

# Pesticides, Chemical Regulation, and Right-to-Know Committee Newsletter

Vol. 8, No. 2

June 2007

## FROM THE CHAIR

**Lynn L. Bergeson**  
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The Pesticides, Chemical Regulation, and Right-to-Know Committee works hard to offer top flight and timely information on legal developments pertinent to our members. Our January 2007 newsletter presented substantive articles on nanotechnology, Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preemption, Global Harmonization System of Classification and Labeling (GHS), and Registration, Evaluation, and Authorization of Chemicals (REACH). This issue of the newsletter offers comparable substantive information on a range of topics including pesticides and endangered species litigation, and state and local government regulation of chemicals, and a public service bulletin.

Here is a brief rundown of committee activities in which we are engaged. We invite and urge committee members and others to let us know if you wish to become involved in any of these activities, or wish to suggest additional activities that you believe may interest committee members:

- **Nanotechnology QTs Series**—The committee, along with many other Section of Environment, Energy, and Resources committees, organized a series of eight Quick Teleconferences (QT) on nanotechnology. The first QT was on Oct. 26,

2006, entitled *A Science Primer on Nanotechnology*. Guests included Drs. Sunil K. Garg, The EcoShelf Group, Inc.; Kristin M. Kulinowski, International Center of Nanotechnology; and John Balbus, Environmental Defense. The second QT was on Nov. 16, 2006, entitled *Nanotechnology: What You Need To Know On the Law, Regulation, and Science Policy Overview*, and featured Dr. Jennifer Sass, Environmental Defense; Jim Alwood, United States Environmental Protection Agency (EPA); and Bill Gulledge of the American Chemistry Council Nanotechnology Panel. The third QT occurred on Jan. 16, 2007, and focused on nanotechnology and the Clean Air Act (CAA). Mary Ellen Ternes lead the discussion on air and nanotechnology issues. Panelists included Bob Martineau; Waller Lansden, former air attorney in EPA's Office of General Counsel (OGC); and Patrice Simms, Environmental Defense. The fourth QT occurred on March 29, 2007 and focused on nanotechnology and FIFRA. Mark Duvall led the discussion on pesticides and nanotechnology issues. Panelists included James Chen, Jim Jones, and Pat Mooney. The fifth QT occurred on April 26, 2007 and focused on nanotechnology and the Clean Water Act (CWA). Moderated by Lynn Bergeson, the panelists discussed how the CWA could potentially be invoked to regulate nanotechnology. Panelists included Lisa Farnen, Dr. Barbara Karn, Tim Mealey, and Stephen Zeismann. The remaining QTs that are scheduled are:

**Pesticides, Chemical Regulation, and  
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James C. Chen, Editor

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This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60610.



- May 24, 2007, entitled *Nanotechnology and the Toxic Substances Control Act (TSCA)*.
- June 21, 2007, entitled *Nanotechnology and Environmental Governance*.
- July 11, 2007, entitled *RCRA, CERCLA, and Nanotechnology*.

■ **Keystone**—The committee sponsored a session at the 36th Conference on Environmental Law at Keystone, CO, on nanotechnology entitled *Making Way for the Super Tiny: Are Emerging Legal and Regulatory Frameworks or Nanoscale Materials Adequate?* The discussion featured: Michael T. Lesnick, Ph.D., Senior Partner, Meridian Institute, Nashville, TN; Lynn L. Bergeson, Bergeson & Campbell, P.C., Washington, DC; Norine Kennedy, Vice President-Environmental Affairs, U.S. Council for International Business, New York, NY; Pat Mooney, ETC Group, Washington, DC; and Don Sadowsky, Office of General Counsel, U.S. Environmental Protection Agency, Washington, DC.

■ **ABA Annual Meeting**—The committee has also prepared and submitted on behalf of the Section a proposal for a plenary session at the ABA Annual Meeting in San Francisco in August. The proposal entitled *The Role of the Legal Profession in the Responsible Development of Nanotechnology* was accepted, and the Aug. 10 session will feature a discussion on four topics challenging the legal profession, including: human health and environment issues, right to privacy and Fourth Amendment searches, IP protection for nanotechnology innovations, and the ethical implications of nanotechnology.

Committee members are urged to get involved. If you think a subject merits discussion and/or wish to organize a QT or other program, please let Program Vice Chair Larry Cullen or me know. Thanks for your interest and thanks for all your wonderful ideas and help. We look forward to continuing our success this year.

## ESA AND FIFRA: AN ONGOING TALE OF TWO FEDERAL STATUTES AT CROSS PURPOSES

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James Chen  
Natalia Medley

On Aug. 24, 2006, *Wash. Toxics Coal. v. Dep't of Interior*, 457 F. Supp. 2d 1158 (W.D. Wash. 2006), partially invalidated joint counterpart regulations governing the Environmental Protection Agency's (EPA) compliance with the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544 (2006), when registering pesticides pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y. The joint counterpart regulations were published by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service ("the Services") in August 2004 and were created in order to "enhance the efficiency and effectiveness of the section 7 consultation process." Prior to the rulemaking, several different courts had concluded that compliance with both the ESA and FIFRA was required where the statutes overlap and had ordered the agencies to comply with both statutes. In the wake of *Wash. Toxics Coal.*, EPA and the Services must again confront the difficulties they encountered prior to the promulgation of the regulations and are seeking a workable method to enforce an often times difficult statutory scheme.

### ESA and FIFRA: Statutory and Regulatory Framework

The ESA endeavors to protect and conserve "the ecosystems upon which endangered species and threatened species depend." 16 U.S.C. § 1531(b). In implementing this general policy, Section 7(a)(2) of the ESA specifically mandates:

Each Federal agency shall, *in consultation with and with the assistance of the Secretary*, insure that any action authorized, funded, or carried out by such agency . . . *is not likely to jeopardize* the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after

consultation as appropriate with affected States, to be critical . . . In fulfilling the requirements of this paragraph each agency shall *use the best scientific and commercial data available*.

16 U.S.C. § 1536 (a)(2) (emphasis added).

Administration of the act has been delegated to the Services by the ESA's implementing regulations. 50 C.F.R. § 402.01. In developing procedures for agency consultation under Section 7(a)(2), the regulations provide for both informal and formal consultation: informal consultation is appropriate for actions *not likely* to adversely affect a listed species or critical habitat (NLAA), 50 C.F.R. § 402.13, and formal consultation is mandatory for those actions *likely* to adversely affect a listed species or critical habitat (LAA). 50 C.F.R. § 402.14. The regulations permit alternative consultation procedures in the case of emergencies, including "acts of God, disasters, casualties, national defense or security emergencies, etc." 50 C.F.R. § 402.05. These provisions also contemplate counterpart regulations, whereby consultation "may be suspended for a particular Federal agency by joint counterpart regulations . . .," 50 C.F.R. § 402.04, so long as the regulations "retain the overall degree of protection afforded listed species required by the [ESA] and the[] regulations." 51 Fed. Reg. 19,937 (June 3, 1986).

The other statute at issue in this matter, FIFRA, charges EPA with the regulation of pesticides. EPA is required to register a pesticide when certain conditions are met, even if the pesticide "will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(D). "Unreasonable adverse effects on the environment" is defined by the statute as "[a]ny unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide . . ." 7 U.S.C. § 136 (bb). In making these determinations, EPA formulates Ecological Risk Assessment Statements on a case-by-case basis. Certain pesticides may, however, be exempt from FIFRA requirements under Section 18 if emergency conditions arise. 7 U.S.C. § 136p.

## Legal Challenges to Compliance

Despite the sometimes overlapping requirements of both statutes, EPA has not always fully complied with the ESA in administering FIFRA and the adequacy of the agency's level of compliance with the ESA has been challenged on several occasions. In *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989), plaintiffs brought suit against EPA seeking the cancellation of a pesticide registration due to the agency's complete noncompliance with the ESA. In determining that EPA's actions had adversely affected a protected species in violation of the ESA, the court held that "FIFRA does not exempt the EPA from complying with ESA requirements when the EPA registers pesticides," and that "[t]he ultimate burden remains on the acting agency to insure any action it pursues 'is not likely to jeopardize' protected species." *Id.* at 1299-1300.

Later, in *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024 (9th Cir. 2005), several environmental groups sued EPA for its alleged noncompliance with ESA section 7(a)(2)'s consultation requirements. EPA maintained that it had fully complied with FIFRA and was not bound by the ESA. The Ninth Circuit, in affirming an opinion from the Western District of Washington by then Chief Judge Coughenour, held that EPA had a duty to comply with the ESA when registering pesticides notwithstanding FIFRA, noting that the two statutes have "consistent, complementary objectives," *id.* at 1032, and that FIFRA does not in any way bar enforcement of the ESA. In so holding, the court did recognize that, even though the ESA and FIFRA have similar environmental objectives, each statute enforces different levels of protection; FIFRA requires a cost-benefit analysis to determine whether there is an unreasonable risk of harm resulting from pesticide use, whereas the ESA makes environmental protection its first priority. *Id.* at 1032.

In *Ctr. for Biological Diversity v. Leavitt*, No. C-02-01580JSW, 2005 WL 2277030 (N.D. Cal. Sept. 19, 2005), EPA's registration of certain pesticides was again challenged for being noncompliant with the ESA. The court found that there was sufficient evidence to demonstrate that the pesticides would

likely have an adverse effect on a threatened species, thereby triggering EPA's obligations under Section 7 of the ESA. EPA was required by the court to further investigate and determine whether the pesticides would likely affect the protected species and, if appropriate, engage in formal consultation or "enter into an alternative consultation agreement, in compliance with the counterpart regulations." *Id.* at \*4. Though the court invoked the joint counterpart regulations as a part of its remedy, the Plaintiff here only challenged EPA's duty to consult, and thus the validity of the joint counterpart regulations was not at issue.

## Joint Counterpart Regulations and Alternative Consultation Agreement

On Aug. 5, 2004, the Services published counterpart regulations, developed jointly with EPA and the Department of Agriculture. These joint counterpart regulations established alternative procedures for EPA consultation with the Services under Section 7(a)(2) of the ESA when registering pesticides pursuant to FIFRA. The stated purpose of regulations was "to enhance the efficiency and effectiveness of the existing consultation process under section 7 of the [ESA] . . . ." 50 C.F.R. § 402.41. In doing this, the Services sought to take advantage of one of EPA's strengths, scientific expertise in assessing environmental effects, in order to streamline ESA consultation.

The counterpart regulations permit EPA to proceed with NLAA actions without consulting with the Services if the agencies have entered into an alternative consultation agreement (ACA). 50 C.F.R. § 402.45. According to the preamble to the counterpart regulations, this would enable the Services to concentrate their attention and resources on the formal consultation process for LAA actions and would defer NLAA determinations to EPA's expertise. 69 Fed. Reg. 47,736 (Aug. 5, 2004) (codified at 50 C.F.R. pt. 402).

The counterpart regulations additionally create an optional formal consultation process for LAA actions. 50 C.F.R. § 402.26. Under this provision, EPA may initiate formal consultation with the Services or may prepare an environmental effects determination and

submit it to the Services for review. The Services can then either adopt, modify, or reject EPA's determination. 50 C.F.R. § 402.26 (c)(1). If the Services choose to modify the effects determination, they have to provide a detailed written statement in support of the modification; and if they rejected the effects determination, they are required to draft a biological opinion. 50 C.F.R. § 402.26 (c)(1)(ii), (iii).

Finally, the joint counterpart regulations permit flexible consultation procedures for complex FIFRA registrations. 50 C.F.R. § 402.47. The Services explained that this rule "makes clear that the emergency consultation provisions in existing Service regulations are available to EPA for consultation on actions under FIFRA section 18 . . . ," and that they interpret FIFRA Section 18 emergencies to be "generally comparable" to ESA emergencies as defined in 50 C.F.R. § 402.05. 69 Fed. Reg. 47,739-47,740.

Shortly after the joint counterpart regulations were published, EPA and the Services entered into an ACA governing the implementation of the optional alternative consultation procedures for NLAA actions. The ACA provides for EPA's unilateral enforcement of its compliance with the ESA, with periodic reviews conducted by the Services. The Services will not, however, have any consultative involvement with EPA for NLAA actions under this agreement.

### ***Wash. Toxics Coal. v. Dep't of Interior***

Subsequent to the promulgation of the joint counterpart regulations, a group of environmental organizations brought an action in federal court in the Western District of Washington challenging the validity of the joint counterpart regulations and the ACA, *Wash. Toxics Coal. v. Dep't of Interior*, 457 F. Supp. 2d 1158 (W.D. Wash. 2006). The Plaintiffs alleged, among other things, that the counterpart regulations violated the ESA's Section 7(a)(2) consultation requirement and that the Services acted arbitrarily and capriciously in promulgating the rules. On Aug. 24, the court granted summary judgment in part for the Plaintiffs, invalidating significant portions of the counterpart regulations.

The court first determined that the sections of the counterpart regulations and the ACA enabling EPA to forgo any consultation with the Services for NLAA actions violated the ESA. It started by citing authority from the Ninth Circuit that Section 7(a)(2) consultation is mandatory for NLAA actions. It went on to hold that, despite having no statutory definition, the meaning of "consultation" in the ESA was sufficiently clear and thus *Chevron* step one analysis was appropriate. The court read the counterpart regulations as eliminating all consultation between EPA and the Services for NLAA actions and concluded that this violated the intent of the ESA.

The court decided, however, to uphold other portions of the counterpart regulations. It determined that 50 C.F.R. § 402.46, authorizing the optional formal consultation process for LAA actions, adequately preserved the Services' role under the ESA. The court went on to also approve the emergency provision in the counterpart regulations, permitting EPA to invoke emergency procedures in FIFRA actions, because it merely amounted to a "temporal shifting of the consultations," and therefore did not abridge Section 7(a)(2).

The court additionally determined that the Services themselves were subject to the ESA in promulgating the counterpart regulations and that they had acted arbitrarily and capriciously in doing so. First, it concluded that the Services had violated their Section 7 duty to insure no adverse effect on endangered species or critical habitat and to use the best available science by approving EPA's FIFRA ecological risk assessment under the ESA. The court held that a FIFRA risk assessment was not the equivalent of an ESA adverse affects determination, and that the two statutes have very different environmental objectives. The opinion also paid specific attention to the fact that the Services had voiced their opinion that EPA used inferior scientific methodology in making its ecological risk assessments, but nonetheless went on to treat EPA's conclusions as the equivalent of "not likely to jeopardize" findings under the ESA. Second, the court found that the Services had acted arbitrarily and capriciously in promulgating the emergency provision in the

counterpart regulations because “emergencies” were defined very differently by FIFRA and the ESA.

The Defendants have appealed Judge Coughenour’s opinion, and it currently awaits review in the Ninth Circuit.

## The Future of FIFRA-ESA Compliance

Following the district court’s invalidation of the FIFRA-ESA joint counterpart regulations in *Wash. Toxics Coal. v. Dep’t of Interior*, the future of EPA compliance with the ESA in registering pesticides under FIFRA is unclear. Since the decision, EPA has reverted to conducting consultation with the Services according to the default ESA regulations. This is usually a lengthy and complicated process that severely slows the registration of harmless, useful pesticides. This inefficiency in the consultation process, and ultimate ineffective enforcement of FIFRA, was the catalyst for the joint counterpart regulations. On the other hand, the agencies must now adhere to the default regulations since noncompliance with the ESA is not an acceptable alternative which could have seriously negative environmental effects, creating a greater possibility of dangerous pesticides doing irreparable harm to already vulnerable endangered species and critical habitats and is contrary to congressional intent.

Problems also arise when considering the appropriate scientific standards for ESA compliance. *Wash. Toxics Coal.* made a great deal of the differences between the scientific standards required by the ESA and those actually employed by EPA. The practical difficulties with this position appear to be two-fold. First, as expressed in the preamble to the joint counterpart regulations, the Services are not as capable of conducting extensive environmental effects analyses as EPA, since it routinely does this type of analysis when assessing FIFRA environmental effects. These types of studies are increasingly complex and must be performed on a case-by-case basis under FIFRA. Furthermore, it is unclear whether a scientific methodology that would satisfy the “best scientific and commercial data available” standard as interpreted by Judge Coughenour exists or that the Services could feasibly put such methods into use. As before, prior to

the issuance of the joint counterpart regulations, it will be difficult for the Services and EPA to effectively conduct ESA Section 7(a)(2) consultation, and that process may prove to be unworkable absent any further regulatory or legislative action.

## Conclusion

Enforcement of the ESA has proven difficult when the statute interacts with other complicated legislative schemes such as FIFRA. Prior to *Wash. Toxics Coal.*, the Services and EPA had fashioned a seemingly workable solution to this problem with their joint counterpart regulations, but the future of the consultation is now uncertain. The Services and EPA are left with a default regulatory scheme that yielded little actual consultation prior to the counterpart regulations. The agencies now face the difficult task of devising an alternative practical solution to facilitate compliance with the ESA, and, pending the outcome of appeal, the effects of *Wash. Toxics Coal* on the pesticide registration process are uncertain.

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### LIKE TO WRITE?

The Pesticides, Chemical Regulation, and Right-to-Know Committee welcomes the participation of members who are interested in preparing this newsletter. If you would like to lend a hand by writing, editing, identifying authors or identifying issues, please contact the editor, James C. Chen, at (202) 624-2570 or [jchen@crowell.com](mailto:jchen@crowell.com).

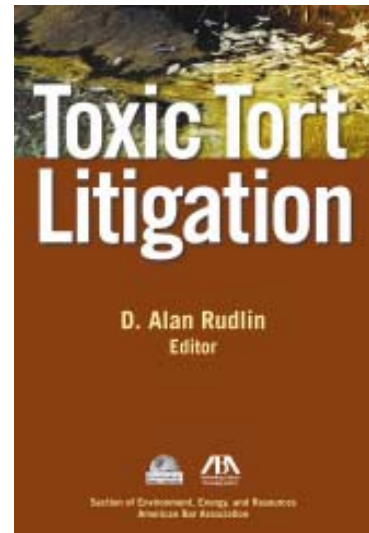
NEW FROM ABA PUBLISHING AND THE SECTION  
OF ENVIRONMENT, ENERGY, AND RESOURCES

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# Toxic Tort Litigation

D. Alan Rudlin, Editor

Trying a toxic tort case is very different from other high-stakes litigation. Cases are complex, involving large numbers of plaintiffs and defendants with multiple lawsuits brought in more than one jurisdiction, and can entail difficulties in identifying the source of the claimed harm. Toxic tort cases require innovative complex litigation procedures and heavily rely on establishing scientific concepts to resolve causation issues. **Toxic Tort Litigation** is a new, practice-focused guide that explores the specific and often unique elements that distinguish this type of litigation.



**Toxic Tort Litigation** explains the differing theories of liability and damages within the toxic tort context, as well as the key procedural and substantive defenses to toxic tort claims. Subsequent chapters cover the important aspects of scientific and medical evidence and causation, including dealing with the opinions of experts in the context of *Daubert* or *Frye* challenges. The book also addresses the important aspects of case strategy, trial management, and considerations in settlement. The final part of **Toxic Tort Litigation** highlights critical aspects in litigating specialized cases, including mold, lead, asbestos, silica, food product and pharmaceutical liability, and MTBE. Includes extensive notes and comprehensive index.

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## STATE AND LOCAL GOVERNMENTS STEP INTO TOXICS REGULATION

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**Lynn L. Bergeson**

According to the Center for International Environmental Law (CIEL), federal inaction on chemicals management and regulation has spurred state and even local government entities to step into toxics regulation. CIEL issued a position paper last May, *Cloudy Skies, Chance of Sun: A Forecast for U.S. Reform of Chemicals Policy*, predicting exactly this result. CIEL points to the fact that at least six states that have enacted legislation or issued some other state initiative to restrict certain polybrominated flame retardants. As discussed below, several recent initiatives tend to support the view that state and local governments are more willing now than previously to consider legislation on and issue regulations pertinent to chemical substances.

**California Biomonitoring**—On Sept. 29, 2006, Gov. Arnold Schwarzenegger (R) signed legislation (A.B. 289) that would require chemical manufacturers to provide information necessary for state officials to identify and measure for chemicals in the air, water, soil, and the human body. To define chemical, the bill cites the federal Toxic Substances Control Act (TSCA) and its definition of chemical substance, which specifically excludes: mixtures; any pesticide when manufactured, processed, or distributed in commerce for use as a pesticide; tobacco or any tobacco product; and any food, food additive, drug, cosmetic, or device when manufactured, processed, or distributed in commerce for use as a food, food additive, drug, cosmetic, or device. Under the bill, a manufacturer would have one year to submit analytical test methods for a chemical and its metabolites or degradation products and other relevant information on the fate and transport of the chemical in the environment. The state could also require the octanol-water partition coefficient and bioconcentration factor for humans for the chemical.

Also on Sept. 29, 2006, Schwarzenegger signed legislation (S.B. 1379) that would create a state biomonitoring program. The bill does not include a list of specific chemicals that would be included. Instead, it

defines designated chemicals as “those chemicals that are known to, or strongly suspected of, adversely impacting human health or development, based upon scientific, peer-reviewed animal, human, or *in vitro* studies, and consist of only those substances including chemical families or metabolites that are included in the federal Centers for Disease Control and Prevention studies that are known collectively as the National Reports on Human Exposure to Environmental Chemicals program and any substances as specified.” Under the bill, a nine-member scientific guidance panel would be formed by Sept. 1, 2007, to guide development and implementation of the program. The first statewide biomonitoring assessment would be due by Jan. 1, 2010. Schwarzenegger stated: “There are literally thousands of chemicals being used in our everyday products in the United States in cleaning supplies, pesticides, cosmetics, and more. It’s important to know more about how those chemicals are building up in our bodies or how they may be affecting our health.”

**City of Berkeley Nano Initiative**—On Dec. 12, 2006, the Berkeley, California, City Council unanimously approved a proposal to require businesses to report nanoparticles being used, provide available toxicological information, and outline measures for safe handling of the materials. Under the proposal, all businesses that manufacture or use nanoparticles must submit a written report of the current toxicology of the nanomaterials reported; and methods for safe handling, monitoring, containing, disposing, and tracking the inventory. The proposal amends Title 15 of the Berkeley Municipal Code, Hazardous Materials and Waste Management, which requires the filing of disclosure information for hazardous materials when certain quantities are exceeded.<sup>1</sup>

According to the Community Environmental Advisory Commission’s (CEAC) Recommendation, Berkeley’s regulations define a hazardous material as “any material that, because of its quantity, concentration, or physical or chemical characteristics, poses a significant present or potential hazard to human health and safety or to the environment if released into the workplace or the environment.”<sup>2</sup> The CEAC Recommendation states that questions about the need to implement a

nanoparticle reporting requirement arose during the design phase of the molecular foundries at the University of California and Lawrence Berkeley Lab. Both institutions, when questioned by the Toxics Management Division, “noted they had no special knowledge or tools to manage nanoparticles.” According to the CEAC Recommendation, after consideration and input from staff, the Lawrence Berkeley Lab, the U.S. Environmental Protection Agency, and the Woodrow Wilson Institute, “the recommended self-reporting was considered to be a minimum regulation for nanotechnology facilities.”<sup>3</sup>

The recommendation notes that, in many cases, the “user will not find sufficient information to determine the health impacts of a material. In such cases, it is hoped that a precautionary approach be used when handling the materials.”<sup>4</sup> The Rationale for Recommendation states:

Nanoparticles behave differently to macro-particle compounds and should be handled and mitigated differently. Handlers may not know much about the materials they are handling, as new information is published, the handlers should keep updating their knowledge, since government is not doing a good job regulating these materials.<sup>5</sup>

According to the recommendation, no alternative action was considered, “but clearly no action has potentially unacceptable consequences for nanoparticle workers and the community.”<sup>6</sup>

**Mississippi PFOA Initiative**—On Jan. 30, 2007, legislation (H.B. 1021) that would authorize a moratorium on new or modified discharge permits for perfluorooctanoic acid (PFOA) issued by the Mississippi Department of Environmental Quality (DEQ) died in the House Conservation and Water Resources Committee. The moratorium would have taken effect July 1, 2007, and would have remained in effect until the Mississippi Health Department could determine that the chemical is not bioaccumulative, persistent, and a likely carcinogen. While the initiative died, that it was considered in the first place is noteworthy.

These and related chemical initiatives are expected to proliferate in the years ahead. Whether these initiatives reflect federal “inaction,” as some assert, a maturing of the “right to know” movement, a growing sophistication of state and local entities in the area of chemicals management, or all of the above, remains to be seen and may not matter in the long run. Stakeholders will need to engage in new venues to protect their interests.

*Lynn L. Bergeson is managing director of Bergeson & Campbell, P.C., a Washington, D.C. law firm focusing on conventional and engineered nanoscale chemical, pesticide, and other specialty chemical product approval and regulation, environmental health and safety law, chemical product litigation, and associated business issues, and president of The Acta Group, L.L.C. and The Acta Group EU, Ltd. with offices in Washington, D.C. and Manchester, UK.*

#### **Notes:**

1. The amendment is available at <http://www.ci.berkeley.ca.us/citycouncil/2006citycouncil/packet/121206/2006-12-12%20Item%2003%20-%20Ord%20-%20Nanoparticles.pdf>.
2. Memorandum from CEAC to Honorable Mayor and Members of the City Council (Dec. 5, 2006) (CEAC Recommendation) at 2, available at <http://www.ci.berkeley.ca.us/citycouncil/2006citycouncil/packet/120506/2006-12-05%20Item%2013%20Manufacture%20Nanoparticle%20Health%20and%20Safety%20Disclosure.pdf>.
3. CEAC Recommendation at 2.
4. CEAC Recommendation at 2.
5. CEAC Recommendation at 3.
6. CEAC Recommendation at 3.

## CURRENT PUBLIC SERVICE OPPORTUNITIES

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**Patricia L. Sims**  
***Vice Chair for Public Service***

Committee on Pesticides, Chemical Regulation, and Right to Know (CPCRRTK) members have several optimal opportunities for public service for 2007. Resource guides and Web sites to assist committee members to participate are provided here.

### ***15th Section Fall Meeting, Sept. 25-30, 2007.***

Public Service Chair Scott J. Sachs will lead the Section of Environment, Energy, and Resources' (SEER's) 2007 Public Service Task Force Project at the 15th Section Fall Meeting in Pittsburgh, Pennsylvania. Contact Task Force site <http://www.abanet.org/environ/publicservice>.

***“Pay It Forward!”*** SEER's Public Service Task Force goals throughout 2007 are to share knowledge and resources to “Pay It Forward,” focusing on nine project areas: (1) educational instruction in schools; (2) development of model regulations; (3) public education materials; (4) pro bono services to conservation and environmental groups; (5) promotion of recycling and reuse; (6) electric industry restructuring impacts on low-income consumers; (7) assistance to law school clinical programs; (8) Earth Day/Law Day projects; and (9) the CARE Program. SEER members reach out to share environmental, energy, and resources legal knowledge and experience.

***Small Business Sector Initiative.*** With the leadership of Chair Lynn Bergeson, CPCRRTK public service focuses in 2007 on assisting the under-served small business sector to achieve compliance with environmental regulatory and statutory mandates. Members are encouraged to participate in U.S. EPA's Community Action for Renewed Environment (CARE), in which EPA awards grants to community groups to address local environmental issues. ABA's initiative, with guidance of SEER's Innovation, Management Systems and Trading Committee, utilizes members' expertise to address releases and other adverse environmental events.

CARE is designed to assist stakeholder groups to advise small businesses and residents of environmentally sensitive business practices to achieve clean-up goals. Legal public service opportunities include identifying environmental problems and stakeholder groups, structuring relationships among stakeholders and partner organizations, advice on environmental requirements applicable to small businesses, stakeholder liability in advising businesses of environmentally sensitive business practices, plan development to address environmental issues, mediation among small businesses and residents, and assistance in taking steps necessary to participate in CARE, including qualifying for EPA grant awards.

Contact: <http://cfpub.epa.gov/care/>. CARE Public Service opportunities are available at EPA Headquarters and in EPA regions, at each of the community groups awarded CARE grants. Contacts are noted both on the ABA SEER public service and EPA CARE Web sites, cited above.

Exemplary ABA SEER public service projects available to members also include:

Science and Technology Committee's online speakers' bureau: On-line Speaker's Bureau by Attorney Name and On-line Speaker's Bureau by Type of Areas of Interest (<http://www.abanet.org/environ/committees/sciencetech/publicservice/>).

Marine Resources Committee's high school student materials, “Swordfish and Sea Turtles,” which educate about marine species fisheries conservation and management plans ([http://www.abanet.org/environ/publicservice/educational\\_instruction.shtml](http://www.abanet.org/environ/publicservice/educational_instruction.shtml)).

Water Quality & Wetlands Committee/Build Your Own Aquifer. This lesson plan, for middle and high school students, illustrates how water is stored in an aquifer, how groundwater can become contaminated, and how contamination can end up in drinking water below ground ([http://www.abanet.org/environ/publicservice/educational\\_instruction.shtml](http://www.abanet.org/environ/publicservice/educational_instruction.shtml)).

International Environmental Law Committee's support of the Philip C. Jessup International Law Moot Court Competition: [www.ilsa.org](http://www.ilsa.org); and Stetson International

Environmental Moot Court Competition: <http://www.law.stetson.edu/environmental>.

Special Committee on Smart Growth and Urban Policy's *Smart Growth and Education: Implications of School Siting* mock public hearing is available online ([http://www.abanet.org/environ/publicservice/educational\\_instruction.shtml](http://www.abanet.org/environ/publicservice/educational_instruction.shtml)). SEER moderators and teachers highlights the importance of location location in environmental and land use decisions.

**Mock Trials.** *United States v. Bunyan* is the classic SEER educational instruction mock trial, in which Federal agencies sue lumberjack Paul Bunyan and Babe the Blue Ox, to enjoin their clear-cutting forests, creating waterways, straightening highways, and creating nuisances. The script features ten speaking parts with a glossary of legal terms. *Bunyan* often is presented at SEER environmental education public service projects at the Section Fall Meeting.

Four ABA Law Day Classics are time-tested with information on types of mock trials, tips on preparing and conducting the trial, simplified steps and rules, glossaries, and guidelines on mock trial competitions. ABA's fourteen Fairy Tale scripts for Grades K-6 include instructions and simplified rules of evidence, in which law professionals act as judges and coaches. Grades 7-12 mock trial materials provide a set of facts, rather than scripts, to allow witnesses and lawyers to create testimony and questioning consistent with the facts. Criminal Law Mock Trials developed by the Constitutional Rights Foundation include hypothetical case facts and pretrial motions to gain understanding of constitutional issues in the criminal trial process. ABA's Street Law Project also has developed materials for competitions and mock trials in Grades 10-12. Further information is available at the Web sites of the National High School Mock Trial Championship (<http://www.nationalmocktrial.org/>); American Mock Trial Association (<http://www.collegemocktrial.org/>); and American Collegiate Moot Court Association.

The SOC Committee on Outreach to Law Students, with assistance from the Law Student Division and the ABA Membership Department, has developed a

"traveling road show" to enhance communication and develop relationships with law students throughout the country (<http://www.abanet.org/dch/committee.cfm?com=YY009000>).

SEER's Public Service Task Force and In-House Counsel Committee has initiated a partnership between ABA and a national environmental education group, Earth Force, to implement a watershed assessment environmental curriculum in underserved city schools, utilizing lawyer mentors: Contact *Earth Force's Project GREEN—The Global Rivers Environmental Education Network*, <http://www.green.org>. ABA members mentor students, consult Fellows on their projects, join field excursions, or act as guest speakers. Contact also <http://www.pinejog.org/WebPages/PineJogFellowship.htm> for Earth Force opportunities.

SEER sponsors the Pro Bono Legal Assistance for Communities (PBLAC) Pilot (<http://www.abanet.org/environ/publicservice/probono.shtml>) to provide legal support to communities undertaking second generation community-based environmental protection (CBEP) efforts. The Pilot coordinates pro bono legal support for specifically defined tasks or projects in communities. PBLAC online materials include PBLAC Description for Volunteer Lawyers, PBLAC Fact Sheet for Communities, and PBLAC Application for Communities. ABA's Pro Bono Services to Conservancy and Environmental Groups also matches conservancy or environmental groups in need of pro bono services with Section members with requisite skills.

SEER's Promotion of Recycling and Reuse encourages lawyers' reduced use (and waste) of paper, and increased use of recycled paper. Methods for law office waste reduction, court rules encouraging use of recycled paper and double-sided printing, and electronic filing and exchange of legal "papers" are explored at *Join the Sustainable Law Office!* ([http://www.abanet.org/publicserv/environmental/sustainable\\_law\\_office.shtml](http://www.abanet.org/publicserv/environmental/sustainable_law_office.shtml)). This Web site, sponsored by the ABA Standing Committee on Environmental Law, introduces law office practices that reduce waste and energy usage and conserve resources.

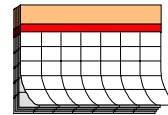
Air Quality Committee programs available online from US EPA's Project A.I.R.E. site (<http://www.epa.gov/region1/students/teacher/aire.html>) include *Translating Science into Public Policy*, which lets students role-play "policymakers" or "scientists" at a climate change panel. SEER members serve as moderator and give opening remarks, introduce the scientist teams and policy makers, and provide exercise wrap-up.

*Writing Environmental Laws* examines interplay of opinions, values, beliefs and science in development of laws (<http://www.abanet.org/environ/committees/airquality/publicservice.shtml>). In *Air Pollution: What's My Solution?* the Air Quality Committee provides a lesson plan to develop environmental legislation ([http://www.abanet.org/environ/publicservice/educational\\_instruction.shtml](http://www.abanet.org/environ/publicservice/educational_instruction.shtml)). Students research smog prevention and air pollution issues; after hearing, the class discusses processes and results in making a decision. SEER moderators emphasize complex challenges in solving environmental issues, e.g., global warming, ozone depletion, ozone transport, and acid rain, which involve economic, social, political and technological dimensions. *Practical Steps You Can Take to Increase Energy Efficiency and Lower Your Personal Contribution to Carbon Dioxide in the Atmosphere* provides a *Family Home Energy Quiz* to increase energy efficiency at home and reduce amounts of carbon dioxide that enter the atmosphere; contact [www.eere.energy.gov](http://www.eere.energy.gov).

Committee members who wish to explore other forms of public service, or who wish to facilitate participation in these current activities, are encouraged to contact the Public Service Vice Chair at [sims.patricia@epa.gov](mailto:sims.patricia@epa.gov). We look forward to seeing you at the SEER Public Service event at the 15th Section Fall Meeting in Pittsburgh!

## ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

### *Calendar of Section Events*



#### **Nanotechnology and Environmental Governance**

June 21, 2007

Nanotechnology Quick Teleconference  
Series

#### **RCRA, CERCLA, and Nanotechnology**

July 11, 2007

Nanotechnology Quick Teleconference  
Series

#### **Emerging Renewables Technologies**

July 18, 2007

Multi-Site National Teleconference/  
Brown Bag

#### **ABA Annual Meeting**

Aug. 9-14, 2007

San Francisco, California

#### **15th Section Fall Meeting**

Sept. 26-30, 2007

Pittsburgh, Pennsylvania

#### **37th Annual Conference on Environmental Law**

March 13-16, 2008

Keystone, Colorado

*For more information, see the  
Section Web site at  
[www.abanet.org/environ/](http://www.abanet.org/environ/) or  
contact the Section at 312/988-5724.*