

# State and Regional Environmental Cooperation Committee Newsletter

Vol. 1, No. 1

October 2003

## CHAIR'S MESSAGE

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**William L. Penny**  
***Wyatt, Tarrant & Combs LLP***  
***Nashville, Tennessee***

Welcome to the State and Regional Environmental Cooperation Committee (SRECC). I have always enjoyed working with this committee and I feel especially privileged to chair SRECC this 2003-04 ABA year. First, I want give a big "THANK YOU" to John Milner, my predecessor, who over the last two years did a lot of work to reorganize and revitalize the committee. We are fortunate that he will continue on as a committee vice-chair this year. Some of the former chairs of this committee have gone on to have positions of leadership in the Section, including our immediate past Section chair, Gene Smary, and Karen Bryan, the Section Membership officer. Still other former chairs are chairing other committees. One of the reasons the Section has been able to have such strong leadership coming from SRECC, is that the committee provides broad opportunity for interaction with other substantive and media specific committees as well as EPA regional offices, state and local bar associations. If you are reading this newsletter for the first time and are not a member of SRECC, I urge you to join. I am confident you will not be disappointed.

SRECC has a number of plans this ABA year which will be described in more detail in upcoming newsletters. SRECC already has one regional stand alone conference scheduled for Region 3, and has proposed Region 2 and Region 8 programs for 2003-04. In addition, we are working with Section chair-elect, Mike Gerrard, to create a list serve for state bar environmental committee chairs. We have formed Regional Councils, each with a vice-chair. These regional vice-chairs will work with members of their councils in identifying opportunities to work with state bars and EPA regional offices in their respective regions to provide worthwhile activities, such as teleconferences, brownbags and information sharing. This year we are working even closer with EPA to provide maximum participation.

On behalf of SRECC, we welcome your participation in all the committee's activities. We are hoping to have regular newsletters that will highlight activities on a regional basis and you can help by submitting articles for publication. Or, just let us know what news is happening in various states of environmental interest. Finally, I want to thank all our vice-chairs for their willing assistance this year. We have a great leadership team, and we are looking for great things this year.

**State and Regional Environmental  
Cooperation Committee Newsletter**  
Vol. 1, No. 1, October 2003  
*Sarah M. Martin, 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, 750 N. Lake Shore Drive, Chicago, IL 60611.



**MTBE BANS COULD LEAD TO  
MIXED RESULTS**

**John A. Poakeart**  
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Effective Jan. 1, 2004, the fuel additive methyl tertiary-butyl ether, commonly known as MTBE, will be banned in Connecticut and New York. Connecticut recently enacted Public Act (P.A.) 03-122, which syncs the effective date of Connecticut's MTBE ban with that of New York's, contained in § 192-g of the New York Agriculture and Markets Law, and is scheduled to take effect on Jan. 1, 2004. Connecticut's law provides that if New York's ban becomes effective as scheduled, Connecticut's ban will go into effect on the same day. If New York's ban does not become effective on Jan. 1, Connecticut's ban will be delayed until July 1, 2004. With these laws, New York and Connecticut join such states as Colorado, Michigan, Washington and California, where bans are already in effect or are scheduled to take effect as of Jan. 1, 2004.

N.Y. Agriculture and Markets Law § 192-g prohibits persons from selling, dispensing or offering for sale of any gasoline containing MTBE as of Jan. 1, 2004, and provides for a civil penalty of up to \$10,000 for violations of the law. In Connecticut, P.A. 03-122 will require the Commissioner of Environmental Protection to develop and implement a plan for the phase-out of the use of MTBE "in a manner that will eliminate MTBE as a gasoline additive in gasoline intended for sale to ultimate consumers in this state."

**MTBE Use**

Over the years, MTBE has been used as a fuel additive for several purposes. In the late 1970s, MTBE use began for its ability to replace leaded gasoline additives and its ability to reduce engine "knock" associated

with the use of leaded gasoline. Since then, MTBE has been used in increasing concentrations – especially since 1990, when the federal Clean Air Act (CAA) was amended. Under the CAA, areas of the country that do not meet the National Ambient Air Quality Standards (NAAQS) set out in the 1990 amendments are required to use reformulated gasoline (RFG), which is gasoline that contains oxygenates such as MTBE. Oxygenation increases oxygen levels in the gasoline, thereby allowing vehicle engines to burn gasoline more completely. Since 1992, areas that have elevated levels of carbon monoxide in the air have implemented the Winter Oxyfuel Program, in which oxygenated fuel is used during the cold winter months. Ethanol is the primary oxygenate used in this program. Areas such as Hartford and New Haven in Connecticut, and Syracuse and New York City in New York had previously implemented the Winter Oxyfuel Program. Areas with elevated levels of ozone (smog) implement a year-round RFG program, in which MTBE is the primary oxygenate used. MTBE is the preferred oxygenate because of economic reasons and its superior blending characteristics. Using reformulated gasoline enables nonattainment areas to better meet the oxygenate requirements under the CAA and to otherwise attain the NAAQS for carbon monoxide and ozone.

### **Problems Associated With MTBE**

Although MTBE was meant to serve honorable purposes, problems began to surface starting in the late 1990s, when studies found that MTBE was contaminating water supply sources. MTBE contamination in ground water can be caused by accidental gasoline spills, leaking underground storage tanks, spills occurring at traffic accidents, or even small spillage occurring when drivers fill their tanks at the gas station. Contamination to surface water can also occur from the use of motor boats. MTBE is highly soluble in

water and is very difficult to remove once the two are mixed. The level of MTBE contamination detected in water supplies has steadily risen, tracking the use and percentage of MTBE contained in gasoline that has also increased over the years.

### **Switching to Other Oxygenates**

While states such as New York and Connecticut may ban MTBE, the federal NAAQS and oxygenate requirements will remain in place, including the oxygenate requirement for nonattainment areas. This may put a strain on the ability for nonattainment areas to remain in compliance, while also threatening to thrust other areas into non-attainment due to increased vehicle emissions. Indeed, while MTBE contamination must be dealt with, the CAA requirements must also be maintained, thus begging the question of what can be done to maintain these standards while not contributing to the further contamination of water supplies. MTBE comprises approximately 11 percent of RFG by volume; thus, to remove MTBE from gasoline would require modification of other portions of the gasoline blend so that MTBE's beneficial effects may be maintained. Toluene could be used as an octane booster, but because toluene can increase toxic vehicle emissions, it is not a practical replacement for MTBE, especially when factoring the relatively high concentrations of MTBE of which RFG is currently comprised. Other compounds such as alkylates or isomerates are potential replacements for MTBE, but have down sides in terms of octane boosting capacity and their limited supply. Ethanol will likely replace MTBE, since like MTBE, it also increases octane and is an oxygenate.

### **New Problems May Result**

However, banning MTBE and switching to ethanol or some other oxygenate may lead to

other types of negative effects. For instance, some predict the switch from MTBE will lead to higher gasoline prices and more polluted air. It is thought that California is already experiencing these effects, where in that state, oil companies have voluntarily begun to phase out MTBE in anticipation of the state ban also scheduled to take effect on Jan. 1, 2004. Further, a switch from MTBE could result in volatile gasoline prices due to a low supply of non-MTBE blended gasoline, as refiners will have to modify refining processes to meet gasoline markets in MTBE versus MTBE-free states, and will also have to modify their sales systems. In the case of New York and Connecticut, such effects are especially real, as neighboring states in the area such as New Jersey have no immediate plans to ban MTBE.

In an effort to prevent such a conundrum, the State of New York earlier in the year requested a waiver from the U.S. Environmental Protection Agency (EPA) of the oxygenate requirement for reformulated gasoline in the nonattainment area encompassing the New York City region. The CAA provides that EPA may waive the oxygenate requirement under certain circumstances. In 2001, EPA denied a similar waiver request made by California.

**STATE AND REGIONAL  
ENVIRONMENTAL COOPERATION  
COMMITTEE NEWSLETTER**

**LIKE TO WRITE?**

The State and Regional Environmental Cooperation 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 Sarah Martin at [smartin@rc.com](mailto:smartin@rc.com).

**COURT RULES TENNESSEE'S 303(d) LIST  
MUST BE PROMULGATED AS A RULE**

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**William L. Penny  
Wyatt, Tarrant & Combs LLP  
Nashville, Tennessee**

On July 11, 2003, a Tennessee trial court granted the City of Cookeville's Motion for Summary Judgment which sought to invalidate the state's 1998 303(d) list and to declare that organic enrichment was an unpromulgated water quality standard. The ruling may have potential widespread ramifications for other states that administer the program in a similar manner as Tennessee.

The court addressed the narrow issue of the authority of the Tennessee Department of Environment and Conservation (TDEC) to impose requirements based upon a receiving stream's appearance on the 303(d) list, and the authority to impose a nitrogen limit based upon a stream's impairment due to organic enrichment. Cookeville initially requested the Tennessee Water Quality Control Board to issue a declaratory ruling, but after hearing argument declined to issue the ruling. The City then filed its petition directly with the Chancery Court of Davidson County. The court ruled that the 303(d) list was invalid, and that organic enrichment was an invalid unpromulgated water quality criteria.

Cookeville operates a publicly owned treatment works (POTW) with a National Pollutant Discharge Elimination System (NPDES) permit allowing it to discharge its treated effluent into Pigeon Roost Creek. As required by Section 303(d) of the federal Clean Water Act, in 1998 TDEC compiled a listing of streams it considered to be impaired, and this list was approved by the U.S. Environmental Protection Agency. Pigeon Roost Creek was placed on the list with the stated cause as "organic enrichment." Cookeville expanded the capacity of its

## COMMITTEE NEWS

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wastewater treatment plant and applied for renewal of its NPDES permit with the new capacity. In issuing the permit, TDEC imposed a nitrogen limit which had never before been imposed.

In issuing the decision, the court relied upon the briefs of the parties and statements of undisputed facts. One of the facts relied upon was a statement in a deposition of the permit writer wherein she stated that in imposing the nitrogen limit, she did not look at actual steam data. Instead, she just “looked at the list,” and because Pigeon Roost was on the list, she imposed the limit. This requirement was not a minimal requirement. To meet the limit, consultants estimated that the expanded treatment would cost as much as \$4 million. Before the City incurred that type of expense, which would then have to be passed back to the residents of Cookeville and other users of the wastewater treatment plant, the City wanted assurances that TDEC had the authority to impose it, and that it was scientifically defensible. The City appealed the permit and challenged the scientific and technical basis for the listing and the imposition of permit limits. The decision by the Chancery Court addressed only the issue of TDEC’s legal authority.

TDEC has filed a notice of appeal with the Tennessee Court of Appeals. Of particular note, TDEC is *not* challenging the portion of the Court’s ruling dealing with organic enrichment. Therefore, any permit, not just Cookeville’s, that had a nitrogen limit placed on the permit because of organic enrichment may need to review the status of this case to see if it impacts them. Certainly if a stream were placed on the 303(d) list solely because of organic enrichment, the basis for the listing is questionable, and the stream by operation of law may lose its impairment status. In addition, the State did not seek a stay of the court ruling on the 303(d) list, so the ruling stands as written unless overturned by the Court of Appeals.

### EPA Region 3

Planning is almost complete for “Key Environmental Issues” in EPA Region 3. This conference, co-sponsored by the state bar associations for Pennsylvania, Maryland, West Virginia and Delaware, will be held on Wednesday, Dec. 3, 2003 at the Hyatt Regency Hotel at the Bellevue in Philadelphia. Panels will provide updates on recent developments in clean air law, clean water law, brownfields redevelopment, and citizen suits. We have invited Secretary of Homeland Security Tom Ridge to be our keynote speaker. Contact either Neil Bigioni at [Bigioni.Neil@epamail.epa.gov](mailto:Bigioni.Neil@epamail.epa.gov) or Bill Cluck at [billcluck@billcluck.com](mailto:billcluck@billcluck.com) for more information.

### EPA Region 8

Regional Vice-Chair John Jacus is working with EPA Region 8 Deputy Regional Counsel Peter Ornstein, state regulators and state bar sections and committees to establish a regional council to explore joint programs and other collaborative efforts. A teleconference or seminar will be considered for late spring or early summer 2004. State bar contacts in Utah, Montana, Wyoming and Colorado have all indicated interest, and several state agencies are also willing to participate. The council’s composition will be solidified in the next month and possible joint programs explored shortly thereafter. Stay tuned for news of a Region 8 activity on issues such as coal bed methane development, environmental regulation in Indian country, regional haze, endangered species developments in the mountain west, wetlands regulation in the post-SWANCC era and many others. We welcome your suggestions for regional topics of interest and speakers/presenters. Contact John Jacus at [john.jacus@dgslaw.com](mailto:john.jacus@dgslaw.com) with your ideas.

**STATE AND REGIONAL ENVIRONMENTAL  
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2003-04 LEADERSHIP**

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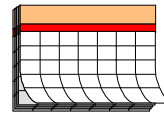
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**AMERICAN BAR ASSOCIATION  
SECTION OF ENVIRONMENT,  
ENERGY, AND RESOURCES**

***Calendar of Section Events***



**11th Section Fall Meeting**

October 8-12, 2003  
Washington, D.C

**Third Annual Indian Tribes, Natural  
Resources and ADR Conference**

October 9-10, 2003  
Durango, Colorado  
(Co-sponsored with the ABA Section of  
Dispute Resolution, for information call  
202/662-1687.)

**The Endangered Species Act Turns 30**

October 23-24, 2003  
Portland, Oregon  
(Co-sponsored with Lewis & Clark Law  
School, for information call 800/222-  
8213.)

**22nd Annual Water Law Conference**

February 19-20, 2004  
San Diego, California

**33rd Annual Conference on  
Environmental Law**

March 11-14, 2004  
Keystone, Colorado

**Eastern Water Law Conference**

May 6-7, 2004  
Hollywood, Florida

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

# New from ABA Publishing and The Section of Environment, Energy, and Resources

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## **Issues of Legal Ethics in the Practice of Environmental Law by Irma S. Russell**

This new book is an essential guide for every environmental lawyer on representing industrial clients, government agencies, individuals, and public interest groups. It focuses primarily on the rules of ethics that raise significant concerns for the environmental practitioner. A proactive approach to ethics helps lawyers avoid problems by making reasoned decisions before ethical problems arise in urgent or complicated context. This book helps you anticipate and analyze these difficult ethics issues. This book also examines the American Bar Association's Model Rules of Professional Conduct (Model Rules), judicial decisions, formal and informal ABA Opinions, and opinions of state boards of professional responsibility. Contents Include:



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