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DEFERRAL RULE FOR BIOGENIC CARBON DIOXIDE VACATED

Mike McLaughlin and Pat Sullivan

On July 12, 2013, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacated the Deferral Rule that had suspended regulation of "biogenic" greenhouse gas (GHG) emissions under the Clean Air Act (CAA). Biogenic GHG includes carbon dioxide produced from the combustion, decomposition, or processing of biologically based materials such as most of the organics contained in municipal solid waste (MSW).

The Deferral Rule was promulgated by the U.S. Environmental Protection Agency (EPA) on July 1, 2011, to enable EPA to consider for three years the complicated science of biogenic carbon dioxide emissions before deciding whether to include such emissions in permitting requirements.

In *Center for Biological Diversity et al. v. EPA*, No. 11-1101 (July 12, 2013) the D.C. Circuit said that because EPA included (or did not exclude) biogenic carbon dioxide in its 2009 endangerment finding for GHG—thus making it an air pollutant under the CAA—the agency cannot defer regulation of these pollutants unless it explains why such an approach is fully compliant with the CAA. For example, the court said it would be a different case if EPA had said in the Deferral Rule that it interprets the "CAA as requiring permits only for biogenic carbon dioxide sources with an adverse impact on the net carbon cycle," and that more time was needed to determine what sources meet that standard.

The practical effect of the D.C. Circuit's opinion for MSW landfills and waste-to-energy facilities will be to increase the potential that these facilities will require permits under the CAA. EPA's Tailoring Rule (75 Fed. Reg. 31,514 (June 3, 2010)) explains how GHG emissions are regulated under the CAA title V and prevention of significant deterioration (PSD) provisions.

Tailoring Rule Summary

Under the Tailoring Rule, new and existing sources emitting at least 100,000 tons per year (tpy) of carbon dioxide equivalent (CO_2e) must obtain title V operating permits. Facilities with existing title V permits must add GHGs as a new regulated pollutant. New facilities with GHG emissions of at least 100,000 tpy CO_2e and existing facilities with GHG emissions of at least 100,000 tpy CO_2e that plan modifications that would increase GHG emissions by at least 75,000 tpy of CO_2e are subject to PSD permitting requirements. Similarly, facilities already subject to PSD requirements for non-GHG emissions must also address GHG emission increases of 75,000 tpy CO_2e in their PSD permits.

Biogenic Carbon Dioxide Deferral

Under the Deferral Rule, biogenic carbon dioxide was not to be included in PSD or title V permitting

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Mike McLaughlin, Editor

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CALENDAR OF SECTION EVENTS

September 24, 2013
The State of Our State and Beyond: Local and National Perspectives on Grid Modernization, Infrastructure Resiliency, and Carbon Emissions Reduction Initiatives
New Jersey Law Center
New Brunswick, NJ
Primary Sponsor: New Jersey State Bar Association

October 9-12, 2013
21st Fall Conference
Hilton Baltimore
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January 24-26, 2014
Winter Council
The Sanctuary
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March 20-22, 2014
43rd Spring Conference
The Grand America Hotel
Salt Lake City, UT

April 10-11, 2014
ABA Petroleum Marketing Attorneys' Meeting
The Ritz-Carlton Hotel
Washington, DC

May 2-4, 2014
Spring Council
The Hutton Hotel
Nashville, TN

June 4-6, 2014
32nd Annual Water Law Conference
The Red Rock Resort, Casino and Spa
Las Vegas, NV

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requirements for three years while EPA evaluated the impacts of biogenic carbon dioxide on global climate change. Several environmental groups objected to the Deferral Rule, noting that some kinds of biomass combustion and/or fermentation were not good for the environment, and pointing out that the atmosphere does not distinguish between a molecule of fossil carbon dioxide and a molecule of biogenic carbon dioxide.

Implications for Landfills

The Deferral Rule litigation was between environmental groups and a combination of EPA and a number of agricultural and other trade associations primarily interested in biomass fuel combustion and fermentation. Landfill interests were not directly represented in the litigation, and as a practical matter including biogenic carbon dioxide emissions should not push many landfills above the Tailoring Rule thresholds when considering landfill surface emissions. Methane is the primary GHG for landfills, and it has been fully regulated under the Tailoring Rule. Nevertheless, some landfills will be affected by the decision, particularly projects that include landfill gas (LFG) combustion. Biogenic carbon dioxide includes both the carbon dioxide in LFG and the carbon dioxide produced by the combustion of methane in LFG, and the analysis will be different for every landfill and each proposed modification.

Without the Deferral Rule, biogenic sources of carbon dioxide, including LFG flares, engines, and recoverable carbon dioxide in LFG, must be considered while undergoing title V or PSD permitting. The inclusion of these sources will result in some landfills that had previously been considered minor sources of GHG being considered major sources of GHG. New title V major sources typically must submit title V permit applications within one year of becoming subject to title V, though local requirements can require earlier submittals.

Under PSD, once a facility is a major source for one pollutant, it is a major source for all pollutants. The inclusion of biogenic carbon dioxide will increase the number of sources considered major under PSD and thus require that any increases in other pollutants be included in the PSD evaluation for new and modified sources. Any such major sources or major modifications, with increases of other regulated pollutants over their significance levels, would have to undergo PSD for those pollutants.

Major facilities and major modifications must evaluate the best available control technology (BACT) and conduct air modeling for certain pollutants. EPA has prepared a white paper intended to be used as BACT guidance for landfills and GHG control. The white paper discusses a variety of approaches to reducing GHG emissions from landfills, including collection of LFG with subsequent flaring or use (e.g., to generate electricity), use of biocovers to enhance oxidation of methane, use of bioreactor technology to expedite LFG generation, and use of management practices such as diverting organics from landfills to reduce LFG generation. The white paper represents EPA's guidance to state and local air agencies as to the range of possible technologies that could be considered in a GHG BACT analysis. Several of these go beyond traditional control technologies and represent fundamental changes in the way the underlying source (the landfill) is managed.

Issues to Be Addressed

It is unclear how federal, state, and local regulators will respond to the court's decision to vacate the Deferral Rule. EPA may petition for a rehearing or for a stay pending appeal, and if either is granted it could be July 2014—when the deferral was to end by its own terms—before the court's order is imposed.

EPA may take the approach of considering biogenic carbon dioxide as a new pollutant as of July 12, 2013. Under this approach, facilities that are minor for GHG excluding biogenic carbon dioxide will be required to reevaluate their status after including biogenic carbon dioxide and determine if they must begin the title V permit application process. At a minimum, title V emission inventories may have to be redone to include biogenic carbon dioxide.

Facilities constructed in the last two years without PSD or title V permits in reliance on the Deferral Rule may find their status questioned by regulators or citizens groups.

EPA may respond to the decision by publishing a new deferral rule that explains how deferral of permitting for biogenic carbon dioxide emissions is fully compliant with the CAA, or that otherwise would meet the requirements of the D.C. Circuit's decision. Perhaps more likely at this point in time (two years into a three-year deferral period), EPA may finalize how biogenic carbon dioxide is to be considered for GHG permitting purposes.

Resources

EPA New Source Review Web site: http://www.epa.gov/NSR/actions.html.
EPA CAA GHG Permitting Web site: http://www.epa.gov/nsr/ghgpermitting.html.
EPA White Paper on Available and Emerging Technologies for Reducing Greenhouse Gas Emissions from Municipal Solid Waste Landfills: http://www.epa.gov/nsr/ghgdocs/landfills.pdf.

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NSWMA v. City of Dallas: Challenges to Flow Control and Import Restrictions Need Not Live or Die by the Dormant Commerce Clause

Graham St. Michel

In the 35 years after the U.S. Supreme Court first held in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), that the dormant Commerce Clause protects solid waste in interstate commerce, many local governments have continued to scheme for control over prices, quantities, and location attributes of the multibillion dollar waste market. Some of the most contentious efforts include flow control ordinances, which generally mandate that all waste originating within a given jurisdiction be disposed of at certain designated facilities; and import restrictions, which limit the quantity of solid waste that may be brought into the jurisdiction from beyond its borders. These local impediments to the free flow of solid waste are often adopted under an array of justifications including environmental protection, conserving local resources, and increasing recycling, but in many cases may have more to do with increasing government revenue (flow control), or provincial desires to keep out somebody else's problem (import restrictions). To the highly sophisticated waste industry that operates under fierce competition on a national and regional scale, these potentially numerous layers of local restrictions are often viewed as significant threats worthy of judicial challenge.

Last October, a coalition of waste industry plaintiffs obtained preliminary and permanent injunctions against a flow control ordinance enacted by the city of Dallas, Texas. *See Nat'l Solid Wastes Mgmt. Ass'n v. City of Dallas*, No. 11-3200 (N.D. Tex. Oct. 16, 2012). Although the dormant Commerce Clause has become a mainstay in challenges to flow control, these plaintiffs elected not to raise such an argument. The case provides an important reminder that the dormant Commerce Clause is not the only legal basis for challenging local restrictions on the free movement of solid waste. This article touches briefly on the parameters of the dormant Commerce Clause, and

then notes some of the additional theories available to opponents of flow control and import restrictions.

The Dormant Commerce Clause

Courts apply a two-tiered approach for reviewing state and local laws under the dormant Commerce Clause. Local laws are per se invalid if they discriminate against interstate commerce on their face, by intent, or in effect. *E.g.*, *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Res.*, 504 U.S. 353, 361 (1992). Discriminatory laws are subject to strict scrutiny and are generally struck down without further inquiry. Nondiscriminatory laws may still be held unconstitutional if they impose burdens on interstate commerce that are excessive in relation to the local benefits. *E.g.*, *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). This weighing of the burdens against the benefits, however, results in a more forgiving standard in favor of the local ordinance.

The dormant Commerce Clause argument is strongest where the local measure clearly discriminates against out-of-state interests or solid waste that crosses state lines. The argument becomes less clear, however, regarding local ordinances that make special accommodation for out-of-state interests and purport to have only intrastate application. Examples include import restrictions that expressly allow unlimited importation of out-of-state waste, and flow control laws that exempt waste destined for out-of-state facilities. Proponents of such laws argue that the laws do not discriminate against interstate commerce, leaving challengers with the more difficult, fact-intensive task of demonstrating that the burdens on commerce outweigh local benefits. *E.g.*, *Ben Oehrleins and Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997).

The ability to mount successful Commerce Clause challenges to flow control laws is also subject to an important limitation emphasized in *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007); flow control laws are less likely to violate the dormant Commerce Clause if they benefit "clearly public" facilities that are both "owned and operated" by public entities, and treat all private businesses exactly the same. *Id.* at 342, 334. According to the Supreme Court, the fact that the flow control ordinance in *United Haulers* benefited a public entity was the "only salient difference" distinguishing it from the flow control law which had forced waste haulers to deliver waste to a particular *private* facility that was struck down in the Court's earlier decision of *C&A Carbone v. Town of Clarkstown*. *Id.* at 334. This apparent dividing line between public and private beneficiaries of flow control is now poised for judicial review in a pending challenge to a county ordinance that directs solid waste to publicly owned, *privately operated* facilities. *See C&A Carbone v. County of Rockland*, No. 08-CV-6459 (S.D.N.Y.).

The flow control law challenged in *NSWMA v. City of Dallas* required all waste and recyclables collected in Dallas to be disposed of at a city-owned and operated facility. The city estimated some $15–18 million in increased revenue from disposal fees. Plaintiffs challenged the law on numerous grounds, but did not raise a dormant Commerce Clause argument likely due to the Court's endorsement in *United Haulers* of flow control laws that benefit publicly owned and operated facilities. The plaintiffs included several franchisees that had franchise agreements with the city for solid waste collection services—most operating their own disposal facilities—and the trade association for the private sector solid waste and recycling industry, NSWMA.

The Contract Clause

The plaintiffs in *NSWMA* succeeded in arguing that the city's flow control ordinance violated the Contract Clause. Under the Contract Clause of the U.S. Constitution, "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. art I, § 10. While the language of the clause is facially absolute, its prohibition is tempered against states' inherent police power to protect the vital interests of their citizens. In making a Contract Clause argument, plaintiffs must first establish that a state or local law operates as a substantial impairment of a contractual relationship. Plaintiffs must then show that the adjustment of the rights and responsibilities of the contracting parties is not reasonably related to a legitimate public purpose. When a state or local

government has substantially impaired its own contracts, courts apply a stricter standard to assess the reasonableness of the impairment, and will strike down legislation when less drastic or alternative means are available for achieving the government's goals. *E.g.*, *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983).

In *NSWMA*, the court found the flow control law substantially impaired existing franchise agreements between the city and the franchisee plaintiffs because those agreements did not limit where the franchisees were allowed to dispose of solid waste, other than restricting disposal to "authorized" facilities. The court agreed with the plaintiffs that "authorized" facilities meant permitted facilities, and rejected the city's argument that the agreements enabled the city to use flow control to define "authorized" facilities. The impairment was substantial due to the financial impacts the ordinance would have on the disposal businesses of certain franchisees, such as those that would otherwise transport waste to their own facilities, and those that would be forced to transport waste greater distances. Finally, the city was unable to justify the impairment, with the court finding instead that the flow control was intended simply to raise city revenue rather than address a specific fiscal problem.

NSWMA demonstrates the Contract Clause is a potentially strong argument for challenging import restrictions and flow control laws, especially when those laws contradict preexisting agreements between plaintiffs and the enacting local government.

Limits on Local Police Power

Waste industry plaintiffs in many cases may also argue the flow control or import restriction is an arbitrary, unreasonable, and otherwise unlawful exercise of local police power. These arguments are typically rooted in state constitutions (the source local police power) and will vary depending on the case law of the enacting jurisdiction. For example, the plaintiffs in *NSWMA* argued the flow control law violated the "due course of law" clause of the Texas Constitution, which prevents local governments from impairing vested rights unless the government acts properly according to its police powers. Furthermore, Texas case law holds that municipal legislation driven by an effort to advance the municipality's own economic interests is not a proper use of police power. These rules provided additional grounds for enjoining the Dallas ordinance because the franchise agreements granted vested rights to dispose of solid waste at any authorized landfill, and the city's motivation to raise revenue was not a proper basis for its exercise of police power.

As another example of a police power argument, California courts have held that local ordinances may be invalid where they impose regional impacts without accommodating regional interests. *E.g.*, *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582 (1976). This "regional welfare" gloss on local police powers is particularly potent against local import restrictions that wall off regional disposal facilities from neighboring jurisdictions (intrastate or otherwise).

Vagueness

Challengers may also wage state and federal due process attacks against unconstitutionally vague laws, such as measures that do not provide the kind of notice needed for ordinary people to understand what the law prohibits, or those that authorize arbitrary and discriminatory enforcement. Succeeding on a facial vagueness challenge can be an uphill battle, as the plaintiff must show the law is impermissibly vague in all applications.

The court in *NSWMA* rejected a facial vagueness challenge that alleged the flow control law failed to define key terms and granted unbridled enforcement discretion to the city director of sanitation services. The court found the undefined terms could be interpreted in reference to common understanding, and the director's discretion was sufficiently constrained by other provisions of the Dallas Municipal Code. Another federal court recently reached a different result, finding unconstitutionally vague a flow control law that allowed the local government to make "case-by-case" determinations as to the meaning of "recyclable materials" not subject to flow control. *JWJ Indus., Inc.*

v. Oswego County, No. 5:09-CV-740 (Nov. 16, 2012).

State Preemption

Finally, plaintiffs should not overlook state preemption as a potentially compelling basis for challenging county or municipal restrictions on the free flow of solid waste. Local measures may be preempted if either they conflict with state law that governs solid waste (conflict preemption), or the state law manifests a legislative intent that no other local enactment may touch upon the subject (field preemption).

For example, the California Integrated Waste Management Act (CIWMA) is a comprehensive scheme governing all solid waste activity in California. It calls for "effective and coordinated approach[es] to the safe management of all solid waste generated within the state" and "regional cooperative efforts" from the state and its political subdivisions. Cal. Pub. Res. Code § 40001(a), (b). It requires that local agencies "make adequate provision for solid waste handling, both within their respective jurisdictions and in response to regional needs." *Id.* § 40002. It also states local governments "shall . . . [m]aximize the use of all feasible source reduction, recycling, and composting options." *Id.* § 40051. State laws like the CIWMA provide viable preemption arguments against import restrictions or flow control laws that stymie regional cooperation or prevent access to otherwise available recycling and composting facilities.

Earlier this year, a California appellate court upheld a preliminary injunction against a county ordinance that banned land application of municipal sewage sludge (biosolids) in unincorporated areas of the county. *City of Los Angeles v. County of Kern*, 214 Cal. App. 4th 394 (2013). Recognizing that using biosolids as fertilizer is a form of recycling, the court found the plaintiffs likely to succeed on their CIWMA preemption arguments because the county ordinance bans activity the CIWMA seeks to promote. According to the court, "[o]ne jurisdiction's action to ban [land application of biosolids] . . . is not consistent with a statutory scheme that presumes all jurisdictions will have access to crucial waste-stream-reduction methods." The court was also concerned that to "authorize all local governments to say 'not here,'" would impermissibly conflict with the CIWMA.

In contrast, the South Carolina Supreme Court recently held the South Carolina Solid Waste Policy and Management Act did not preempt a county flow control ordinance. *Sandlands C&D, LLC v. County of Horry*, 394 S.C. 451 (2011). The court was unwilling to find the ordinance preempted where the state law merely "encouraged" rather than required regional approaches to solid waste management. Instead, the court found that the state law silence over the flow of local waste invited, rather than preempted, local regulation.

Preemption was also rejected as an additional theory for invalidating the flow control law in *NSWMA*. There, the court held a state law governing recycling related to a different disposal activity than the flow control law, and there was no indication the state law intended to preempt local regulation of solid waste disposal.

Conclusion

Given the holding of *United Haulers*, it is of little surprise that the plaintiffs in *NSWMA* elected not to pursue a dormant Commerce Clause challenge to a flow control ordinance that directed waste to a city-owned and operated landfill. Yet the plaintiffs' success in enjoining enforcement of the flow control law confirms there are other limits on local authority, even where the facts do not present a clear violation of the dormant Commerce Clause. Practitioners should be sure to consider these and other potential bases for challenging local restrictions on the free movement of solid waste, and should not be afraid to elevate the prominence of such arguments in cases where they present brighter limits on local authority.

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EPA SIGNALS SUBTITLE D FOR COAL ASH IMPOUNDMENTS

Mike McLaughlin

Following the 2008 failure of one of the Tennessee Valley Authority's coal ash impoundments in Kingston, Tennessee, the U.S. Environmental Protection Agency embarked on a well-publicized rulemaking effort that culminated in June 2010 with EPA proposing comprehensive options for regulating coal combustion residuals (CCRs) produced by coal-fired electric utilities. The two basic options proposed by EPA for regulating CCRs were as special wastes subject to hazardous waste regulations under subtitle C of the Resource Conservation and Recovery Act (RCRA) and as solid wastes under subtitle D of RCRA. The agency has not finalized the rulemaking, but in June of 2013 it provided a signal as to which way it was leaning:

> Although a final risk assessment for the CCR rule has not yet been completed, reliance on the data and analyses discussed above may have the potential to lower the CCR rule risk assessment results by as much as an order of magnitude. If this proves to be the case, EPA's current thinking is that, the revised risks, coupled with the ELG requirements that the Agency may promulgate, and the increased Federal oversight such requirements could achieve, could provide strong support for a conclusion that regulation of CCR disposal under RCRA Subtitle D would be adequate. [Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category [78 Fed. Reg. 34,432 (June 7, 2013)

In addition to the rulemaking process, EPA has used its bully pulpit and broad authorities under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to force utilities with coal ash impoundments to assess and repair many of them. In response to CERCLA 104(e) information requests, utilities reported some interesting facts regarding 676 impoundments:

- Average size of 1,362 acre-feet, and median size of 186 acre-feet
- Just over 70 percent designed by a licensed professional engineer
- 41 (about 6 percent) of the impoundments were reported to have had a release at some point
- Two-thirds are "big" or "tall" impoundments (20 acre-feet capacity with height of at least 5 feet, or any impoundment with a height of at least 20 feet).

In addition, EPA had its contractors review the data provided by utilities, make site visits, and prepare assessments for 516 impoundments (as of July 19, 2013). For each impoundment, the contractor provided a condition assessment (144 Poor, 158 Fair, and 214 Satisfactory) and gave its opinion of the potential harm that could result from failure of the impoundment (40 High, 241 Significant, 197 Low, 20 Less-than-Low, and 18 not assigned). At least 27 of the impoundments rated as in "poor" condition were rated as such because some design documentation was not available.

EPA invited utilities to comment on the assessment reports and to tell the agency what the utility planned to do in response to any recommendations made by the EPA contractor. Many of the resulting action plans included geotechnical investigations and repairs or improvements to impoundments as warranted.

EPA posted the information—answers to CERCLA 104(e) requests, contractor assessments, company responses, and action plans—on its public Web site. This is an unusual approach, and perhaps could be considered either a modern version of the public stocks used in colonial times or a creative way to share important information with an interested public. The information captured is available at:

- Information Request Responses from Electric Utilities (http://www.epa.gov/epawaste/nonhaz/industrial/special/fossil/surveys/), and

register today!
http://www.wmbar.org/EnvironmentalWL

- Coal Combustion Residuals Impoundment Assessment Reports (http://www.epa.gov/wastes/nonhaz/industrial/special/fossil/surveys2/

It will be interesting to see whether the creative approach taken by EPA for addressing coal ash impoundments using its broad general power under CERCLA will serve as a model for future executive actions to address environmental issues where Congress has not provided specific guidance, and it will be interesting to see if the courts allow such.

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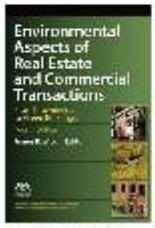

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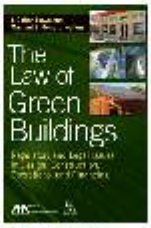

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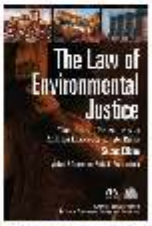

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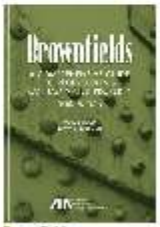

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SESSION TITLES:

Wednesday, October 9, 2013

- How to Get Hired by In House Counsel
- Keynote Address: Kenneth R. Feinberg, Feinberg Rozen, LLP, Washington, DC

Thursday, October 10, 2013

- Plenary Session 1 - News from the Capitol: Administration and Congressional Priorities for Energy and Environmental Law and Policy
- The Corporate Supply Chain Goes Global: What You Need to Know to Counsel Your Multinational Client
- Reacting to Coastal Disasters: Response and Future Preparedness
- Less is More? The Expanding Universe of Low-Level Toxic Tort Claims
- Clean Air Developments Every Lawyer Should Know
- Going Back to the Well: the Next Generation of Fracking Challenges
- Clash of the Titans: Live Litigation
- Road Warriors – A Hands-On Practical Demonstration of Technology and Ethical Perils
- State Authority on Climate Change: Where are the Commerce Clause Boundaries?
- Environmental Markets 2.0: The Evolving Use of Market-Based Mechanisms

Friday, October 11, 2013

- Plenary Session 2—From the Top: Second Term Priorities and Perspectives from Senior EPA Officials
- Renewable Energy Development: Challenges, Opportunities and Pay-Offs
- TMDL Regulation: How EPA's Chesapeake Bay Initiative May Spread to Your Watershed
- CERCLA Case Studies and Lessons Learned—Novel Approaches and Noteworthy Outcomes
- Cooperative Federalism: Under Assault or In Balance?
- Hot Topics in Environmental Enforcement and Compliance
- Transaction Jeopardy! Getting the Deal Done
- Today's Ethics: More Complicated Than You Thought? Managing Conflicts & Virtual Reality in Today's Environmental, Energy and Natural Resources Law Practices

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