Water Law Review

Volume 8 | Issue 1 Article 74

9-1-2004

# American Bar Association Section of Environment, Energy, and Resources 12th Section Fall Meeting

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## DAY TWO

### WATER LAW MERGES WITH AGRICULTURAL AND RURAL LAW

### ENDANGERED SPECIES AND RURAL COLORADO

The second day of the conference consisted of four attorney panelists discussing endangered species and rural Colorado. Participants in the Agricultural and Rural Law conference also attended this unique session.

Kent Holsinger from Hale Hackstaff Friesen, LLP in Denver, Colorado began the panel by discussing the recent efforts to list the sage Grouse and de-list the Preble's Meadow Jumping Mouse from the list of endangered species. Deborah L. Freeman, a partner at Trout Witner & Freedman discussed the Platte River species draft and environmental impact statements. Thomas R. Graf, an attorney at the United States Department of the Interior, Office of the Regional Solicitor in Lakewood, Colorado presented "an agency attorney's view" of endangered species in Colorado. Finally, Eric Kuhn from the Colorado River Water Conservation District discussed Yampa and Colorado River endangered fish issues.

The two-day conference concluded with an ethics seminar on Conflicts of Interest and Ex Parte Contracts in Rural Practice, conducted by the Honorable J. Steven Patrick, the Honorable Michael O'Hara, the Honorable Thomas W. Ossala, and Cynthia F. Covell.

*Becky Bye*

## AMERICAN BAR ASSOCIATION SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES 12TH SECTION FALL MEETING

**San Antonio, Texas October 6-10, 2004**

For its 12th annual meeting, the attorneys who make up the ABA's Section of Environment, Energy, and Resources convened in San Antonio to discuss issues and developments currently facing attorneys in the section. Although the conference did not focus solely on water law issues, water law was the subject of several classes, and the focus of our attendance at the conference. Water attorneys found a variety of interesting topics on subjects ranging from the impacts posed to agriculture by the expansion of the Clean Water Act's jurisdiction to the history of the Edwards Aquifer. The upcoming 2004 Presidential election was an undercurrent of the entire conference. The contrasting environmental views and goals of the two primary platforms provided fertile ground for discussion.

## DAY ONE

### SESSION ONE: FIXING THE GULF OF MEXICO: OLD PROBLEMS—NEW SOLUTIONS?

Robin Kundis Craig, Associate Professor of Law at Indiana University School of Law moderated the session. Len Bahr from the Louisiana Governor's Office of Coastal Activities, Kimball Nill from the American Soybean Association, Andrew Solow from the Woods Hole Oceanographic Institution, and Bryon Griffith, Director of the EPA District over the Gulf of Mexico made up the panel of presenters. The discussion centered on the numerous water-related problems affecting the "Dead Zone" of the Gulf of Mexico/Mississippi River watershed.

Dr. Len Bahr of the Louisiana Governor's Office of Coastal Activities in Baton Rouge discussed Louisiana's perspective as a downstream victim of hypoxia. Dr. Bahr stated that Louisiana plays an important role in reducing Gulf hypoxia, and reported that a new management paradigm makes up the primary focus on the state's coastal restoration plan. Louisiana actively participates in a task force comprised of federal agencies and states located along the main channel of the Mississippi River. This task force approved an action plan in 2001 to alleviate the current hypoxia problems; however, Congress never appropriated funds for the plan. Nevertheless, Louisiana organized the Lower Mississippi River Sub-basin Committee on Hypoxia with neighboring states to continue to address the problem.

Kimball Nill of the American Soybean Association in St. Louis, Missouri advocated on behalf of biotechnology-derived crops that improve the hypoxia problem by significantly reducing the amount of agricultural runoff into the Mississippi River watershed. Agriculture has long been a cause of hypoxia through runoff from concentrated animal feeding operations. Mr. Nill argued that biotechnology-derived crops ease the hypoxia problem by using "no till" practices that generally employ herbicide-resistant biotech crops.

Andrew Solow of the Woods Hole Oceanographic Institution in Woods Hole, Massachusetts stated that although the scientific basis for public policy and decision making concerning the hypoxic zone in the Gulf of Mexico is relatively clear, the economic basis for making decisions is incomplete. Although there is a reasonably good understanding of the economic cost of reducing nutrient inputs in the Gulf, there are no such estimates of the economic benefits of such reductions. In fact, Mr. Solow stated that it has been surprisingly difficult to demonstrate clear economic effects of hypoxia using existing data.

Bryon Griffith is Deputy Director of the EPA Gulf of Mexico Program Office located in Space Center, Mississippi. Mr. Griffith briefly discussed how his office makes up a unique partnership between public and private entities, including state agencies, business representatives, broad environmental and public interests, and numerous federal

agencies. This partnership works toward the protecting natural resources located in the Gulf to ensure the economic vitality of the Gulf region.

## SESSION TWO: THE EXPANDING JURISDICTION OF THE CLEAN WATER ACT (CWA) PERMIT PROGRAM: IMPLICATIONS FOR AGRICULTURE AND IRRIGATION

### AGRICULTURAL PESTICIDE APPLICATIONS AND THE CLEAN WATER ACT PERMIT PROGRAM

Claudia O'Brien of Latham and Watkins spoke on the effect of recent court ruling on the National Pollutant Discharge Elimination System ("NPDES") permitting process. Ms. O'Brien argued that three cases in particular could result in the extension of NPDES permit requirements to all agricultural pesticide applications. The cases that Ms. O'Brien referred to are: *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002) (holding aerial silvicultural insecticide spraying of forests is a "point source"); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001) (holding NPDES permit is required for direct application of aquatic herbicide to irrigations canals); and *No Spray Coalition, Inc. v. City of New York*, 351 F.3d 602 (2d Cir. 2003) (holding Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") does not preempt NPDES permitting requirements).

According to Ms. O'Brien, notwithstanding the above cases Congress never intended the NPDES to cover pesticide applications that comply with FIFRA and the pesticide's label instructions. She posited that because Congress expressly exempted agricultural runoff from NPDES requirements by defining it as a non-point source that the same exemption should apply to spray drift. She reasoned that defining spray drift as a point source would result in a situation whereby the same pesticide application would constitute both a point source and a non-point source depending on the route the pesticide took on its way into the water. This, she maintained would be inherently inconsistent and illogical and thus spray drift should be defined as a non-point source.

Ms. O'Brien when on to analogize the spray nozzle on an airplane or truck to the smoke stack of a factory or power plant and suggested that if such spray nozzles are point sources then power plants and the like would also be point sources because some of their emissions end up in water bodies.

Ms. O'Brien stated that because CWA section 304(f) specifically identifies "agricultural and silvicultural activities including runoff" that are considered non-point sources, it is reasonable to conclude that the word "including," suggests that spray drift is one of the non-point sources activities. Ms. O'Brien stated that in light of the above mentioned court rulings the EPA should act to counter that possibility be-

fore the courts issues a ruling that would make such permitting mandatory and threaten the administrative workings of the NPDES program.

Joshua Kratka spoke on the opposite of the issue. Mr. Kratka argued that because spray nozzles in effect introduce a pollutant directly into a water body, albeit unintentionally, they are and should be defined as a point source. Mr. Kratka analogized such spray nozzles to a waste pipe coming from a factory and pointed out that a factory could not avoid the NPDES permit requirements for such a pipe by simply elevating the end of the pipe above the water surface and claiming that the discharge was into the air rather than the water. Mr. Kratka also mentioned that had Congress intended to exempt spray drift it could have done so explicitly as it did with agricultural runoff. He argued that because Congress chose to specifically exempt agricultural runoff but did not do the same for spray drift, it is reasonable to conclude that Congress did not intend to exempt spray drift from the NPDES permit requirements.

## DAY TWO

### SESSION ONE: ENERGY PROJECTS AND WATER QUALITY: CAN OIL AND WATER MIX?

#### EPA REGULATION OF THE IMPACTS OF COOLING WATER INTAKE STRUCTURES

James May, a professor of law at Widener University School of Law spoke on the topic of power plant cooling water. He presented many statistics regarding the impact of the CWA on the power industry and the EPA response to those statistics.

Professor May began by giving an overview of the environmental impact of power generation on the nation's water. He stated that beyond the familiar environmental impacts that are often reported in the news, e.g. mercury pollution and acidification of lakes and streams, the power industry also is responsible for the death of millions of aquatic animals. These animals die when they are either sucked into power plant cooling systems, or, more commonly, when they are trapped against intake grates designed to prevent the plant's cooling system from pulling in animals. Professor May said that each year the nation's power plants kill more fish than the U.S. fishing fleet. In fact, 90 power plants on the Great Lakes alone kill in excess of 40 million fish annually.

In addition to this environmental problem, Professor May discussed the problems presented to the nation's waters by atmospheric pollution created by power plants. Professor May stated that despite the implementation of the CWA more than 45 percent of the nation's lakes, rivers, and streams remain too contaminated for recreational use. In reference to mercury in particular, Professor May said that

since 2003 the incidence of advisories regarding fish contamination have increased 9.3 percent. Professor May believed that this was due in part to the Bush administration's weakening of environmental regulations, particularly the "Clear Skies" initiative.

## EPA'S PHASE I COOLING WATER INTAKE RULES FOR NEW FACILITIES UNDER CLEAN WATER ACT § 316(B) IN LIGHT OF *RIVERKEEPER V. EPA*, 358 F.3D 174 (2D CIR. 2004)

For the second part of the Energy Projects presentation Professor May took the place of Reed Super of Riverkeeper, Inc., who was unable to attend due to last minute scheduling conflicts. The focus of this presentation was the regulatory approach the EPA took with its Phase I cooling water rule and its interpretation by the *Riverkeeper* decision in the Second Circuit.

Professor May started by explaining the provisions of the Phase I rules. Phase I creates a two track system. Track I applies to plants that withdraw 10 million gallons or more of water per day. It limits intake flow to a level commensurate to that attained by a closed-cycle recirculating cooling system. Phase I also limits intake velocity to 0.5 feet per second on through-screen intake designs and imposes other limitations such as requirements that withdrawals not disrupt the thermal stratification of lakes or reservoirs. Track II permits certain alternative options that have a "comparable environmental impact" to Track I. According to Professor May, this means that under Track II plants may use technology that would limit impingement mortality and entrainment of fish and shellfish to 90 percent or greater of the reduction achieved by Track I. Track II also permits environmental offsets such as riparian buffers, removal of fish barriers to fish migration, and restocking of killed fish with hatchery fish.

Professor May next turned to the Second Circuit's ruling in *Riverkeeper*. In that case, the court examined Track I and found that the EPA's focus on the number of organisms killed by cooling systems was reasonable. In examining Track II, the court found the EPA's 90 percent standard reasonable because it permitted the EPA to clarify what it considered being a reasonable margin of error. According to Professor May, when the court examined the restoration measures of Track II it found them "plainly inconsistent with Congress's intent." According to the Professor, this is because the restoration measures functioned as a substitute for the "best technology available" required by the CWA. By permitting this substitution, the court found, the EPA exceeded its authority.

Professor May finished by briefly discussing the Phase II rule that the EPA promulgated in late spring of 2004. According to Professor May, Phase II applies to larger, existing plants and is similar to the Phase I rule. He stated that utility groups and environmental organiza-

tions in some states have already filed legal challenges to the rule, with briefing scheduled for late 2004 and early 2005.

### A BRIEF OVERVIEW OF EPA'S § 316(B) RULES

Kristy Bulleit of Hunton and Williams presented last. She presented an overview of section 316(b) of the CWA. In her presentation she stated that the section is unusual because rather than focusing on an actual discharge the sections instead controls the technology that is responsible for a given discharge. Thus, rather than specifically limiting the quantity of cooling water a plant may discharge, section 316(b) requires cooling structures to use "the best technology available" in an effort to minimize environmental impacts.

Ms. Bulleit also discussed the performance standards of the Phase II rule. According to Ms. Bulleit, one of the primary requirements of those standards is that new plants must demonstrate that they will have an impingement mortality rate 80-95 percent lower than a calculated base line. The rule also requires an entrainment of no more than 60-90 percent of the calculated base line. Ms. Bulleit stated that plants are subject to the rule if they have a capacity utilization rate of 15% or more and either draw cooling water from a tidal river, estuary, ocean, or the Great Lakes, *or* they have a design intake flow that is greater than 5% of a freshwater stream's mean annual flow. According to Ms. Bulleit, the rule also requires that plants, which propose to increase their consumption of lake water for cooling, must demonstrate that the increase will not disrupt the thermal layering or turnover of the lake.

## SESSION TWO: EVOLUTION OF THE EDWARDS AQUIFER

This session discussed the evolution of the maintenance and use of the Edwards Aquifer located in South Central Texas. Mary Q. Kelly of Loeffler Jonas & Tuggey, LLP of San Antonio, Texas moderated the session. Stuart Henry of Henry & Levin from Austin, Texas; Steve Kosub of Water Resources Counsel, San Antonio Water System; and Professor Joe G. Moore, Jr. of Texas State University in San Marcos, Texas participated in the panel discussion.

The Edwards Aquifer is a 180-mile long aquifer underlying eight counties in South Central Texas. It is the principal source of water for more than 1.5 million Texas residents, including residents of San Antonio. Historically, Texas groundwater was subject to the rule of capture, which meant that farmers, cities, and industries could pump as much water as they wanted, so long as they put it to a beneficial use. This system resulted in excessive pumping of water from the Edwards Aquifer as the population continued to grow to the point that demand for water exceeded the supply.

The over pumping of the aquifer led Texas lawmakers to pass legislation to help govern the Edwards Aquifer. Thus, in 1993, legislators

passed the Edwards Aquifer Authority Act ("Act"), which created the Edwards Aquifer Authority ("Authority"). The Act gave the Authority authorization to issue permits to regulate groundwater withdrawals from the aquifer, and to implement other management strategies within the aquifer without affecting the governance of groundwater in other parts of Texas. The Authority is made up of a seventeen member board of directors (fifteen of whom are elected from the region, and the other two are non-voting appointed members who carry out the duties set out in the Act). The board sets policy to manage, conserve, preserve, and protect the aquifer and works to increase recharge and prevent waste or pollution of the aquifer. The Authority is unique in that it is the only groundwater district in Texas that wields such broad regulatory powers.

The Act seeks to balance the interests of all aquifer users and beneficiaries, including municipalities, industry, agriculture, and spring/downstream interests. Although the Act did grandfather historic users of the aquifer, all other users are subject to Authority regulations and permits. The Act permits the Authority to allow the initial withdrawal of 450,000 acre-feet of water per year; however, by the year 2008, withdrawals must be reduced to 400,000 acre-feet per year. The Authority is also responsible to implement comprehensive water management strategies adequate to protect spring flow at Comal Springs by the end of 2012.

## SESSION THREE: "BEST SCIENCE" IN WATER MANAGEMENT

### THE ROLE OF SCIENCE IN DECISIONS ALLOCATING WATER BETWEEN ENDANGERED SPECIES AND CONFLICTING USES.

As Professor Holly Doremus of the University of California, Davis School of Law noted in her opening comments, scientific judgments are constrained by available data and this has the effect that science advances very slowly.

The slow pace of science in not normally much of a problem, but when it comes to the Endangered Species Act it is a problem because under the Act, science is the basis for management decisions. The effect of this slow pace was one of the main themes in Professor Doremus' presentation.

According to Professor Doremus, the Endangered Species Act's requirement of Best Science Available ("BSA") has a number of problems. One of the problems noted by the Professor is that BSA mandates do not appear to drive the ESA decision-making process. In fact, Professor Doremus stated that if an agency bases its decision on some reasoned evaluation of BSA data it does not mater if the data is weak or even inconclusive. The Professor suggested that the reason for this situation lies in the purposes of BSA. These purposes have little to do with species preservation and rather more to do with political concerns

such as increasing public trust in the decision making process, and avoiding unnecessary economic disruption.

Professor Doremus went on to state that when viewed in context there are three types of science: research science, courtroom science, and regulatory science. Research science is based on the scientific method and has the long-range goal of developing reliable knowledge. Courtroom science has the aim of convincing a decision maker that one party in a suit has the better argument based on scientific evidence. An important difference is that while research science continues to evolve with new knowledge, courtroom science is not subject to later revision. Finally, regulatory science is differentiated from the other two types in that its goal is the enhancement of management goals.

Professor Doremus then turned to current efforts to reform the ESA. She concluded that a desire to create barriers to protective regulations drives these efforts. In support of this assertion she the unbalanced way in which science is applied to decisions to list species under the ESA but not when the decision is made not to list a species. In closing, Professor Doremus stated that to be effective, agencies applying the ESA should be encouraged to practice research science rather than regulatory science. She also believes that agencies must be free to exercise their judgment as to the needs of a give species. She suggest that Congress could aid in this goal by providing targeted funds for studies that wildlife agencies identify as necessary for effective decision making.

### BEST SCIENCE AND ABSENT SCIENCE IN THE KLAMATH RIVER BASIN: A CASE STUDY AND IMPLICATIONS

Paul Simmons of Somach, Simmons and Dunn followed Professor Doremus. Mr. Simmons discussed some of the ways that BSA can fail and result in a public backlash. As an example, Mr. Simmons discussed the 2001 debacle that occurred in the Klamath Basin.

In 1988, two types of suckers that live in Upper Klamath Lake were listed as endangered. In 1997, the Coho salmon, which inhabits the main stem of the Klamath River, was listed as threatened. These two listings required that the Bureau of Reclamations ("Bureau"), which controls the massive irrigation project known as the Klamath Project would have to annual ESA consultations with the National Oceanic and Atmospheric Administration ("NOAA"), and with the U.S. Fish and Wildlife Service ("FWS"). In April of 2001, both agencies issued opinions that due to an ongoing drought the lake level and river flow proposed by the Bureau would threaten the listed fish. The opinions identified new mandatory lake levels and river flows that were needed to protect the fish. However, due to the drought there was not even enough water to satisfy these mandatory levels. Irrigators sought to enjoin the opinions instream flows from taking effect but ultimately

the suit was dismissed. The result was that the Klamath Project's century-old water supply was eliminated for the 2001-growing year.

Later in that same year, the Departments of Interior and Commerce requested the National Academies to review the biological opinions of NOAA and the FWS. According to Mr. Simmons, the Academy's findings were that the opinions lacked a scientific basis for the required instream flows. Moreover, they found no foundations for the opinions departure from the instream flows of the 1990's. According to Mr. Simmons, the result of both the opinions and the subsequent investigation was public outrage and criticism of the "scientific process."

Mr. Simmons posited that there were several reasons for the failures of the scientific process at Klamath in 2001. He said that first; there was a culture that pitted one side against the other with the inevitable result that there would be winners and losers. Second, Mr. Simmons pointed to the fact that agency policies had infiltrated the scientific process. He argued that in Klamath in 2001 scientists were controlling the policy with the result that BSA because a contest to present the most persuasive argument for a given instream flow.

Mr. Simmons concluded by addressing proposed legislation that would, among other things, require that greater weight be given to field-tested or peer-reviewed data. He contended that such a requirement is consistent with the mandate of using BSA. Moreover, he stated that in situations where reliable data is lacking that such a requirement would be especially valuable. Mr. Simmons concludes that peer review requirement in combination with regulating agencies heeding the goals of the ESA will result in more effective administration of the Act.

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