundbreaking effort to establish a “feed-in tariff” to promote development of a particular type of electricity generating technology known as combined heat and power (CHP) or co-generation. A feed-in tariff enables a qualifying energy producer to sell its electrical output to the local utility company, under standardized contract terms with prices set by state regulatory authorities. Questions about the lawfulness of the California program under federal law came before the Federal Energy Regulatory Commission (FERC) for resolution. In a series of orders, FERC affirmed the lawfulness of the

California feed-in tariff, albeit under a narrower interpretation of state authority than California initially proposed. The California program is now being implemented by the state Public Utilities Commission (PUC) within the parameters set forth by FERC. The FERC orders are grounded in a Carter Administration-era amendment to the Federal Power Act of 1935, known as the Public Utility Regulatory Policies Act of 1978 or “PURPA.”

10:30 a.m. – 12:00 p.m.

Hydraulic Fracturing: The Legal Landscape

Regulation of Gas Drilling in the Marcellus Shale: Federal Exemptions and the Need for Stronger State Disclosure Laws

Amy Sinden, Professor, Temple University School of Law, Philadelphia, PA

Recent attempts to tap the natural gas reserves locked in the Marcellus Shale through the controversial technique known as “fracking” have generated enormous controversy because of the wide range of negative environmental impacts this process can cause, from the contamination of drinking water supplies, to the dewatering of streams, to air pollution. Exacerbating these environmental concerns is the fact that the politically powerful and well-connected natural gas industry has successfully exempted its fracking operations from many of the federal environmental laws we usually rely on to protect the health of our water, air, and land. As a result, we must rely primarily on state law to protect us from the negative environmental effects of shale gas drilling. One concern is whether these state regimes will provide adequate provisions for citizen participation and enforcement—something that has been a hallmark of the federal environmental laws in this country. This paper first describes various provisions exempting shale gas drilling from federal environmental laws. It then examines the strengths and shortcomings of five states’ new rules requiring companies to disclose the chemical make-up of their fracking fluids, concluding that, while they represent a step in the right direction, these laws should be strengthened, particularly in Pennsylvania.

Federal Regulation of Shale Gas Development: A Solution in Search of a Problem

Stephanie R. Timmermeyer, Chesapeake Energy, Oklahoma City, OK

Amidst the States’ hard work to modernize their regulations in response to oil and natural gas industry’s burgeoning activity of horizontal drilling in unconventional plays, the United States Environmental Protection Agency (USEPA) has been increasingly assertive in exercising, and some would say expanding, its jurisdiction over oil and gas extraction. USEPA’s activity in the sector can be placed into three categories: national initiatives, oversight of state regulation, and increased field inspections and enforcement. Regarding the first, national initiatives, the USEPA has launched several since the first quarter of 2010, when the USEPA claimed “Energy Extraction” as a National Enforcement Initiative. Other very public initiatives included USEPA’s announcement of a multi-year, multi-million dollar hydraulic fracturing study, regulation of the use of diesel fuel in hydraulic fracturing, and new air emission rules targeting wells that have been hydraulically fractured. The second category, oversight of state regulation, has been most evident in USEPA’s investigation of historically state-regulated activity in the East, and is considered by some to be an aggressive, though arguably legal, exercise of USEPA’s oversight authority. Third, targeted enforcement and inspection action, has been directed at multiple individual oil and gas companies, and has been unusually public. This three-pronged approach by the USEPA could be viewed as a well-orchestrated play to step into what traditionally has been viewed as an area of state jurisdiction. The real questions to be answered are whether the states are responding efficiently and appropriately to update regulations and address citizen concerns and whether the USEPA’s actions could serve to thwart those efforts. Further, consideration should be given to whether the federal agency is actually missing an opportunity to resolve important issues squarely within its jurisdiction.

ABSTRACT SUMMARY

19th Section Fall Meeting October 12-15, 2011 Indianapolis, IN

10:30 a.m. – 12:00 p.m.

Reforming Chemicals Regulation: Balancing Science and Fear in the Reform of the Toxic Substances Control Act

Improving TSCA and EPA's Chemicals Management Efforts

Steve Owens, Assistant Administrator, U.S. Environmental Protection Agency, Washington, DC

EPA Administrator Lisa Jackson has made assuring the safety of chemicals one of her highest priorities. The 35-year old Toxic Substances Control Act (TSCA), which gives EPA authority over chemicals in the United States, does not require chemicals to be reviewed for safety, however. It also is difficult under TSCA for EPA to obtain needed data on the health and environmental effects of chemicals and take regulatory action to address chemical risks. With more than 84,000 chemicals on the TSCA Inventory EPA is working to improve the way that chemical risks are assessed and managed by: (1) supporting congressional action to update TSCA; and (2) using EPA's existing authority under TSCA more fully. The Obama Administration has developed a set of principles for modernizing TSCA, and TSCA reform legislation has been introduced in Congress. EPA also has begun to use its TSCA authority more fully to identify chemicals that pose significant risks and take action to address those risks, as well as make more chemical information transparent and accessible to the public. This paper discusses the need for TSCA reform and EPA's recent efforts to use its existing TSCA authority.

Modernization of the Toxic Substances Control Act: An Industry Perspective

Michael P. Walls, Vice President, American Chemistry Council, Washington, DC

The prospect of significant change to the Toxic Substances Control Act (TSCA) is becoming more likely over the next year or two, spurred by the continuing efforts of stakeholders (including industry and non-governmental organizations) and Members of Congress. Chemical manufacturers and other stakeholders have outlined a number of areas in which modifications are warranted. Among the many complex details to be worked out in TSCA modernization, three are of particular interest to the chemical industry: Prioritization, preemption, and the safety standard. EPA already has considerable discretionary authority in TSCA to prioritize its work on chemicals, and need not wait on statutory modifications to begin the effort. Significant changes to the preemption provisions of TSCA may not be warranted given experience to date. There are a number of options for modifications to the TSCA safety standard, some of which have important ramifications for the intersection of law and science in regulatory decision-making. This paper addresses these three priority issues and some of the legal implications for implementation of a modified TSCA.

1:30 p.m. – 3:00 p.m.

Real Estate Transactions in the New Economy: New Requirements, New Standards, and Climate Risks

Real Estate Transactions in the New Economy: New Requirements, New Standards and Climate Risks

Dennis M. Anderson, Vice President, FM Global Research Campus, West Glocester, RI

As this year's large property related storm damages have demonstrated once again, many parties to real estate transactions fail to understand the distinction between insurance and risk management, sometimes with disastrous consequences. My company, FM Global, is an insurance company but with a unique focus on understanding and managing risks from all forms of accidents and disasters, including fires, high winds,

earthquakes, and floods. Based on our research and experience, we are convinced that a significant majority of property losses from these events are preventable with modest efforts. Thus my message to you as advisors in real estate transactions: being vulnerable is a choice that can be understood and managed.

Real Estate Transactions in the New Economy: New Requirements, New Standards and Climate Risks

Tina St. John Bryan, Chief Environmental Risk Officer, Regions Bank, Birmingham, AL

The 2009 American Recovery and Reinvestment Act (ARRA) is the most recent of several laws attempting to create incentives for assessment and cleanup of brownfield sites. This paper explains why, from a banker's perspective, lending to such sites is unlikely to increase regardless of the funding available for remediation. A key factor is the lack of income to support repayment. Consequently, communities should be aware that private financing will be a challenge when they utilize government funds to remediate properties.

1:30 p.m. – 3:00 p.m.

Is It Really Toxic? How Would I Know?

Sublethal Whole Effluent Toxicity Limits A Concern to Texas Permittees

Peggy Glass, Principal & Executive Vice President, Alan Plummer Associates, Inc., Austin, TX

Using the Whole Effluent Toxicity (WET) test effectively in a regulatory context has been the subject of an ongoing dialog between the U.S. Environmental Protection Agency (EPA), National Pollutant Discharge Elimination System (NPDES) permittees, and States since the late 1980s. Since 2005, there have been extensive discussions between Region 6 of the EPA, the Texas Commission on Environmental Quality (TCEQ), and Texas permittees regarding changes EPA Region 6 is proposing related to WET permit provisions for effluent discharges from wastewater treatment plants. This paper summarizes the changes being proposed by EPA, presents a description of the existing WET regulatory program in Texas, and identifies the concerns of Texas permittees related to the EPA-proposed program.

Colorado and Whole Effluent Toxicity Testing

Andrew Neuhart, Colorado Department of Public Health and Environment, Denver, CO

Based upon an agreement with EPA in its Performance Partnership Agreement, the Colorado Water Quality Control Division (WQCD) updated its policy regarding Whole Effluent Toxicity (WET) to include limitations for chronic sublethal effects (effective 9-30-10). As WET is a highly controversial topic, and the timeframe for updating the policy was very limited, the WQCD initiated a stakeholder workgroup process to get input from, and work through all potential issues with stakeholders including permittees, EPA, laboratories, consultants and environmental groups. Although numerous issues had to be resolved, the WQCD feels this was a successful endeavor that resulted in meeting EPA requirements regarding sublethal WET testing, while being able to implement WET in a manner that addresses many of the short comings and fears associated with WET testing from the regulated community.

California's Whole Effluent Toxicity Regulatory History

Melissa A. Thorme, Downey Brand LLP, Sacramento, CA

The State of California's whole effluent toxicity (WET) regulatory program has been in place and working fine for the last decade. That program has recently been proposed for change by the State Water Resources Control Board at the urging of the U.S. Environmental Protection Agency (EPA), Region IX. The new proposal would

ABSTRACT SUMMARY

19th Section Fall Meeting October 12-15, 2011 Indianapolis, IN

change the current narrative acute and chronic toxicity standards to stringent numeric standards, and would modify the current effluent triggers into accelerated monitoring by replacing triggers with numeric effluent limits, which would be subject to civil and criminal penalties. Given the rash of citizen suits under the Clean Water Act in this state, California dischargers regulated by National Pollutant Discharge Elimination System (NPDES) permits or state-only Waste Discharge Requirements (WDRs) are understandably upset. This paper chronicles the history of WET regulation in California and describes the proposed regulatory changes.

1:30 p.m. – 3:00 p.m.

Your Client, Your Project: What You Must Know about Greenhouse Gas Regulation

Your Client, Your Project: What You Must Know About Greenhouse Gas Regulation
Bernie Hawkins, Nelson Mullins Riley & Scarborough LLP, Columbia, SC

Greenhouse gases (GHGs) are now being regulated at federal, state and local levels. Litigation and potential legislative developments cloud the future direction of this regulation and how immediately and broadly it might apply. However, GHGs must be considered now in the permitting process. There are unique considerations for permitting, such as under the Prevention of Significant Deterioration program in properly identifying sources and in selection of Best Available Control Technology (BACT). Furthermore, GHGs must now be considered in contexts far beyond that of permitting, in areas such as SEC disclosures, vendor certifications, advertising campaigns, evaluation of future energy costs and availability, building certifications, and the potential for third-party litigation. This paper seeks to identify and address some of these key questions for further consideration and discussion.

Greenhouse Gas Regulation – One State’s Perspective

Steven Dunn, New Source Review Team Leader, Bureau of Air management, Wisconsin Department of Natural Resources, Madison, WI

The Wisconsin Department of Natural Resources (WDNR or Department), in cooperation with USEPA, operates the air permitting construction and operation permits programs in the State. An important component of the construction permit program is the Federal Prevention of Significant Deterioration (PSD) program. The WDNR has been the EPA approved Agency for operating this program since the mid-1980’s and has been a State Implementation (SIP) Plan-approved program for over ten years.

Greenhouse Gas Regulation: California is Moving Full Speed Ahead

Sharon F. Rubalcava, Alston & Bird LLP, Los Angeles, CA

While the Federal government’s attempt to adopt a comprehensive climate change law has ground to a halt, California has continued to forge ahead with its ambitious efforts to reduce greenhouse gas (GHG) emissions despite the significant economic downturn and record levels of unemployment. Not only has California already adopted numerous regulations to reduce emissions of GHGs, the state is now finalizing the details of the ambitious cap-and-trade program that is the cornerstone of its efforts to reduce GHG emissions to 1990 levels by 2020. This paper will provide a broad overview of these regulatory efforts to date.

In addition, environmental activists and community groups have used the California Environmental Quality Act (CEQA) to force government agencies and developers to consider the effect on the climate when they adopt new plans or regulations or approve development projects. Through CEQA litigation, projects have been forced to

revise their Environmental Impact Reports (EIRs) to quantify projected GHG emissions, determine whether those emissions are significant, and, if so, consider potential mitigation measures. Other projects have withstood challenge, but as a result of the amount of litigation in this area, most EIRs now include an analysis of GHG emissions. This paper discusses cases illustrating the different approaches California courts have taken regarding the analysis of GHG emissions.