ABSTRACT AND INTRODUCTION SUMMARY

40th Annual Conference on Environmental Law
March 17-19, 2011
Salt Lake City, UT

Thursday, March 17, 2011

3:15 p.m. – 4:45 p.m.
Implementing Climate Change Regulation: Congress, EPA, or the Courts?

Implementing Climate Change Regulation: Congress, EPA, or the Courts? [Moderator's Overview]
Kirsten H. Engel, Professor, James E. Rogers College of Law, University of Arizona, Tucson, AZ

Legal measures to limit greenhouse gases are being considered or are under review in each of the three branches of the federal government. The U.S. Supreme Court has granted certiorari in the landmark case of American Electric Power v. Connecticut in which a coalition of nine states has sued members of the electric power industry asserting the defendants' greenhouse gas emissions constitute a common law nuisance. At the same time, the U.S. Environmental Protection Agency (EPA) is moving forward with regulating greenhouse gas emissions from mobile and stationary sources under the federal Clean Air Act. Congress, in the meantime, is considering several bills that would prevent EPA from using the Clean Air Act to regulate greenhouse gases as well as preempt state greenhouse gas regulation. Panel members will discuss these developments with a particular emphasis upon how the response of each branch overlaps, interacts or cancels actions of the other branches. Important questions include: What are the key cases and actions?: Which branch is scheduled to act first? How will the decisions of each branch unfold and how might actions by one alter the policy or decision making landscape of the others? Does any branch hold a trump card? The panel members, drawn from Capitol Hill, EPA , the Solicitor General's office and industry, will consider each of these questions as well as others posed by the audience.

Friday, March 18, 2011

8:30 a.m. – 10:00 a.m.
Gulf Oil Spill: One Year Later

Environmental Recovery for Louisiana's Tribes—One Year after the BP Oil Spill
Patty Ferguson-Bohnee, Director, Indian Legal Clinic, Associate Clinical Professor, Sandra Day O'Connor College of Law, Arizona State University, Tempe, AZ

On April 20, 2010, the Maconda well of the Deepwater Horizon drilling rig exploded. This was the first oil spill of national significance since Exxon Valdez in 1989. It took approximately one month for oil from the well, located forty-nine miles off the coast of Louisiana, to reach Louisiana's shore. A few days later, oil was spotted in the traditional fishing grounds of the Pointe-au-Chien Indian Tribe. The Tribe, concerned about the community, sacred sites, and well-being of its members, took action to respond to oiling in the community. For three months, oil poured out of the well, releasing millions of barrels of oil into the Gulf of Mexico before it was capped in July. The response to the spill highlighted that neither the state governments, nor the federal government, nor the local governments were adequately prepared to respond to the incident. The spill also highlighted that Louisiana's first inhabitants faced barriers in protecting their homes, sacred sites, and cultural resources—a result of historical policies affecting legal recourse. This paper will highlight the environmental issues affecting tribes directly

impacted by the oil spill, their participation in response and recovery, and the obstacles faced by tribes in navigating response and recovery under federal and state laws.

10:30 a.m. – 12:00 p.m.
There Will Be Blood, or Not? Environmental Enforcement in the Gulf Oil Spill Context

There Will Be Blood or Not? An Overview of Environmental Enforcement, Liability Limits and the Gulf Oil Spill
Elizabeth B. Wydra, Constitutional Accountability Center, Washington, DC

On April 20, 2010, an explosion occurred on BP's Deepwater Horizon drilling rig, killing 11 workers and injuring 17 others. The explosion and subsequent fire destroyed the rig and sent millions of barrels of oil gushing into the Gulf of Mexico. Nearly one year after the devastating Deepwater Horizon oil spill in the Gulf of Mexico, the debate continues over not only the environmental consequences of the spill, but also how BP and other corporations will be held liable for the spill's economic and other consequences. The oil spill is considered the largest environmental catastrophe in U.S. history and, according to the co-chairs of the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, a "human, economic, and environmental disaster." Questions of liability range from who will be held responsible—BP has admitted that it is the responsible party under the Oil Pollution Act, but it could seek reimbursement from other responsible parties, and federal criminal and civil liability could attach to BP as well as other corporations who built or operated parts of the rig—to how much money will be paid out and to whom.

Potential Limitations of Liability Applicable to Deepwater Horizon Spill
Jeffrey S. Moller, Blank Rome LLP, Philadelphia, PA

The statutory and Constitutional limits of liability potentially applicable to the Deepwater Horizon disaster will continue to be the subject of much litigation and legislative debate. Those limits are found in the Oil Pollution Act of 1990, the Death on the High Seas Act and the Supreme Court's decision in Exxon Shipping Co. v. Baker. The public policy and due process concerns which gave birth to the limitations have continuing vitality. As the facts of the Deepwater Horizon case emerge, there have not yet appeared substantial justification for avoiding the limitations, although much of the tension has been eased by BP's creation of a claims fund which far exceeds the calculated OPA 90 limit. However, as in the case of the Exxon Valdez, BP's response and claims expenditures may well lead to a hike in the statutory limit by setting a new benchmark as to the foreseeable costs associated with a maritime disaster.

10:30 a.m. – 12:00 p.m.
The Public Trust Doctrine—Reviving, Thriving, or Maxed Out as a Water Resources Management Tool?

States, Their Public Trust Doctrines, and Water Resources Management: How Relevant is *Illinois Central Railroad* These Days?
Robin Kundis Craig, Associate Dean for Environmental Programs, Attorneys' Title Professor, Florida State University, College of Law, Tallahassee, FL

The U.S. Supreme Court issued its most classic statement of "the" public trust doctrine in Illinois Central Railroad Co. v. Illinois, *protecting public rights of navigation, commerce, and fishing in the navigable waters. These are fairly basic protections for public rights in water, but limited in their usefulness for comprehensive water resources management. Moreover, there is an ongoing debate about the legal origins—state law or federal law—of the public trust doctrine that the Supreme Court announced. As a result, state expansions of their public trust doctrines have been much more important to the application of those doctrines to broader water resource*

management issues, such as water allocation, public recreation, and maintenance of basic ecological values. This panel explores the use and limits of those state public trust doctrines to address both classic and emerging water issues, such as hydraulic fracking in Louisiana or water management in the face of water shortages in the West. This overview paper, in turn, provides a basic introduction to the state public trust doctrines.

The Public Trust Doctrine and Surface Water Management and Conservation: A View from Louisiana
Ryan M. Seidemann, Assistant Attorney General, Section Chief, Lands & Natural Resources, Civil Division, Louisiana Department of Justice, Baton Rouge, LA

Recent mineral activity in North Louisiana has brought the need for surface water management to the attention of the public and the Louisiana Legislature. Hydraulic fracking activity in the Haynesville Shale, although not the largest water use in Louisiana, has become the most visible and the massive uses of water have caused concern for citizens and regulators. Within this framework, an examination of ownership rights and public trust duties of the State with regard to surface water is here undertaken. The present analysis concludes that running surface water is a thing owned by the State, the use of which is largely subject to State oversight and environmental review.

10:30 a.m. – 12:00 p.m.
Permitting and New Initiatives: Creating Offshore Wind's New Frontier Through Novel Policies, Regulations, and Legislative Developments

Permitting and New Initiatives: A Primer on Creating Offshore Wind's New Frontier
Ellen J. Crivella, Project Manager, Environmental and Permitting Services, GL Garrad Hassan, Portland, OR

As technology, policy, and public sentiment advances, the U.S. offshore wind industry stands poised to expand into the market as a viable electricity source; however costly and lengthy permitting reviews under the National Environmental Policy Act (NEPA) have hindered this industry's growth. Presently the Bureau of Ocean Energy Management, Regulation and Enforcement is tasked with providing oversight and guidance as the lead federal agency for many offshore wind projects. The time has arrived for a more integrated approach to offshore wind development and the potential environmental impacts must be weighed along side the potential benefits in renewable energy generation.

Global Warming's Impact on Wind Speeds: Long-Term Risks for Wind Farms May Impact Guarantees and Wind Derivatives Tied to Wind Energy Production
Kimberly E. Diamond, Lowenstein Sandler, New York, NY

While there is debate among the scientific community as to whether global warming is, in fact, occurring, this paper presumes that, based on certain recent research findings, global warming exists. This paper analyzes increases in global temperature over the last several decades and how continuing global warming trends in future decades may alter the jet stream, impact wind speeds and wind directions, intensify storms and other extreme weather conditions, and change the wind patterns that historically have characterized particular areas. It also discusses how these changes in wind speeds and weather conditions may impact the usefulness of meteorological and other feasibility studies conducted prior to the construction of a wind farm at a particular location, and how such altered wind patterns may adversely influence the performance and productivity of utility-scale wind turbines in terms of their electricity generating output, particularly toward the end of their 20 – 30 year life span. This paper also examines how global warming-induced shifts in wind speeds may alter the landscape of certain

risk-based contracts, such as guarantees that turbine manufacturers currently offer and financing products such as wind derivatives that are used to hedge risks associated with certain wind speeds, including how these products are structured. As a result, this paper concludes that rising global temperature and its impacts on wind speeds and wind turbine energy production may ultimately alter products in the finance markets, and that wind farm project developers should plan ahead now in anticipation of such impacts

1:30 p.m. – 3:00 p.m.
The Future of Coal

The Future of Coal as a Fuel for U.S. Electricity Generation: One Utility's View
A. Richard Walje, President, Rocky Mountain Power, Salt Lake City, UT

Between 2000 and 2008, construction began on 20 coal-fired power plants in the United States. In 2009 and 2010, construction started on no new coal-fired generation plants, and decisions were announced to scrap 38 new plants and retire 48 coal units. In 2006, the ten-year plan for PacifiCorp (dba Rocky Mountain Power) included three new coal units. Today it has none. This sea change occurred even though coal-fired generation currently accounts for approximately 50% of electricity generated in the U.S. This information clearly demonstrates that the future of coal runs the gamut from uncertain to bleak, though some might say it is moribund. Why did this rapid change occur? This paper describes some of the legal, regulatory, financial and technological reasons for the uncertain outlook for coal-fired power plants, both existing and new. The paper also describes how one utility incorporates these issues into its planning process to serve relatively rapidly growing loads when 70% of its electric energy currently comes from coal plants. The paper describes the risks it faces because of the current uncertainty about implementation of greenhouse gas regulations and how state regulators might respond to the costs imposed by increasingly stringent environmental regulations.

3:30 p.m. – 5:00 p.m.
Environmental Bankruptcy Settlements Revisited—A Year of Consensus and Progress

Managing the Disposition of Environmentally Challenged Property Interests in Bankruptcy: The Use of a Custodial Trust
Aileen M. Hooks, Baker Botts L.L.P., Austin, TX

The successful reorganization of a Chapter 11 debtor with a history of industrial operations inevitably involves managing the debtor's environmental liabilities. One mechanism that has been used during the past decade is the creation and funding of a custodial trust into which owned properties that will not be operated by the debtor after emergence from bankruptcy along with funding for environmental response costs and administrative costs are transferred to a custodial trustee for the benefit of federal and/or state governmental agencies. Creation of the trust is coupled with a settlement agreement with the trust's beneficiaries. Ultimately, the establishment of a custodial trust to manage appropriate sites can serve to moderate risks for the debtor, the bankruptcy estate and the governments.

This paper discusses the legal and practical considerations for forming a custodial trust in bankruptcy to address owned non-operating properties with known or potential environmental issues. In addition to issues associated with the identification of candidate sites for a custodial trust and determination of the appropriate funding level for a trust, the paper addresses various details that need to be addressed in drafting and establishing the trust vehicles and the complexities created by the bankruptcy setting.

3:30 p.m. – 5:00 p.m.
Judicial Takings: Fact or Fiction?

Justice Scalia's Judicial Takings Jurisprudence
Robert "Bo" Abrams, Professor, Florida A&M University, College of Law, Orlando, FL

Near the end of its October 2009 Term, the United States Supreme Court decided Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, 130 S.Ct. 2592 (2010). In that case, Justice Scalia's opinion, joined by Chief Justice Roberts and Justices Thomas and Alito, considered whether the judicial decision of the Florida Supreme Court addressing petitioners' property rights constituted a taking of property by the judicial branch. Although concluding there was not a judicial taking, the test that Justice Scalia applied in deciding that issue interjects the United States Supreme Court into the process of determining the content and common law progression of state property law to an unprecedented degree. The logic supporting Justice Scalia's approach is that takings, no matter what branch commits them, have an identical impact on the property owner. Accordingly, his test of judicial takings when the Court engages in federal constitutional review of state court common law decisions proceeds in the same fashion as cases claiming takings of property by legislative or executive action. There are many controversial elements subsumed within that approach. This paper will explore briefly how contemporary takings doctrine functions, concluding that the standards are muddled and difficult to apply to judicial takings in the fashion Justice Scalia's opinion seems to contemplate. Going further, this paper will suggest that reviewing state common law decisions as potential takings without considerable deference to the state's police power authority to articulate its own law is an ill-advised intrusion on state sovereignty.

Judicial Takings: A Solution in Search of a Problem?
Scott D. Makar, Solicitor General, Office of the Attorney General, Tallahassee, FL

The path to the United States Supreme Court's decision in Stop the Beach Renourishment, Inc., v. Florida Department of Environmental Protection (STBR) is strewn with legal twists and turns that environmental, constitutional, and local government attorneys alike can well appreciate. Indeed, the litigation – from its inception in a Florida administrative proceeding to the Supreme Court's 8-0 ruling (dividing evenly on the viability of a judicial takings claim) – is a case study in how a federal constitutional claim can arise based solely on how a state supreme court ruled on a question of its own state's law. A state appellate court's ruling on the validity of a state law challenged under a provision of the state's constitution does not ordinarily lend itself to review in the Supreme court – unless the ruling transgresses federal (here, constitutional) law, which was the ultimate question in STBR. How the case made it to the Court, and some of the major misnomers about Florida's beach renourishment laws and their effect on beachfront property rights, are major themes of this paper. Whether a case with sufficiently egregious facts will eventually arise to justify application of the judicial takings theory is also discussed, albeit briefly.

Saturday, March 19, 2011

8:30 a.m. – 10:00 a.m.
Environmental Enterprise Risk Management: In-House Counsel Tell You What Outside Counsel Need to Know

Environmental Enterprise Risk Management: In-House Counsel Tell You What Outside Counsel Need to Know [Moderator's Overview]
Brent A. Fewell, United Water, Inc., Harrington Park, NJ

Certain environmental liabilities have the potential to result in significant negative impacts to a company's reputation, stock price, manufacturing, sourcing and supply chain operations and market position. These risks can be particularly acute for companies with a global reach and the added challenges of conducting international due diligence. Environmental enterprise risks can often trigger unwanted media exposure and government enforcement, with immediate repercussions to a company's capital and earnings. Aside from a company's traditional environmental, health and safety programs and metrics, leading companies are increasingly using environmental enterprise risk management (ERM) as a tool for planning, organizing, leading, and controlling the activities of the organization to better identify and minimize the effects of such risks to the organization. This interactive presentation will discuss best practices of such enterprise risk reviews and address what questions to ask, process and procedures to consider, and why multi-area coordination is required to maximize the value of this process for your client.

Environmental Enterprise Risk Management: In-House Counsel Tell You What Outside Counsel Need to Know
Phyllis P. Harris, Vice President Environmental, Health, and Safety Compliance, Wal-mart Store, Inc., Bentonville, AR

The purpose of this paper is to provide a framework for a thoughtful planning process for environmental risk management. Legal requirements of Sarbanes-Oxley and guidance provided by the Environmental Protection Agency and the Department of Justice advise companies to perform routine and thorough assessments of enterprise wide risks, including environmental risks. In the best of all worlds, an environmental risk assessment (ERA) can be an invaluable tool to assist a company with identifying, mitigating and monitoring environmental compliance risks. At worst, an ERA can be viewed as a time intensive process that creates additional areas of liability because the business is aware of its compliance shortcomings and must take immediate corrective measures. However, when conducted in a dynamic environment, with participation by all areas of the business, the ERA can provide a holistic, enterprise wide view of the company's environmental risks, a thoughtful prioritization of risks, and results based action plan to mitigate risks.

10:30 a.m. – 12:00 p.m.
Hollywood v. Reality: What an Environmental Criminal Investigator Really Does and What Legal Tools Lawyers Can Use to Protect the Client

Criminal Enforcement in the U.S. Environmental Protection Agency
Fred L. Burnside, Fred Burnside & Associates, LLC, Point of Rocks, MD

The U. S. Environmental Protection Agency, Office of Criminal Enforcement was established in 1982 and since that time the numbers of personnel and scope of investigative resources have changed significantly. The staff is made up of federal agents, lawyers and technical personnel all working together to investigate environmental crimes. Special agents in the criminal program investigate violations of a wide range of environmental and criminal laws. Cases selected for investigation are in alignment with overall EPA enforcement goals and initiatives established by the Office of Enforcement and Compliance Assurance, the parent organization within EPA. This paper reviews statistics for the EPA criminal program for the fiscal years 2007 - 2010, provides examples of significant environmental crimes cases prosecuted in the past few years, and references sources that provide additional information about the EPA criminal program.

10:30 a.m. – 12:00 p.m.
Clarity or Obfuscation: The Changing World of Environmental Disclosure

The SEC Reporting Guidelines for Climate Change Disclosures and the Responsive Disclosures of Coal Producers
Ben T. Keller, Wyatt, Tarrant & Combs, LLP, Lexington, KY

In response to growing investor demands, the Securities and Exchange Commission ("SEC") released on February 8, 2010 interpretative guidance regarding disclosure requirements related to climate change entitled "Commission Guidance Regarding Disclosure Related to Climate Change." ("Release"). Although federal climate change legislation has stalled and the science of climate change remains unsettled, a patchwork of state, regional, and international initiatives are effective or under consideration to reduce greenhouse gas emissions. The Environmental Protection Agency ("EPA") has, likewise, recently taken steps to regulate emissions. The consequences and risks to the carbon-intensive coal industry and coal-fired electricity generation are significant. This paper reviews the Release issued by the SEC, what public coal mining companies disclosed in their SEC filings immediately following the Release, and the challenges presented to coal firms and other public companies alike moving forward. Also included are brief discussions of coal registrants' disclosures regarding the recent regulatory actions to severely limit mountaintop removal mining and the mine safety disclosure requirements recently imposed by the Dodd-Frank Act.

Climate Change: Disclosure Guidelines,
Gayle S. Koch, Axlor Consulting LLC, Cambridge, MA

Climate change disclosures in financial filings are currently at best inconsistent and lacking in financial information, and at worst, non-existent. There are arguments that climate change disclosures are required now due to (1) recent SEC elaboration concerning climate change disclosure requirements, (2) current state and regional regulation and the portent of federal regulation, both in the U.S. and internationally, (3) ongoing and likely future climate-change related litigation, (4) commitment of significant corporate capital and management attention to develop climate change-related strategies and responses, and (5) increasing investor demand for climate change disclosures. ASTM International has published a standard on Financial Disclosures Related to Climate Change, and the Climate Disclosure Standards Board recently published a framework for considering climate change disclosures. This paper discusses these and other available guidelines for implementing climate change disclosure.

10:30 a.m. – 12:00 p.m.
A New Brownfield Economy—Recognizing the Risks and the Market

Adapting to Changing Markets: Renewable Energy on Brownfield's
Pete Pedersen, Brightfields Development LLC, Wellesley, MA

This paper discusses the advantages of developing renewable energy facilities on brownfields properties. The contents reflect the experiences of its author as a brownfield developer during the past two decades and more recent experiences developing solar energy facilities on brownfields. The paper discusses brownfields redevelopment in general in the introduction. It then introduces renewable energy as a re-use that satisfies many of the criteria enabling redevelopment of a brownfields. The body of the paper delves motre deeply into the advantavges and challenges of renewable energy devlopment on contaminated property. The end of the paper

sets out a fictional case study illustrating the potential benefits of renewable energy development. All elements of the case study are drawn from actual experience, though no one project resembles the case study.

Insurance Considerations for Redevelopment of Contaminated Sites

Cliff Yeckes, Willis Group, Denver, CO

This paper provides an updated discussion of the insurance considerations related to redevelopment of contaminated sites in the United States, both private and federal. A discussion of the evolution of environmental insurance, the products and strategies typically utilized for redevelopment projects is provided in the following paragraphs.