Environmental Law Update

Robert M. Stonestreet, Esq., Dinsmore & Shohl, LLP, gave an ***Environmental Law Update*** to the West Virginia Coal Mining Institute.

Stonestreet began by focusing on citizen suit litigation with regard to the Clean Water Act – NPDES effluent limits. EPA's civil action against Massey Energy Companies took place in May 2007. There was a $20 million civil penalty settlement agreement. WVDEP then began negotiating consent orders ***(see Figures 1 and 2)***.

Powellton filed a motion to dismiss CWA Paragraph 309(g) Administrative Enforcement Action under "comparable state law" precludes a citizen suit if commenced before "notice of intent." Penalties were already assessed for the same alleged violations and the SMCRA claims were duplicative. ***Sierra Club vs. Powellton Coal Company, LLC (Southern District West Virginia, August 18, 2009)*** held that the West Virginia Administrative Enforcement Scheme was not "comparable" to CWA. There was no power to unilaterally assess penalties and the permittee need not cooperate in the process. It was held that SMCRA claims may be pursued for the same alleged exceedances and that SMCRA obligations were independent of CWA. There was potential additional penalty. Citizen suits may proceed notwithstanding the consent order.

Clean Water Act enforcement litigation occurred in ***West Virginia Highlands Conservancy vs. Huffman*** at the Northern District West Virginia on January 14, 2009 and the ***West Virginia Highlands Conservancy vs. Huffman*** in the Southern District West Virginia on August 24, 2009. These covered WVDEP management of bond forfeiture sites. OSM does not hold NPDES permits for bond forfeiture sites in Tennessee. It was held that WVDEP must obtain NPDES permits and meet effluent limits at the bond forfeiture site. This considers the definition of "operator" under CWA and "inheritance" is irrelevant. The appeal was filed and the briefing concluded early October.

Stonestreet turned to the subject of citizen suit litigation with regard to carbon emissions and global warming. There are a number of carbon emissions suits. ***Connecticut vs. American Electric Power Company Inc.*** in the Second Circuit Court September 21, 2009 is a suit seeking a cap and reduction in carbon emissions. Two separate suits have been filed in federal court in New York in 2004. These involve eight states: California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, Wisconsin, and New York City. Another suit involves three private land trusts comprising Open Space Institute, Open Space Conservancy, and Audubon Society of New Hampshire ***(see Figure 3)***. The defendants are the same in both cases and these are six electricity providers comprising: American Electric Power Company, Inc., American Electric Power Service

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Corporation, Southern Company, Tennessee Valley Authority, Xcel Energy, and Synergy Corporation. The defendants own and operate fossil fuel-fired power plant in 20 states.

The plaintiffs allege the defendants emissions contribute to an "ongoing nuisance" global warming. The claims are not based on any statute, i.e. Clean Air Acts CAA, but are based on federal "common law." The "factual" basis for the claims is the Intergovernmental Panel on Climate Change and the National Academy of Sciences.

The states allege mostly future damages such as: increased deaths and illnesses from heat waves, more smog and associated respiratory illnesses, rising sea levels causing beach erosion and damage to coastal areas, more droughts and floods, and general disruption of ecosystems. Only California alleges current injuries with the decreased size and duration of the mountain snow pack. The land trusts alleged damages are: the same type of property damage alleged by the states, but they claim a different injury than the general public. This injury is "diminish or destroy the particular ecological and aesthetic values" that caused them to acquire and maintain their properties.

The requested relief is to hold each defendant liable for contributing to global warming, cap and reduce carbon emissions by a specified annual percentage, and there are no monetary damages.

The trial court dismissed the claims and presented a "political question," saying that a resolution of the claims require "identification and balancing of economic, environmental, foreign policy, and national security interests." The issues that require an "initial policy determination" include: appropriate cap, appropriate reductions and schedule, implications for negotiations with other nations, identify and evaluate alternative energy sources, and energy sufficiency and national security. The court said that these are issues for Congress and the President to decide, not the courts.

Four years later, a two-judge panel of the Second Circuit Court of Appeals reversed the Trial Court finding with a 139-page opinion saying that nuisance claims are viable and not a political question. The states may bring an action to safeguard the health and well-being of residents and the states may bring action to protect property rights. The two-judge panel also said that trusts have standing to assert a violation of public rights. They have a right to use, enjoy, and preserve the aesthetic and ecological values of the natural world and the right to be free from widespread environmental harm caused by the effects of global warming. The U.S. Supreme Court has never addressed this.

In alleging an "imminent" injury, the definitions of "imminent" are: "ready to take place; especially hanging threateningly over one's head; likely to occur at any moment; impending; about to occur; impending." The panel also said that the defendants account for only 2.5% of global manmade carbon emissions and a redress of slowing global warming is sufficient.

Another carbon emissions suit is ***Kivalina vs. ExxonMobil*** in the Northern District Court of California, September 30, 2009. The plaintiffs are village and city on the Alaskan Coast and the defendants are 24 oil, energy, and utility companies. It is claimed that GHG emissions cause property damage and there are nuisance claims for monetary damages. The courts dismissed the political question and said that nuisance claims require balancing utility against harm. There are no manageable standards. A policy determination is required on the appropriate use of fossil fuels. Courts said that ***Connecticut*** is wrong. There are no GHG limits so there is no presumption of harm from emissions. Harm cannot be traced to the defendants and causation is too remote.

An additional carbon emissions suit is ***Comer vs. Murphy Oil*** in the Fifth Circuit of October 16, 2009. This is a class action by Mississippi Gulf Coast residents and property owners vs. various energy and chemical companies named as defendants. The action claims GHG emissions have added to the ferocity of Hurricane Katrina. The claims asserted: public and private nuisance – unjust enrichment, trespass – civil conspiracy, and negligence – fraudulent misrepresentations. Monetary damages only were requested. The trial courts dismissed the suit as a political question. The appeals court partly reversed this and the nuisance, trespass, and negligence claims survive with the same analysis as ***Connecticut vs. AEP***. The unjustment, conspiracy, and fraud claims were dismissed as "generalized grievance." The Second Circuit Court of Appeals and the Fifth Circuit Court of Appeals are shown in ***Figure 4***.

For further information, contact robert.stonestreet@dinslaw.com.

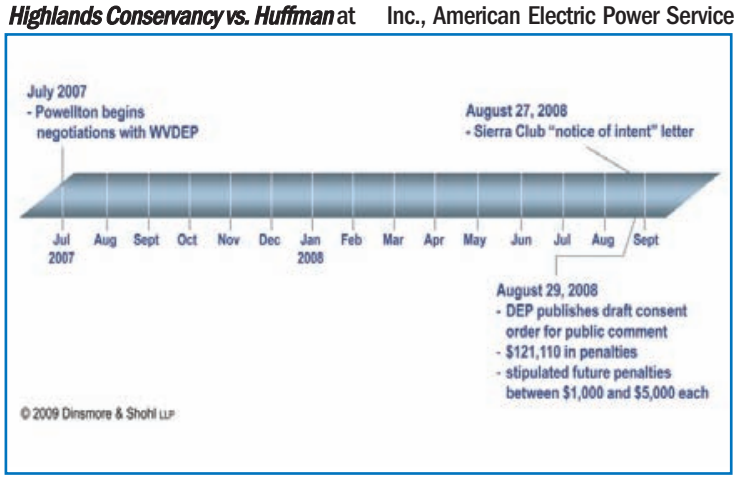

Fig 1 Powellton Coal

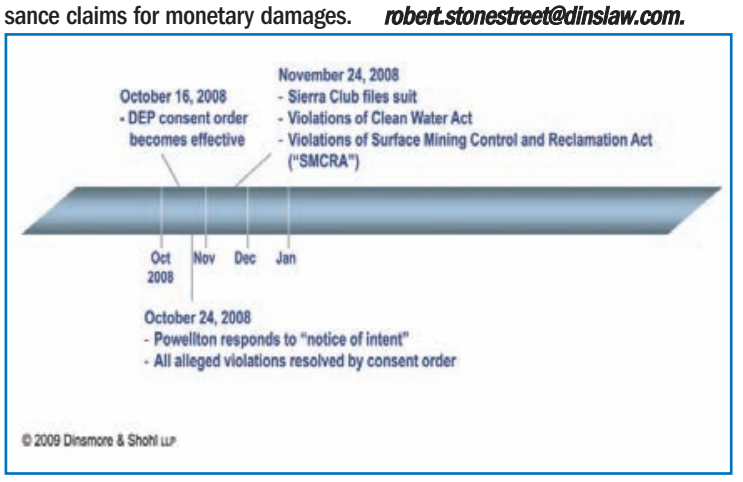

Fig 2 Powellton (Continued)

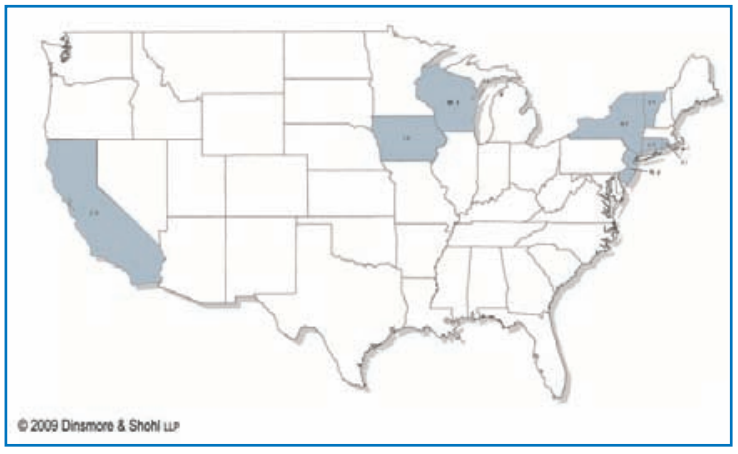

Fig 3 Connecticut vs. American Electric Power Company

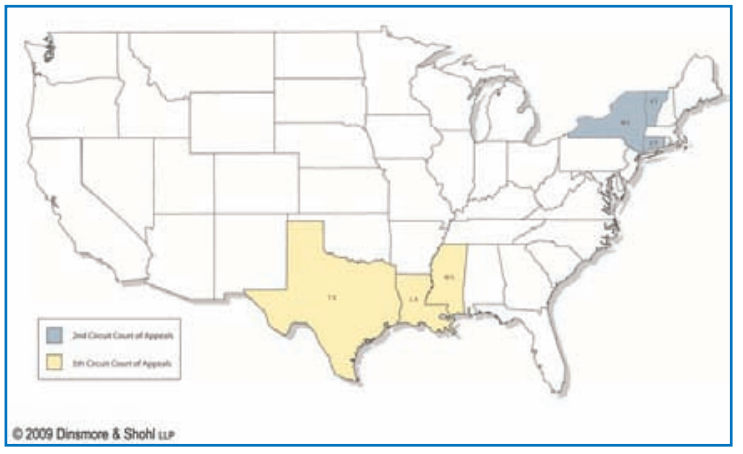

Fig 4 Second and Fifth Circuit Court of Appeals