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AIR TODAY, GONE TOMORROW

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Features

The Mystery of the Disappearing Air Regulations

Stephen Gidiere, Thomas Casey, and David Mitchell

Traditionally, an incoming presidential administration will suspend ongoing administrative actions so that the prior administration's proposed or final rules that have not been published can be properly reviewed. The Obama administration, however, has diverged from this practice by making efforts to pull back final rules and permits, issued by the Bush administration, without following prescribed processes found in the Clean Air Act and the Administrative Procedure Act for amending or withdrawing permits or rules. Recent examples include: (1) EPA's attempt to withdraw a PSD air permit issued to a coal-fired power plant to be built in New Mexico, and (2) EPA's attempt to withdraw a final approval of an amendment made to the visible emissions portion of the Alabama SIP without going through the statutorily mandated SIP Call process. Courts, however, may begin to rule against such unilateral agency actions—at least one court has recently ruled against an agency attempting to bypass statutory procedures for repealing an agency rule. If courts do not begin to similarly rule against agencies taking unilateral actions on permits and rules, the new administration will succeed in promulgating new rules at a faster rate than previous administrations have been able to accomplish.

Legal Uncertainties and the Future of U.S. Emissions Trading Programs

Sonja L. Rodman

Emissions rights trading programs, once the exclusive domain of economists and regulators, are in the public eye like never before. Much of this attention stems from congressional consideration of bills that use cap and trade as a mechanism to reduce U.S. emissions of greenhouse gases. With the bright lights comes increased scrutiny of emissions trading programs. In recent years, litigants and courts have both questioned the scope of EPA's authority to promulgate trading programs under the existing Clean Air Act and sought to clarify the interaction of trading programs with traditional command-and-control regulations. To date, most courts have addressed these issues gingerly, narrowly tailoring individual holdings and avoiding broad generalizations. The issues, however, are now ripe for more definitive resolution, creating an opportunity to solidify a place for emissions trading programs as a part of, instead of separate from, the existing regulatory structure.

Fixing CAIR: EPA Embarks on a New Rulemaking for Interstate Pollution

Norman W. Fichthorn and E. Carter Chandler Clements

EPA is undertaking rulemaking to replace the Clean Air Interstate Rule (CAIR), which is on remand to the Agency following decisions of the U.S. Court of Appeals for the D.C. Circuit finding important elements of the rule unlawful. Although the court has allowed the rule to remain in effect pending completion of rulemaking, its opinion compels a substantial rewrite of the rule. On remand, EPA confronts complex issues of broad importance under the Clean Air Act, including whether and in what manner emission allowances may be traded across state lines and the role of cost-effectiveness in determining emission reduction obligations. EPA's redesign of CAIR may well

provide important indications of how other market-based environmental programs could be structured in coming years.

Ten Years of New Source Review Enforcement Litigation

Margaret Claiborne Campbell and Angela Jean Levin

Just over ten years ago, EPA announced what has become one of the longest running industry-wide enforcement initiatives in the Agency's history—EPA's electric utility New Source Review enforcement initiative under the Clean Air Act. This article discusses some of the major legal issues at play and decisions to date. The issues range from the effect of the federal statute of limitations, fair notice, and regulatory deference to substantive New Source Review issues, such as the scope of the Routine Maintenance, Repair and Replacement exclusion, determining emissions increases, and the role of causation. Because EPA has indicated that it intends to expand its enforcement focus under the New Source Review program to include additional industries, the courts' treatment of these issues may have implications well beyond the electric utility industry.

Go West Young Man? Air Quality Developments Affecting Western Oil and Gas Exploration and Production

John R. Jacus and Denee A. DiLuigi

This article reviews numerous regulatory developments that are shaping air quality regulation of the oil and gas production industry in the western United States. Topics reviewed include: (1) recent ozone excursions and the capping of emissions of ozone precursors in Sublette County, Wyoming; (2) the potential impacts of EPA restating Clean Air Act source aggregation policy for the oil and gas industries; (3) the impact of recent settlements between operators and EPA for alleged violations in Indian Country; and (4) the potential addition of greenhouse gas (GHG) reporting requirements for onshore oil and gas production to the proposed EPA GHG Reporting Rule, among others. The importance of this industry regionally and nationally and the complex regulatory issues facing it now and in future years guarantee the keen interest of many stakeholders in the continuing debate of important policies and proposals affecting oil and gas activity.

Ubiquitous Industrial and Commercial Boilers and Their Regulation under the Clean Air Act

Robert J. Lambrechts

It is estimated that there are over 160,000 industrial and commercial boilers and approximately 1.3 million boilers characterized as area sources in the United States for which expanded regulation of air emissions is fast becoming a reality. EPA’s promulgation of emission control and emission reporting rules will require that boiler owners develop a comprehensive strategy for responding to these complex regulations. Commensurate with increased regulation of emissions, control technology manufacturers are developing a new generation of multipollutant controls designed to capture multiple air pollutants more cost effectively than existing control systems.

Europe Fights Particle Pollution—Insight into Implementation of EU Law

Andrej Kobe and Katerina Varenne

Particulate matter is currently the most important air pollutant in the European Union (EU). While it is expected that successfully addressing ground-level ozone will require even more time and international effort, it is the particles that by far dominate effects on public health. It is, therefore, not surprising that particles attract significant public interest and have driven discussions in the Council and Parliament of the EU during the co-decision procedure for the new Directive on air quality 2008/50/EC adopted in June 2008 [OJ L 152, 11.6.2008]. This article addresses the deliberations that eventually established new objectives on fine particles (PM2.5), confirmed the existing PM10 standards, and introduced the notorious Article 22 on time extension.

State Common Law of Public Nuisance in the Modern Administrative State

F. William Brownell

The ancient writ of “public nuisance” has experienced a renaissance in the area of environmental law. What is “unreasonable interference” with a “public right” (i.e., a public nuisance), however, is quintessentially a policy judgment that in our modern administrative state is the province of the political branches of government. Because overlapping public nuisance and statutory regimes creates potential for conflict and confusion, this common law

cause of action must be approached with restraint. Important principles defining the limits of this cause of action in the modern administrative state arise from the common law history of this tort and the Constitution.

The Clean Air Act: An Indispensable Tool to Combat Global Warming

Vera P. Pardee and Kassie R. Siegel

This article discusses why, in light of Congress' inability to pass legislation to address the potentially devastating effects of climate change, the Clean Air Act (CAA) constitutes the best existing tool to combat global warming. The authors explore the CAA's forty-year history of effective and economically efficient pollution control and consider how each of its provisions can and should be implemented to reduce greenhouse gas (GHG) emissions. The article shows how these provisions can work in a complementary fashion with whatever new climate legislation may emerge and warns against weakening or giving away any of its existing pollution reduction programs. The discussion also explores why GHG emissions targets proposed by currently pending legislation are inadequate and why such targets should aim to reduce carbon dioxide concentrations from their current 385 parts per million to at most 350 parts per million. According to the authors, the fact that GHG pollutants are globally well mixed is not an obstacle to implementing a national GHG pollution cap, as any reasoned response to a shared and world-wide threat requires action by each nation to fulfill its global responsibilities. With or without congressional gridlock, the CAA and each of its complementary provisions remain valuable tools to accomplish this moral and legal imperative.

Clean Air Act Permitting Standards Impose Obstacles to Achieving Environmental Justice

Annise K. Maguire

Most studies about the environmental justice movement focus on the disproportionate share of environmental burdens minority and low-income populations bear, the negative effects of an unequal distribution of undesirable land uses, and how industry contributes to the adverse impacts suffered by the communities. Unfortunately, trying to prove that an injury was caused by actions of a nearby facility is difficult, and this approach has yielded few legal victories for environmental justice communities. Rather than focusing on the negative effects that occur under the current system, this article argues that a new approach, which focuses on the cause of the problems—the existing statutory and regulatory scheme—should be adopted. The article examines how the current framework of technology-based permitting provides facilities with the legal ability to continue emitting dangerous levels of pollution that disproportionately harm environmental justice communities and uses a case study from Michigan to illustrate these problems. It concludes with suggested changes that could be implemented by states, or at the federal level, to provide adequate protections for environmental justice communities so that the environmental justice movement has a better chance of achieving its goals.

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GHG Regulation Is Here to Stay

Patrick J. Paul

With EPA’s greenhouse gas (GHG) endangerment finding timed to coincide with the international climate change discussions in Copenhagen, the Obama administration has thus far maintained its pledge to rigorously pursue changes to the environmental regulatory scheme. This article provides a brief discussion of the late 2009 developments, including an assessment of recent nuisance law developments. Although the framework for final GHG regulation is unclear, it unquestionably will be part of our future.

Local Regulation of Mineral Extraction in Colorado

Jean Feriancek

In Colorado, the extent to which local governments can regulate mineral extraction first was tested in challenges to city and county land use ordinances prohibiting or restricting oil and gas drilling within their boundaries. In 1992, the Colorado Supreme Court held that that the Colorado Oil and Gas Conservation Act did not expressly or impliedly preempt all local regulation of oil and gas extraction and, since then, local oil and gas regulations have been struck down or upheld based on a case by case analysis of whether their operational effect conflicts with the state statute. The article discusses *Colorado Mining Association v. Board of County Commissioners of Summit County*, 199 P.3d 718 (Colo. 2009), a case challenging a county ordinance that banned the use of cyanide or other toxic or acidic reagents for mineral processing on the grounds that the ordinance was preempted by another Colorado state statute, the Mined Land Reclamation Act.

Still Defining "Discharge of a Pollutant" after Thirty Years

James H. Andreasen

Two recent cases highlight the fact that it is not always easy to define a "discharge of a pollutant" that is subject to Clean Water Act permitting. Even after three decades with the same basic definitions, and in the face of longstanding agency practice not to require permits for certain discharges, litigation may yield conclusions contrary to EPA's interpretations, even when those interpretations are codified in regulations.

Nevada-Utah Interstate Groundwater Negotiations

John R. Zimmerman

The allocation of interstate groundwater resources presents unique challenges to stakeholders and the courts. This article discusses the method used by Nevada and Utah to resolve issues that arise between states with shared groundwater resources. The Snake Valley Agreement represents one method of allocating an interstate groundwater resource and may not be appropriate in all situations. This article also discusses some of the issues that may prevent such an agreement from being implemented.

Cleaning Up Clean Rivers: Dollars Well Spent?

Jeffrey C. Miller

The pre-cleanup PCB contamination level at Portland Harbor is compared to those of other cleanup sites. The relationship between cleanup goals and background levels of contamination is explained. The author questions whether it makes sense to spend scarce cleanup dollars on relatively clean rivers when much higher-risk levels are tolerated at more contaminated rivers.

Connecticut v. AEP: The New Normal?

Joy C. Fuhr

This article examines the implications of the Second Circuit's decision in *Connecticut v. American Electric Power Co.*, 2009 U.S. App. Lexis 20873 (Sept. 21, 2009), in which the Court held that eight states, the city of New York, and three private land trusts could pursue a federal common law public nuisance claim against five electric utilities for global warming. In reversing U.S. District Court Judge Preska, the Second Circuit found greenhouse gas emissions were no different from any other air pollutant for purposes of justiciability. Even if they are able to maintain their suit, Plaintiffs will likely find it difficult to establish that the utilities' emissions were unreasonable and the proximate cause of the alleged damages.

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