

# EENRCENTER BRIEF

A Fast Briefing from the Environment, Energy & Natural Resources Center at the UH Law Center

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This *EENRCenter Brief* – the final issue for the 2010-2011 academic year – focuses on the climax of several legal issues that dominated the past year:

- The U.S. Supreme Court ruled last week that several state attorneys general could not seek to declare emissions from power companies as a public nuisance under federal common law. As the Court limits access to the federal courts for these claims, will the legal battle simply move on to other courts and under state laws?
- As Texas and the U.S. Environmental Protection Agency continue their bitter disagreement over greenhouse gas permitting and flexible permit authorizations, the relationship between the agencies – the two largest environmental regulatory agencies in the world – has continued to fray. This issue provides a summary of recent comments on that relationship by Chairman Bryan Shaw of the Texas Commission on Environmental Quality.
- As our EENR Speaker for Spring 2011, John Cruden offered his thoughts on federal environmental enforcement and the U.S. Department of Justice's priorities for the upcoming year. While his thoughts carried special weight as the senior career attorney in DOJ's Environment and Natural Resources Division, Mr. Cruden's retirement from DOJ this month and his appointment as the President of the Environmental Law Institute will give him an influential new platform to carry out his thoughts and suggestions.

We've also included a brief update on recent EENR activities underway and planned for the summer.

## Climate Change Public Nuisance Actions: A Curtain Falls, but the Road Show Begins

One long-running theme in the *EENRCenter Brief* this year has centered on climate change public nuisance litigation. For nearly seven years, states, environmental groups and private claimants have gone to federal court seeking to declare greenhouse gas emissions as a public nuisance under federal common law. The claims, if they succeeded, could have led to federal court orders restricting greenhouse gas emissions and created open-ended liabilities for climate change caused (at least in part) by industrial emissions. Three different federal appellate courts wrestled with these claims and arrived at varying results.

On June 20, the U.S. Supreme Court closed the federal courts to this approach. In *Connecticut v. American Electric Power Co.*, the Court unanimously ruled that Congress effectively took over this area by passing the Clean Air Act and authorizing EPA to regulate greenhouse gas emissions. Where Congress has spoken through such legislation, the Court noted, federal courts cannot craft their own remedies under federal common law. You can access the opinion [here](#).

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As usual with U.S. Supreme Court decisions, some of the most interesting aspects of the ruling lie in what the Court did *not* decide. First, the Court declined to dismiss the complaint on jurisdictional grounds and instead affirmed the federal courts' ability to hear these cases in the first place. The defendants had claimed that the plaintiffs lacked standing and that the cases posed a political question which the federal courts can't address. In a tie 4-4 decision, the Court effectively confirmed its earlier ruling in *Massachusetts v. EPA* that the federal courts can hear some of these climate change claims (particularly lawsuits by states).

Second, the Court did not rule that EPA had to actually implement greenhouse gas regulations to displace federal common law claims. As a result, federal common law nuisance claims are now dead even if EPA theoretically declined to regulate greenhouse gas emissions under the Clean Air Act in the future (although, of course, such regulations are already underway). If Congress chose to pass a statute that exempted greenhouse gases from regulation under the Clean Air Act, however, it may revive federal common law actions unless the new law expressly bars those claims as well.

Last, and perhaps more important, the Court's decision may simply throw open the door to a broader and more complicated arena. While it ruled that the Clean Air Act displaced federal common law nuisance claims, the Court pointedly noted that this conclusion did not apply to public nuisance lawsuits under *state* law. Climate plaintiffs have already picked up on this important distinction: plaintiffs in Mississippi who had their federal claims dismissed last year have filed a new [complaint](#) that includes claims under state law for many of the same damages. If the climate change nuisance battle shifts to the state courts, companies may find themselves facing a patchwork array of state laws and conflicting orders while plaintiffs in turn wrestle with new questions of jurisdiction and enforcement against defendants outside the state. The historically complex and challenging federal litigation could, in effect, be multiplied many times over through a complicated phalanx of multiple state court actions.

If so, climate change nuisance defendants find themselves at risk of a Pyrrhic victory: rather than fighting a small set of high-stakes claims under a single federal standard before a federal court with limited subject matter jurisdiction, they instead could face an array of state law claims in multiple state courts under varying standards and possibly conflicting awards. Because state law courts are not limited in their jurisdiction like federal Article III courts, they can have significantly broader standing doctrines and flexible justiciability standards.

The possible shift of this legal struggle to the state courts may throw a belated new light on the Court's pending decision on whether to review *North Carolina v. Tennessee Valley Authority*. In this case, the Fourth Circuit issued a sweeping decision that dismissed North Carolina's public nuisance lawsuit to force emission reductions from coal-fired power plants operated by TVA across the border in Tennessee. The Fourth Circuit's broad language found that the Clean Air Act preempted state law public nuisance lawsuits against sources outside the state that operated within an EPA-authorized state implementation plan under the federal Clean Air Act. While the Fourth Circuit's ruling remains limited to states within the Circuit and arguably conflicts with a prior U.S. Supreme Court decision on similar preemption issues under the federal Clean Water Act, the *North Carolina v. TVA* decision will undoubtedly take center stage if the Court grants certiorari and climate change public nuisance litigation starts to move into the state courts.

**The Dysfunctional Duo: EPA and TCEQ in a Time of "Vigorous Disagreement"**

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In the 1988 black comedy *The War of the Roses*, battling spouses Michael Douglas and Kathleen Turner refused to sell their mansion during a venomous divorce. They instead stubbornly shared a house divided: the husband lived in one half, the wife in the other, and they circled each other warily in common areas. When Douglas' character explained the elaborate arrangement to his divorce attorney (complete with a color-coded map), his lawyer incredulously replied: "And this seems like a rational arrangement to you?"

Regulators, environmentalists and industry in Texas may share the same feeling. As the Texas Commission on Environmental Quality and U.S. EPA Region 6 continue their stand-off on several high profile issues, their fractious relationship has grown increasingly strained. This bad blood has already had consequences for bystanders: for example, operators of large Texas facilities have found themselves having to undo their flexible air permits, wrestle with EPA over water quality discharge limits to which TCEQ had not objected, and obtain parallel air permits from each agency for facilities that emit both criteria pollutants (from TCEQ) and greenhouse gases (EPA).

Against this backdrop, recent comments by TCEQ Chairman Bryan Shaw underscore the regulatory Cold War in Texas. Dr. Shaw spoke at a luncheon for the Houston Bar Association's Environmental Section on June 6, 2011. He offered an overview on several important initiatives (including environmental outcomes from the recently concluded regular Texas legislative session), but his characterization of EPA's treatment of Texas deserves special note. We've provided a brief summary of Dr. Shaw's comments below:

\* \* \* \* \*

Dr. Shaw began his presentation with a brief update on the results from the Texas Legislative session (in particular, on the Sunset Commission's review of TCEQ and other state agencies). He noted that the Sunset process, for TCEQ, went better than TCEQ hoped especially given the Legislature's acceleration of its Sunset review of TCEQ by a full year. TCEQ's self-assessment concluded that the Commission was running well, and it consequently made only a few changes such as a reorganization along functional lines that created an Office of Water. Mark Vickery, TCEQ's Executive Director, and Dr. Shaw worked to make sure that the Sunset staff understood TCEQ's position and that the Sunset Commission's decision would rest solely on facts. According to Dr. Shaw, the staff did a "phenomenal" job and ultimately knew TCEQ better than EPA.

As a result, Dr. Shaw said that the TCEQ Sunset bill addresses "issues worth discussing" such as moving certain functions to the Texas Public Utility Commission. Those focused changes, when combined with the Sunset Commission's commitment for a clean bill, resulted in good legislation. TCEQ now has twelve years until it undergoes the Sunset process again. By contrast, the Railroad Commission and the PUC have to resolve numerous procedural concerns and snags in their respective Sunset bills.

The Sunset bill did provide for several changes to TCEQ's operations:

- The bill provides for continuation of TCEQ's petroleum storage tank program.
- TCEQ will retain authority over dam safety programs, but certain dams with less than 500,000 acre-feet of impounded water are now exempt unless they lie in areas that pose special risks or significant populations. This exemption expires in four years.
- The bill changes considerably the Texas compliance history system. The prior compliance history framework's insistence

on uniformity sometimes led to nonsensical results, and TCEQ now faces a challenging rulemaking task. For example, compliance history scores will now fall into categories of “satisfactory” and “unsatisfactory” (the category of “poor” will be discontinued). The bill also limits the use of compliance history in penalty calculations solely to enhance certain penalty amounts (for example, the penalty enhancement cannot exceed 100% of the penalty and can only apply to violations during the prior two years).

- TCEQ will refine the criteria for involvement of its Office of Public Interest Counsel to assure that it fully protects the public interest in a transparent fashion.
- The Sunset bill will increase the maximum penalties under most state environmental statutes from \$10,000 per violation per day to \$25,000 per violation per day.
- The bill allows local governments to apply funds from supplemental environmental projects to bring themselves into compliance with environmental requirements (normally, such funds cannot be used simply to meet legal standards).
- The bill sets out timelines for TCEQ action on permits and contested case history requests.
- Under the bill, TCEQ’s Executive Director can curtail water usage without a public rulemaking process. The Executive Director can also evaluate the need for a Water Master in certain watersheds every five years.
- In new revisions to the contested case hearing process, TCEQ can submit comments on matters but it cannot become a full party to the hearing.

TCEQ must complete rulemaking to implement these changes from the Sunset bill by September 1, 2011.

Dr. Shaw also noted that the Texas Legislature’s proposed budget for the next biennium will pose special challenges for TCEQ. The current budget provides TCEQ with a \$1 billion allocation and up to 3,000 employees. As a result, TCEQ will lose 235 full-time employees. The significance of these cuts is tempered by TCEQ’s increasing reliance on fees for program operation (up to 75%) as well as the availability of federal grants. In a helpful provision from the Sunset bill, TCEQ received flexibility in how to achieve its reductions (including reallocation of personnel). TCEQ also anticipated the impending cuts, and it has already imposed a hiring freeze over the past two years. Dr. Shaw expects that TCEQ will meet its 235 FTE reduction through retirements and attrition alone.

The budget also imposed large cuts on the Low-Income Repair Assistance, Retrofit and Accelerated Vehicle Retirement Program (LIRAP, which is now known as AirCheck Texas) and the Texas Emission Reduction Program (TERP). TERP in particular had played a crucial role in helping reduce emissions from sources protected from state regulation by federal preemption standards, and Dr. Shaw noted that the loss of TERP funding will definitely “slow us down.” He added, though, that the timing was good because both Houston-Galveston and Dallas-Fort Worth had shown good performance recently in meeting ozone standards (although TERP funding will become more critical in meeting any new ozone standard). Dr. Shaw stressed that these cuts were “painful, but easier to swallow” than the employee workforce reductions. Last, the budget imposed a general ten percent reduction in program budgets as well. While this reduction would also slow things down at TCEQ and result in longer hours, Dr. Shaw reiterated that TCEQ will “have to do more with less.”

Dr. Shaw then turned to TCEQ’s recent dealings with EPA. He began with a general observation: “there is no clear solution on the horizon.” According to Dr. Shaw, EPA still wants to maintain its takeover of Texas’ air permitting program, and EPA has concerns about water quality programs as well. For example, Dr. Shaw noted

that TCEQ had clearly demonstrated that it met EPA's objections to Texas' flexible air permitting program. EPA did not identify any further issues, but it simply said that "they did not want a flexible permit program." Dr. Shaw thought that this comment reflected on the nature of TCEQ's current relationship with EPA. When TCEQ pointed out that the flexible permit program had clearly worked and produced greater reductions in NO<sub>x</sub> at facilities under flexible permits, Dr. Shaw said that Al Armendariz (Regional Administrator for EPA Region 6) simply reiterated his demand that air permits impose individual emission limits on each point source within a facility. When TCEQ pointed to EPA's own use of flexible limits under EPA's PAL program, Dr. Armendariz simply repeated that the Clean Air Act required individual emission limits. When he repeated this position during subsequent testimony, Dr. Armendariz refused to give any citation to the Clean Air Act that supported EPA's stance and instead declined to answer because the matter was "in litigation."

Dr. Shaw added that Dr. Armendariz believes any regulation or program under a delegated federal program can become effective *only* after EPA had approved the regulation. This position, however, overlooks that TCEQ has submitted 30 rules to EPA for approval in the past 18 years that EPA still has yet to approve. EPA, according to Dr. Shaw, needs to take its twelve-month deadline to approve regulations seriously. Under EPA's interpretation, TCEQ would still have to extend grandfather status to numerous sources in Texas, and Texas will need regulatory creativity to meet the impending new ozone standards.

Dr. Shaw concluded by noting that TCEQ will press its position in upcoming oral arguments over EPA's disapproval of Texas' flexible permit rules, and Texas is now beginning to brief its objections to EPA's federal implementation of greenhouse gas permitting requirements in Texas. TCEQ will need to rebuild its programs and trust despite its difficulties with EPA so that Texas industries will still work with the Commission on innovative programs.

During the following question session, Dr. Shaw was asked whether the federal government harbored some bias against Texas on environmental issues. Dr. Shaw replied that "if you look at the issues on these programs and EPA's stance, it looks like a power grab." While EPA has justified its actions against Texas because EPA needed to provide a level playing field for all states, Dr. Shaw pointed out that this rationale revealed a negative perspective on Texas. This bias was especially pronounced because EPA had allowed similar programs in other states (such as Virginia) and other federal programs (such as EPA's Project XL program). EPA, according to Dr. Shaw, "seems to pick and choose," and it scrutinizes Texas more closely and gives it less flexibility. This stance is unfortunate because Texas "has real world issues, limited resources and huge costs on some issues." Dr. Shaw strongly emphasized that TCEQ "needs EPA to work with us."

In response to a later question, Dr. Shaw added that he expected EPA to try to get involved with oil and gas permitting in Texas. He noted that "EPA seems unconfined by the federal/state relationship," and he pointed out that EPA had objected to a proposed shift in the burden of proof in Texas contested case hearings (even though EPA's own process is far less rigorous, and the contested case process is not part of Texas' SIP submittal). Dr. Shaw called EPA's stance "brazen and bold," and that EPA insisted that the standard for its engagement didn't need to be ground in its own rules. EPA's actions instead seemed driven by "the whim of the current occupants." Dr. Shaw felt that Texas had done well, but that EPA nonetheless had identified TCEQ as "a rogue agency." Instead of holding Texas up as an example to other states, Dr. Shaw said, EPA had insisted on putting Texas in a negative light.

## **Looking Back While Moving On: Parting Thoughts from John Cruden, DOJ's Senior Career Environmental Enforcement Attorney and Incoming ELI President**

On March 30, we welcomed John Cruden as our second EENR Center speaker for the 2010-2011 academic year. While serving as the Assistant Deputy Attorney General for the U.S. Department of Justice's Environment and Natural Resources Division, John became the senior career environmental attorney at DOJ and played a key role in some of the most important environmental litigation in U.S. history. For example, he directed the U.S. government's legal efforts on the *Deepwater Horizon* blowout, the *Exxon Valdez* spill and the Love Canal clean-up. More specifically, as Deputy Assistant Attorney General, John supervised a wide variety of environmental litigation, including civil enforcement actions in federal court for the key environmental statutes, including Clean Water Act, Clean Air Act, RCRA, Safe Drinking Water Act, and CERCLA/Superfund. In addition, he oversaw wetland enforcement, challenges to EPA rule making, and environmental actions filed against the United States. Prior to becoming a career Deputy, John was Chief of DOJ's Environmental Enforcement Section (EES). John has also served as Chair of the American Bar Association's Section on Environment, Energy & Resources and as Chair of the District of Columbia Bar Association.

In his presentation, John provided an overview of how DOJ structures its environmental defense and prosecution efforts, how it selects its cases, and some of its most notable past cases. He also offered some perspective on DOJ's enforcement priorities for the upcoming year. You can listen to his presentation [here](#).

John's comments carry special resonance this month. After nearly 20 years at the Department of Justice, he announced his retirement this month to become the new President of the prestigious Environmental Law Institute. In his new role, John will help craft new environmental policy concepts and provide a needed neutral authority that can help bridge partisan divides which have paralyzed significant environmental progress on both the federal and state levels. We wish John the best of luck on his exciting new endeavor!

### **EENR Events**

Although the summer break has begun, the EENR program has a busy schedule set out for the next three months. Recent activities include:

*ABA Workshop on Hydraulic Fracturing Enforcement.* On May 18, the University of Houston helped support a workshop sponsored by the ABA's Environmental Enforcement & Crimes Committee on state and federal enforcement initiatives affecting hydraulic fracturing operations. The workshop included simultaneous sessions in Houston, Philadelphia and Washington, DC linked by videoconference. The speakers included key enforcement attorneys from each state agency and the U.S. Environmental Protection Agency. You can find the presentations from the workshop [here](#).

*NAFTA Environmental Enforcement Review.* The University of Houston has joined six other law schools from Mexico, Canada and the United States to begin an independent review of the NAFTA Commission on Environmental Cooperation's submittal for enforcement (SEM) process. This effort will take place under the auspices of the North American Conference for Legal Exchanges, which is led by Prof. Steven Zamora at the University of Houston Law Center.

NAFTA's SEM process is unique: it provides citizens of all three countries the opportunity to submit complaints to the CEC that will trigger an investigation of that country's enforcement programs and actions. During its fifteen years of operation, however, the SEM process has begun to draw accusations of ineffectiveness and

political manipulation. The NACLE review will field multinational teams of professors and students to create a research report that will identify possible problems and opportunities for improvement in the SEM process.

The NACLE team tentatively plans to complete its efforts by May 2012. Of course, we will alert you and post the results of the report on the EENR Center website as soon as the team completes its work.

*Sonangol.* The University of Houston Law Center is again hosting the in-house legal department of Sonangol (Angola's national oil company) this summer as part of its Environment & Energy LLM program with the University de Catolica in Lisbon, Portugal. We will have the honor of sharing the summer with twelve in-house counsel with responsibilities for various programs within Sonangol. As we did last year, the EENR Center will host a reception that will provide an opportunity for Houston attorneys to meet our guests in July. Please look for announcement of the reception in the near future.



*Summer Teaching Activities.* Professor Jacqueline Weaver taught for a week in the LL.M Program in Petroleum Law at Agostinho Neto University's law school in Luanda, Angola in May 2011. This is Angola's premier public law school. Its LL.M. in

petroleum law began with a \$2 million donation from BP and the tireless efforts of BP Senior Counsel Norman Nadorff (in the yellow shirt in the photograph) to create a world-class curriculum at the law school in this area. Prof. Weaver lectured on Sustainable Development issues. She also gave a presentation to Sonangol professionals on the Deepwater Horizon spill. Over the past 4 years, lecturers from the United States, Portugal, Brazil and other countries have taught segments of the A. Neto curriculum. Increasingly, Angolan law professors are doing the teaching and the university is running the program on its own. After Luanda, Professor Weaver flew to Lisbon where she taught International Petroleum Transactions in the Global LL.M program at Catolica University, which the Financial Times ranked as one of the best programs in the world in 2011. Catolica is a sister school to the University of Houston Law Center.

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As always, your input and suggestions are critical to us. We invite your thoughts and participation, and will continue to reach out to our current (and future!) supporters and sponsors.

Please feel free to call or email me if you have any questions or need further information. We look forward to talking with you again soon.

Tracy Hester

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