Defending Liberty Pursuing Justice

ABA Section of Environment, Energy and Resources

In-House Counsel Committee Newsletter

Vol. 12, No. 1 October 2010

MESSAGE FROM THE PAST CHAIR

James M. Stuhltrager
U.S. Army Legal Services Agency
Environmental Law Division
james.stuhltrager@us.army.mil

Welcome to the 2010 issue of the In-House Counsel Committee Newsletter. I would like to introduce the new committee chair, Brent Fewell, with United Water. Brent has some great ideas on how to reinvigorate the committee and provide more opportunities to our members. It should be an exciting year with him at the helm!

We hope you were able to attend the 18th Fall Section Meeting in New Orleans September 29–October 2. The plenary sessions on the oil spill in the Gulf and efforts to rebuild the Gulf Coast following Hurricane Katrina, as well as panels on air, water, hazardous wastes, green jobs and buildings, renewable energy, disaster preparedness, permitting tips, and the Endangered Species Act were all interesting and informative. Please mark on your calendars now for the 40th Annual Conference on Environmental Law on March 17–20 in Salt Lake City, Utah.

As always, the committee is interested in identifying and cultivating future leaders. If you would like to take an active role in the committee, please contact Brent or me. We are always looking for suggestions or contributions from our members. I would like to extend my thanks to the vice chairs who have served with me and the authors in this newsletter for their efforts.

Join SEER Efforts to Plant One Million Trees by 2014

In 2008, the Section of Environment, Energy, and Resources (SEER) announced at the Annual Conference on Environmental Law its ambitious nationwide public service One Million Trees project. This project calls on ABA members to contribute to the goal of planting one million trees across the United States in the next five years. In addition to planting of trees, the Section also intends, through public outreach and partnering efforts, to raise the nation's awareness of the multiple benefits of trees. A key component of the project is the Section's partnerships with tree-planting organizations, including Alliance for Community Trees (ACT), the Arbor Day Foundation, Tree Link/Tree Bank, American Forest, and the Institute for Environmental Solutions. Members are encouraged to get involved in hands-on tree planting activities in their communities, but the partnerships will allow participation by simply purchasing a tree or trees through a dedicated webpage. To participate in the One Million Trees project, please visit any of the information pages at our partners' Web sites linked from http://www.abanet.org/environ/projects/million_trees/home.shtml.

BACK ISSUES

Back issues of this newsletter can be found at *http://www.abanet.org/environ/committees/counsel/newsletter/archive/.*

**In-House Counsel
Committee Newsletter
Vol. 12, No. 1, October 2010**
Gary P. Gengel, Editor

In this issue:

Message from the Past Chair
James M. Stuhltrager 1

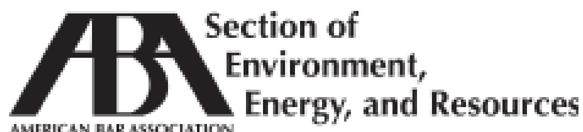
Differentiating Suppliers Based on Environmental Performance
*Caroline A. Henrich and
Bryan P. Franey* 3

Evolving Accounting Requirements Indicate a Trend of Increased Recognition and Disclosure for Environmental Loss Contingencies
Kevin J. Klesh 4

Water, Water Everywhere but Not a Drop to Permit?
*Shell J. Bleiweiss and
Jamie P. Davidson* 7

Copyright © 2010. American Bar Association. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher. Send requests to Manager, Copyrights and Licensing, at the ABA, e-mail: copyright@abanet.org.

Any opinions expressed are those of the contributors and shall not be construed to represent the policies of the American Bar Association or the Section of Environment, Energy, and Resources.



Upcoming Section Programs—

For full details, please visit
www.abanet.org/environ/calendar/

October 21, 2010
What Lawyers Should Know About Going Green
Teleconference and Live Audio Webcast
Primary Sponsors: The American Bar Association Forum on Affordable Housing and Community Development Law and the ABA Center for Continuing Legal Education

October 27, 2010
The Deepwater Oil Catastrophe - Where Are We Now?: An Update on Litigation, Economics and Significant Insurance Issues
Teleconference and Live Audio Webcast
Primary Sponsor: Section of Litigation

November 3, 2010
Sustainability: How Values-Driven Law Firms are Surviving Tough Times and Prospering over the Long Term
Quick Teleconference

Feb. 23-25, 2011
29th Annual Water Law Conference
San Diego

March 17-20, 2011
40th Annual Conference on Environmental Law
Salt Lake City

August 4-9, 2011
ABA Annual Meeting
Toronto

DIFFERENTIATING SUPPLIERS BASED ON ENVIRONMENTAL PERFORMANCE

Caroline A. Henrich and Bryan P. Franey

Manufacturers of "green" products are increasingly focused on the environmental compliance of their suppliers. Historically, a manufacturer may be interested in the environmental compliance of its suppliers only to the extent that it could impact the supplier's continued viability or the product quality. While this is still relevant, manufacturers are increasingly evaluating the environmental management systems and compliance histories of suppliers because of the potential impact on the "green" branding of their own products. For example, manufacturers of solar panels want consumers and others to understand that energy derived from solar sources is renewable and has less of an environmental impact (i.e., more "green") than a fossil fuel-fired power plant. Environmental compliance issues in the supply chain, however, could negatively affect that perception.

While "green" products may utilize cutting-edge technology, the component parts are often derived from heavy industry and necessarily implicate traditional environmental compliance issues. Using the solar example mentioned above, while the daily operation of a photovoltaic panel does not produce air emissions, the manufacturing of component parts, such as aluminum or silicon, may result in emissions of regulated air pollutants under the Clean Air Act. Specifically, metal components may be melted or molded using nonrenewable combustion sources, which may result in emissions of regulated criteria pollutants or even hazardous air pollutants. In addition, because solar panels are exposed to the elements, they often require special coatings, the application of which may produce emissions of volatile organic compounds.

The manufacturing of component parts for products advertised as "green" may also implicate the Clean Water Act and its corresponding regulations. One example is the management and disposal of wastewater generated during production. Process wastewater can be generated, for example, from cleaning or cooling the component product. EPA and state agencies are also increasingly focused on compliance with stormwater requirements, particularly where industrial materials are stored outside and exposed to precipitation.

Even to the extent that a supplier/manufacturer maintains a robust environmental management program, the current regulatory framework creates significant opportunities for noncompliance. "Paperwork" requirements such as record keeping, monitoring, labeling, and reporting may be overlooked and can result in penalties even where there is no evidence of environmental harm. The potential to identify noncompliance is further enhanced by EPA and state requirements for self-disclosure (e.g., deviation reporting and annual compliance reports).

Beyond compliance with traditional environmental laws, manufacturers and even retailers are increasingly evaluating their suppliers based on sustainability-related metrics. For example, many companies ask suppliers to calculate their carbon footprint and to identify strategies for reducing that footprint, even in the absence of government regulation. Similarly, many companies ask suppliers about the quantity and type of waste generated by the manufacturing process. The use of recycled materials can be an important aspect to the marketing or branding of a "green" product.

While every company strives to comply with all laws, including environmental laws, today's competitive economic climate demands that companies achieve success. Companies must recognize that not only are the government regulators and environmental groups concerned about their compliance record, but that the customer is also watching. Therefore, proactive environmental compliance programs and implementation of such programs are essential to the success of producing "green" products.

Caroline A. Henrich *is an in-house environmental counsel at Norsk Hydro North America, Inc., a global supplier of aluminum and aluminum products, where she is responsible for managing the company's environmental matters.*

Bryan P. Franey *is an attorney at Manko, Gold, Katcher & Fox, LLP, where he represents and counsels clients on a broad range of environmental matters including regulatory compliance, sustainability, and environmental management programs.*

EVOLVING ACCOUNTING REQUIREMENTS INDICATE A TREND OF INCREASED RECOGNITION AND DISCLOSURE FOR ENVIRONMENTAL LOSS CONTINGENCIES

Kevin J. Klesh

One of the most daunting tasks for a company and its in-house counsel is determining when and how to account for and disclose environmental risks. This has become even more complex and controversial in the last few years due to newly adopted and proposed accounting standards relating to loss contingencies from the Financial Accounting Standards Board (FASB). In 2009, FASB adopted FAS 141R making fair value accounting applicable to business combinations. Recently, on July 20, 2010, FASB released an exposure draft of an updated standard for the Disclosure of Certain Loss Contingences under Topic 450 (File Reference No. 1840-100). These recently adopted and proposed standards include increased recognition requirements, more precise valuation techniques, and more detailed disclosures. As outlined below, navigating this evolving landscape can involve uncertainty, but familiarization with existing, recent, and proposed standards can help prepare a company to adapt to emerging trends.

Traditional Accounting for Loss Contingencies
Financial Accounting Standard No. 5 (FAS 5), now codified under Topic 450 of FASB's Accounting Standards Codification, is the long-standing benchmark by which companies have been required to account for loss contingencies since 1975. This is done by (1) charging loss contingencies to income (i.e., "recognition" in financial statements) and (2) describing their nature in a footnote to financial statements (i.e., "disclosure").

Under FAS 5, a company must *recognize* a loss contingency only if it is *probable* that *both* a liability has been incurred or an asset has been impaired *and* the amount of the loss is *reasonably estimable*. For the first prong, FASB has recognized "probable" as "highly likely." Notably, this means that a company may be able to delay recognition of a loss contingency until such time that it is nearly a certainty. For the second prong, FASB Interpretation No. (FIN) 14 on Lost Estimation states that when a company is able to prepare a loss *range* (i.e., both a low and a high value), it qualifies as "reasonably estimable." Notably this means that a company may be able to delay recognition of a loss contingency if it contends that either a low or high value cannot be determined. Under FIN 14, the actual value required to be assigned for such a loss contingency is the amount that is most likely to be incurred and, in the absence of being able to identify such a value, the low end of the range. As a practical matter, this often means that companies will end up using the low value in their financial statements.

Under FAS 5, the standard for *disclosure* of a loss contingency is lower than that for recognition. A company must disclose a loss contingency in a footnote to its financial statements if it is *reasonably possible*. Therefore, even if a loss contingency is not probable or reasonably estimable, disclosure still may be required. Such disclosure typically consists of a basic description of the nature and circumstances surrounding the loss contingency and the accounting principles applied in the financial statements (e.g., whether accrual for liabilities is on a discounted basis).

In the environmental context, FAS 5 typically applies to environmental remediation liabilities, impairments, and litigations that have arisen prior to the date of a financial statement's filing. It does not include risks associated with future events (such as asset retirement obligations, which are covered under FAS 143). FAS 5's narrow standards for recognition often lead to many environmental liabilities, particularly those that are inactive, uncharacterized, or unstudied, either going unrecognized or being assigned only their known minimum value. Unless a cleanup has been actually required by a governmental authority or a private legal action has been filed, companies may contend that a dormant environmental liability is "not probable." Likewise, unless a detailed environmental study (such as a remediation action plan) exists, companies may either deem the cost of a potential environmental liability as not "reasonably estimable" or assign it the lowest potential value. Moreover, information provided in typical disclosures may often not provide any or much detail about *how* a company arrived at the numbers assigned to its environmental loss contingencies.

Evolving Recognition and Disclosure Requirements

Due to the potential limitations of FAS 5 and concerns over whether loss contingencies have been characterized in financial statements in a way that is useful to investors, FASB has been working on amending the applicable recognition and disclosure requirements. In particular, over the last few years, FASB has been attempting to expand the population of loss contingencies reported in financial statements, create clearer benchmarks for ascertaining the value of loss contingencies, and require more robust disclosure requirements.

Increased Recognition of Certain Loss Contingencies
As a potential preview of future broader action, last year FASB took a "baby step" in endorsing fair value accounting for loss contingencies by making it applicable to mergers and acquisitions only. The new FAS 141R requires an acquiring company to recognize at fair value as of the acquisition date the following loss contingencies associated with the acquired company or asset: (1) all contractual loss contingencies and (2) noncontractual loss contingences that are more likely than not to give rise to a liability. This means that, although an environmental loss contingency previously was exempted from recognition or valued at the low end of a range under FAS 5, upon a property transfer or merger such may not only need to be recognized immediately but also assigned a fair value.

In the environmental context, determining the fair value of a loss contingency would not likely reference market price because such is usually unavailable. Instead, environmental loss contingencies would likely be measured at fair value utilizing the expected value approach recognized by FAS 157 on fair value. When the amount is uncertain, this could involve an average of several loss estimates weighted by their probability of occurring. When the timing is not imminent, this could involve discounting for the time value of money such that the estimate in financial statements escalates over time as the loss becomes more imminent. Notably, these approaches for estimating environmental liabilities at fair value are not foreign to companies, as they have been utilized previously under FAS 143 in the context of accounting for prospective environmental liabilities associated with conditional asset retirement obligations.

The lower thresholds for recognition and the expansion of fair value accounting to certain loss contingencies under FAS 141R may serve as a harbinger of things to come on a broader scale. This is not only due to FASB's increasing interest in making loss contingency accounting more robust but also a practical matter. Over time, as companies engage in mergers and acquire assets, a dichotomy will develop in their financial statements between the type and value of loss contingencies recognized for preexisting assets under FAS 5 versus assets acquired after the adoption of FAS 141R. The inevitable confusion for investors over the standards applied for loss contingency recognition and valuation for these two classes of assets may lead FASB to broaden the approach employed by FAS 141R for consistency's sake. Therefore, companies may consider becoming acquainted with FAS 141R and fair value accounting for environmental loss contingencies now in preparation for the potential future landscape of environmental loss contingency accounting and disclosure generally.

Proposals for Increased Loss Contingency Disclosure
On the disclosure side, FASB has also been attempting since at least 2008 to increase the qualitative and quantitative information disclosed about loss contingencies. FASB's original attempt to do so in June 2008 was met with widespread criticism that it would force disclosure of internal management predictions about potential resolutions, timing, and maximum loss exposures, which was said to be particularly troubling in the litigation context. It was feared that this would potentially compromise companies' positions in active litigation or spur new lawsuits from plaintiffs' attorneys. FASB eventually withdrew its proposal. In July 2010, FASB released a new exposure draft on disclosure of loss contingencies that calls for both a lower disclosure threshold and more detailed disclosures, effective December 15, 2010. These new disclosure standards would also be specifically applicable to the preparation of environmental remediation estimates.

FASB's latest proposal would broaden the scope of loss contingencies that would need to be disclosed on

several fronts. First, *remote* loss contingencies with potentially severe impact on the company would need to be disclosed. Second, disclosure of unasserted claims would be required if it were considered probable that a claim will be asserted and there is a reasonable possibility that the outcome will be unfavorable. Third, when evaluating the potential materiality of loss contingencies for purposes of deciding whether to disclose, potential insurance and other indemnification coverage could not be factored in.

FASB's latest proposal would also widen the breadth of qualitative and quantitative information that would be included in the disclosure. Qualitatively, disclosures would need to include the contentions of the parties, relevant nonprivileged information, and anticipated timing of, or next steps in the matter. Quantitatively, the disclosures would need to include the amount of damages asserted or indicated by expert witness testimony, the possible loss or range of loss, and the amount accrued. Period-over-period reassessments of quantitative disclosures and tabular reconciliations of accruals would also be required. Possible recovery from insurance and other sources is also to be provided if such had been provided to plaintiffs or is discoverable. While the proposal does permit an aggregation of disclosures about similar contingencies by class or type, in those instances in which there are a large number of claims, the total number and average amount claimed and settled are required.

As with FASB's 2008 proposal, this most recent exposure draft has been met with criticism, including from the Association of Corporate Counsel (ACC). On August 18, 2010, the ACC issued a comment letter in which it expressed concerns that the proposal would impose accrual disclosure requirements that could fuel additional litigation and have a prejudicial impact on defendant companies, such as their ability to obtain favorable settlements. For example, the ACC noted that "ongoing adjustments in these disclosures would provide a window into management's evolving view of the matter and provide plaintiffs' attorneys with a road map of the company's litigation strategy." In addition, the ACC noted that increased accrual-related disclosure requirements may have a negative impact on the attorney-client privilege and work product protections because of the need for attorneys to divulge privileged information to auditors in order to audit accrual amounts. Accordingly, the ACC is calling for the abandonment of the requirement to disclose individual accrual amounts for loss contingencies; a limitation on remote contingency disclosure to those that could have severe impact "in the near term"; removal of the requirement to disclose claimed damages; a limitation on disclosure of insurance; an explicit exemption for the disclosure of prejudicial information; and a postponement of the effective date for one year.

It appears that FASB's latest proposal has spurred many of the same concerns as the 2008 proposal that was abandoned. However, FASB's recent action in extending the comment period indicates that it will likely attempt to finalize this proposal with potential modifications based on respondent input. Perhaps it will also extend the effective date as suggested by the ACC.

Conclusion

Recognition and disclosure of environmental loss contingencies is a complex process that has long been difficult for companies to predict and estimate with certainty. For many years, FAS 5's high thresholds for recognition and somewhat subjective standards for valuation have allowed the delay of recognition and disclosure and/or assignment of low-end range estimates. However, FASB's initiatives in recent years promoting lower thresholds for recognition and disclosure as well as fair value accounting indicate that the trend is shifting. Therefore, companies should familiarize themselves with evaluating environmental loss contingencies through these new accounting lenses and consider setting reserves accordingly

Kevin J. Klesh *is an associate in the Environment, Health, and Safety practice group of Willkie Farr & Gallagher LLP. He represents and advises clients in a variety of litigation, regulatory, compliance, and corporate environmental matters, including preparation of disclosures. He can be reached at kklesh@willkie.com.*

WATER, WATER EVERYWHERE BUT NOT A DROP TO PERMIT?

Shell J. Bleiweiss and Jamie P. Davidson

Since the Supreme Court issued its decision in *Rapanos v. United States*, 126 S. Ct. 2208, 547 U.S. 715 (2006), the regulated community and regulators continue to struggle to determine the jurisdictional reach of the Clean Water Act (CWA). The CWA proffers jurisdiction over "navigable waters," defined as "the waters of the United States, including the territorial seas." Clean Water Act, 33 U.S.C. §1362(7). The definition of "navigable waters" has been analyzed extensively, most recently by the Supreme Court in *Rapanos* and by commentators since. This article discusses the difficulty sometimes encountered in asserting jurisdiction under the Act by regulators, the behavior of businesses in light of the *Rapanos* decision, and Congress's attempt to address the problem in the Clean Water Restoration Act (CWRA), S. 787, 110th Cong. (2009), which attempts to broaden the CWA by removing the "navigable waters" requirement entirely.

In *Rapanos*, four justices, in a plurality opinion, rejected the argument that the term "waters of the United States" is limited to only those waters that are navigable in the traditional sense, but did limit the EPA's authority to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters. *Rapanos*, 126 S. Ct. at 2208. Justice Kennedy's concurring opinion concluded that wetlands are "waters of the United States" "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.* at 2248. Because the case failed to garner a majority opinion, the Court did not establish a clear rule for developers and dischargers to follow and for federal agencies to enforce.

As a result, the circuit courts of appeals are split over which of three tests should control jurisdiction. In *United States v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009), the Sixth Circuit discusses the division among the courts. The Ninth Circuit applies Justice Kennedy's test in most instances, *see Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir 2007), while the Eleventh Circuit has held that CWA coverage may be established only under his test. *See United States v. Robison*, 505 F.3d 1208, 1219–22 (11th Cir. 2007). By contrast, the First and the Seventh Circuits, though differing somewhat in their analyses, have followed Justice Stevens's view that the Act confers jurisdiction whenever either Justice Kennedy's or the plurality's test is met. (*Id.*) Currently, the split has not been reconciled by the Supreme Court.

As a result of the split, EPA and the Army Corps of Engineers (Corps) have been struggling to ascertain which cases they can bring and which waters they can govern. In order to streamline the process, EPA and the Corps issued guidance to help determine whether they have jurisdiction over particular types of water consistent with *Rapanos*. US EPA & US Army Corps of Engineers, *Clean Water Act Jurisdiction Following U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, Dec. 12, 2008, http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf.

Despite the guidance, the agencies have experienced frustration in trying to assert jurisdiction over waters that may no longer be covered under the CWA. At the request of Representative James Oberstar, one of the backers of the CWRA, EPA issued a report containing anecdotes from EPA and Corps staff members regarding the practical effects of the Supreme Court rulings in their enforcement efforts. US EPA Office of Inspector General, *Congressionally Requested Report on Comments Related to Effects of Jurisdictional Uncertainty on Clean Water Act Implementation*, Apr. 30, 2009, http://www.epa.gov/oig/reports/2009/20090430-09-N-0149.pdf. The comments illustrate how enforcement of potential CWA violations has been deterred by the agencies'

uncertainty about jurisdiction over certain waters. The report cites a strain on resources leading to some cases not even being assigned to lawyers. *Id.* at 4. Businesses have an incentive to determine that they are not within CWA jurisdiction with a more limited fear of potential federal enforcement. A Region 5 section chief remarked that individual concentrated animal feeding operations are announcing they will not reapply for permits because they feel that the *Rapanos* decision has removed them from CWA jurisdiction. *Id.* at 7. Another situation cited by EPA involved an alleged CWA violator asserting *Rapanos* as a defense in its enforcement case. Although the defense in this case did not succeed, according to EPA, it prolonged the case's penalty phase and created more work for the agency during settlement negotiations. *Id.* at 9.

The rulings in *Rapanos* may impact more than just regulation of wetlands. Some dischargers under the National Pollutant Discharge Elimination System permit program may also be defined out of the program. A recent article published in the *New York Times* addressed this issue. Charles Duhigg & Janet Roberts, *Rulings Restrict Clean Water Act, Hampering E.P.A.*, N.Y. TIMES, Mar. 1, 2010, at A1, *available at* http://www.nytimes.com/2010/03/01/us/01water.html. The article highlights both the uncertainty of the CWA's reach as a result of Supreme Court holdings, as well as the reaction of businesses in light of it. The article quotes Douglas F. Mundrick, an EPA attorney in Atlanta, as saying, "We are, in essence, shutting down our Clean Water programs in some states . . . This is a huge step backward. When companies figure out the cops can't operate, they start remembering how much cheaper it is to just dump stuff in a nearby creek." *Id.* Additionally, EPA officials have said they avoid cases when proving jurisdiction is too difficult. *Id.*

Even federal entities are now questioning whether they are bound by the CWA. The Cannon Air Force Base in New Mexico discharges 750,000 gallons a day from its wastewater treatment plant into a local lake. Although the base discharged under a permit for more than a decade, following *Rapanos*, it hired a consultant who determined that the lake lacked CWA protection. Despite acknowledging that the "limited water resources in the area are extremely important for wildlife and the surrounding vegetation," the consultant's report determined that the lake was not within CWA jurisdiction. *New Mexico and Clean Water—What Is at Stake? Save the Clean Water Act*, http://www.savethecleanwateract.org/map/nm-state-specific-what-is-at-stake-fact-sheet-nov-2009.pdf. As a result, the base informed EPA officials that it no longer considers itself subject to the Act. Duhigg & Roberts, *Rulings Restrict Clean Water Act.*

Another example of a business successfully asserting the argument that its discharges are not within the jurisdictional bounds of the CWA is a pipe manufacturer in Alabama. The defendant in the case, McWane, Inc., appealed a conspiracy conviction after the Supreme Court issued the *Rapanos* opinion. *United States v. McWane*, 505 F.3d 1208 (11th Cir. 2007). The plant discharged wastewater beyond the limitations of an EPA-issued permit. *Id.* McWane contended that the creek into which the plant was discharging was not a "navigable water" within the CWA definition. *Id.* The jury charge defined navigable waters as including "any stream which may flow into a navigable stream or river," and that such stream may be man-made and flow "only intermittently." The court held that the jury charge in the case was erroneous as a result of the limiting language in *Rapanos* and vacated and remanded the convictions. *Id.* McWane eventually settled with the EPA by agreeing to pay a smaller amount than the company was initially fined. Duhigg & Roberts, *Rulings Restrict Clean Water Act.*

In response to the receding jurisdictional boundaries of the CWA, the Clean Water Restoration Act (CWRA) has been introduced into Congress. Supported by many environmental organizations (*see, e.g.*, Earthjustice, Environment America et al., *Courting Disaster: How the Supreme Court Has Broken the Clean Water Act and Why Congress Must Fix It*, Apr. 2009, http://www.southernenvironment.org/uploads/publications/courting_disaster.pdf), the CWRA seeks to "clarify the jurisdiction of the United States over waters of the United States." The legislation attempts to resolve the confusion over federal jurisdiction by removing the term "navigable" from the CWA and restoring authority over all waters

that were regulated before *Rapanos* was decided. Duhigg & Roberts, *Rulings Restrict Clean Water Act.* The bill has been introduced annually in Congress but has yet to pass. The latest iteration of the CWRA was introduced on April 10, 2010 (H.R. 5088, 111th Cong.).

Many entities oppose passing the CWRA, arguing that removing the "navigable" modifier from the CWA could expand the federal government's power beyond pre-*Rapanos* levels, and hamper local decision making, impact the economy, create permitting delays and litigation, and burden farmers and ranchers. Waters Advocacy Coalition, *Protect the Clean Water Act*, http://protectmywater.org. One group against the CWRA is the Waters Advocacy Coalition (WAC). The WAC is a collection of individuals and businesses, with members such as the National Mining Association, the National Cattlemen's Beef Association, and the Associated General Contractors of America. *Id.* The WAC's website urges Congress not to pass the CWRA and provides a library emphasizing that, by removing the "navigable" qualifier, the CWRA would expand federal power, granting jurisdiction over all federal waters. Water Advocacy Coalition, *Navigable Waters vs. All Waters*, http://www.protectmywater.org/library/. WAC's concern is that removal of the pivotal "navigable" term in determining federal jurisdiction over waters would regulate intrastate waters not previously covered by the CWA.

The Commerce Clause of the Constitution limits federal law regulating interstate commerce. *See* Phil Kerpen, *Oberstar's Water Bill Sets Up Biggest EPA Power Grab Yet*, DAILY CALLER, Apr. 21, 2010, http://dailycaller.com/2010/04/21/oberstar%E2%80%99s-water-bill-sets-up-biggest-epa-power-grab-yet/. By deleting the term "navigable," some argue, the bill on its face would have the federal government regulating and protecting the water supply, which has been a local responsibility. *Id.* Thus, according to the argument, the CWRA would violate the Constitution and provide EPA the expansive ability to regulate all waters of the United States, regardless of any connection to interstate commerce. *Id.*

In response to the confusion over CWA jurisdiction that has resulted since *Rapanos*, the agencies and the legislative branch have attempted to clarify which waters are regulated and, similarly, which dischargers are subject to permits. The CWRA has still not been passed in Congress, but it continues to be reintroduced annually. The EPA is making an ongoing effort to issue guidance to its staff regarding CWA implementation. In the meantime, only time will tell how developers, dischargers, and regulators will interpret and implement the Act, and what effect that will have on U.S. waters, "navigable" or otherwise.

Shell J. Bleiweiss *practices environmental and OSHA law from his own firm, the Law Offices of Shell J. Bleiweiss, with offices in Chicago and Barrington, Illinois. He can be reached at sbleiweiss@shell-bleiweiss.com or (847) 487-7095.*

Jamie P. Davidson *is an independent attorney specializing in environmental law. She works in the Chicago area and can be reached at jpdavid@law.emory.edu*

CALL FOR NOMINATIONS

The Section invites nominations for three awards:

The Environment, Energy, and Resources Government Attorney of the Year Award

The Law Student Environment, Energy, and Resources Program of the Year Award

The State or Local Bar Environment, Energy, and Resources Program of the Year Award

Nominations for all three awards are due at the ABA Section office by May 16, 2011. The awards will be presented at the ABA Annual Meeting in Toronto in August 2011. Award recipients should plan to be present at the award presentation.

For more information, visit www.abanet.org/environ/sectaward/

NEW! ESSENTIAL AND CURRENT BOOKS FOR YOUR LAW LIBRARY

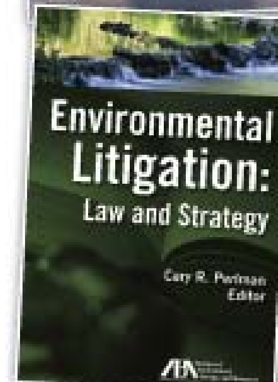
Published by the Section of Environment, Energy, and Resources

Endangered Species Act
Law, Policy, and Perspectives, Second Edition

Donald C. Baur and Wm. Robert Irvin, editors

Endangered Species Act: Law, Policy, and Perspectives is an authoritative guide to the history of the ESA, including its most critical sections, implementation of the Act, and current issues facing the protection of endangered wildlife and its habitat. This updated edition begins with the building blocks of the ESA: the processes for listing species and designating critical habitat. Subsequent chapters address key aspects of the application of the ESA: the duty to consult and avoid jeopardy and the Act's take prohibitions and its exemptions. Topics include citizen suits, land owner incentives, private property rights, international trade restrictions, Indian rights, state endangered species acts, the evolving issues of climate change and nanotechnology, and the ESA from the perspective of the regulated community.

2010, 467 pages, 7 x 10, paper, ISBN: 978-1-60442-580-2, Product Code: 5350185
Regular Price: $139.95 **Section of Environment, Energy, and Resources Member Price: $119.95**

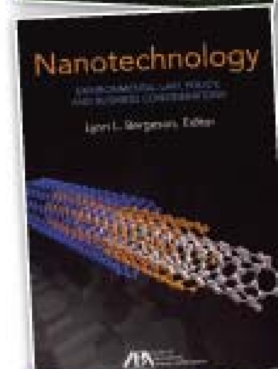


Environmental Litigation: Law and Strategy

Cary R. Perlman, editor

The scope of what qualifies as environmental litigation is huge, while at the same time, this area of litigation is growing at a tremendous pace as a result of evolving issues such as climate change litigation. *Environmental Litigation: Law and Strategy* examines some of the most critical issues in specialized litigation, including global climate change litigation and the types of future litigation that can be anticipated, litigating government enforcement matters in both the civil and criminal context, citizen-suit actions, toxic tort and pesticide litigation, natural resources damages claims, and insurance as a source of recovery for environmental litigation.

2009, 612 pages, 6 x 9, paper, ISBN: 978-1-60442-367-9, Product Code: 5350178
Regular Price: $129.95 **Section of Environment, Energy, and Resources Member Price: $109.95**

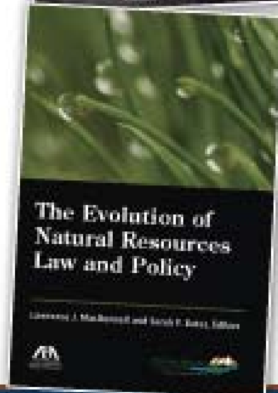


Nanotechnology
Environmental Law, Policy, and Business Considerations

Lynn L. Bergeson, editor

The rapid commercialization of nanotechnology is one of the most intriguing industrial phenomena of the early twenty-first century. But just as the universe of applied nanotechnology is burgeoning, so are the questions raised about the possible impact of exposure to nanoscale materials on human health and the environment. The commercialization of nanotechnology poses major challenges for environmental regulators, from policy makers to scientists and engineers to lawyers. Complicating the picture are the unique properties of nanoparticles as well as the ambition of researchers and the commercial sector to use nanotechnology in health and environment-enhancing tools, such as drug delivery devices or groundwater pollution sensors. As this dynamic area continues to evolve, this book takes a comprehensive look at the regulatory, governance, and business issues of a technology that is as fascinating as it is challenging.

2010, 305 pages, 6 x 9, paper, ISBN: 978-1-60442-582-6, Product Code: 5350186
Regular Price: $89.95 **Section of Environment, Energy, and Resources Member Price: $69.95**



The Evolution of Natural Resources Law and Policy

Lawrence J. MacDonnell and Sarah Bates, editors

Globalization, corporate dominance, and shifts in resource management are nothing new: North America was "discovered" during an era of expanding global trade, and quasi-public actors such as the Massachusetts Bay Company and Hudson's Bay Company, as well as private concerns such as the railroads, played huge roles over the centuries. The contributors to this book do more than take a look at the past, however: they chart the course of the future as well, considering such diverse topics as the ethics of natural resources policy (particularly on global warming and endangered species), mineral development of federal lands, the public law of private ecosystems, water management, and the law of forests and grasslands.

2010, 451 pages, 6 x 9, paper, ISBN: 978-1-60442-430-0, Product Code: 5350182
Regular Price: $109.95 **Section of Environment, Energy, and Resources Member Price: $89.95**

Order online at www.ababooks.org or call the ABA Service Center at 1-800-285-2221