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## American Bar Association Section of Environment, Energy, and Resources 11th Section Fall Meeting

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**AMERICAN BAR ASSOCIATION  
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES  
11TH SECTION FALL MEETING**

**Washington, DC      October 8-12, 2003**

Every year hundreds of natural resource, environmental, and energy attorneys from across the country join at the ABA Section of Environment, Energy, and Resources annual conference. For water attorneys, the focus of the 11th section meeting was squared upon the intersection of water quality and water quantity. As population and demand for water increases, and businesses and municipalities increase their use of water, an interesting conflict develops. Environmental laws, written to address quality, are increasingly being used to address quantity issues. As the pressures on water use—especially in the East—grow, the conflicts between environmental laws and the doctrines of prior appropriation and riparianism will continue to provide some of the most interesting fluctuations and adaptations in natural resources and environmental law.

**DAY ONE**

**AGRICULTURAL ENVIRONMENTAL MANAGEMENT OF WATER IMPACTS**

**CONCENTRATED ANIMAL FEEDING  
OPERATIONS: AN UNSATISFACTORY  
SET OF NEW REGULATIONS**

Barclay Rodgers of the Sierra Club spoke about concentrated animal feeding operations (“CAFOs”) and some potential problems with new EPA regulations that may limit the enforcement of the CWA with respect to these entities. The crux of Mr. Rodgers’ presentation centered on new EPA regulations regarding agricultural storm water exemptions that may provide a loophole for CAFOs whose operations produce bacteria and nutrients that end up in rivers and streams. Mr. Rodgers noted that bacteria and nutrients are classified as pollutants. He also noted that, while the term CAFO is not defined in the CWA, it does expressly designate those entities as point sources and subjects them to regulation and NPDES permitting requirements.

Mr. Rodgers stated that the old regulations forbade discharges by CAFOs without a permit, regardless of whether the discharge came from the animal feeding facility itself or came as a result of storm water washing animal waste off the land where the CAFO disposed of it. However, Mr. Rodgers called attention to provisions in the current regulations that exempt such storm water discharges so long as the CAFO has complied with its nutrient management plan. The new regulations hold CAFOs to a “best management practices” standard with respect to the disposal or application of animal waste to land. This requires the CAFO to draft a nutrient management plan and

comply with its provisions. The new regulations apply the agricultural storm water discharge exception to storm water discharges when CAFOs dispose of their waste in accordance with their nutrient management plan.

Mr. Rodgers claimed the EPA lacks authority to interpret the agricultural storm water exemption in this manner. In essence, he argues, the CAFO, as a point source, must be regulated and the EPA cannot interpret the law in a way that causes inconsistent enforcement. Specifically, he argues that if a CAFO is a point source, including when it disposes of waste on land, then it must be regulated as such. To provide an exemption simply because the CAFO disposed of the waste in accordance with the CAFOs own management plan strips the law of its force and meaning. Mr. Rodgers also questioned the propriety and effectiveness of the new regulations' nutrient management plan process and discharge minimization requirements in controlling waste.

#### **CONCENTRATED ANIMAL FEEDING OPERATIONS REGULATIONS**

Don Parrish of the American Farm Bureau provided a different viewpoint on the agricultural storm water discharge exemption for discharges from CAFO animal waste disposal sites. Mr. Parrish first contextualized the issue by providing statistics about poultry and livestock production and a glimpse of the market forces at play in these industries. Mr. Parrish then posited that the states currently regulate agricultural storm water discharges sufficiently and the EPA regulations could only add an unnecessary level of regulation and cost. As for the agricultural storm water exemption for CAFOs, he claimed the EPA lacked the authority to define "discharge" broadly or to narrow the exemption.

Essentially, Mr. Parrish argued that regulation of storm water discharges containing animal waste from CAFOs fell within the province of the states and that EPA could tread only lightly in this area. This provided a contrasting view to the one put forth by Mr. Rodgers, but at the root of both presentations was the EPAs interpretation and application of the agricultural storm water exemption, which remains undefined in the Act and subject to considerably different interpretations.

#### **DON ELIVRIO'S COW: DEL MONTE, ISO, AND WATER IN COSTA RICA**

Óttón Solís from the University of Costa Rica spoke about the Del Monte fruit company and how its large pineapple plantation affects the water and the community of a small Costa Rican town. Mr. Solís explained that the company's presence brought both benefits and problems for the people of the town. He identified two major problems with respect to water: (1) Del Monte planted on sloped ground above the town causing changes in soil and water composition,

quality and quantity for the people below; and (2) the problem of scarcity and pineapple harvesting as a water intensive activity. The citizens of the town must cope with drought conditions in the summer and floods in the winter, as well as changes in water quality because of Del Monte's operations.

After identifying the problems, Mr. Solis explained the legal recourse. He noted that the Costa Rican system required reconciliation for harm it had caused, and that Del Monte had complied. However, Mr. Solis felt the reconciliation measures were ineffective at addressing local concerns, and cited a disconnect between local needs and legislation as the reason why local farmers had begun to organize and demand greater regulation over Del Monte. He felt the government regulators in the country's capital were too far removed, and too unconcerned with the farmer's plight, to regulate effectively, but noted that ad hoc regulation defined the Costa Rican system. This, he feels, leaves many with inadequate recourse to their water problems.

Mr. Solis then proposed that the regulation process should be standardized to provide environmental control pursuant to the purpose and mandate of ISO 14000. ISO 14000 is an environmental management system comprised of methods and standards, formed by the Organization de Standards International (ISO), to be used by multinational corporations to address environmental problems worldwide. Companies can use the guidelines in ISO 14000 to help address environmental problems, and can be certified by the ISO if in compliance. ISO 14000 is not the law of Costa Rica, and compliance by leaders of industry is voluntary. Mr. Solis nonetheless thinks ISO 14000 provides a good framework for a more effective regulatory system in Costa Rica.

## **DAY TWO**

### **RIPARIANISM: NEW CHALLENGES FOR AN OLD DOCTRINE**

Increasing population, pollution, and demand together pressure riparianism in new and diverse ways. Water quality increasingly has effects upon water quantity. The panelists addressed these problems in the context of the changing doctrine of riparian water law.

### **TMDL AND ESA CONTROLS OVER WATER BODIES IMPACTED BY FLOW AND TEMPERATURE PROBLEMS**

As Mark A. Ryan, Assistant Regional Counsel for EPA Region Ten, noted in his introduction, "temperature and flow problems pose daunting obstacles to restoring the health of affected ecosystems while allowing agriculture and development that depends upon the use of impacted water bodies." Mr. Ryan focused his presentation on the Pacific Northwest where government agencies have confronted the

challenges of species protection, pollution, and prior appropriation.

Throughout the West, rivers are often over appropriated. The impacts on ecosystems are two-fold. First, diversion can reduce and even eliminate habitat. Second, with less water in the stream, pollution and temperatures increase and have greater impacts upon habitat. Mr. Ryan explained the efforts of the EPA, the National Marine Fisheries Service, and the United State Fish and Wildlife Service to streamline the requirements of the Clean Water Act, the Endangered Species Act, and the doctrine of prior appropriation. As he explained, decreased flow rates increase both temperature and effluent concentration. These increases can have serious impacts upon endangered species. As a result, in states like Oregon, farmers are being required to reduce appropriations to allow greater flows for salmon runs.

### **THE CLEAN WATER ACT AND THE ROLE OF FLOW IN STATE WATER QUALITY STANDARDS AND NPDES PERMITTING**

Like Mr. Ryan, Ms. Williams, from the EPA Office of Regional Counsel, Region One, focused her presentation on the intersection of water quality and quantity. She highlighted four problems with inadequate flows. First, stream flow reductions have adverse effects on aquatic species because lower flows eliminate fish passages, reduce protective cover, increase predation and temperatures, and reduce spawning habitat. Second, reduced flow increases aquatic organisms' exposure to toxic concentrations of chemicals from wastewater discharge. Third, with less habitat and smaller food supplies, native species can weaken and become more susceptible to disease. Fourth, reduced flow results in greater concentrations of pollutants and increases the difficulty of meeting water quality standards.

As Ms. Williams noted, the Clean Water Act contains no provisions for flow. She explained the New England Region's efforts to address flow rates through various provisions of the Clean Water Act. These provisions include the adoption and implementation of state water quality standards, National Pollution Discharge Elimination System ("NPDES") permitting, establishment of Total Maximum Daily Load limits ("TMDLs"), section 401 certifications of federal permits and licenses, and section 404 permitting.

Vermont, for example, has implemented stream flow protections that prohibit all aggregate uses from diminishing natural flow in Class A streams by more than 5 percent. Additionally, the NPDES program provides an incentive for discharges to increase flows, especially on streams with the lowest flows. Discharges can face huge compliance expenses in meeting water quality standards on streams and rivers with low flows. Although the NPDES permitting does not directly address flow rates, discharges may take measures to increase flow rates so they do not have to treat pollution. Finally, the New England states are also using section 401 certifications to impose minimum stream flow

conditions on section 404 permits and FERC licenses. Ms. Williams noted that these certifications are playing an especially important role since the deregulation of electricity production in New England. Deregulation has brought an onslaught of natural gas power plants that have and will continue to impact adversely flow rates throughout the region.

The problems New England faces are not unique. Increasing pressure on water supplies is affecting water quality. New England's small states, many rivers, and growing population, however, have created unique opportunities for solving flow problems that will be mirrored across the country.

### **THE RISE OF ENVIRONMENTAL REGULATION AND THE DECLINE OF THE COMMON LAW RIPARIAN DOCTRINE**

George A. Somerville, Troutman Sanders, LLP, called for a "comprehensive re-evaluation of the enormously detailed, complex, costly, and time-consuming regulatory structure that has been erected" and impedes public water supply development. He points out that environmental statutes and regulations have made the riparian doctrine almost irrelevant and predicts the cumulative nature of the regulations impose and will continue to create a hurdle far more stringent than the limitations of reasonable use. After discussing the various environmental laws affecting public water supply development, Mr. Somerville concluded with a call for moderation, recognition of competing uses, and the need to accommodate the development of public water supplies.

### **CLEAN WATER ACT UPDATE—JURISDICTION AND PROGRAMS**

#### **CLEAN WATER ACT UPDATE, AUTUMN 2003**

Margaret Strand, of Venable, Baetjer, Howard & Civiletti, LLP, discussed the limitations of the Clean Water Act ("CWA") in addressing certain environmental problems faced by society today. She posited that the CWA might not be flexible enough to deal with these problems. First, she noted that while geographically broad-reaching, the CWA has jurisdiction over a limited number of activities. She reiterated that the CWA says one cannot add a *pollutant* from a *point source* into *navigable waters*, and noted that controversy exists with respect to the interpretation of each of these terms. She called attention to some particularly problematic terms in the act such as "neighboring," "perennial," "intermittent," and "perennial waters" and stated that the current administration favors interpretations that seek to limit the jurisdiction of the CWA. With a battle over the jurisdictional reach of the act, the interpretation of these vital terms becomes quite important. Ms. Strand concluded that current statutory

tools are inadequate at addressing current problems and stated that government needs to work backwards from the needs of the receiving water towards effective regulation of pollution.

**SYLVIA QUAST, ENVIRONMENTAL AND  
NATURAL RESOURCES DIVISION,  
DEPARTMENT OF JUSTICE**

Sylvia Quast discussed section 402 of the CWA, regarding the act's activities jurisdiction. She focused on the *Mikasuki* case, which involved water pumping into a new source where the pumped water already contains a high level of phosphorous. She noted the split in authority regarding whether one needed an NPDES permit to release such water when nothing had been added to the water. This demonstrated the complicated task of enforcing the CWA.

On the topic of enforcement, Ms. Quast spoke of criminal and civil enforcement actions under the CWA. She noted that CWA's civil enforcement has been used to combat pipeline pollution.

**THE CLEAN WATER ACT UNDER ATTACK**

Nancy Stoner, Director of the Clean Water Project, NRDC, spoke about the growing inability of the CWA to serve as an effective tool to protect the environment. She noted the past effectiveness of the act to combat old problems, but also noted the inadequacy of the CWA in addressing new problems like storm water discharges. Ms. Stoner pointed out that the Bush administration had reinterpreted certain CWA provisions germane to these emerging problems, usually to avoid having to undertake enforcement, which is often expensive and difficult.

She suggested that the administration is now inappropriately interpreting the narrow holding in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), as a justification for further limiting the jurisdiction of the CWA and creating loopholes that threaten the efficacy of the whole statutory scheme. This is especially true, Stoner asserts, with respect to wetlands. Some of the key reinterpretations include definitional changes for terms such as "fill" and "CAFO." Stoner also says the term "blending," mixing sewage and untreated water, will become important in terms of what activities can be regulated by the CWA.

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