

November 2009



Vol. 48, No. 4

Lake Michigan States Section Air & Waste Management Association Newsletter[®]

Fueling our Future: A Forum on American Energy Needs

Friday, November 20, 2009
11:30 a.m.

Union League Club
65 West Jackson Blvd
Chicago, IL 60604-3598

For America and the world, the path toward economic recovery and sustainable growth is dependent upon energy. What is the outlook for America's energy needs? Will our nation have the energy required to sustain our quality of life and to grow our economy in the years ahead.

Lake Michigan States Section of the Air & Waste Management Association is cosponsoring this event along with the ULC Public Affairs Committee, the ULC Environmental Committee and the Illinois Channel. An expert panel will review America's energy needs and provide insight into how we can best "fuel our future." Topics will include the use of fossil fuels, what industry is doing to be creative in meeting its energy needs and environmental mandates, and the future of alternative energies.

Our panelists will include Doug Scott, director of the Illinois Environmental Protection Agency; Jim Monk, president of the Illinois Energy Association; and Katy Lawrence, manager of Government Affairs for United States Steel. The panel discussion will be moderated by Terry Martin, executive director of the Illinois Channel, and will be taped for broadcast.

Please note: luncheon at this event will be served at 11:45 a.m. so that the program may begin promptly at noon.

Cost to attend is \$50 for non-ULC members.

Reservations must be received by close of business on Tuesday, November 17. Contact Robin Pelsis, LM-A&WMA at robin@LMAWMA.org or 847-202-0418 to make your reservation.

Please note that ULC has a business casual dress code. No jeans allowed.

Opinions expressed in this newsletter represents the view of the author and not necessarily the editor, the section or the A&WMA.



ANNUAL HOLIDAY RECEPTION

**Tuesday, December 1, 2009
5:00 p.m.**

Join fellow A&WMA members and guests to celebrate the Holiday Season as we return to:

**ITT Stuart School of Business
565 W. Adams St.
Chicago, IL 60661**

This event is always an enjoyable, relaxing, fun evening that provides the opportunity to meet fellow environmental professionals in a non-business setting. You will have a chance to network with your peers and their guests while enjoying cocktails and delicious hors d'oeuvres.

Attendees are invited to bring a guest and help us celebrate the holiday season. There is no cost to attend this event. All we ask is that you RSVP your intention to attend.

**Sponsorship Opportunities are available
for \$100**

*Contact Robin Pelsis at Robin@LMAWMA.org
or (847) 202-0418 to make your reservation
or to be a sponsor.*



2009 Air Quality Management Conference

Thursday, November 12, 2009

Doubletree Guest Suites & Conference Center

2111 Butterfield Road
Downers Grove, IL 60515

The Lake Michigan States Section of the Air & Waste Management Association is pleased to once again offer the Midwest's most comprehensive annual program on air quality management issues. The LMSS's Air Quality Management conference has become a tradition in the region - bringing together environmental professionals from industry, government, environmental services and the legal community to learn about the hottest issues and most important developments in this rapidly evolving field. This year, prominent leaders in air quality management will provide information and insights on such current topics as Climate Change policy and what it means to industry and an industrial perspective on air quality regulatory enforcement. Also to be covered will be new developments in permitting and other regulatory initiatives.

Companies that supply products and services for environmental management will have exhibits on display at the conference. There are also sponsorship opportunities available. For information on exhibiting or sponsorship, contact Robin Pelsis at (847) 202-0418 or robin@lmawma.org.

Clean Air Act Primer

Wednesday, November 11, 2009

7:00-9:00 p.m.

Environmental professionals working in the air quality area should have an understanding of what the Clean Air Act is and what it entails. This primer is perfect for environmental managers with expanding air quality responsibility, supervisors directing air quality professionals, and experienced air quality managers looking for a broader perspective on their field. The course will provide an overview all of the Clean Air Act, with special attention on Title III - Air Toxics and Title V - Clean Air Act Permitting. Handouts distributed from the course will cover the Clean Air Act and its details, Air Toxics and other valuable information that can serve the professional as a reference for years to come.

Course Instructors are: Paul Farber, PE DEE, Senior Environmental Specialist with Sargent & Lundy with over 25 years experience in air pollution and air pollution control; and Dale G. Kalina, Ph. D., a Principal with Environmental Partners, Inc., with 20+ years experience in dealing with air pollution control regulations.

Attendees of this conference are eligible to receive a PDH certificate for 6.5 hours. LM-A&WMA is also an authorized CLE provider. Attendees in need of CLE credits can sign up to receive a CLE certificate for 6.5 hours.

2009 Air Conference Agenda

Wednesday **November 11, 2009**

7:00 p.m. **CLEAN AIR ACT PRIMER**

*Dale Kalina, Principal
Environmental Partners, Inc.*

*Paul Farber, Sr. Environmental Specialist
Sargent & Lundy*

Thursday **November 12, 2009**

8:00 a.m. **WELCOME & INTRODUCTION**

*John Yates, P.E., Vice President
Civil & Environmental Consultants, Inc.
LM-A&WMA Past Chair*

LAKE MICHIGAN STATES SECTION UPDATE

*Ferdinand Alido, Navistar, Inc.
LM-A&WMA Chair*

8:15 a.m. **ISSUES IN NATIONAL AIR QUALITY POLICY**

Speaker: *Mary Pat Tyson, Branch Chief, Air & Radiation Division
United States Environmental Protection Agency, Region V*

8:45 a.m. **STATE AIR POLICY**

Moderator: *John Yates, P.E., Civil & Environmental Consultants, Inc.*

Speakers: *Dan Murray, Assistant Commissioner
Indiana Department of Environmental Management*

*Laurel Kroack, Bureau Chief, Bureau of Air
Illinois Environmental Protection Agency*

*Larry Bruss, Section Chief, Regional Pollutant & Mobile Source Section,
Bureau of Air Management, Wisconsin Department of Natural Resources*

*Lynn Fielder, Assistant Division Chief, Air Quality Section
Michigan Department of Environmental Quality*

10:30 a.m. **BREAK AND EXHIBIT VIEWING**

10:45 a.m. **CURRENT AIR PERMITTING CLIMATE**

Moderator: *Mark Horne, Environmental Partners, Inc.*

Speakers: *Genevieve Damico, Environmental Engineer
United States Environmental Protection Agency, Region V*

*Christopher Romaine, Manager New Source Review
Illinois Environmental Protection Agency*

*Matt Stuckey, Branch Chief, Office of Air Quality - Permits Branch
Indiana Department of Environmental Management*

2009 Air Conference Agenda

12:30 p.m. **LUNCHEON**

Moderator: **John Yates**, Civil & Environmental Consultants, Inc.

Speaker: **Bharat Mathur**, Acting Regional V Administrator
United States Environmental Protection Agency

2:00 p.m. **CLIMATE CHANGE AND REGULATORY ISSUES**

Moderator: **Eric Boyd**, Seyfarth Shaw LLP

Speakers: **Doug Scott**, Director, Illinois Environmental Protection Agency
Chair, Climate Registry

Melissa Hulting, Regional Climate Change Coordinator, Region V
United States Environmental Protection Agency

3:00 p.m. **BREAK AND EXHIBIT VIEWING**

3:15 p.m. **ENFORCEMENT: APPROACH AND EXPOSURE**

Speakers: **Ferdinand Alido**, Manager, Environmental Affairs
Navistar, Inc.

Rebecca A. Burlingham, Supervising Attorney
Environmental Enforcement Bureau, Illinois Attorney General's Office

James T. Harrington, Retired
McGuireWoods LLP

4:30 p.m. **CLOSING RECEPTION - SPONSORED BY THE EXHIBITORS**

Conference Co-Chairs: **John Yates, Civil & Environmental Consultants Inc.**
Eric Boyd, Seyfarth Shaw, LLP
Mark Horne, Environmental Partners, Inc.
James T. Harrington, McGuireWoods LLP

Exhibitor Chair: **David Ozawa, Platt Environmental Services, Inc.**

If you are unable to join us for this conference, but know of a colleague who would be interested in attending, please pass this brochure on to them.

**Check out our website at: www.lmawma.org
for updates to this conference brochure.**

STEPHEN H. ROTHBLATT SCHOLARSHIP

The Lake Michigan States Section of AWMA has established a new graduate student scholarship in memory of Mr. Stephen H. Rothblatt. Mr. Rothblatt was a long time supporter and contributor to the LM-AWMA, including serving as Chairman of the Board from 1987-1988. In his professional capacity Mr. Rothblatt was the Director, Air and Radiation Division, U.S. Environmental Protection Agency, Region 5, headquartered in Chicago, Illinois.

We are soliciting donations from our members and friends for the new scholarship fund. The scholarship recipients will be outstanding graduate students studying in the environmental field.

As a section, we feel that scholarship programs are a vital function and provide needed support to the future environmental professionals within the territory of the Lake Michigan State Section. Ideally, we will be able to provide several generous scholarships to reflect the strength of our membership. The fund amount each year will be dependent upon annual donations and/or the interest generated from the investment fund.

Since the scholarship program will be funded strictly through the generosity of our members and supporting businesses, the Section's Board of Directors is hopeful that you will give serious consideration to making a tax-deductible donation in support of this program.

Please consider making a donation today! Make your check payable to LM-AWMA Scholarship Fund and mail it to LM-A&WMA, 11 W. Pleasant Hill Blvd., Palatine, IL 60067.

Any donation amount will be graciously accepted. Thank you very much for your consideration and continued support.

Current Contributors:

*Al Gans
Donna M. Kenski
Dennis A. Lawler
Mary T. McAuliffe
Scott J. Mermel
Mark J. Rood
Robin M. Rotman
Mr. & Mrs. Carlos A. Rotman
John Summerhays*



A&WMA Scholarships for the Next Generation of Environmental Professionals

A&WMA invites graduate students pursuing a course of study and research in air quality, waste management, environmental management/policy/law, and/or sustainability to apply for A&WMA's 2010-2011 Scholarships!

The Association will be awarding over \$22,000 to exceptional students this year, so be sure to submit your application so you don't miss out!

Applications must be submitted by Tuesday, December 15, 2009 at 5:00 p.m. Eastern time. Visit the Scholarship Web site at <http://secure.awma.org/scholarships/> for more information.

THE VALUE OF AN OFFICE-WIDE MENTORING PROGRAM (continued)

By: Perry Fisher

This is the second in a series of articles begun in the August 2009 newsletter. In answering the question, should the mentoring program be voluntary?, I would recommend yes, but only for employees with at least six months of employment in their firm. It is common for new employees to be placed in an orientation program in which they are provided a mentor, who is often their supervisor, to assist them in the early months of their employment, providing a ready source of guidance and answers to their questions. After that orientation period is complete, and the employee is reasonably familiar with the policies, procedures, culture, etc. of his employer, these programs are generally terminated and not replaced with an ongoing program which provides mentoring beyond that of the immediate supervisor.

By creating a voluntary mentoring program, the employee will bring to it a greater willingness to avail himself of the benefits of such a program. Assuming a mentoring program is in place, it is common for such a program to not be office-wide, but rather targeted at particularly promising employees in terms of career advancement. It is my belief that, since a mentoring program provides benefit to the employee with respect to his success and sense of his employer's commitment to supporting him, it should not be limited to the targeted few, but rather be available for all personnel—management, technical, administrative.

With regard to selection of the mentor, while most mentoring programs designate the employee's immediate supervisor as his mentor, I recommend that someone different from the supervisor should also be available to the employee for mentoring. A supervisor's responsibilities generally include mentoring to those under their supervision. I believe, however, that the employee would benefit considerably from having, in addition, another person to be available to turn to for guidance, support, answering questions, a different perspective, etc. This would serve to enhance the support system available to the employee and demonstrate to the employee the firm's commitment to his professional and personal growth, satisfaction, and success. This should in no way detract from the importance of the employee-supervisor relationship and need for quality communication and rapport between them.

Accepting the value of having a different person than the supervisor as mentor, the question then becomes should the employee have any input into that selection process. My experience suggests that, indeed, the employee should. In fact, in the programs I have run, I have asked the employee to designate to me his first two choices, someone one or two grade levels above him in the organization. In providing guidance to employees regarding who such a person should be, I have encouraged them to not rule out someone in a different discipline. Importantly, it should be someone they respect and

communicate with easily. By involving the employee in the choice of his mentor, this will encourage the employee to fully utilize and benefit from having a mentor, which is the whole purpose of the program.

This type of program will inevitably result in some individuals being requested to be a mentor for more than one protégé. I have not viewed this as a particular limitation, for I have only asked individuals to be a mentor with the understanding that this would involve minimal additional demands on their time. They simply need to be available to meet with the protégé at a mutually convenient time. I impose no formal requirements such as writing up or reporting on such meetings. This allows particularly popular mentor-types to mentor a modest number of protégés—generally capped at four or five—without undue impact on their own time.

In subsequent newsletters I shall be addressing such issues as (1) If a mentor-protégé relationship is not working, what should be done? (2) Who is the best person to run the program? (3) How often should surveys be conducted of the protégés and mentors to evaluate the success of the program? (4) While it is clear that the protégé benefits considerably from the program, are there any benefits received by the mentor? and (5) What are guidelines for success of the program?

*Contributor: Perry W. Fisher,
Mentoring Program Consultant
perrywf@aol.com*

EPA ISSUES FINAL GREENHOUSE GAS REPORTING RULE

*By: David L. Rieser, Partner
McGuireWoods LLP*

On September 22, 2009, EPA issued its final Mandatory Greenhouse Gas Reporting Rule, setting up a complex structure for companies in certain industries to report direct, and in some cases indirect, emissions of Greenhouse Gases (“GHGs”). While the Rule is generally similar to the proposal issued on April 10, 2009 (74 Fed. Reg. 16448), EPA made a number of changes generally to provide greater flexibility to describe how it is applied to certain types of sources. The final Rule will become effective 60 days from publication in the Federal Register which should be next week.

The final Rule retains the basic structure and requirement of the proposed rule. Specified sources in certain industries, sources which emit more than 25,000 tons per year of carbon dioxide equivalents whether from combustion either alone or in combination with specified sources, must begin monitoring their GHG emissions in January 2010 and submit their first annual report on March 31, 2011. Fuel production sources must report not only their own process emissions but must also report emissions from all fuel they produce, import or export. Heavy duty engine manufacturers must also report their own process emissions as well as emissions from the engines they produce. The Rule defines each specialized source category and includes requirements for monitoring, data verification and reporting.

In response to comments, EPA modified their proposal in several significant ways. First, EPA changed its rigid “once in, always in” approach and established several thresholds by which reporters could eventually escape reporting requirements. These include reporting emissions less than 25,000 tons per year for five straight years or less than 15,000 tons per year for three straight years, or by shutting down all GHG emitting sources at a facility. EPA further clarified that, in contrast to most other emission rules, GHG reporting was based purely on actual emissions and not the facility’s potential to emit.

Second, in response to concerns that sources would have insufficient time to install the required monitoring systems by the initial monitoring start date of January, 2010, EPA allowed sources limited flexibility to use best available monitoring methodologies from January through March of 2010. EPA intends to issue rules on criteria for determining best available monitoring methods. In a related discussion about data quality, EPA also provided further clarification on required QA/QC for internal measuring systems such as flow meters and reduced record retention requirements from five to three years.

Third, EPA deferred regulation of numerous sources based primarily on the lack of data or consensus on how these sources would monitor their GHG emissions. The deferred sources include electronics manu-

facturing, ethanol production, underground coal mines, oil and natural gas systems, food processing, industrial landfills and waste water treatment facilities. In its preamble, EPA asserted that it would continue to develop requirements for these sources, but provided no timeline on when rules would be issued.

In response to comments, EPA deferred another key issue, the protection of confidential business information (“CBI”). Numerous companies expressed concerns that the monitoring methodologies required the disclosure of data such as throughput or raw material inputs, which companies generally maintain as significant trade secrets. EPA rules preclude protecting “emissions data” used to document emissions reporting or compliance as CBI, thus threatening broad disclosure of the information supporting GHG reporting. In the final Rule, EPA acknowledged the concern but said it would address the issue in rules it intended to promulgate shortly.

While the GHG Reporting Rule will be the first federal requirement imposed on industry with respect to GHG emissions, its implications for EPA’s authority to adopt other GHG regulations is less clear. Its adoption shines no light on the question of the ability of the EPA to regulate GHG under the Clean Air Act (“CAA”) since the Rule was adopted pursuant to specific authority in an appropri-

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FINAL GREENHOUSE GAS (con't.)

ations act. Further, the Rule will not in and of itself authorize control of GHG emissions through Title V air permits, since EPA specifically determined that the Rule did not constitute an “applicable regulation” under the air permit programs.

At the same time, EPA trumpeted the Rule’s implications for the political process considering GHG controls. EPA noted that the data would inform their decisions on how or whether to use CAA authority to adopt New Source Performance Standards and “would inform future climate change policy decisions,” a clear and unmistakable message that EPA is prepared to act through the CAA, if Congress does not adopt another program. EPA sent another message when it claimed that the information would encourage companies to evaluate their GHG emissions and that the publication of GHG emissions data would encourage greater awareness similar to other programs. This is a not so subtle reference to the Toxics Release Inventory Program which has encouraged companies to reduce toxics in response to public scrutiny despite the lack of any specific toxics reduction program.

In short, the Rule marks a very significant step in the march toward regulation of GHG emissions and, in contrast to other such steps, imposes requirements which must be met within the next four months.

Contributor: David L. Rieser,
Partner, McGuireWoods LLP

YOUNG PROFESSIONALS ATTEND A CHICAGO WHITE SOX GAME

One of many Young Professional events this year was the June 8th White Sox Game. There was a great turn out with over 30 people in attendance. This was the second year for this event and plans are being made to do it again in 2010.



Additional Young Professional events are being planned for 2010. Currently planned are a February Bowling Event and a March 11, 2010 St. Patrick’s Day at Fado’s. If you are interested in more information on the Young Professionals, please contact Laura Mammoser at laura_mammoser@yahoo.com.



A SUSTAINABLE ENVIRONMENT: OUR OBLIGATION TO PROTECT GOD'S GIFT

By: George P. Nassos

The “Cash for Clunkers” Program – Another Example of Wasteful Spending

Our presidential administration has been very active in trying to improve the economy, develop plans to reduce our dependence on foreign oil, and reduce the impact energy on climate changes. Of course, the administration has been spending money at an unprecedented rate. Just how effective are these programs. Let's take a look at a recent one – the Car Allowance Rebate System (CARS) system, better known as Cash for Clunkers.

During the past two months, people traded in their old, low efficiency automobiles for cars that get more miles per gallon. This program was designed to place more fuel efficient automobiles on the road and as a result reduce energy consumption, reduce the carbon dioxide emissions that are affecting climate change, and jump-start the U.S auto industry. So how does it work? Basically, if you trade in your old car that gets 18 miles per gallon (mpg) or less for one that gets between four and ten mpg more but at least 22 mpg, you will receive \$3,500. If the new car gets at least ten miles per gallon more, you can receive \$4,500. For SUVs or trucks, the differential in fuel economy to earn some cash is even less. In any event, the old vehicle must then be converted to scrap in order to assure that it has been taken off the road. Will this program accomplish its goals, and will it do it in a cost effective manner?

Let's just use an example of a person that drives 12,000 miles per

year with a car (clunker) that averages 18 miles per gallon. The person trades in the car for one that averages 22 miles per gallon and thus qualifies for a \$3,500 rebate. Over a ten-year period, the more efficient automobile will consume 1,200 less gallons. Since each gallon of gasoline generates 19.4 pounds of carbon dioxide, the more efficient automobile will emit 10.7 metric tons of carbon dioxide less than the old clunker over ten years. At a cost of \$3,500, this amounts to about \$327 per ton of carbon dioxide. If the person decided to lease a new car that gets 22 miles per gallon and kept it for the minimum required of five years, the emission savings is 5.35 tons of carbon dioxide. This results in an overall cost of \$654 per ton of carbon dioxide. Of course, this is the worst case as most exchanges will result in a car getting more than four additional miles per gallon. For SUVs or trucks, the cost per metric ton of carbon dioxide can be twice the \$654 amount.

Reducing the emission of green house gases like carbon dioxide can be done at a fraction of this cost. Companies as well as individuals have been able to purchase carbon credits at a cost of \$2 – 30 per ton from the Chicago Climate Exchange or other exchanges. This money would then be used to fund projects, such as wind farms, that will reduce the emission of carbon dioxide. In 2008, the average cost of a ton of carbon dioxide was \$28.

If you consider the impact on reducing oil consumption, this can be considered positive, but again at a cost. If one saves 1,200 gallons over ten years, there is a savings of about \$3,600 dollars (at \$3/gal) in addition to the rebate of \$3,500 – a gain of over \$7,000 over ten years.

Now consider what this program has done to jump start the U.S. auto industry. Through this program, an additional 700,000 cars were sold. However, four of the five top selling automobiles through this program were foreign cars (Toyotas and Hondas), even though they may have been manufactured in the U.S. Isn't the goal to help the U.S. auto companies? Only Ford had one of the top five selling cars. In addition, to whom was this program directed? It was for people who owned clunkers probably because they couldn't afford new cars. So now they bought cars they may not even be able to afford. This is not too dissimilar to allowing everyone to buy a house even if they couldn't afford it – a program the U.S. administration promoted a few years ago and got us into this financial mess.

Are we using taxpayer's money to fund the purchase of automobiles by people that may not even afford them? Is this an example of redistribution of wealth? Just wondering!

AN ANALYSIS OF RECENT GREENHOUSE GAS APPELLATE RULINGS

*By: Christina M. Landgraf
Barnes & Thornburg, LLP*

Several lawsuits have been filed in federal district court asserting that large emitters of greenhouse gases (“GHG”) should be held liable for rising sea levels and other harms attributable for global warming. GHG litigation is fairly new, and there are a number of open questions presented by these types of cases. This article analyzes two of the most recent appellate court decisions, Connecticut v. American Electric Power Co., No. 05-5104-cv, 05-5119-cv (2nd Cir. Sept. 21, 2009), and Comer v. Murphy Oil, No. 07-60756 (5th Cir. Oct. 16, 2009), and provides an analysis of the types of questions that major emitters of GHG, and their environmental consultants and legal counsel, should be considering.

I. Connecticut v. American Electric Power Co.

In Connecticut v. American Electric Power Co., the United States Court of Appeals for the Second Circuit found that eight states, New York City, and three land trusts could bring public nuisance claims against the owners of some of the largest electric power plants in the United States. The court found that the plants’ GHG emissions contribute to global warming. The plaintiffs sought to cap and reduce these coal-fired power plants’ carbon dioxide (“CO₂”) emissions by bringing claims under the federal common law of nuisance.

The appellate court reversed the lower court’s decision and ruled that plaintiffs’ claims were justiciable, that each plaintiff had standing to sue, that all plaintiffs stated a claim upon which relief could be granted, and that the federal common law cause of action was not displaced by federal statutes or regulations.

A. The Complaints and District Court Ruling

In 2004, two groups of plaintiffs, the first consisting of eight states (led by Connecticut and New York City) and the second consisting of three private land trusts, filed separate complaints against six corporate entities who own coal-fired electric power plants operating in twenty states. The plaintiffs asserted that the plants release 25% of all CO₂ emitted by the United States electric power sector and 10% of all United States man-made CO₂ emissions. The plaintiffs alleged that the defendants’ emissions would have an adverse, lasting effect on climate, would adversely impact the public, the environment, and other natural resources, including the plaintiffs’ properties. The plaintiffs sought to hold the defendants jointly and severally liable for creating a public nuisance and demanded that the nuisance be abated.

In 2005, the United States District Court for the Southern District of New York had dismissed both complaints, holding that plaintiffs’ claims could not be decided

by the federal judiciary because they presented a “political question.” Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 271-72 (S.D.N.Y. 2005). Because the district court found that the claims were nonjusticiable, the court did not reach defendants’ arguments to dismiss the claims for lack of standing or for failure to state a claim under the federal common law of nuisance.

B. The Second Circuit’s Opinion Reversed the District Court

On appeal, the Second Circuit reversed the district court’s dismissal on justiciability grounds, and further held that all plaintiffs had standing and had adequately pled federal common law nuisance claims. The Second Circuit also found that these common law claims were appropriate despite the current, ongoing legislative and executive actions addressing air pollution and GHG emissions. The appellate court sent the case back to the trial court for further proceedings.

1. Political Question Doctrine Did Not Preclude Claims

The appellate court first addressed the district court’s sole basis for dismissal – that plaintiffs’ claims raised a non-justiciable “political question.” The Second Circuit

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AN ANALYSIS OF RECENT GREENHOUSE GAS APPELLATE RULINGS (con't.)

focused its analysis on the language of the pleadings and requests for relief. The court characterized those pleadings as nuisance claims against specific parties for particular emissions, which the plaintiffs sought to reduce. The court refused to cast plaintiffs' claims as claims based upon the reduction of global warming in general.

The Second Circuit noted that, similar to other public nuisance cases that federal courts have decided, the courts have the constitutional authority and could create manageable standards for deciding the case, as federal courts often deal with complicated scientific issues – including those in the nuisance category. Given the “high bar” against finding a political issue, the court found that plaintiffs' claims were basically “an ordinary tort suit,” and were within the court's ability to decide. Unlike the district court, the Second Circuit found that congressional and executive branch inaction did not preclude justiciability, but allowed the court to use common law to fill “regulatory gaps.” Finally, the Second Circuit found that, in adjudicating the claims in this case, the court would not be contradicting past actions of either the legislative or executive branch. According to the Second Circuit, although the case had “political ramifications,” it did not present a political question. In addition, the executive or legislative branches always could take action to override the federal courts' common law decisions.

2. Standing

The appellate court then analyzed plaintiffs' standing to bring the claims. The Second Circuit found that, at this early stage of the litigation, the states appropriately had alleged a basis for standing, based on their capacity as property owners. The Second Circuit held that all plaintiffs sufficiently alleged injury-in-fact, finding that the parties alleged concrete, particularized, and current or imminent injuries. The court found that California alleged a current injury from erosion due to flooding resulting from early-melting snowpack. The Second Circuit rejected defendants' argument that plaintiffs' alleged future injuries were too speculative, finding that the plaintiffs alleged current exposure from current emissions, which they alleged definitely would cause injury. While the injuries may be incremental and may not occur within a particular time period, plaintiffs alleged sufficient injury-in-fact to survive dismissal of the complaints. The Second Circuit found that plaintiffs' allegations regarding (1) the volume of CO₂ emitted by the defendants; and (2) the emissions' effect on global warming, demonstrated “causation,” i.e., that the alleged injury is “fairly traceable” to defendants' actions. The court rejected defendants' arguments, finding instead that causation was established because the plaintiffs had alleged that the defendants' actions “contributed to” plaintiffs' alleged injuries, even though the defendants were not the only cause. Although the defendants argued that the plaintiffs did not allege

that their requested relief – forcing a certain percentage of emission reductions over the course of ten years – would prevent global warming, the Second Circuit found that the plaintiffs had alleged that their injuries were redressable because the defendants' CO₂ emissions reductions would “provide some measure of relief.” Thus, the court found that the plaintiffs had standing to pursue their claims.

3. Claims Stated Under Federal Common Law of Nuisance

With these threshold jurisdictional matters resolved, the appellate court, exercising its discretion to address issues not reached by the lower court in the “interest of judicial economy,” analyzed whether plaintiffs stated a claim under the federal common law of nuisance. Determining that the Restatement (Second) of Torts § 821B established the elements of a federal common law nuisance claim, the Second Circuit ruled that plaintiffs had pled “an unreasonable interference with a right common to the general public,” and thus, had stated a sufficient claim.

In response to the defendants' assertion that the Constitution limits the scope of interstate nuisance actions, the Second Circuit noted that those constitutional limitations did not apply in this case, as the case was between states and private parties. The court also rejected the defendants' argument that federal

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AN ANALYSIS OF RECENT GREENHOUSE GAS APPELLATE RULINGS (con't.)

nuisance cases must be a “simple type;” due to pollution from an out-of-state source; and so harmful that “they would have justified war at the time of the founding.” The court held that no such criteria existed for federal common law nuisance claims. The court also found that, based on federal precedent and the Restatement, non-state parties (New York City and the trusts) could sue under the federal common law of nuisance. The Second Circuit found that New York City and the land trusts adequately had alleged a federal common law public nuisance claim.

4. Federal Common Law Nuisance Claims Regarding CO₂ Were Not Displaced By Federal Statute

The court then addressed the question of whether the public nuisance cause of action was “displaced” by federal legislation, including the Clean Air Act. The appellate court found that the scope of federal legislation must be analyzed carefully to determine whether common law is displaced. The defendants asserted that the Clean Air Act and other legislative and executive action demonstrated a “comprehensive scheme” that displaced common law claims relating to global warming. The Second Circuit held that, at least until the United States Environmental Protection Agency (“USEPA”) issued the necessary endangerment findings and finalized regulations

regarding GHG emissions from stationary sources, there was no displacement of federal common law.

The court also rejected the separate arguments for dismissal advanced by defendant Tennessee Valley Authority based on its special federally-chartered status. The court declined to adjudicate the plaintiffs’ state law public nuisance claims.

In conclusion, the Second Circuit discussed the United States Supreme Court’s decision in Illinois v. City of Milwaukee, 406 U.S. 91 (1972), in which, prior to the enactment of the Clean Water Act, the Supreme Court held that discharges of sewage into interstate waters constituted federal common law public nuisance. The Second Circuit noted that public nuisance claims could be appropriate until laws and regulations of GHG emissions “pre-empt the field.”

C. Subsequent Proceedings

The Connecticut defendants have a number of procedural options; they could seek a rehearing, either by the same panel of judges or en banc, or they could file a petition for a writ of certiorari with the United States Supreme Court. The defendants also have the option of allowing the case to proceed in the trial court.

II. Comer v. Murphy Oil

In Comer v. Murphy Oil, the Fifth Circuit Court of Appeals reversed a district court dismissal of nuisance claims related to damage resulting from Hurricane Katrina. The complaint was filed in the federal

district court in Mississippi and is based solely on Mississippi law. The plaintiffs brought claims against major energy, fuel and chemical companies, alleging that their emissions of GHGs contributed to global climate change, which in turn, intensified the strength of Hurricane Katrina, and resulted in the destruction of their property.

The district court had dismissed the suit on the grounds that the plaintiffs lacked standing to invoke the federal court’s jurisdiction and that the claims presented non-justiciable political questions.

The Fifth Circuit, like the Second Circuit in the Connecticut v. American Electric Power case, found that the complexity of the underlying proof is not sufficient to render these types of cases non-justiciable. As for standing, the plaintiffs in this case solved the redressability issue by seeking only damages, and not injunctive relief. Both the Second and Fifth Circuits hold that (1) climate change issues are not exclusively political questions, but may be addressed by federal courts; and (2) states, local governments and private litigants have standing to seek judicial remedies for injuries attributable to global climate change caused by GHG emissions.

A. Factual Background

The plaintiffs were owners of property along the Mississippi Gulf Coast. They alleged that the defendants’ operations of energy, fossil fuels and chemical industries caused the emission of GHGs that

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contributed to global warming, which in turn added to the ferocity of Hurricane Katrina, which destroyed their property. Their class action complaint asserted claims for compensatory and punitive damages based on the Mississippi common law of public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation and civil conspiracy.

B. The District Court Dismissed the Suit

The district court had dismissed the suit on the grounds that the plaintiffs lacked standing to invoke the federal court's jurisdiction over suits based on diversity of citizenship, and that the claims presented non-justiciable political questions. The district court stated that the suit was essentially a debate about global climate change, which had no place in a federal court until Congress enacted legislation setting standards by which the court could measure conduct, and by which juries could adjudicate the facts.

C. The Fifth Circuit's Opinion

The Fifth Circuit concluded that the plaintiffs had standing under Article III of the Constitution to assert their public and private nuisance, trespass, and negligence claims under Mississippi law, and that these state law tort claims did not present non-justiciable political questions. The court, however, dismissed for lack of standing other claims the plaintiffs brought –

specifically the claims that the defendants had been unjustly enriched, had made fraudulent misrepresentations about the nature of global warming, and had engaged in a civil conspiracy to mislead the public and the government about the dangers of GHGs. The Court remanded the case to the district court to decide whether the plaintiffs had alleged sufficient facts to state a cause of action under Mississippi tort law by showing that their losses were proximately caused by the defendants' emissions.

1. Standing

The court first noted that in a diversity case based on state common law, the plaintiffs must satisfy both state and federal standing requirements. Because the judicial power under the Mississippi Constitution is not limited to cases or controversies, the court held that plaintiffs adequately established standing to assert all of their claims under Mississippi law.

2. Nuisance, Trespass and Negligence

The court held that the constitutional minimum for federal standing under Article III of the United States Constitution requires plaintiffs to demonstrate that: (1) they have suffered an injury in fact; (2) the injury is "fairly traceable" to the defendants' actions; and (3) the injury is capable of being redressed by the court. The court determined that the plaintiffs clearly met the first and third of these requirements.

Turning to traceability, the court distinguished the traceability requirement for standing from the proximate causation that must be established in order for the plaintiffs to succeed on the merits of a tort claim. For federal standing purposes, it held that "an indirect causal relationship will suffice so long as there is a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant."

3. Unjust Enrichment, Fraudulent Misrepresentation, and Civil Conspiracy

The court held that the plaintiffs' claims for unjust enrichment, fraudulent misrepresentation, and civil conspiracy did not satisfy the federal prudential standing requirements. The court noted that, because the source of these claims was the alleged failure of the government to properly regulate and enforce environmental laws that would have prevented defendants' emissions of GHGs, each of these claims "presents a generalized grievance that is more properly dealt with by the representative branches and common to all consumers of petrochemicals and the American public."

4. Political Question

The court held that because the defendants could not identify any constitutional provision or federal law

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that committed Mississippi's common law torts of nuisance, trespass, and negligence exclusively to the legislative or executive branches of the federal government, no political question was involved. The court noted that future laws or regulations might preempt state common law torts, but "[u]ntil Congress, the president or a federal agency so acts...the Mississippi common law tort rules questions posed by the present case are justiciable, not political...."

III. Implications

These two cases are quite different, but each potentially opens the door to more suits based on climate change impacts of GHG emissions. *Comer* involves only class action damages. *Connecticut* involves only injunctive relief. *Comer* was based only on state tort law. *Connecticut* is based only on federal common law. Both *Comer* and *Connecticut*, however, clearly hold that global change issues may be considered in suits against major emitters of GHGs in private litigation. Under those decisions (unless reversed), such suits will continue to be available so long as there are no federal statutes or regulations that preempt state law tort claims like those in *Comer*, or displace federal common law claims like those in *Connecticut*. Both cases will, moreover, influence the disposition of other pending tort cases premised on climate change-related harms.

One such case is *Native Village of Kivalina v. ExxonMobil Corp., et al.*, (N.D. Calif.), No. C 08-1138

SBA (Sept. 30, 2009). In that suit, a village on the Northwest coast of Alaska sued 24 energy, oil, and utility companies for unspecified damages under federal common law. The complaint alleged that coastal erosion threatens to force the 400 inhabitants to relocate. This crisis is asserted to be attributable to global climate change linked to GHG emissions from the defendants' facilities.

The district court dismissed the complaint on the ground that it raised non-justiciable political questions, and that the plaintiffs lack constitutional standing. Given the opinions in *Connecticut* and *Comer*, the *Kivalina* plaintiffs may appeal to the Ninth Circuit in the hope that it will view the issues in the same light as the Second and Fifth Circuits.

In the meantime, all of these cases suggest the potential for additional federal and state common law suits against a variety of GHG sources by public and private parties alleging injuries from climate change. The cases also add to the current debate over climate change in Congress and the Executive branch.

In addition, GHG litigation raises the question of whether defendants in such litigation will have insurance coverage for such suits. New GHG suits will spur even more litigation as insurers fight their duties to defend and indemnify.

If courts allow GHG suits to proceed, one issue will be whether there is a claim of coverage for potential liability to the insured that is colorable enough to support a duty to defend. The appellate decisions discussed above do not

address that question. In addition, to the extent that courts are going to allow these cases to proceed, coverage in some cases might be subject to the pollution exclusion.

Policyholders should review their historic comprehensive general liability policies in light of these appellate decisions to see if there is potential coverage for these types of claims. In addition, risk managers may want to consider other strategies for potential liability related to GHG claims, such as obtaining pollution legal liability ("PLL") coverage, or other types of insurance policies that are being developed to specifically address GHG emissions.

IV. Conclusion

Climate change and GHG regulation and controls are coming closer each day. Congress is moving toward passing legislation designed to implement regulatory controls on GHG from stationary sources, and courts are entertaining nuisance claims based on GHG emissions. Insurance coverage lawsuits from alleged GHG emissions likely will begin to work their way through the courts. As further congressional, regulatory and legal actions are taken, facilities that emit GHG must begin to assess and manage their potential environmental exposures.

For further information about this topic, please feel free to contact Christina M. Landgraf, Barnes & Thornburg, LLP, at clandgraf@btlaw.com.

MEMBER NEWS

Mostardi Platt Environmental is pleased to announce the addition of **Lauren Laabs** and **Cory Peruba** to our consulting organization staff.

Mr. Laabs joins us with over 30 years of experience managing environmental issues for industry. He has been involved in environmental regulatory issues in over 30 states and all 10 federal regions. Lauren also has extensive background in permitting and compliance for both manufacturing and the power industries. His experience includes site selection, multimedia greenfield permitting, management systems implementation and compliance auditing. Through long association with various professional and trade associations, he has been involved extensively in development of legislation and in regulatory rulemaking processes from Clean Air Act re-writes through RACT, MACT and NSR. Lauren is a Mechanical Engineering graduate of the University of Wisconsin, a Licensed Professional Engineer and is now located at our main office in Oak Brook, IL.

Mr. Peruba has been an Environmental, Health, and Safety (EHS) Manager for over 12 years. He joined Mostardi-Platt Environmental (MPE) in June 2009 as a Senior Consultant after being a client of MPE for the last 8 years. Mr. Peruba brings some unique insight and experience as an environmental consultant because of his time as an EHS Manager for the renewable fuels industry, steel industry, and mining industry. Mr. Peruba's environmental experience also involves performing as an industrial client's Environmental Manager with responsibilities including the maintenance of environmental records required pursuant to environmental regulatory and permitting requirements, completion of annual environmental reports, and the performance of site inspections and regulatory applicability evaluations.

Louis Bowman Honored with ARTBA's Guy Kelcey Award

Louis Bowman, PE, PLS, Chairman of Chicago Firm **Bowman, Barrett & Associates**, was recently honored with the Guy Kelcey Award from the American Road and Transportation Builders Association (ARTBA). The award was announced during ARTBA's National Convention October 7, held this year in Charleston, South Carolina.

The award, which honors Guy Kelcey, one of the Planning & Design (P&D) Division's organizers, is given each year to an ARTBA member who has exhibited a high degree of service to the association's Planning and Design Division. Bowman is the Founder and Past President of the Illinois Road and Transportation Builders Association's (IRTBA) Planning and Design Division.

Bowman holds a Bachelor's Degree (1951) in Civil Engineering from the University of Illinois. Over the course of his career, Bowman has worked on numerous major highway, rail and airport projects throughout the Midwest, including major interstates in Illinois, Wisconsin, Michigan and Indiana.

Notable accomplishments include the Project Management for design and construction of the Illinois Center infrastructure in Downtown Chicago, the C&NW Intermodal Rail Yard at 24th and Western, the relocation of the portion of Lake Shore Drive from the Chicago River to Monroe Street, and the ongoing O'Hare Modernization Project.



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HELP WANTED

Platt Environmental Services, Inc. is currently looking for both experienced and entry level emissions testing personnel to join a rapidly growing firm staffed with experienced personnel and new state of the art equipment.

Please contact Jim Platt or Eric Ehlers at 630-521-9400 or fax your resume to 630-521-9494 or e-mail us at hr@plattenv.com.

Midwest Generation, LLC is currently looking for an Environmental Specialist at our power plant in Joliet, IL. This position will provide technical, administrative and strategic oversight for all environmental programs to ensure they are managed in compliance with all company procedures and applicable federal, state and local regulations. For complete job description and to apply for this position, go to www.edisonjobs.com and Search Jobs for Midwest Generation. Job number MG2009-18.



New & Rejoining Members

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Tyler Spence

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Rajesh Thotakura



Former EPA Employee? Join the EPA Alumni Association!

A newly formed nationwide alumni organization of former employees of the U.S. Environmental Protection Agency (EPA) is now accepting membership from anyone who, as a Federal employee, worked at EPA for at least one continuous year in any location and any position.

Membership is free for the first year and if donations to the Association continue, for future years as well. The Association Web site, www.EPAalumni.org, will be the primary locus of alumni interactions, but local "chapters" will be encouraged to facilitate interaction at the local level. Two former administrators, Bill Ruckelshaus and Russ Train, are already members, along with many other alumni, and the nationwide membership drive now underway is intended to bring in alumni from every kind of job and location.

Visit the A&WMA Association Web (www.awma.org) site to join and to fill out your profile so you can locate former colleagues; share news, views, and old stories; make new friends among EPA alumni who shared some of the same experiences at EPA; and volunteer with your colleagues to help out in environmental efforts.

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SAVE THE DATES

Fueling our Future: A Forum on American Energy Needs

November 20, 2009

11:30 a.m.

**Where: Union League Club
65 W. Jackson Blvd.
Chicago, IL 60604**



See page 1 for full details.

LM-A&WMA Annual Holiday Reception and Networking Event

December 1, 2009

IIT Stuart School of Business

This has always been a well attended event offering members and non-members the chance to relax and network in an informal setting. Watch your emails for further details. Sponsorship opportunities for this event are available. Please contact Robin Pelsis at Robin@LMAWMA.org for additional information.



Vapor Intrusion 2010

September 29-30, 2010

The Westin Michigan Avenue Hotel

This conference is being presented by A&WMA Headquarters. Additional information will be distributed shortly.