



Oklahoma Bar JOURNAL

Volume 83 ♦ No. 5 ♦ February 11, 2012

Environmental Law

ALSO INSIDE

- LHL Foundation to Hold Fundraising Event
- Professional Responsibility Commission & Professional Responsibility Tribunal Annual Reports

OBA Boot Camp: Oklahoma Lawyers For America's Heroes Feb. 22 - Tulsa, OK

Cosponsored with
the OBA Military
Assistance Committee

Renaissance Hotel
6808 S. 107th E. Ave.

www.okbar.org/cle

8:30

Registration and Continental Breakfast

8:50

Welcome Remarks

Cathy Christensen, 2012 President,
Oklahoma Bar Association, OKC

9

The Real Rules of Engagement and it's Impact in
Family Law Practice

Phil Tucker, Tucker Law Firm, Edmond

9:50

Break

10

The Service Members Civil Relief Act and
Consumer Transactions

Kaleb Hennigh, Ewbank Hennigh & McVay,
PLLC, Enid

10:50

The Military and Criminal Law Issues

Catherine Burton, Oklahoma County District
Attorney's Office, Oklahoma City
Tim "Tarzan" Wilson, Oklahoma County Public
Defender's Office, Oklahoma City

11:40

Lunch (Provided by Pros4Vets) and Exhibit
Showcase

1

Military Divorce: Dividing Military
Retirement Benefits

Phil Tucker, Tucker Law Firm, Edmond

1:50

Military Disability Law and How it Interacts
with Social Security, ERISA, and Private
Disability Policies

Amy Hart, Hart Law Office, P.C., Tulsa

2:40

Break

2:50

Post Traumatic Stress Disorder
TBA

3:40

Ethical Considerations with Pro Bono Public Service
(ethics)

Gina Hendryx, General Counsel, Oklahoma Bar
Association, OKC

4:30

Adjourn

Planner/Moderator:

Deborah Reheard, Chair, OBA Military Assistance Committee, Eufaula

Credit: Approved for 7 hours of MCLE credit, including 1 hour of ethics. This program is approved for 7 hours of judicial credit, including 1 hour of ethics. This free CLE is not available to members not yet CLE compliant for 2011. While you are welcome to audit the course as a refresher, members that attended and received credit for the February 2011 OBA Boot Camp may not attend the February 2012 program for CLE credit.

Tuition: No charge if attendees agree to provide twenty (20) hours of pro bono service through Oklahoma Lawyers for America's Heroes. To register online for free CLE go to <http://www.okbar.org/heroes/signup.php>. \$150 for attendees not participating in the pro bono service. Attendance to this seminar is restricted to licensed attorneys, judges, and paralegals who attend with their supervising attorney. Preregistration is required.

Materials will be provided electronically.

Visit
www.okbar.org/heroes/
for more info on the
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America's Heroes
Program



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Men Helping Men

Oklahoma City • March 1, 2012

Time - 5:30-7 p.m.

Location

The Oil Center – West Building
2601 NW Expressway, Suite 108W
Oklahoma City, OK 73112

.....

Tulsa • Feb. 23, 2011

Time - 5:30-7 p.m.

Location

The University of Tulsa College of Law
3120 East 4th Place, JRH 205
Tulsa, OK 74104

Women Helping Women.....

Oklahoma City • Mar. 8, 2012

Time - 5:30-7 p.m.

Location

The Oil Center – West Building
2601 NW Expressway, Suite 108W
Oklahoma City, OK 73112

.....

Tulsa • March 1, 2012

Time - 5:30-7 p.m.

Location

The University of Tulsa College of Law
3120 East 4th Place, JRH 205
Tulsa, OK 74104

Food and drink will be provided! Meetings are free and open to OBA members. Reservations are preferred (we want to have enough space and food for all.) For further information and to reserve your spot, please e-mail kimreber@cabainc.com.

LAWYERS HELPING LAWYERS ASSISTANCE PROGRAM



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Courtesy of the
Oklahoma Tourism
& Recreation Dept.

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OBA DAY
AT THE
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PLUS

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Bar Members Encouraged to Participate in Upcoming Events

By Cathy Christensen

On Jan. 19, I enjoyed my ceremonial swearing in as the 2012 OBA president before the Oklahoma Supreme Court. It is a memory that I will treasure forever. New OBA governors and OBA leadership joined current members of the Board of Governors, family and friends, professional colleagues and other interested persons in the Oklahoma Supreme Court courtroom for the traditional annual event.

My favorite part of the ceremony (and I have attended seven of them) is listening to the comments made by non-lawyers witnessing the ceremony for the first time. They are awestruck by the formality of the event. They are filled with respect for the highest court in the state of Oklahoma and appreciate the opportunity to witness the court en banc. They are moved by the almost tangible authority of the Supreme Court and the respect demon-

strated between the legislators, attorneys and the court.

In my subsequent reflections of the day, I realized that my presidential initiative to increase opportunities for civic education about the judicial system was accomplished, in small part, that day. Many people, who had previously never been exposed to the judicial system, left the courtroom with a valuable lesson in civic education. The young children in attendance (my great niece and nephew, Logan and Lucas, included) returned to their school classrooms with a story to tell about the third branch of government with an OBA-provided pocket Constitution for show and tell. My nephew tells me the Constitution is one of his favorite things to read — and he had read most of it before swearing-in day.

The OBA mission statement is to assist Oklahoma lawyers in providing justice for all. It is a concise mission statement followed by seven specific goals. In my comments before the Supreme Court, I pledged to take at least one

action to further each of the seven goals of the Oklahoma Bar Association during my year as president. I hope I can enlist your support. Two of those enumerated OBA goals are “to promote activities and programs which service the public” and “to foster the highest ideals of integrity and competence and to maintain the highest standards of conduct and civility.”

Bar association members have two upcoming opportunities to provide valuable service to the public and foster ideals of integrity and competence — supporting the Lawyers Helping Lawyers Foundation Inc. inaugural Cornerstone CLE Banquet and Auction and joining the ranks of the Oklahoma Lawyers for America's Heroes.

JOIN THE RANKS OF OKLAHOMA LAWYERS FOR AMERICA'S HEROES

A free military CLE will be offered Wednesday, Feb. 22, in Tulsa at the Renaissance Hotel. Attorneys will receive seven hours of free CLE (including one hour of ethics) in exchange for a promise to provide 20 hours of legal service to a qualified military home state hero or to serve the heroes program in other valuable ways. Within the next several months, more than 3,000 Oklahoma National Guard troops will return to U.S. soil. Many will be greeted by loving friends, families and communities. Some will, unfortunately, return to legal issues that may hinder their return to civilian

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Feb. 22

Tulsa

Oklahoma Lawyers for America's Heroes Free CLE

March 27

Oklahoma City LHL Foundation Inc. Cornerstone Banquet, CLE & Auction



Cathy Christensen

President Christensen
practices in Oklahoma City.
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CathyChristensenLaw.com
405-752-5565

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EVENTS CALENDAR

FEBRUARY 2012

- 13 **OBA Law-related Education State Social Studies Meeting;** 3:45 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell 405-416-7024
- 14 **OBA Bench & Bar Committee Meeting;** Oklahoma Judicial Center, Oklahoma City and OSU Tulsa; Contact: Barbara Swinton 405-713-7109
OBA Legal Intern Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Candace Blalock 405-238-3486
OBA Civil Procedure and Evidence Code Committee Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton 918-591-5229
- 15 **OBA Law-related Education Close-Up;** 8:45 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell 405-416-7024
OBA Women in Law Committee Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Deirdre Dexter 918-584-1600
- 16 **OBA Law-related Education Close-Up;** 9:15 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell 405-416-7024
OBA Access to Justice Committee Meeting; 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Rick Rose 405-236-0478
OBA Law-related Education Close-Up Teachers Meeting; 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell 405-416-7024
OBA Justice Commission Subcommittee Meeting; 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Drew Edmondson 405-235-5563
OBA Justice Commission Meeting; 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Drew Edmondson 405-235-5563
- 16-18 **OBA President's Summit;** Post Oak Lodge, Tulsa; Contact: John Morris Williams 405-416-7000
- 17 **Oklahoma Association of Black Lawyers Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donna Watson 405-721-7776

For more events go to www.okbar.org/calendar

The Oklahoma Bar Association's official website: **www.okbar.org**

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THE OKLAHOMA BAR JOURNAL (ISSN 0030-1655) IS PUBLISHED THREE TIMES A MONTH IN JANUARY, FEBRUARY, MARCH, APRIL, MAY, AUGUST, SEPTEMBER, OCTOBER, NOVEMBER AND DECEMBER AND BIMONTHLY IN JUNE AND JULY. BY THE OKLAHOMA BAR ASSOCIATION, 1901 N. LINCOLN BOULEVARD, OKLAHOMA CITY, OKLAHOMA 73105. PERIODICALS POSTAGE PAID AT OKLAHOMA CITY, OK. POSTMASTER: SEND ADDRESS CHANGES TO THE OKLAHOMA BAR ASSOCIATION, P.O. BOX 53036, OKLAHOMA CITY, OK 73152-3036. SUBSCRIPTIONS ARE \$55 PER YEAR EXCEPT FOR LAW STUDENTS REGISTERED WITH THE OKLAHOMA BAR ASSOCIATION, WHO MAY SUBSCRIBE FOR \$25. ACTIVE MEMBER SUBSCRIPTIONS ARE INCLUDED AS A PORTION OF ANNUAL DUES. ANY OPINION EXPRESSED HEREIN IS THAT OF THE AUTHOR AND NOT NECESSARILY THAT OF THE OKLAHOMA BAR ASSOCIATION, OR THE OKLAHOMA BAR JOURNAL BOARD OF EDITORS.



Oops! My Client Had a Spill – What Do I Do Now?!

By Gerald L. Hilsher

Anyone who has raised a child or represented a company in a regulated industry knows that accidents will happen. This article will address what should happen when a business regulated by one of the state's environmental agencies has a spill, release or upset that involves environmental contamination.¹ The article will also address the attorney's responsibilities and considerations when the client fails to do the right thing to redress the accident.

The statutory and regulatory framework of state and federal environmental laws is designed to be self-policing. It requires honest and candid environmental permit applications, conscientious monitoring of environmental protection systems and procedures, and truthful reporting to authorities of releases or upsets, and permit deviations. At least that is how it is designed to work in order to prevent significant risk of harm to human health and/or the environment. Because concerns for the public welfare are the driving forces behind the environmental regulatory scheme, crimes can be committed and prosecuted as strict liability crimes, without any apparent *mens rea* or intent required.² Thus, many environmental violations can occur by accident or simple neglect, and the difference between criminal prosecutions versus the imposition of civil or administrative penalties is often how the client and/or attorney respond.

It is important to note that the decision to bring a criminal prosecution, as opposed to a civil or administrative enforcement action, is one based on "prosecutorial discretion." In deciding whether to bring a criminal action, the prosecuting authority (e.g., Oklahoma Attorney General's Office, District Attorney's Office, or U.S. Attorney's Office) will generally consider 1) the significance of the actual or threatened harm; 2) whether there was a failure to report an actual

discharge, release or emission; 3) whether the violation appears to be widespread in the industry requiring deployment of a stratagem of deterrence; 4) whether the conduct was intentional or negligent; 5) whether there is a history of past violations; 6) whether there was concealment of misconduct or whether the violator self-reported; 7) whether there was tampering with monitoring equipment; or 8) whether documents were falsified.³

Similarly, the Oklahoma Department of Environmental Quality (DEQ) has established enforcement priorities and protocols in its Enforcement Standard Operating Procedures.⁴ Self-reporting of environmental violations can mitigate penalty assessments, and is thus an important consideration in DEQ's establishment of administrative or civil penalties or criminal prosecution.⁵ In determining the degree of penalty mitigation appropriate given an appropriately submitted self-disclosure, the DEQ will consider 1) whether the regulated entity voluntarily, promptly and fully disclosed the failure to comply; 2) whether the failure was deliberate or intentional; 3) whether there was a lack of good faith on the regulated entity to understand or attempt to comply with environmental management regulations; 4) whether the regulated entity took immediate and reasonable action to correct the failure; and 5) whether the regulated entity coop-

erated with DEQ.⁶ Oklahoma statutes also list a number of considerations that would allow for mitigation of enforcement penalties for environmental violations.⁷

Owners and operators of facilities who apply for and receive permits for air emissions, water discharges, and solid and hazardous waste disposal are subject to state and federal laws (often implemented by the state through delegated programs) requiring record retention, monitoring requirements, and reporting obligations, including the duty to report extraordinary events like a spill or release.⁸ Non-permitted facilities may also have reporting requirements in the event of a spill or release of a pollutant.⁹ Administrative, civil, and criminal penalties exist for violations of these regulatory requirements.¹⁰

REPORTING DISCHARGES AND SPILLS TO WATERS OF THE STATE

Not all Oklahoma statutes and regulations designed to protect waters of the state from pollution require a *mens rea* or unlawful intent element to criminalize the conduct.¹¹ For instance, Title 27A O.S. §2-6-105(A) makes it unlawful for any person to cause pollution of any waters of the state and does not contain an intent requirement.¹² DEQ regulations require that an owner or operator of a facility or vessel must report any spill or discharge to waters of the state,¹³ pursuant to the federal requirements at 40 CFR Part 117, which lists a long list of hazardous substances from A to Z (acetaldehyde to zirconium tetrachloride).¹⁴ In addition to reporting the spill, an owner or operator must immediately act to stop, contain, clean up and prevent the recurrence of the spill or discharge.¹⁵ A violation of the reporting or cleanup requirement can result in administrative penalties of up to \$10,000 per day of violation or criminal prosecution for a misdemeanor, with a fine of up to \$10,000 per day and up to six months imprisonment, or both such fine and imprisonment.¹⁶

REPORTING RELEASES OF HAZARDOUS WASTES

Releases of hazardous wastes, or releases of materials that become hazardous wastes due to spillage, leakage, or discharge to the land, or to the air, or to surface or groundwater – above reportable quantities, or in excess of the limits of a discharge permit, and which could threaten human health or the environment – must be reported to the DEQ and/or other authorities (e.g., the National Response Center) imme-

diately consistent with applicable requirements.¹⁷ Steps must also be taken to contain or mitigate the harmful effects of the release.¹⁸ The failure to report a reportable spill can result in administrative suspension or revocation of operating permits or licenses and civil penalties of up to \$25,000 per day.¹⁹ Criminal fines of up to \$25,000 and imprisonment of up to six months, or both, for each day or part of a day during which the violation is continued or repeated, can be assessed upon the misdemeanor conviction of failing to report.²⁰

Note that the reporting requirement for spills or discharges of hazardous wastes is on the “owner” and “operator.” However, to the extent that failing to make a report could be treated as “concealment,” an undefined term in the criminal statute, arguably “any person” who knows of the spill and fails to report/conceals it could be prosecuted for the crime of unlawful concealment of hazardous waste.²¹ An element of the concealing hazardous waste statute requires that the violator knowingly subjects “other persons, including but not limited to peace officers, emergency responders or clean-up crews to the potential for immediate or long-term risk to their health and safety.”²² Unlawful concealment of hazardous waste is a felony crime punishable by two to 10 years imprisonment and a fine of up to \$100,000.²³

REPORTING SPILLS AND LEAKS FROM STORAGE TANKS

Unlike the regulation for reporting spills of hazardous wastes, state statutes concerning the Oklahoma Corporation Commission’s authority over storage tanks makes reporting the responsibility of not only the owner and operator, but also the responsibility of those employees and agents *with knowledge* of the storage tank leak or spill.²⁴ Those responsible for making a report of a release from a storage tank system must do so within 24 hours of the release.²⁵ The failure to make such a report can render “any person” who has violated the Oklahoma Storage Tank Regulation Act or any rule promulgated thereunder subject to an administrative penalty of up to \$10,000 for each day the violation continues.²⁶

REPORTING EXCESS AIR EMISSIONS

There are also excess air permit emission reporting requirements under state law.²⁷ DEQ regulations under the Oklahoma Clean Air Act require notification by “the owner or operator”²⁸ to DEQ as soon as possible but no later

than 4:30 p.m. the following working day of the first occurrence of excess emissions.²⁹ A detailed report must follow within 30 days after the start of any excess emissions event describing the event and the actions taken in response to the event.³⁰ A knowing and willful failure to notify or report as required by the Oklahoma Clean Air Act can be prosecuted as a misdemeanor crime, with a fine of up to \$25,000 per day of violation and up to one year in county jail, or both such fine and imprisonment.³¹ The crime becomes a felony and the penalty substantially increased if the person(s) failing to report knew at the time that he or she placed another person in danger of death or seriously bodily injury.³² The felony crime is punishable by a fine of up to \$250,000 and imprisonment for up to 10 years, or both such fine and imprisonment.³³

THE ENVIRONMENTAL ATTORNEY'S OBLIGATIONS

An environmental attorney's ethical obligations are necessarily intertwined with the reporting obligations of his/her client. Under Rule 1.2 of the Oklahoma Rules of Professional Conduct (RPC), a lawyer may not assist a client in conduct that the lawyer knows is criminal or fraudulent.³⁴ Clearly, a lawyer cannot advise the client on how he or she may continue violations of environmental regulations without getting caught or on what actions the client might take to avoid discovery of his or her crime or fraud.³⁵ This does not mean that the lawyer is prohibited from explaining to the client the difference between right and wrong, criminal and non-criminal conduct. RPC 1.2 provides that "a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."³⁶ Thus, an attorney may "discuss, explain, and predict the consequences that would constitute crime or fraud, but a lawyer may not counsel or assist in such conduct," as would make him an "aider or abettor" or a "joint tortfeasor."³⁷

Where the spill or release has already occurred, and is not continuing, RPC 1.2(d) is not implicated, because the crime (*i.e.*, the unreported release) has been completed. But what if the plume of contamination is migrating underground and threatens public or private water supplies? Is passive migration of an earlier spill or release a reportable event? Sorry,

no clear answer here, but discussing with the client the potential implications of passive migration and potential harm to third parties and future potential for criminal and/or civil liability should be paramount.

In the event an investigation by the DEQ or other authorities begins, it is clear that an attorney may not, on behalf of his/her client, knowingly make false representations to environmental regulators to the effect that no spill or release has occurred or that discharge permits have not been exceeded.³⁸ And should the matter go forward to an enforcement hearing, the lawyer may be placed in a position requiring disclosure to a tribunal if his or her client has offered material evidence that the lawyer knows to be false and disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.³⁹ Under certain circumstances, a lawyer's silence may be treated as corroboration of a client's misrepresentation.⁴⁰ If the lawyer fails in his or her duty to avoid assisting the client in continuing a criminal scheme or perpetrating a fraud, the lawyer may not only be sanctioned by the court, but may also be suspended or disbarred under the Code of Professional Responsibility, and even subjected to civil and criminal penalties.

Comments to RPC 1.2 recognize that where the client's course of conduct "has already begun and is continuing," the lawyer's responsibility is "especially delicate."⁴¹ "The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed."⁴² A lawyer may not continue to assist the client in conduct once he discovers the conduct is criminal or fraudulent.⁴³ If the client persists in the criminal or fraudulent conduct, the lawyer is required to withdraw from the representation, and may have to give notice of the fact of the withdrawal, and disaffirm any opinion, document, affirmation or the like.⁴⁴

The attorney who fails to disclose the client's confidential information concerning a hazardous waste release or other spill could be pulled into court under tort theories of a duty to warn, *i.e.*, not to conceal, if harm should occur to innocent bystanders or emergency responders, who come in contact with the hazardous waste or hazardous substances.

The lawyer's imperative to keep client information confidential is the other horn of the

dilemma for the lawyer confronted with illegal or fraudulent conduct committed by or intended by his client. RPC 1.6(a) provides:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

The duty of confidentiality “contributes to the trust that is the hallmark of the client-lawyer relationship.”⁴⁵ Rules of Professional Conduct 1.6 applies “not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”⁴⁶ But there are exceptions to the lawyer’s duty of client confidentiality.

The exceptions to the Rule of Client Confidentiality are found in subsection (b). Under RPC 1.6(b):

A lawyer may reveal information “to the extent that the lawyer reasonably believes necessary:

- 1) to prevent reasonably certain death or substantial bodily harm;
- 2) to prevent the client from committing:
 - (a) a crime; or
 - (b) a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;

- 6) as permitted or required to comply with these rules, other law or a court order.

In discussing the exception that allows for disclosure of confidential client information to prevent “reasonably certain death or substantial bodily harm,” Comment 6 to RPC 1.6 employs an example of an accidental discharge of a toxic waste into a public water supply that could present a risk of contraction of a life-threatening disease or debilitating disease — as being within the exception — despite the fact that the onset of potential harm may not occur until a much later date if the lawyer fails to take action necessary to eliminate the threat. Thus, the risk of “substantial bodily harm” need not be imminent.

Disclosure is certainly permitted under the Rules of Professional Conduct to prevent substantial bodily harm,⁴⁷ but is it mandatory in certain circumstances? In considering this question, it is very important not to overlook RPC 1.6(b)(6), which provides an exception for disclosure of client confidences “as permitted or required to comply with these rules [of Professional Conduct], other law or a court order.” Would the reference to attorney disclosures “as required to comply with other law” include those environmental statutes and regulations, previously discussed, requiring reporting of spills, leaks, discharges and permit exceedances?

Arguably, the disclosure of spills and releases may be required by “other law,”⁴⁸ where the statute is not limited to “owners and operators,” but refers to “any person” or an “employee or agent,”⁴⁹ which would include an attorney.⁵⁰ A similar conclusion concerning the meaning of “any person” was reached in a matter before the New York Department of Environmental Conservation that did not involve a lawyer, but an environmental consultant.⁵¹ In overruling the administrative law judge’s opinion below, the environmental conservation commissioner ruled that the term “any person,” in the statute requiring “any person with knowledge of a spill, leak or discharge of petroleum” to report the incident within two hours after obtaining knowledge should be given “a broad, not limited or restrictive, interpretation.”⁵² The commissioner wrote, “The rationale for requiring ‘any person’ to report a spill or discharge to the department within two hours is obviously to enable stoppage of ongoing contamination as quickly as possible after detection of a spill.”⁵³

Weighing in favor of a conclusion that the lawyer *must* disclose the fact of the release to the regulators, if no amount of persuasion will convince the client to do so, is the “remedial and preventive purposes” behind the criminal statute, *i.e.*, to prevent potential serious harm to persons unaware of the dangers presented by the unlawful abandonment or disposal. The sanctity of human life is a value expressly recognized in the Rules of Professional Responsibility:

Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the

overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm.

Whether the environmental attorney must disclose the fact of an accidental or deliberate release of pollution to the environment caused by his client — or whether he simply may do so to prevent death or serious bodily injury, to prevent a crime or a fraud, notwithstanding the confidentiality owed to his client — is not an easy decision to make. Factors such as the extent of the potential harm caused, the involvement of the attorney in past or future action surrounding the release and explanations to authorities, and the attorney's dependence on the client, especially in the situation of in-house counsel, all add to the calculus of determining the lawyer's appropriate response. Difficult ethics questions can be directed to the Oklahoma Bar Association's ethics counsel from which OBA members can obtain informal advice and interpretations of the rules of attorney conduct. Given the inherent dangers to human health from spills and releases of toxic substances, a lawyer's educated decision on the subject of ethical dilemmas that may arise with reporting releases is a much better strategy than willful blindness or intentional ignorance or trusting to dumb luck.

1. There are also spill or release reporting requirements under federal law, including primarily the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA §103, 42 U.S.C. §9603), the Emergency Planning and Community Right to Know Act (EPCRA §304, 42 U.S.C. §11004), and requirements incorporated within federal programs delegated to state agencies as discussed herein.

2. See e.g., *Magnolia Pipe Line Co. v. State*, 1952 OK DR 42, 243 P.2d 369, 383-84 (Okla. Crim. App. 1952) (Court held that intent was not an element of the crime of contaminating waters of the state, and that the omission of an intent element by the Legislature was intentional, reflecting the "gravity of the problem" with water pollution.)

3. See e.g., Memorandum from Earl E. Devaney, director, Office of Criminal Enforcement, EPA, *The Exercise of Investigative Discretion* (Jan. 12, 1994) (establishing principles to guide the exercise of investigative discretion — EPA Special Agents). www.epa.gov/Compliance/resources/policies/criminal/exercise.pdf; see also EPA Civil Penalty Policies (incorporating elements of EPA Civil Penalty Policies, which provide penalty calculation matrices and worksheets for arriving at a specific penalty amount based upon multiple factors, including degree of departure from regulatory requirements and potential for or actual harm to human health and the environment) at <http://cfpub.epa.gov/compliance/resources/policies/civil/penalty/>.

4. See www.deq.state.ok.us/aqdnew/ComplianceEnforcement/Enforcement_SOP.pdf (incorporating penalty policy elements of delegated federal programs).

5. OAC 252: 4-9-5 - Considerations for self-reporting of noncompliance.

(a) Conditions for not seeking administrative and civil penalties. Except in the case of habitual noncompliance or as otherwise provided in this section, in evaluating an enforcement action for a regulated entity's failure to comply with DEQ rules, the DEQ will not seek an administrative or civil penalty when the following circumstances are present:

1) The regulated entity voluntarily, promptly and fully discloses the apparent failure to comply with applicable state environmental statutes or rules to the appropriate DEQ division in

writing before the division learns of it or is likely to learn of it imminently;

2) The failure is not deliberate or intentional;

3) The failure does not indicate a lack or reasonable question of the basic good faith attempt to understand and comply with applicable state environmental statutes or rules through environmental management systems appropriate to the size and nature of the activities of the regulated entity;

4) The regulated entity, upon discovery, took or began to take immediate and reasonable action to correct the failure (i.e., to cease any continuing or repeated violation);

5) The regulated entity has taken, or has agreed in writing with the appropriate division to take, remedial action as may be necessary to prevent recurrence of such failure. Any action the regulated entity agrees to take must be completed;

6) The regulated entity has addressed, or has agreed in writing with the appropriate division to address, any environmental impacts of the failure in an acceptable manner;

7) The regulated entity has not realized and will not realize a demonstrable and significant economic or competitive advantage as a result of noncompliance; and

8) The regulated entity cooperates with the DEQ as the DEQ performs its duties and provides such information as the DEQ reasonably requests to confirm the entity's compliance with these conditions.

6. *Id.* Note that the EPA also offers an opportunity for self-disclosure pursuant to the EPA's Audit Policy, *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, 65 Fed. Reg. 19618 (April 11, 2000) available at www.epa.gov/compliance/incentives/auditing/auditpolicy.html.

7. See 27A O.S. §2-3-504(H) ("In determining the amount of a civil penalty the court shall consider such factors as the nature, circumstances and gravity of the violation or violations, the economic benefit, if any, resulting to the defendant from the violation, the history of such violations, any good faith efforts to comply with the applicable requirements, the economic impact of the penalty on the defendant, the defendant's degree of culpability, and such other matters as justice may require.")

8. See generally, Oklahoma Environmental Quality Code, 27A §2-1-101 through §4-2-105; Environmental Crimes Act, 21 O.S. §1230.1 – 1230.10; Oklahoma Storage Tank Regulation Act, 17 O.S. §301 – §318.

9. *Id.*

10. *Id.*

11. Negligent violations of the Clean Water Act, 33 U.S.C. §1319(c), may also be pursued criminally by the state of Oklahoma via delegation of Environmental Protection Agency (EPA) authority to ODEQ, or by EPA in its oversight role.

12. Title 27A O.S. §2-6-105(A): "It shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state. Any such action is hereby declared to be a public nuisance."

13. OAC 252:606-1-6 - Spill Reporting

"(a) Report. The owner or operator of a facility or vessel must report to the DEQ any spill or discharge to the waters of the state on or from the facility or vessel according to 40 CFR Part 117. Reports to the DEQ may be telephoned to (800) 522-0206."

14. 40 CFR 117.3.

15. OAC 252:606-1-6 - Spill Reporting

"(b) Response. Whenever a spill or discharge occurs that is required by 40 CFR Part 117 and this rule to be reported to the DEQ, the owner or operator of the facility or vessel must immediately act to stop, contain, clean up and prevent recurrence of the spill or discharge."

16. Title 27A O.S. §2-3-504(A)(1) and (2): "Except as otherwise specifically provided by law, any person who violates any of the provisions of, or who fails to perform any duty imposed by, the Oklahoma Environmental Quality Code or who violates any order, permit or license issued by the Department of Environmental Quality or rule promulgated by the Environmental Quality Board pursuant to this Code:

1) Shall be guilty of a misdemeanor and upon conviction thereof may be punished by a fine of not less than Two Hundred Dollars (\$200.00) for each violation and not more than Ten Thousand Dollars (\$10,000.00) for each violation or by imprisonment in the county jail for not more than six (6) months or by both such fine and imprisonment.

2) May be punished in civil proceedings in district court by assessment of a civil penalty of not more than Ten Thousand Dollars (\$10,000.00) for each violation;

3) May be assessed an administrative penalty pursuant to Section 2-3-502 of this title not to exceed Ten Thousand Dollars (\$10,000.00) per day of noncompliance;...”

17. See delegated RCRA regulatory provisions 40 C.F.R. Parts 262, 264, 265 adopted by reference at OAC 252:205-3-1 including spill response and reporting requirements as part of general facility requirements and contingency plans. A general reporting requirement is also included at OAC 252: 205-13-1 Incidents: “Release of hazardous waste. Upon release of materials that are or become hazardous waste whether by spillage, leakage, or discharge to soils or to air or to surface or ground waters (outside the limits of a discharge permit), or by other means, and which could threaten human health or the environment, the owner or operator shall immediately notify the DEQ and take all necessary action to contain, remediate, and mitigate hazards from the release.”

18. *Id.*

19. Title 27A O.S. §2-7-129.

20. Title 27A O.S. §2-7-130 – “Except as otherwise provided by the Oklahoma Hazardous Waste Management Act or other law, any person who violates any of the provisions of the Oklahoma Hazardous Waste Management Act or rules promulgated thereunder shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject to imprisonment in the county jail for not more than six (6) months, or a fine of not less than Two Hundred Dollars (\$200.00) nor more than Twenty-five Thousand Dollars (\$25,000.00), or by both such fine and imprisonment. Each day or part of a day during which such violation is continued or repeated shall constitute a new and separate offense.”

21. Title 21 O.S. §1230.7 Unlawful Concealment of Hazardous Waste:

“Any person commits the offense of unlawful concealment of hazardous waste who knowingly and willfully subjects any other person, including but not limited to peace officers, emergency responders or clean-up crews, to the potential for immediate or long-term risk to their health or safety by exposure to chemical wastes, by knowingly and willfully:

1) Concealing . . . the unlawful abandonment or disposal of hazardous waste . . .”

22. *Id.*

23. Title 21 O.S. §1230.8(5): “Any person convicted of the offense of unlawful concealment of hazardous waste shall be guilty of a felony punishable by imprisonment for not less than two (2) years nor more than ten (10) years and a fine of not more than One Hundred Thousand Dollars (\$100,000.00).”

24. 17 O.S. §309(A): “No owner or operator, employee or agent of such owner or operator shall knowingly allow a release from a storage tank system to occur or continue to occur without reporting the release to the Corporation Commission within twenty-four (24) hours upon discovering such a release.”

25. *Id.*

26. Title 17 O.S. §311(A): “Any person who has been determined by the Corporation Commission to have violated any provisions of the Oklahoma Storage Tank Regulation Act or any rule promulgated or order issued pursuant to the provisions of the Oklahoma Storage Tank Regulation Act shall be liable for an administrative penalty of not more than Ten Thousand Dollars (\$10,000.00) for each day that said violation continues.”

27. Excess air emissions may also include nonconventional air pollutants, like toxics, which might also require release reporting under CERCLA §103 and EPCRA §304.

28. OAC 252: 100-1-3 defines “Owner or operator” as “any person who owns, leases, operates, controls or supervises a source” [of air pollution].

29. OAC 252:100-9-7 - Excess emission reporting requirements.

(a) “Immediate Notice: Except as provided in OAC 252: 100-9-7(a)(1), the owner or operator of excess emissions shall notify the director as soon as possible but no later than 4:30 p.m. the following working day of the first occurrence of excess emissions in each excess emission event. Notification may be made by telephone 1-877-277-6236, by email excessemissions@deq.ok.gov by web <http://.deq.state.ok.us/excessemissions> or by other method as approved in writing by the director prior to the excess emissions event.”

30. OAC 252:100-9-7 - Excess emission reporting requirements.

(b) “Excess emission report. No later than thirty (30) calendar days after the start of any excess emission event, the owner or operator of an air contaminant source from which excess emissions have occurred shall submit a report for each excess emis-

sion event describing the event and the actions taken by the owner or operator of the facility in response to this event. . . .”

31. Title 27A O.S. §2-5-116(A)(5): “Any person who knowingly and willfully fails to notify or report as required by the Oklahoma Clean Air Act, rules promulgated thereunder or orders or permits issues pursuant thereto shall, upon conviction, be guilty of a misdemeanor and be punished by a fine not to exceed Twenty-five Thousand Dollars (\$25,000.00) per day of violation or for not more than one (1) year imprisonment in the county jail, or both such fine and imprisonment.”

32. Title 27A O.S. §2-5-116 (B)(1): “Any person who knowingly and willfully violates any applicable provision of the Clean Air Act or any rule promulgated thereunder, or any order of the Department or any emission limitation or substantive provision or condition of any permit, and who knows at the time that he thereby placed another in danger of death or serious bodily injury shall, upon conviction, be guilty of a felony and subject to a fine of not more than Two Hundred Fifty Thousand Dollars (\$250,000.00) or for not more than ten (10) years imprisonment, or both such fine and imprisonment.”

33. *Id.*

34. RPC 1.2(d): “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent...”

35. *Id.*; RPC 1.2 Comments 9 and 10.

36. See RPC 1.2(d).

37. *Attorney Grievance Comm’n of Maryland v. Rohrback*, 591 A.2d 488, 495 (Md. 1989).

38. See RPC 4.1 (Truthfulness in Statements to Others).

39. See RPC 3.3(a)(3) – (4) (Candor Toward the Tribunal).

40. See *Rohrback*, 591 A.2d at 497 (“If the circumstances are such that the court would treat the lawyer’s silence as corroboration of a client misrepresentation, as would normally be the case, Rule 3.3 requires the lawyer to volunteer the truth.”)

41. See RPC 1.2, Comment 10.

42. *Id.*

43. *Id.*

44. RPC 1.16(b)(2) (Declining or Terminating the Representation); see also Comment 10 to RPC 1.2 (Scope of Representation).

45. Comment 2 to RPC 1.6 (Confidentiality of Information).

46. Comment 3 to RPC 1.6 (Confidentiality of Information).

47. See RPC 1.6(b)(1).

48. See RPC 1.6(b)(6).

49. See e.g., 21 O.S. §1230.7, 17 O.S. §309(A).

50. See RPC 1.6(b)(6), Comment 12 (“Other law may require that a lawyer disclose information about a client. Whether such a law supercedes Rule 1.6 is a question of law beyond the scope of these Rules.”)

51. See *In the Matter of Middleton, Kontokosta Associates Ltd. and Donald J. Middleton Jr., individually and as vice president*, 1998 WL 939495 (NY Dept of Environmental Conservation December 31, 1998).

52. *Id.*

53. *Id.*

54. See RPC 1.2, Comment 6.

55. RPC 1.6(b)(4) provides an exception to client confidentiality to the extent the lawyer reasonably believes necessary to “secure legal advice about the lawyer’s compliance with these Rules [of Professional Conduct.]”

ABOUT THE AUTHOR



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Greenhouse Gas and Climate Change Current Law, Regulation and Policy

By Mary Ellen Ternes

Regardless of strongly held beliefs regarding climate change, the law now recognizes — at least as of this writing — that greenhouse gases (or GHG) are “air pollutants” regulated by the Clean Air Act. Entities potentially subject to greenhouse gas regulation, and their counsel, should become familiar with the scope and applicability of this new regulatory structure to ensure that compliance requirements are properly considered in project scoping, timing and staffing.

The impact of U.S. climate change and GHG policy extends far beyond mere compliance with the requirements triggered by the Environmental Protection Agency's (EPA) new GHG regulations. The Securities and Exchange Commission has issued guidance instructing publicly held entities regarding proper disclosure of risk factors related to climate change. Municipalities and industry are preparing for impacts expected due to climate change, referenced with the umbrella term “adaptation,” and including measures to mitigate the impact of a rise in sea level and changing weather patterns including severe storms, flooding and prolonged drought. Engineering schools are even developing “adaptation” elements within core engineering curricula. Certainly, lawyers should become more aware of these developments to ensure clients are informed of potential legal issues. This article provides a short summary of these developments for all practitioners.

WHAT ARE GREENHOUSE GASES?

Greenhouse gases are those gaseous substances that absorb and emit radiation (energy from sunlight) within the portion of the sunlight spec-

trum called the thermal infrared range. Generally the concept is that these gases present in our atmosphere, by absorbing and emitting the energy from sunlight, trap this energy within our atmosphere contributing to changes in our climate that may already be occurring.

Greenhouse gases include many naturally occurring substances such as water vapor, carbon dioxide, methane, nitrous oxide and ozone, which may also be emitted from manmade sources, as well as wholly manmade substances, such as chlorofluorocarbons (Freon) and sulfur hexafluoride (SF₆). All greenhouse gases are not created equal. Some greenhouse gases trap a lot more heat than others. The degree to which a greenhouse gas traps heat is called the “global warming potential” or GWP. GWPs are calculated in reference to carbon dioxide, and over time, *e.g.*, 100 years. By definition, carbon dioxide's GWP is 1, with several others as follows: methane, 25; nitrous oxide, 298; HFC-23, 14,800; sulfur hexafluoride, 22,800.¹ Thus, one ton of carbon dioxide would be expected to result in the same degree of heat trapping potential as

0.08 pounds of sulfur hexafluoride (*i.e.*, 1/22,800 tons x 2,000 pounds/ton).

We generate these greenhouse gases in many ways. The most obvious is oxidation of carbon (to form carbon dioxide) from, say, just breathing, as well as from combustion of hydrocarbon fuels. Methane, *i.e.*, natural gas, is both a hydrocarbon fuel, as well as a greenhouse gas emission in its own right, generated by living creatures famously recognized by Justice Scalia quite literally as flatulence in his dissent in *Massachusetts v. EPA*,² — but also fossil fuel extraction, landfills, wastewater treatment systems and other operations. Nitrous oxide (yes, laughing gas) is produced from agriculture soil management, vehicle emissions and nitric acid production, among other sources. Sulfur hexafluoride is generated primarily in manufacturing liquid crystal display (LCD) televisions.³

BACKGROUND AND COMMON CONCEPTS

Some people recall “the Kyoto Protocol” and “cap-and-trade.” The United States has never signed the Kyoto Protocol, an international treaty, linked to the United Nations Framework Convention on Climate Change (UNFCCC), pursuant to which participating countries (not including the United States) agreed to reduce their emissions of greenhouse gases to below 1990 levels by 2012, the end of the first “commitment period.” Some may recall the highly publicized 2009 attempt by the participating countries to achieve commitments beyond 2012, *i.e.*, the 15th meeting of the UNFCCC Council of the Parties in Copenhagen in December 2009. This meeting failed to result in the final agreement originally contemplated, although “The Copenhagen Accord” initiated by President Obama did serve as a basis for recording consensus reached at COP15.⁴ Follow-up meetings of the UNFCCC continue with the participation of the United States.⁵

The UNFCCC relies on findings of the Intergovernmental Panel on Climate Change (IPCC) formed in 1988 by the World Meteorological Organization and the United Nations Environment Programme (UNEP). Itself relying on voluntary contributions from thousands of scientists from 194 United Nations and World Meteorological Organization member countries, the IPCC’s first assessment report in 1990 served as the impetus for the creation of the UNFCCC. The IPCC has developed much of the science upon which U.S. policies rest,

including development of GWPs and basic greenhouse gas emission estimation methods — for engineering types, simple and familiar gross heat and mass balance approaches derived from the 2006 IPCC Guidelines for National Greenhouse Gas Inventories⁶ including, for example, the U.S. GHG Inventory and the EPA’s Mandatory GHG Reporting Rule (discussed herein).

The United States never did enact greenhouse gas “cap-and-trade” legislation either, which you might remember as those hotly-debated legislative proposals including “McCain-Lieberman,”⁷ “Lieberman-Warner”⁸ and “Waxman-Markey”⁹ — each including structures for mitigating greenhouse gas emissions with mandatory caps on emissions and greenhouse gas emission trading schemes. However, in 2006, California enacted its Global Warming Solutions Act of 2006 (AB32 cap-and-trade), which has survived challenge.¹⁰ Also, in 2008, the Regional Greenhouse Gas Initiative (RGGI) was adopted in its 10 member states and held its first emission allowance auction.¹¹

The Kyoto Protocol, proposed U.S. cap-and-trade legislation and state and regional cap-and-trade initiative — including California’s AB32 and RGGI — focus on reduction of greenhouse gas emissions as one way to approach climate change “mitigation.” Mitigation efforts are aimed at avoiding the worst impacts of climate change. One way to reduce greenhouse gas emissions from combustion of fossil fuels at large sources like coal-fired power plants is carbon dioxide capture and sequestration (CCS), which utilizes air pollution control equipment to remove or “capture” carbon dioxide from fossil fuel combustion emissions, compress the captured carbon dioxide, convey the compressed gas to an appropriate geological formation and then inject it into the geological formation where the hope is it will stay permanently.¹² There has also been reference to some fairly remarkable ideas involving “geoengineering,” such as seeding the oceans with iron or infusing our atmosphere with aerosols to reflect sunlight back into space.¹³

Another climate change reference is “adaptation,” which focuses on easing the world’s experiences with the expected impacts of climate change. Adaptation efforts include protecting coastline areas by building sea walls, redesigning infrastructure such as wastewater treatment, drinking water treatment and

power plants to withstand some of the expected impacts of climate change including power and supply chain disruption and water shortages, as well as moving infrastructure above expected rising sea levels.¹⁴

Contemplating these potential risks, the Securities and Exchange Commission expects publicly held companies to address climate change issues in disclosing risk factors. On Feb. 2, 2010, the SEC issued interpretive guidance explaining how public companies must disclose impacts of climate change related issues to shareholders. The categories of disclosures discussed by the SEC include impacts to business from: 1) Legislation and regulation including direct and indirect changes to profit or loss dynamics from cap-and-trade; 2) International accords; 3) Indirect consequences of regulation or business trends, such as decreased demands for goods that produce significant greenhouse gas emissions, or increased demand for services related to carbon-based energy sources, among others; 4) Physical impacts of climate change, including "severity of weather (for example, floods or hurricanes), sea levels, the arability of farmland, and water availability and quality, that have the potential to affect a registrant's operations and results."¹⁵

While Oklahoma practitioners may not find themselves routinely wrestling with California's AB32, RGGI or rising sea levels, Oklahoma entities are impacted by current EPA greenhouse gas regulation and potentially even recent greenhouse gas litigation.

CURRENT U.S. GREENHOUSE GAS REGULATION AND LITIGATION

Greenhouse gas emissions are currently regulated as "air pollutants" pursuant to the Clean Air Act as implemented by the EPA, delegated to the state of Oklahoma, and implemented by the Oklahoma Department of Environmental Quality.¹⁶ As "air pollutants," greenhouse gases are subject to air permitting, which does impose a form of emission restrictions. Additionally, GHG emissions are subject to reporting under a separate EPA rule, the "Mandatory Greenhouse Gas Reporting Rule." The EPA has also adopted regulation governing permanent geologic sequestration of carbon dioxide emissions.

It took a U.S. Supreme Court decision to prompt the EPA to regulate GHG as "air pollutants." On April 2, 2007, in *Massachusetts v. EPA*, the U.S. Supreme Court held for the state of Massachusetts and against the EPA, in a 5-4

decision, finding that the EPA does have authority under the Clean Air Act (CAA) to regulate carbon dioxide.¹⁷ The case was granted certiorari from the U.S. Court of Appeals for the District of Columbia Circuit, *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005). The Supreme Court reversed and remanded the D.C. Circuit's ruling which held that the EPA had not violated the CAA for refusing to regulate greenhouse gas emissions. Although the context of the decision was with regard to mobile source emission standards, the decision removed the EPA's previous basis for finding that it had no jurisdiction to regulate greenhouse gases.

The underlying facts were as follows: In response to previous rulemaking petitions filed by several states urging the EPA to regulate vehicle emissions of greenhouse gases, the EPA had concluded that it lacked authority under 42 U.S.C. §7521(a)(1) to regulate new motor vehicle emissions arguing that carbon dioxide is not an "air pollutant" as defined by 42 U.S.C. § 7602. Further, even if it were, the EPA stated that it would decline to do so because regulation would conflict with other administration priorities.¹⁸

With *Massachusetts v. EPA*, the Supreme Court stated:

The Clean Air Act's sweeping definition of "air pollutant" includes "any air pollutant agent or combination of such agents, including any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air . . ." §7602(g) (emphasis added). On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the "any." Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt "physical [and] chemical . . . substances [s] which [are] emitted into . . . the ambient air." The statute is unambiguous.¹⁹

Thus, the Supreme Court found that the GHGs are *air pollutants* as contemplated by the CAA. Further, the Supreme Court held that the EPA has no discretion to look to other administrative priorities in declining regulation of GHG, but must instead base its decision on whether this particular air pollutant "cause[s] or contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare."²⁰

The Supreme Court remanded the case to the EPA to consider whether it would issue an “endangerment” finding consistent with the CAA. If the EPA were to find an “endangerment” to which vehicle emissions cause or contribute, the CAA requires the agency to regulate emissions of the pollutant from new motor vehicles.²¹

EPA RULEMAKING

On Dec. 15, 2009, the EPA promulgated its final rule, “Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act,” finding that 1) the current and projected emissions of six key well-mixed greenhouse gases, including carbon dioxide and methane, constitute a threat to public health and welfare, and 2) the combined emissions from motor vehicles cause and contribute to the climate change problem which threatens public health and welfare. These findings did not themselves impose any requirements on industry or other entities, but were a prerequisite to the EPA’s adoption of greenhouse gas emission standards for motor vehicles.

On July 29, 2010, the EPA denied 10 petitions to reconsider its 2009 Greenhouse Gas Endangerment and Cause and Contribute Findings, including petitions from Coalition for Responsible Regulation, Competitive Enterprise Institute, Ohio Coal Association, Peabody Energy Company, State of Texas and the U.S. Chamber of Commerce, among others. With its denial, the EPA issued a Response to Petitions in three volumes:

- *Volume 1*, “Climate Science and Data Issues Raised by Petitioners”;
- *Volume 2*, “Issues Raised by Petitioners on EPA’s Use of IPCC”; and
- *Volume 3*, “Process Issues Raised by Petitioners.”

In *Volume 1*, the EPA addressed petitioners’ questions regarding the reliability of global temperature data, email discussions regarding temperature data, assertions that warming has slowed or stopped, questions regarding data sets maintained by NOAA, NASA and the Climatic Research Unit (CRU), and assertions that new studies not previously considered contradict key conclusions in the Endangerment Finding. In *Volume 2*, the EPA addressed claims regarding asserted errors in the IPCC’s Fourth Assessment Report, assertions of bias within

the IPCC, characterizations by petitioners of undue reliance by the U.S. Global Change Research Program and the National Academy of Sciences on the IPCC, and suggestions that the EPA’s process was not rigorous. In *Volume 3*, the EPA addressed process issues raised by the petitioners including those regarding consideration of the CRU emails (referred to as climate-gate), the separate and independent nature of the USGCRP and NRC assessments, issues regarding integrity of peer-reviewed literature and freedom of information act requests.²²

On May 7, 2010, the EPA and the Department of Transportation’s National Highway Traffic and Safety Administration (NHTSA), promulgated new emission standards for certain motor vehicles reducing greenhouse gas emissions and improving fuel economy, with the EPA adopting the standards under the CAA, and NHTSA adopting the standards as Corporate Average Fuel Economy standards under the Energy Policy and Conservation Act.

While these motor vehicle regulations do not apply to stationary sources of greenhouse gas emissions, these final rules are significant in that they automatically triggered application of certain CAA permit programs for stationary greenhouse gas emissions sources. These programs, the Prevention of Significant Deterioration (PSD) and Title V Operating Permit programs, have historically applied to sources of air pollutants “subject to regulation” with emissions exceeding a mere 100 and 250 tons per year. While these thresholds have been reasonably implemented for decades with respect to conventional CAA air pollutants, these thresholds are extremely low for greenhouse gas emissions, especially carbon dioxide which is emitted in such high volumes from very large emission sources such as power plants. For perspective, a single average household in the United States produces more than 25 tons per year of carbon dioxide from fossil fuel combustion. Imposing a GHG emissions threshold equivalent to the threshold utilized for other conventional CAA air pollutants would lead to “absurd consequences,” according to the EPA.

To avoid the broad impact of such low permitting thresholds for greenhouse gas emission sources and relying on a “doctrine of absurd consequences,” — on June 3, 2010, the EPA promulgated its “Prevention of Significant Deterioration and Title V Greenhouse Gas Tai-

loring Rule,” — setting new “major” permitting thresholds of 75,000 tons per year carbon dioxide equivalents (CO₂e) for major modifications of a stationary emission source (*i.e.*, physical change or change in the method of operation) and 100,000 tons per year CO₂e for new major sources.²³ As you might expect, carbon dioxide “equivalents” are merely the mass emission of a greenhouse gas multiplied by its GWP.

Sources triggering PSD permitting due to modification or new construction are required to undergo full PSD permitting, including application of Best Available Control Technology (BACT) and include GHG emissions in CAA Title V operating permits as set forth in the Tailoring Rule. While not “cap-and-trade,” application of BACT is intended to result in emission reductions. BACT means “an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this act emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental and economic impacts and other costs determines is achievable for such facility through application of production processes and available methods, systems and techniques, including fuel cleaning, clean fuels or treatment or innovative fuel combustion techniques for control of such pollutant.”²⁴ In March 2011, the EPA released PSD and Title V Permitting Guidance for Greenhouse Gases. This guidance includes comprehensive discussion as well as flow charts and examples illustrating proper application of the BACT analysis for PSD permits and additional guidance for Title V permitting.²⁵

It is perhaps an understatement to say that the PSD program and BACT application are recognized by industry as both expensive as well as litigious, and a scenario upon which an overlay of GHG uncertainty creates much apprehension. In any case, CAA, GHG and PSD permits are being issued at this time along with Title V GHG operating permits.

“The GHG Reporting Rule requires all facilities meeting defined categories of qualifying sources to report pursuant to the rule...”

EPA GHG REPORTING RULE

The FY2008 Consolidated Appropriations Act²⁶ required the EPA to implement rules requiring GHG reporting. The statute gave the EPA great discretion in determining “appropriate” reporting thresholds, but mandated such reporting in all sectors of the economy, including emissions resulting from upstream production and downstream sources.

On Sept. 22, 2009, the EPA finalized its mandatory reporting rule.²⁷ While the EPA was required to adopt this greenhouse gas reporting rule by the 2008 Appropriations Act, the EPA relied on the CAA Section 114 as the statutory basis for this rule. Section 114 is the section used to request information for enforcement evaluations or policy making. The reporting rule does not impose CAA permitting requirements, but it is enforceable as a CAA requirement, analogous to a request for information.

The GHG Reporting Rule requires all facilities meeting defined categories of qualifying sources to report pursuant to the rule, including many common types of sources in Oklahoma such as: ammonia manufacturing; cement production; electricity generation facilities; lime manufacturing; manure management systems; municipal solid waste landfills; nitric acid production; petrochemical production; petroleum refineries; and oil and natural gas systems. Some categories must report regardless of emissions, while others need only report if their emissions exceed 25,000 metric tons of carbon dioxide equivalents or MTCO₂e. Stationary source combustion sources generally report if the maximum rated heat input capacity is equal or greater than 30 mmBtu/hr, and the emissions exceed 25,000 MTCO₂e. The rule also requires reporting by suppliers of fossil fuels and industrial gases, in addition to some mobile source requirements. The final rule became effective on Jan. 1, 2010, with monitoring required through 2010 for most sources, and GHG emission reports, while originally required to be submitted by March 31, 2011, were first filed upon the EPA’s later completion of its online reporting system with a new deadline of Sept. 30, 2011.

The EPA's mandatory GHG reporting rule, codified at 40 C.F.R. Part 98, is complex and quite detailed, requiring in many cases hiring of additional staff and installation, calibration and maintenance of new equipment. Thus, this rule has represented a significant expense to many impacted entities. In addition to the expense, the data reported pursuant to this rule is public information, and as of Jan. 11, 2012, is now publicly available.²⁸ This data will be used by the EPA to develop future policy, but also represents actual emissions data that reporting entities should consider when reporting emissions in other contexts, such as CAA GHG permitting, compliance and emissions inventories. Given these implications, entities may wish to cease annual reporting by reducing their GHG emissions. Specifically, facilities and suppliers can cease reporting after five consecutive years of emissions below 25,000 metric tons CO₂e/year, after three consecutive years of emissions below 15,000 metric tons CO₂e/year, and then also if the GHG-emitting processes or operations are shut down. Facilities may also submit revised annual GHG reports if necessary to correct errors. Records supporting the annual reports must be retained for three years.

GREENHOUSE GAS AND CLIMATE CHANGE LITIGATION

About 100 lawsuits have been filed in the D.C. Circuit Court of Appeals challenging the EPA's issuance of greenhouse gas rulemaking, including challenges to the EPA's Endangerment Finding, mobile source rules (Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards), Tailoring Rule and Mandatory GHG Reporting Rule (discussed below), with industry and environmental advocacy groups alike suing from different sides of the issue. Many of these challenges are driven by concerns arising from the EPA's permitting of stationary source GHG emissions, which is triggered by the EPA's Endangerment Finding and the mobile source rules.

Though under review by the D.C. Circuit, the EPA's CAA rules promulgated thus far have survived petitions for stay, and thus are currently final and effective, and will remain so unless vacated or remanded by the court, or unless Congress adopts legislation preempting the EPA's regulatory authority to address greenhouse gases under the CAA.

However, even before the EPA promulgated the suite of GHG regulations discussed above, many lawsuits had been filed alleging harm resulting from climate change caused by GHG emissions — with a goal of forcing government to act to address climate change pursuant to various statutes — including the Clean Air Act, the Endangered Species Act and Marine Mammal Protection Act, the Clean Water Act, the Global Climate Change Research Act, the Freedom of Information Act and the First Amendment, the Alternative Motor Fuels Act, and the Energy Policy Act and Energy Independence and Security Act. Plaintiffs in these cases are familiar advocacy groups including, for example, the Center for Biological Diversity, the Natural Resources Defense Council and the Sierra Club.²⁹ Suits have also been filed by the Sierra Club and others to stop government action, including issuance of permits to large greenhouse gas emission sources such as coal-fired power plants, and to enjoin issuance of a final Environmental Impact Statements (EIS) without including climate change impacts within an EIS impact analysis, pursuant to the National Environmental Policy Act (NEPA).

Other lawsuits seek to force companies to disclose climate risk information as well as business risks resulting from laws and regulations intended to address global warming. Still, others have been filed by industry interests against climate change scientists — with plaintiffs including Competitive Enterprise Institute and the American Tradition Institute — suing defendant NASA regarding issues related to “climate-gate.” Recent cases include the “public trust cases.” On May 4, 2011, advocacy groups Our Children's Trust and iMatter filed petitions in every state seeking a declaration that the state holds the atmosphere in trust for citizens and future citizens of that state, and that the state must take action to protect the atmosphere by requiring greenhouse gas emission controls.

The lawsuits reported most widely given the implications for individual greenhouse gas emission sources, particularly before the EPA promulgated its suite of GHG rulemaking, are the common law trespass and nuisance cases filed against large greenhouse gas emission sources seeking injunctive relief or money damages.

One of the most illustrative cases is *Connecticut v. American Elec. Power Co.* This case originated when Connecticut, seven other primarily

coastline states, New York City and three land trusts, sued AEP and four large electric power producers operating coal-fired power plants, seeking relief from damages resulting from climate change (rising sea levels, etc.) based on a claim of public nuisance. The Southern District of New York had dismissed the case in 2005, finding the issue a political question, because “explicit statements of Congress and the Executive on the issue of global climate change in general and their specific refusal to impose the limits on carbon dioxide emissions Plaintiffs now seek to impose by judicial fiat confirm that making the ‘initial policy determination[s]’ addressing global climate change is an undertaking for the political branches.”³⁰ However, in 2009, the 2nd Circuit reversed, holding that the federal courts were competent to deal with well-settled principles of tort and public nuisance, and that, while future laws and regulations might pre-empt the field of federal common law of nuisance, judicial action was not yet displaced.³¹ Also, following *Massachusetts v. EPA*, the 2nd Circuit held that the plaintiffs have a legitimate interest in protecting their resources and citizens from the harm caused by GHG emissions, and that the redress sought, *i.e.*, reduction in GHG emissions, would reduce the harm alleged.

The EPA then promulgated the suite of GHG rulemaking discussed above. Thus, upon review, the Supreme Court addressed industry’s argument that the EPA’s regulation of GHG emissions under the CAA pre-empted any further challenge relying upon a federal common law claim of public nuisance. On June 20, 2011, the Supreme Court held that the CAA and the EPA action authorized by the CAA displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil fuel-fired power plants.³² Specifically, the Supreme Court stated the displacement test as simply “whether the statute ‘speak[s] directly to the question’ at issue,” and that in this case, *Massachusetts v. EPA* had made clear that emissions of carbon dioxide qualify as air pollution subject to the CAA.³³ The Supreme Court found that the CAA Section 111 (New Source Performance Standards or NSPS) direction to the EPA to establish emission standards for categories of stationary sources, and the EPA’s listing of the fossil fuel-fired power plant category, is enough to create carbon dioxide emission limits, leaving “no room for a parallel track” via federal common law. The Supreme Court rejected the argument that federal common

law is not displaced until the EPA actually exercises its regulatory authority in adopting standards, citing the *Milwaukee II* displacement test, “‘whether the field has been occupied, not whether it has been occupied in a particular manner.’”³⁴

The Supreme Court’s displacement finding is expected to impact other similar cases alleging federal common law nuisance. One such case is *Native Village of Kivalina v. ExxonMobil Corp.*, in which Inupiat Eskimos sued oil, energy and utility companies alleging that climate change had melted the Arctic Sea ice that had protected the Kivalina coastline from storms, resulting in erosion and requiring relocation of its residents.³⁵ The case was appealed to the 9th Circuit in November 2009 and remains pending. In *Comer v. Murphy Oil USA*, the U.S. 5th Circuit Court of Appeals partially reversed a lower court’s dismissal of plaintiff claims that corporations, which operated in the energy, fossil fuel and chemical industries, caused the emission of greenhouse gases that ultimately resulted in additional property damage from Hurricane Katrina. The plaintiffs asserted claims of federal common law public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation and civil conspiracy. In reversing, the 5th Circuit rejected the lower court’s reliance on defenses similar to those claimed in *Connecticut v. American Electric Power Co.*, including the political question defense. Ultimately however, the 5th Circuit decided that it would not disturb the lower court’s ruling, upholding a decision to vacate its own reversal. Subsequently, plaintiffs’ petition for review by the U.S. Supreme Court was rejected. Plaintiffs refiled their case on May 27, 2011, relying on Mississippi statute.³⁶

The outcome of these cases and others will illustrate the types of litigation risks awaiting significant greenhouse gas emission sources, sources which have become more visible upon the EPA’s Jan. 11, 2012, public release of data reported pursuant to the EPA’s GHG Reporting Rule. However, litigation risk would appear to increase should the EPA cease to regulate GHG emissions pursuant to the CAA and its regulation no longer displace federal common law causes of action.

CONCLUSION

General practitioners should be aware of the current landscape of greenhouse gas and climate change requirements which may impact

client operations and business risk, requiring significant investment in compliance efforts and increasing exposure to enforcement and litigation. Politics continue to cloud this area of practice, creating a climate of uncertainty exacerbated by the storm of litigation in another upcoming election year. U.S. businesses must endure, gearing up for more permitting and reporting while closely tracking legislative, regulatory and judicial developments.

1. See Intergovernmental Panel on Climate Change Fourth Assessment Report or "AR4," available at www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml. Note, for CAA permitting purposes, the EPA requires use of the GWPs in IPCC's AR2 (at the same link), for consistency with the EPA's Mandatory GHG Reporting Rule. See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 65 Fed. Reg. 31514, at 31522 (June 3, 2010).

2. *Massachusetts v. EPA*, 549 U.S. 497 (2007), Dissent, Justice Scalia, footnote 2 (stating, "Not only is EPA's interpretation reasonable, it is far more plausible than the Court's alternative. As the Court correctly points out, 'all airborne compounds of whatever stripe,' ante, at [1460], would qualify as 'physical, chemical, ... substance[s] or matter which [are] emitted into or otherwise ente[r] the ambient air,' 42 U.S.C. §7602(g). It follows that everything airborne, from Frisbees to flatulence, qualifies as an 'air pollutant.' This reading of the statute defies common sense.").

3. See generally, <http://epa.gov/climatechange/index.html>.

4. To review the Copenhagen Accord, see <http://unfccc.int/resource/docs/2009/cop15/eng/107.pdf>.

5. To see the UNFCCC events, see <http://unfccc.int/2860.php>.

6. The methods used for these inventories are available at http://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml.

7. See Climate Stewardship and Innovation Act of 2007, S. 280 (110th Congress), available at www.govtrack.us/congress/bills/110/280.

8. See Climate Security Act of 2008, S. 2191 (110th Congress), available at www.govtrack.us/congress/bills/110/2191.

9. See American Clean Energy and Security Act of 2009, H.R. 2454 (111th Congress), available at www.govtrack.us/congress/bills/111/2454.

10. See Global Warming Solutions Act of 2006, Cal. Health & Safety Code §38550, available at http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0001-0050/ab_32_bill_20060927_chaptered.html.

11. The Regional Greenhouse Gas Initiative (RGGI) is a cooperative effort among the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Vermont. Together these 10 states have capped and committed to reducing power sector CO₂ emissions 10 percent by 2018. See www.rggi.org.

12. See e.g., www.epa.gov/climatechange/emissions/co2_geosequest.html.

13. See e.g., <http://news.discovery.com/tech/geoengineering-schemes-top-5.html>.

14. See e.g., the Pew Center on Global Climate Change, State Adaptation Plans, available at www.pewclimate.org/what_s_being_done/in_the_states/adaptation_map.cfm.

15. For more information, see SEC Release No. 33-9106, Commission Guidance Regarding Disclosure Related to Climate Change, Feb. 2, 2010, available at www.sec.gov/rules/interp/2010/33-9106.pdf.

16. 40 C.F.R. Part 52, Approval and Promulgation of Implementation Plans, Subpart LL – Oklahoma.

17. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

18. Control of Emissions From New Highway Vehicles and Engines, notice of denial of petition for Rulemaking, 68 Fed. Reg. 52,922 (Sept. 8, 2003) (responding to Oct. 20, 1999, petition for rulemaking to regulate emissions of greenhouse gases (GHG) from new motor vehicles pursuant to 42 U.S.C. §7521(a)(1)).

19. *Massachusetts v. EPA*, 549 U.S. at 528-29.

20. *Id.* at 497-498, quoting CAA §202(a)(1), 42 U.S.C. §7521(a)(1).

21. See CAA §202(a)(1), 42 U.S.C. §7521 (a)(1) (stating the EPA "shall by regulation prescribe ...standards applicable to the emission of any air pollutant from any class of new motor vehicles.").

22. For more information on the EPA's denial of the endangerment petitions, see www.epa.gov/climatechange/endangerment/petitions.html.

23. 75 Fed. Reg. 31514 (June 3, 2010).

24. CAA §169(3).

25. See www.epa.gov/nsr/ghgdocs/ghgpermittingguidance.pdf.

26. H.R. 2764; Public Law 110-161.

27. See Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56260 (Oct. 30, 2009), available at www.epa.gov/climatechange/emissions/ghgrulemaking.html.

28. EPA made available all GHG reporting data on Jan. 11, 2012, at this link: www.epa.gov/climatechange/emissions/ghgdata/index.html.

29. See Michael Gerrard's Climate Change Litigation in the U.S. Chart — Columbia Law School Center for Climate Change Law, available at www.climatecasechart.com.

30. *Connecticut v. American Elec. Power Co.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009).

31. *Connecticut v. American Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009).

32. *American Elec. Power Co., v. Connecticut*, 131 S.Ct. 2527 (2011).

33. *Id.* at 2530.

34. *Id.* at 2531. Opinion available at www.supremecourt.gov/opinions/10pdf/10-174.pdf.

35. *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863 (N.D. Cal. 2009) (order granting defendants' motion to dismiss for lack of subject matter jurisdiction).

36. *Comer v. Murphy Oil*, 585 F.3d 855 (5th Cir. 2009), *reh'g en Banc granted*, 598 F.3d 208 (5th Cir. 2010), *on reh'g en Banc, appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010). See www.climatecasechart.com for tracking this tortured case.

ABOUT THE AUTHOR



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Confidential OBA-ADR Section Questionnaire for Mediators

STATEMENT OF PURPOSE: OBA member attorneys increasingly ask the OBA-ADR Section to identify OBA attorneys that hold themselves out to be qualified Mediators. We are unaware of any statewide list of qualified attorney Mediators or any list of Oklahoma attorneys that hold themselves out to the public as being qualified Mediators, and we do not want to create the appearance that we endorse or recommend any particular attorney to provide Mediation services. Inquiries have led us to consider what we could do to address this lack of information.

The Section has decided to compile a database of attorneys in each county that hold themselves out to be Mediators who are qualified by training, experience, or both. At this time we are simply gathering information and will look to the OBA (and perhaps the Judiciary and other sources) for guidance as to whether or not this data should be made public, and under what circumstances.

Accordingly, if you represent yourself to the public
to be a qualified attorney Mediator,
please complete, sign and return
**the OBA-ADR SECTION CONFIDENTIAL QUESTIONNAIRE
FOR MEDIATORS,**
which is available online at www.okbar.org.

You may mail your completed Questionnaire to:

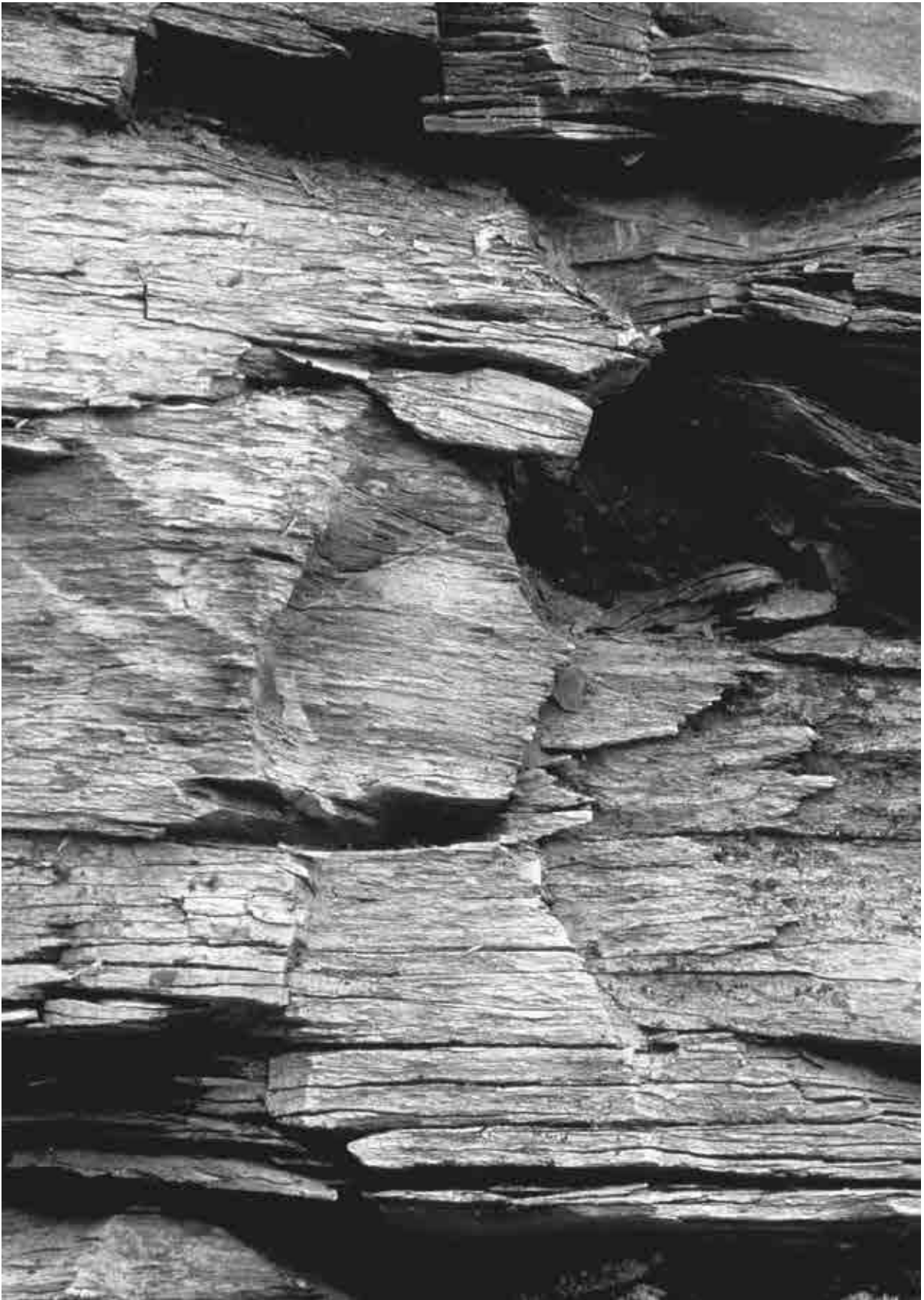
OBA Mediator Database Project
P.O. Box 53036
OKC, OK 73152-3036

Or scan and email it to michael@christensenlawgroup.com.

The Section will hold all completed Questionnaires in confidence and will not release information to the public without your advance consent.

DEADLINE FOR SUBMISSION: MARCH 30, 2012

***Direct any questions you may have to D. Michael O'Neil,
(405) 232-2020, michael@christensenlawgroup.com.***



Fracking¹ Face-Off

By LeAnne Burnett

For years geologists have known of the presence of natural gas in shale rock, but until recently could not cost-effectively extract it. Similarly, for decades, hydraulic fracturing — i.e., “fracking” — and horizontal drilling have been used in the production of oil and natural gas. In the last few years, however, advances in technology have brought the two processes together to make shale gas production economically viable. This convergence has transformed shale formations from marginal sources of natural gas to substantial contributors to the nation’s natural gas supply, ushering in a resurgence in domestic natural gas production. U.S. gas output expanded 20 percent in the past five years as “fracking” allowed drillers to extract gas from shale formations once considered impenetrable, most notably the Barnett Shale in Texas and the Marcellus Shale in Pennsylvania up through New York.² In Oklahoma, promising shale plays exist in the Arkoma Basin of southeastern Oklahoma and in the Anadarko Basin of the western part of the state.

Public awareness evolves from the proliferation of gas production in areas that are not used to such activity. Such proliferation also drives the concerns of environmental groups, as demonstrated by movies such as the 2010 documentary, *Gasland*³ and recent claims that fracturing is responsible for heightened seismic activity, i.e., earthquakes. Although these sources also suggest that regulation of the oil and gas industry is lacking, the recent focus on hydraulic fracturing processes has resulted in increased federal attention in this area. Although many issues remain pending and unsettled at the present time, this article proposes to give an overview of what has happened to date at the federal level with regard to hydraulic fracturing, including a general description of ongoing litigation that has the potential to impact oil and gas operations nationwide.

REGULATORY FRAMEWORK AND A GROWING INTEREST BY THE EPA IN FRACKING

In Oklahoma several agencies regulate different aspects of the oil and gas industry. The Oklahoma Corporation Commission is responsible for oil and gas drilling, production, pipelines, storage tanks and pollution abatement; the Oklahoma Department of Environmental Quality regulates air emissions, waste water treatment systems, drinking water, underground injection wells and other issues that impact oil and gas production or activity; and the Oklahoma Water Resources Board is responsible for issuing and overseeing water use permits. All have regulatory roles.

Current federal regulations also govern many aspects of natural gas and oil exploration and development. The Clean Water Act, the Safe Drinking Water Act, the Clean Air Act, the National Environmental Policy Act, the Endangered Species Act, and the Comprehensive Environmental Response, Compensation and Liability Act (Superfund) may not mention fracking specifically, but they do regulate and have implications for various aspects of the oil and gas industry. New regulations are expected to expand the federal role. The Department of the Interior is expected to propose rules that require disclosure of chemicals injected underground. The Energy Department's Shale Gas Advisory Committee is set to release its final recommendations for regulating fracking. Finally, Congress once again has bills before it to expand the Safe Drinking Water Act to specifically regulate fracking. In short, at least currently, momentum appears to be shifting toward federal regulation.

In 1974, Congress enacted the federal Safe Drinking Water Act (SDWA).⁴ Part C of the act established the Underground Injection Control (UIC) program.⁵ The UIC program prohibits any "underground injection" (defined as the "subsurface emplacement of fluids by well injection") that endangers underground drinking water sources.⁶ EPA policy into the 1990s was that this law did not apply to hydraulic fracturing because the UIC program applied only to operations where the "principal function" of an injection was the placement of fluids, and the principal function of fracking is resource recovery.⁷ States were left to regulate fracking on their own.

Early litigation discussed whether the SDWA provided authority to regulate fracking or fracking fluids.⁸ *Legal Envtl. Assistance Found., Inc. v. U.S. E.P.A.*, 118 F.3d 1467, 1471 (11th Cir. 1997) (LEAF 1) reviewed EPA's approval of Alabama's UIC program. EPA approved the program because it found fracking does not fall within regulatory definition of underground injection. In *Legal Envtl. Assistance Found., Inc. v. U.S. E.P.A.*, 276 F.3d 1253 (11th Cir. 2001), cert. denied, 537 U.S. 989 (2002) (LEAF 2), the court reviewed EPA's approval of the state UIC program for fracking fluids. Though the impact of the LEAF decisions was limited to Alabama, they are attributed with forcing EPA to evaluate its oversight of hydraulic fracturing under the SDWA. In 2004, EPA released a study⁹ that concluded the threat to drinking water from

hydraulic fracturing was "minimal."¹⁰ Shortly thereafter the Energy Policy Act of 2005 exempted fractured wells from being re-classified as injection wells.¹¹

Even so, a shift in perspective became evident in 2009 with congressional consideration of HR 2766, also known as the "FRAC Act," to repeal the exemption for hydraulic fracturing in the SDWA.¹² In a similar vein, in March 2010, EPA announced a new "Hydraulic Fracturing Research Study"¹³ designed to research the impact of hydraulic fracturing on human health and the environment through drinking water sources. The first report is due in late 2012.

Post mid-term elections, the FRAC Act died, and the SDWA exclusion survived.¹⁴ On the other hand, EPA moved toward a stronger emphasis on oil and gas regulation. The EPA's National Enforcement Priorities for 2011-2013 shifted to emphasize the energy extraction sector, a newly added emphasis since the 2008-2010 priorities.¹⁵

THE 'RANGE RESOURCES' LITIGATION

Current litigation in the Barnett Shale in Texas confirms EPA's emphasis. The "Range Resources" litigation has expanded from an EPA emergency unilateral order into a full-fledged brouhaha that spans state and federal agencies and state and federal courthouses simultaneously.

The case began on Dec. 7, 2010, when EPA Region 6 (Texas, Oklahoma, Kansas, Arkansas, Louisiana and New Mexico), issued an emergency administrative order under the SDWA.¹⁶ The order was directed to Range Resources Corporation and Range Production Company (Range). The order found that methane was present in the aquifer supplying two domestic water wells; that Range caused or contributed to the endangerment; that state and local authorities had not taken sufficient action and did not intend to do so; and that the order was necessary to protect the "health of persons."¹⁷ EPA unilaterally issued the "imminent and substantial endangerment order" under Section 1431 of the Safe Drinking Water Act, and provided relatively short deadlines such as the following:

***48 hours:** provide replacement potable water supplies and install explosivity meters at the homes of the consumers of the two water wells;

***Five days:** Survey and submit a list of all private water wells within 3,000 feet of well bore tracks and develop a plan to sample all such wells and determine impact;

***10 days:** (Five days after sampling plan submitted), Sample;

***14 days:** submit plan to conduct soil gas surveys and indoor air analyses;

***60 days:** develop and submit plan to identify gas flow pathways to the aquifer; eliminate gas flow to the aquifer; and remediate any affected areas of the aquifer.

The facts leading to the order include that Range drilled and completed two horizontal wells in the Barnett Shale at a depth of roughly 5,800 feet. Shortly thereafter a landowner in the area complained to EPA Region 6 that his fresh-water well began producing methane gas. The question became whether this was an event attributable to the Range drilling or an ongoing and well-documented historical occurrence due to the presence of a very shallow gas-bearing formation closer to the surface.

From the outset Range took the position that it did not believe its new wells were the source of the problem and set out to methodically prove it. Even so, it consulted with EPA and provided alternative water and installed explosivity meters.¹⁸ As matters continued, Range informed EPA that it disputed the validity of the emergency order, and would not abide by some of its terms. Three things happened in rapid succession: The Texas regulatory agency held hearings; The EPA sued Range in federal district court to enforce its unilateral order; and Range petitioned the 5th Circuit Court of Appeals for review of the EPA order.

TRRC FACES OFF WITH EPA

The day after the EPA emergency order issued to Range, the Texas Railroad Commission (TRRC), the state of Texas's governing body with jurisdiction similar to that of the Oklahoma Corporation Commission, set a hearing to determine whether Range's operation of gas wells had caused or contributed to the contamination of water wells. The TRRC had also received complaints from the water well owners, and had also investigated those complaints.¹⁹ A TRRC hearing, held in January 2011, concluded with a March 2011 proposal for decision that Range had not caused or contributed to contamination of the water wells at issue, and that the gas in the water wells was

from a different source of gas than the source Range's gas wells were tapping.²⁰ TRRC Commissioners also indicated during the proceedings that state officials did not welcome EPA's perceived interference in state affairs.²¹

EPA SUES RANGE

Range declined to comply with parts of the EPA's unilateral order, and on Jan. 18, 2011, EPA sued Range in the Northern District of Texas, seeking injunctive relief and penalties.²² EPA sought statutory penalties that added up to \$16,500 per day for each day that Range refused to comply with the EPA's order under 42 U.S.C. §300i(b).

Under the SDWA, Section 1431(a) provides the EPA with two options: Begin a civil action in district court or issue an administrative order. If the recipient of the order does not comply with its terms, Section 1431(b) allows EPA to sue in district court to enforce the order and obtain damages for violating the order.²³

“From the outset Range took the position that it did not believe its new wells were the source of the problem and set out to methodically prove it.”

Range moved to dismiss,²⁴ arguing that enforcement is premature because there had been no final agency action.²⁵ Range also argued that EPA had not plead or proved that Range caused the contamination at issue. EPA responded that it did not need to plead that Range actually caused the contamination — only that Range violated its emergency order. Range did not challenge EPA's ability to issue emergency orders or other administrative orders. Range argued, instead, that such orders cannot be enforced without requiring EPA to prove that Range was responsible for the contamination of the water wells. Range argued that allowing EPA to enforce the emergency unilateral order or recover penalties for violation of the order without pleading or proving a violation of law would violate Range's due

process rights. EPA countered that the order was issued under emergency circumstances, so that a lack of a pre-deprivation hearing would not violate due process.

In its ruling on the motion to dismiss, citing to *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997), the district court determined the EPA Emergency Order was a final agency action and ripe for review.²⁶ The court noted that it was

“struggling with the concept that the EPA can enforce the Emergency Order and obtain civil penalties from Range without ever having to prove to this Court, or another neutral arbiter, that Range actually caused the contamination of the Lipsky and Hayley wells, or without ever giving Range the opportunity to contest the EPA’s conclusions. That being said, the Court is also impressed by the EPA’s response that the statutory scheme that provides for an appeal by Defendants to the Fifth Circuit is sufficient for due process purposes.”²⁷

The court then denied without prejudice Range’s motion and issued a stay of the litigation, deferring to the Fifth Circuit’s evaluation of the EPA emergency order.

RANGE SUES EPA

On Jan. 20, 2011, Range filed a petition for review of EPA’s emergency administrative order in *Range Resources Corporation, and Range Production Company, v. United States Environmental Protection Agency, Lisa Perez Jackson, and Alfredo Armendariz*, Case No. 11-60040 in the U.S. Court of Appeals for the 5th Circuit. Briefing on the issues is complete. The 5th Circuit heard oral argument on Oct. 3, 2011. The argument has continued in subsequent filings. To date the 5th Circuit has not issued a decision.

CONCLUSION: AWAITING DECISION FROM THE U.S. SUPREME COURT?

It may be that the *Range Resources* cases will await the outcome of the U.S. Supreme Court’s decision in *Sackett v. United States Environmental Protection Agency*, 622 F.3d 1139 (9th Cir. 2010). The issue in *Sackett v. EPA*, centers on whether the Sacketts — who filled in a half acre of their property near Priest Lake, Idaho, with dirt and rock — have a due process right to pre-enforcement review of an EPA-compliance order under Section 404 of the Clean Water Act (the dredge and fill permit requirement). The compliance order unilaterally prevented further construction and required the Sacketts to

restore the wetland. The United States Supreme Court could address either due process rights to pre-enforcement review of a unilateral order or it could address the EPA’s alleged expansive definition of wetlands that arguably led to property right infringement.

To the extent that the *Sackett* decision focuses on the unilateral order, it has ramifications for the EPA’s ongoing initiative to use the SDWA’s emergency authority to regulate fracking. The exact ramifications for the oil and gas industry as a whole are uncertain. But stay tuned, because the unfolding story will be worth watching.

1. Hydraulic fracturing, often called fracking, fracing or hydro-fracking, is the process of initiating and subsequently propagating a fracture in a rock layer, by means of a pressurized fluid, in order to release petroleum, natural gas, coal seam gas, or other substances for extraction. Charlez, Philippe A. (1997). *Rock Mechanics: Petroleum applications*, Editions Technip.

2. The proliferation of activity into new shale plays has increased dry shale gas production in the United States from 1 trillion cubic feet in 2006 to 4.8 trillion cubic feet, or 23 percent of total U.S. dry natural gas production, in 2010. Wet shale gas reserves increased to about 60.64 trillion cubic feet by year-end 2009, when they comprised about 21 percent of overall U.S. natural gas reserves, now at the highest level since 1971. U.S. Energy Information Administration, U.S. Crude Oil, Natural Gas, and Natural Gas Liquids Reserves (Washington, DC, Nov. 30, 2010), www.eia.doe.gov/oil_gas/natural_gas/data_publications/crude_oil_natural_gas_reserves/cr.html.

3. *Gasland* is a 2010 documentary film written and directed by Josh Fox. *Gasland* premiered at the Sundance Film Festival in 2010. In 2011 it was nominated for an Academy Award. At one point in the movie, the apparent viewpoint of the film’s director is indicated by a voice-over that states: “What I didn’t know was that the 2005 energy bill pushed through Congress by Dick Cheney exempts the oil and natural gas industries from the Clean Water Act, the Clean Air Act, the Safe Drinking Water Act, the Superfund law, and about a dozen other environmental and Democratic regulations.” *Gasland* at 6:05.

4. 42 U.S.C. §300f *et seq.* The act was amended in 1986 and 1996, yet fracking was not targeted.

5. 42 U.S.C. §300h *et seq.* EPA issues regulations establishing minimum requirements for states to follow. When states choose not to regulate, EPA runs the program.

6. 42 U.S.C. §300h(b)(1). Underground injection “endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system’s not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons.” 42 U.S.C. §300h(d)(2).

7. *Legal Envtl. Assistance Found., Inc. v. U.S. E.P.A.*, 118 F.3d 1467, 1471 (11th Cir. 1997). While the SDWA specifically excludes hydraulic fracturing from UIC regulation under 42 U.S.C. §300h(d)(1), the use of diesel fuel during hydraulic fracturing is regulated by the UIC program.

8. Both “Leaf 1” and “Leaf 2” remanded for consideration of the decisions. See, also, “Did the 11th Circuit Crack ‘Frac’? — Hydraulic Fracturing after the Court’s Landmark LEAF Decision”. *Virginia Environmental Law Journal* 18 (4). 1999.

9. “Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs,” EPA 816-R-04-003.

10. *Id.*

11. Congress provided for exclusions via the Energy Policy Act of 2005, 42 U.S.C. §13201 *et seq.* (2005): “The term ‘underground injection’ — (A) means the subsurface emplacement of fluids by well injection; and (B) excludes — (i) the underground injection of natural gas for purposes of storage; and (ii) the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.”

12. 111th Congress (2009-2010) H.R.2766.IH

13. <http://yosemite.epa.gov/opa/admpress.nsf/0/BA591EE790C58D30852576EA004EE3AD> The study consists of studying two geo-

graphic areas prospectively throughout the life cycle of a well, and five areas retrospectively to examine any impact on drinking water resources. Wise and Denton Counties, Texas, in the Barnett Shale are included in the retrospective study. <http://yosemite.epa.gov/opa/admpress.nsf/0/57d665864627766f852578b8005c8813>

14. Economy and jobs became the stated priority of both Congress and the administration. President Obama issued a Jan. 18, 2011, executive order — *Improving Regulation and Regulatory Review* — stating that each federal agency must “tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.” www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order.

15. Compare 2008 enforcement initiatives, www.epa.gov/compliance/data/planning/priorities/index.html, with the current initiatives: www.epa.gov/oecaerth/data/planning/initiatives/index.html.

16. *In the Matter of Range Resources Corporation and Range Production Company, Respondents*; Environmental Protection Agency Region VI, Docket Number: SDWA-06-2010-1208 (Dec. 7, 2010). The order can be found at www.epa.gov/region6/6xa/pdf/range_order.pdf.

17. *Id.* at p. 6.

18. *United States of America v. Range Production Company et al.*, Case No. 3:11-cv-116-F; United States District Court, Northern District of Texas, Dallas Division (June 20, 2011) at page 6.

19. www.rrc.state.tx.us/pressreleases/2010/120810.php.

20. www.rrc.state.tx.us/pressreleases/2011/032211.php. The Range wells were drilled to a depth of about a mile below the surface. *Id.* The two water wells at issue drew from a depth of 200 and 220 feet below ground surface, respectively. *Id.*

21. www.rrc.state.tx.us/pressreleases/2011/032211.php. The TRRC invited Range Resources, the EPA and the two domestic water well owners to present their evidence at the hearing. However, no EPA officials or water well owners appeared to testify. TRRC Commissioner David Porter said: “I hope . . . that the EPA gets the message that the Railroad Commission of Texas can handle its regulatory jurisdiction and is plenty competent when it comes to protecting our natural resources.”

22. *United States of America v. Range Production Company et al.*, Case No. 3:11-cv-116-F; United States District Court, Northern District of Texas, Dallas Division.

23. *See Ross Incineration Servs., Inc. v. Browner*, 188 F. Supp. 2d 837, 846-47 (N.D. Ohio 2000).

24. The parties’ arguments are summarized in the court’s order of June 20, 2011. *United States of America v. Range Production Company et al.*, Case No. 3:11-cv-116-F; United States District Court, Northern District of Texas, Dallas Division (June 20, 2011).

25. Judicial review of federal agency action is governed by Section 10(c) of the Administrative Procedure Act, 5 U.S.C. §704, which provides that only “final agency action” is subject to judicial review.

26. *United States of America v. Range Production Company et al.*, Case No. 3:11-cv-116-F; United States District Court, Northern District of Texas, Dallas Division (June 20, 2011) beginning at p. 13.

27. *Id.* at p. 18.

ABOUT THE AUTHOR



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Common Law Remedies for Environmental Torts

By Wes Johnston

Imagine a client tells you there was a leak at a nearby oil and gas well and now the water from her water well has turned salty. Or that a foul discharge from a neighboring property ran across her land and now nothing will grow there. Or that particulates from the smokestack of a neighboring manufacturing facility coat her yard and sometimes even drift through her window at night, making her cough and wheeze. What these situations have in common is they all share deep roots in the common law that protects a person from unreasonable harm at the hands of a neighbor.

Often when one hears about such situations, the first thought is of the EPA or the state regulatory agencies and the many regulations that govern every kind of industry. But from the standpoint of the affected person, a citation for a rule violation is of little comfort. This will not restore her property or pay her medical bills. Even landmark environmental acts like Superfund are of limited utility to the ordinary resident or property owner. This is because these acts focus on providing a mechanism to reimburse a party for expenses incurred during a cleanup. For an individual landowner who has no means to undertake such a cleanup (with costs potentially running into the many thousands or even millions of dollars), the possibility of future reimbursement of expenses provides little comfort.

The traditional common law theories of nuisance and trespass can, however, provide a remedy. In Oklahoma, a nuisance is statutorily defined as “unlawfully doing an act, or omitting to perform a duty” which “[a]nnoy, injures or endangers the comfort, repose, health, or safety of others” or “renders other persons insecure in life, or in the use of property.”¹ In addition to this

statutory form of nuisance, the established common law of nuisance is available to protect against wrongful interference with the use and enjoyment of rights or interests in land.² A good description of common law nuisance is set forth in *Briscoe v. Harper Oil Co.*, where the Oklahoma Supreme Court stated as follows:

[T]he term “nuisance” signifies in law such a use of property or such a course of conduct irrespective of actual trespass against others, or of malicious or actual criminal intent, which transgresses the just restrictions upon use or conduct which the proximity of other persons or property imposes. It is a class of wrongs which arises from an unreasonable, unwarranted, or unlawful use by a person or entity of property lawfully possessed, but which works an obstruction or injury to the right of another.³

Trespass, on the other hand, involves “an actual physical invasion of the property of another.”⁴ A trespass may also arise where one wrongfully remains on another’s land or fails to remove from the land a thing which he is under a duty to remove.⁵ Either action, however, affords

an injured party a full range of remedies — both legal and equitable.⁶

DAMAGES

Oklahoma law has always allowed for the recovery of money damages to compensate for injuries caused by a party's wrongful act, and the most common remedy sought in actions for environmental torts is the recovery of damages.

Property Damages

In instances where land has been harmed by pollution or other environmental injury, the applicable measure of damages is determined by focusing on whether the injury suffered is permanent or temporary:

Either the damage to the land or the cause of the damage can be permanent or temporary in the legal sense; the rule of damages applicable in a given case is determined by whether the damage suffered is permanent or temporary, rather than whether the cause of the damage is permanent or temporary.⁷

For permanent injury to land, the measure of damages is the diminution in value of the property due to the injury.⁸ For temporary injury, the measure of damages is the reasonable cost of restoring the property to as good a condition as it was in before the injury.⁹

But while this distinction seems straightforward, it is complicated by the fact that modern technology allows for the repair or remediation of virtually *any* injury to property. That is, given enough money, labor and material, nearly any environmental injury may be considered "temporary" in the sense that it is capable of being cleaned up. In such cases, the cost of achieving remediation of the property may be greater than the value of the property itself. Oklahoma courts, however, have long used a practical approach to the determination of whether an injury that can be remediated only at great cost is temporary or permanent. "Permanency, in the legal acceptance of the term, does not include the idea of absolute, but only of practical, irremediability."¹⁰ Thus, damage to land is deemed to be permanent where it is irreparable, irremediable, or the remedial costs exceed the value of the property.¹¹

This limitation was made explicit in the leading case of *Schneberger v. Apache Corp.*¹² *Schneberger* involved groundwater pollution alleged to have been caused by an oil and gas well. As part of a settlement, the parties agreed to cer-

tain cleanup criteria. When the oil company failed to meet the agreed cleanup levels, the landowners sought an award of the estimated cost of remediation in the amount of \$1.3 million. The oil company countered that any damages should be limited to the loss in value of the property due to the pollution, which was alleged to be only \$5,175. So the question presented was whether the landowner could recover the full cost of cleanup or whether the diminution in value of the property would serve as a "cap."

The Supreme Court reviewed past case law and held that "Oklahoma case law has limited recovery of repair and restoration costs so that recovery cannot exceed the depreciated value of the land itself."¹³

Whatever the rationale, the essence of the *Peevyhouse* holding — to award diminution in value, rather than cost of performance, has been consistently adhered to in cases giving rise to temporary and permanent injuries to property. This approach attempts to resolve in as fair a manner as possible the inequities inherent in a situation regarding two competing interests *and* it still represents the majority view.¹⁴

Thus, where the cost of repair exceeds the loss in value occasioned by the injury, the applicable measure of damages is the diminution in value of the property.¹⁵ The rationale for the court's holding arises from the concept that all damages must be "reasonable."¹⁶ In particular, the court noted that under the cost of cleanup rule the landowners might recover a verdict nine times greater than the total value of the property, and pointedly observed that "nothing in a private injury award requires a plaintiff to apply the award to reclaiming the land."¹⁷ The court has later described the limitation as a manifestation of the rule of avoidable consequences requiring a plaintiff to diminish the loss as much as possible.¹⁸ As this is in the nature of an affirmative defense, the burden is on the party claiming the limitation to present evidence to sustain it.¹⁹

One issue that has not been addressed by Oklahoma courts, however, is whether the *Schneberger* limitation must be applied in cases where the landowner has a personal reason for actually cleaning up the property. The Restatement of Torts recognizes that restoration damages may be appropriate in cases where "a building, such as a homestead, is used for a

purpose personal to the owner . . . even though this might be greater than the entire value of the building.”²⁰ Courts from other jurisdictions have followed the restatement’s line of reasoning,²¹ and certainly it addresses the *Schneberger* concern about the use of money recovered through a judgment. But at this time it is uncertain whether Oklahoma courts too will follow this authority.

Whatever the applicable measure of damage, as a practical matter, calculation of the value of land involves the consideration of many factors. The considerations that go into fair market value include any factors which a reasonably prudent buyer would consider before purchasing a property and all favorable and unfavorable circumstances, including any competent evidence of matters which would be considered by a prospective vendor or purchaser or which would tend to enhance or diminish the value of the property.²² In particular, one matter a buyer would likely take into consideration is the cost to repair an environmental injury to a property. Indeed, the Supreme Court has observed that “there may be a correlation between the cost of repairing a temporary injury to real property and the diminishment in its value if the land is left unrestored,” remarking that “this appears obviously so because a buyer would presumably factor into any price he or she may be willing to pay for the property the cost it would take to repair the injury.”²³

One issue that commonly arises is the proper method of measuring the loss in value of land where only a portion of the property has been directly harmed — whether to consider the entire property or only the portion of the land that is directly impacted. Oklahoma has long employed the rule that the amount of diminution is to be calculated based upon a plaintiff’s “whole property.”²⁴ “It has been consistently held that the diminished value is the diminished value of the entire unit and not the difference in the value of the specific land which is harmed.”²⁵ In this regard, where a single property sustains both temporary and permanent injuries to different parts of the property, an owner may seek compensation for both injuries so long as there is no double recovery.²⁶

Oklahoma law also allows for the recovery of damages for injury to personal property such as cattle²⁷ and for growing crops.²⁸

In cases where a person is injured by exposure to environmental toxins or other harmful substances, the party is entitled to claim the full range of normal personal injury damages. These include physical pain and suffering, past and future, mental pain and suffering, past and future, physical impairment, disfigurement, lost earnings, impairment of earning capacity as well as the reasonable expenses of the necessary medical care, treatment, and services, past and future.²⁹ In fixing the amount of these damages, there is no absolute standard to measure the damages for personal injuries; instead, a wide latitude of discretion is necessarily left to the good sense and discretion of the jury who fixes the award.³⁰

A person affected by a nuisance may also seek compensation for personal inconvenience, annoyance and discomfort resulting from the nuisance. Such damages are considered personal injuries, separate and apart from any injury to the property.³¹ As with other personal injuries, there is no precise rule for the ascertainment of damages for annoyance and inconvenience because such injuries are not subject to exact measurement in money. Again, it is for the jury to determine “from all the facts and circumstances existing in the case, the amount of money which will reasonably and fairly compensate the plaintiff for such personal inconvenience and annoyance.”³²

In addition to these traditional elements of recovery for personal injuries, persons who have been exposed to hazardous pollution often seek to recover the costs of future medical monitoring.³³ The goal of such claims is, of course, to provide for ongoing medical evaluation of individuals who have been exposed to hazardous substances through the often lengthy latency period between initial exposure and the later development of a disease. At present, however, Oklahoma courts have not determined whether or not such costs may be recovered in the absence of an existing physical injury.³⁴

Miscellaneous Damages

The recovery of any consequential damages incurred as a result of tortious conduct is allowed by statute which provides for damages in “the amount which will compensate [a plaintiff] for all detriment proximately caused thereby, whether it could have been anticipated or not.”³⁵ The clear intention of this statute is to

place an injured party in as nearly as possible the same condition he would have occupied had the wrong not been done.³⁶

Another ground for recovery commonly raised in environmental cases is unjust enrichment.³⁷ While this is more properly considered an equitable remedy rather than a basis for legal damages, it works in a similar way as it allows for the “disgorgement” of money from the defendant.³⁸ In order to gain the benefit of this doctrine, a party must prove that the defendant is responsible for contaminating the property, that the contamination will not be abated, and that the defendant received an economic benefit thereby.³⁹

Finally, in appropriate cases, a party may also seek punitive damages to punish and deter reckless and malicious conduct.⁴⁰ Exemplary damages have long been allowed in cases seeking damages for pollution from oil and gas operations, even in cases where there is no direct evidence of evil intent. For example, punitive damages were allowed in a case where the defendant oil company knew its lines and tanks were not of sufficient quality to protect the plaintiff’s land from leaks, yet for nearly a decade was content to make post-spill repairs rather than pre-pollution replacement.⁴¹ In another case, a verdict for \$5 million in punitive damages was upheld against an oil company where there was clear and convincing evidence that the defendant had conducted its operations and caused pollution in violation of the applicable rules of the state regulatory agency.⁴²

ABATEMENT

In instances where a legal remedy is unavailable or inadequate, Oklahoma courts have the authority to provide equitable relief. The power of a court to abate a nuisance is firmly established in the law of Oklahoma.⁴³ “Ordinarily, where the one liable for a nuisance fails to abate it voluntarily, abatement is accomplished through mandatory injunction.”⁴⁴ A party seeking such an injunction is bound to meet the traditional standards for equitable relief as an injunction is an extraordinary remedy that will not be lightly granted.⁴⁵ For a preliminary injunction, the criteria considered will include 1) the moving party’s likelihood of success on the merits, 2) whether the party seeking relief will suffer irreparable harm if injunctive relief is denied, 3) the relative effect on the other interested parties, and 4) whether the request-

“Neighboring landowners complained that the dust, noise and blast vibrations coming from the quarry interfered with their rights to the quiet and peaceful enjoyment of their homes and properties.”

ed relief would be adverse to the public interest.⁴⁶ For a permanent injunction, a claim must be established by clear and convincing evidence and the nature of the injury must not be nominal, theoretical or speculative — a mere fear or apprehension of injury will not be sufficient.⁴⁷

Once a party establishes entitlement to injunctive relief, the particular remedy selected will necessarily depend on the facts of the specific case. In cases where the ongoing actions of a party are causing harm to another, an injunction may focus on the manner in which the party conducts itself — even up to the point of prohibiting the further operation of a lawful business. For example, in *Crushed Stone Co. v. Moore*,⁴⁸ the defendant operated a rock quarry and stone crusher. Neighboring landowners complained that the dust, noise and blast vibrations coming from the quarry interfered with their rights to the quiet and peaceful enjoyment of their homes and properties. The landowners sought an injunction to prohibit further operation of the quarry. At an initial hearing, the trial court found that the quarry constituted a nuisance. The defendant’s subsequent failure to effectively mitigate the ongoing harm from its operations led the court to issue an injunction enjoining any further operations and directing the defendant to remove the dusty stockpiles of rock from the plant. In upholding the trial court’s ruling, the Supreme Court held:

While we recognize that in proper cases, especially those involving businesses upon which the public’s interest, or necessity, depends, the matter of “comparative injury” should be given prominent consideration, this court is among those holding that where damages in an action at law will not give

plaintiffs an adequate remedy against a business operated in such a way that it has become a nuisance, and such operation causes plaintiffs substantially and irreparable injury, they are entitled, as a matter of right, to have same abated, by injunction "...notwithstanding the comparative benefits conferred thereby or the comparative injury resulting therefrom."⁴⁹

An injunction may similarly be focused on the legacy of environmental harm from past activities. In *Meinders v. Johnson*,⁵⁰ the court considered the effects of decades of oil and gas development on a rural property. Finding that the abandoned wells, oilfield junk and saltwater erosion scars constituted an ongoing nuisance, the district court entered a mandatory injunction directing the current operators to, *inter alia*, plug all abandoned wells, cease production from wells with inadequate surface casing, remove all abandoned tanks, pipelines and other oilfield junk and "restore the surface of the polluted areas to a condition free of erosion with soil quality and chemical composition that will maintain a healthy, mature stand of native grasses[.]"⁵¹ On appeal the Court of Civil Appeals affirmed the order, finding that the district court had proper jurisdiction to direct the cleanup of oilfield pollution and that the order was not contrary to the clear weight of the evidence or affected by an abuse of discretion.⁵²

An injunction may even be focused on the prevention of threatened environmental harm. For instance, when confronted with evidence showing a reasonable probability that a proposed landfill would pollute the groundwater of neighboring properties, the Supreme Court approved an injunction prohibiting the construction of the landfill.⁵³ The court held that when landowners are faced with a nuisance that threatens the destruction of their water supply, they do not have to wait for the actual infliction of such loss, but may apply to a court for injunctive relief.⁵⁴ In so ruling, the court recognized that "[n]o commodity affects and concerns the citizens of Oklahoma more than fresh groundwater." And while the court cautioned that care should be applied in formulating an appropriate remedy,⁵⁵ its core holding was that where "a business cannot be conducted in any manner at the place where situated without constituting a substantial injury to adjoining or nearby property owners a permanent injunction absolutely prohibiting opera-

tion of such business at the particular location is appropriate."⁵⁶

A claim for trespass will likewise support the exercise of a court's power to grant equitable relief. In *Fairlawn Cemetery, Ass'n v. First Presbyterian Church*,⁵⁷ construction at a church resulted in the deposition of a large quantity of dirt against a wall on land owned by a neighboring cemetery. The cemetery brought suit seeking an injunction requiring the removal of the dirt and also seeking damages for alleged injury to the wall. While the district court refused to grant an injunction, the Supreme Court found that the case involved a "continuing trespass which a court of equity will enjoin."⁵⁸ The Supreme Court, therefore, remanded the case "with directions to enter a mandatory injunction against the church from continuing the encroaching trespass on cemetery's property and to require the defendant church to remove all of the encroaching dirt[.]"⁵⁹ Similarly, in a case where an oil company had placed a road in an unauthorized location on a surface owner's land, the Court of Civil Appeals reversed the district court's denial of a mandatory injunction to enjoin the future use of the road.⁶⁰ The court recognized that "[w]here a trespasser persists in trespassing upon another's land and threatens to continue the wrongful invasion of the premises, equity will enjoin such continuing trespass," and held that an injunction was necessary to protect the landowner's "interest in the exclusive possession of her land[.]"⁶¹ While these cases do not arise directly from environmental torts, it is no great leap to analogize from removal of a church's unwanted dirt to the cleanup of another's unwanted pollution. Indeed, courts from sister jurisdictions have specifically held that pollutants invading an owner's land from adjacent properties constitutes an actionable trespass.⁶²

Thus, both nuisance and trespass actions can provide a basis for the granting of equitable relief to enjoin ongoing, past or threatened environmental wrongs. As a procedural matter, such actions seeking abatement are equitable matters which are ordinarily to be tried to the court. But if a plaintiff seeks both injunctive relief and damages, then the existence of a nuisance and the resulting damages is a question for the jury.⁶³

CONCLUSION

The established law of Oklahoma has long provided a variety of remedies for environ-

mental wrongs. These include damages to compensate for injuries to persons and property, as well as equitable remedies to provide for the prevention or restoration of environmental harm. With damages, the goal is always to restore the plaintiff to as near as possible the position she was in before the injury; with equitable remedies, the goal is always to do substantial justice between the parties.

So in the examples posed above, the client whose water well has been contaminated may seek damages for the loss in value of her property occasioned by the injury to the groundwater. The property owner whose land was rendered sterile may seek to recover money to clean up the polluted soil. And the person who suffered from inhaling particulates may seek personal injury damages for the harm she has sustained. All may seek equitable relief to correct the injury or to prevent further harm. But as with any claims founded upon the common law, the appropriate remedy and the extent of any recovery will be governed by the particular circumstances of each case.

1. 50 O.S. §1.

2. *Nichols v. Mid-Continent Pipe Line Co.*, 1996 OK 118, ¶¶8, 11, 933 P.2d 272, 276.

3. *Briscoe v. Harper Oil Co.*, 1985 OK 43, ¶ 9, 702 P.2d 33, 36.

4. *Fairlawn Cemetery, Ass'n v. First Presbyterian Church*, 1972 OK 66, ¶14, 496 P.2d 1185, 1187.

5. *Angier v. Mathews Exploration Corp.*, 1995 OK CIV APP 109, ¶6, 905 P.2d 826, 830 (citing the Restatement (Second) of Torts, §158, Liability for Intentional Intrusions of Land ("One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove)).

6. Negligence and strict liability are also viable but less commonly used theories of liability in cases involving environmental injuries. See, *Gulf Pipe Line Co. v. Sims*, 1934 OK 292, 32 P.2d 902 (negligence). Nuisance and negligence are distinct torts, however, and negligence is not an essential or material element of a cause of action for nuisance and need not be proved. *Cities Service Oil Company v. Merritt*, 1958 OK 185, 332 P.2d 677. Other potential theories include labeling the polluting substance as a defective product. See, e.g., *Blair v. Eagle-Picher Indus., Inc.*, 962 F.2d 1492 (10th Cir. 1992) (asbestos).

7. *Mid-Continent Petroleum Corp. v. Fisher*, 1938 OK 483, 84 P.2d 22, syl. 2. See, also, *Briscoe v. Harper Oil Co.*, 1985 OK 43, 702 P.2d 33, 36.

8. *Schneberger v. Apache Corp.*, 1994 OK 117, 890 P.2d 847, 849 ("We are committed to the rule that where damages are of a permanent nature, the measure of damage is the difference between the actual value immediately before and immediately after the damage is sustained."). See, also, *N.C. Corff Partnership, Ltd. v. Oxy USA, Inc.*, 1996 OK CIV APP 92, &22, 929 P.2d 288 ("Diminished value has been recognized by the Oklahoma Supreme Court as legally sufficient to support a nuisance claim, particularly when accompanied by physical injury to the property.").

9. *Schneberger*, at 849 ("Where property can be repaired and substantially restored to its former condition, the measure of damage is the reasonable cost of repairing the damage and restoring it to its former condition.").

10. *Commercial Drilling Co. v. Kennedy*, 1935 OK 232, 45 P.2d 534. See, also, *Danciger Oil & Refining Co. v. Donahey*, 1951 OK 296, 238 P.2d 308, syl. 2.

11. *Conkin v. Ruth*, 1976 OK CIV APP 57, 581 P.2d 923, 925.

12. 1994 OK 117, 890 P.2d 847.

13. *Id.*, at 849 (citing, *Peavyhouse v. Garland Coal & Mining Co.*, 1962 OK 267, 382 P.2d 109, cert. denied, 375 U.S. 906, 84 S.Ct. 196, 11 L.Ed.2d 145 (1963)).

14. *Id.* at 852 (emphasis in original).

15. *Id.* at 849, 855.

16. *Id.* at 850, 854 (citing 23 O.S. §97).

17. *Id.* at 822, 855.

18. *Houck v. Hold Oil Corp.*, 1993 OK 166, ¶33, 867 P.2d 451.

19. *Burlington Northern and Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1028 (10th Cir. 2007).

20. Restatement (Second) of Torts, §929, cmt. b. Oklahoma courts often look to the Restatement to inform their interpretation of the common law. "The Restatement has long been recognized as a material source of the common law. It is only after its adoption by the highest court of a jurisdiction that the endorsed portions of the Restatement stand transformed into formal law." *Am. Bank of Oklahoma v. Wagoner*, 2011 OK CIV APP 76, 259 P.3d 841, 850 (citing *Bouziden v. Alfalfa Elec. Co-op., Inc.*, 2000 OK 50, 16 P.3d 450, Opala, J., dissenting).

21. See, *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 2007 MT 183, ¶¶ 28-39, 338 Mont. 259 (Mont., 2007) (affirming jury award of \$15 million to restore properties with aggregate value of \$2 million); *Kelly v. CB&I Constructors, Inc.*, 179 Cal.App.4th 442, 102 Cal. Rptr. 3d 32 (Cal. App., 2009).

22. *Western Farmers Elec. Coop. v. Enis*, 1999 OK CIV APP 111, ¶13, 993 P.2d 787 (citations omitted).

23. *Houck v. Hold Oil Corp.*, 1993 OK 166, ¶33, n. 8, 867 P.2d 451.

24. *Enid & Anadarko Railway Co. v. Wiley*, 1904 OK 70, ¶ 10-11, 78 P. 96.

25. *Thompson v. Andover Oil Co.*, 1984 OK CIV APP 51, 691 P.2d 77, 82. This is consistent with the Restatement approach. Restatement (Second) of Torts §929, cmt. a ("One whose land has been damaged is entitled to compensation for the difference between its value before and after the harm. If only a portion of a tract of land has been directly harmed, the diminished value of the entire tract is considered.").

26. *Briscoe v. Harper Oil Co.*, 1985 OK 43, ¶13, 702 P.2d 33.

27. The measure of damages for the loss of cattle that die as a result of exposure to the pollution is the reasonable market value of the cattle at the time of injury. *Deep Rock Oil Corp. v. Griffith*, 58 P.2d 323, Syl. 1 (Okla. 1936). Where cattle are damaged and depreciated in value as a result of exposure to polluted water and soils, the measure of damages is the difference between the reasonable market value of the cattle immediately prior to and subsequent to the injury. *Id.* at 323, Syl. 2. See, also, *Wilcox Oil Co. v. Walters*, 284 P.2d 726 (Okla. 1955).

28. *Portable Drilling Corp. v. Guinn*, 1950 OK 330, 226 P.2d 923.

29. See, generally, *Shebester, Inc. v. Ford*, 1961 OK 67, 361 P.2d 200; *Haco Drilling Co. v. Burchette*, 1961 OK 145.

364 P.2d 674. See, also, OUI No. 4.1, Personal Injuries – Adults.

30. *Yellow Cab Operating Co. v. Spelce*, 1936 OK 597, syl. 6, 61 P.2d 672. See, also, *Denco Bus Lines Inc. v. Hargis*, 1951 OK 11, &16, 229 P.2d 560 ("There is no 'market where pain and suffering are bought and sold, nor any standard by which compensation for it can be definitely ascertained, or the amount actually endured determined.'").

31. *Truelock v. City of Del City*, 1998 OK 64, ¶¶10-14, 967 P.2d 1183. See, also, *Phillips Petroleum Co. v. Ruble*, 1942 OK 93, ¶ 11, 126 P.2d 526 ("We cannot make a manila rope into a rubber automobile tire by calling it such. Neither can we change an injury to the person into one to property by so denominating it. The fact that the property owner in this type of case is using his property at or during the time he receives the injury does not change the character or type of injury received. A broken arm would not be called an injury to personal property because it was fractured in an automobile collision when the injured person was using his own automobile.").

32. *Tenneco Oil Co. v. Allen*, 1973 OK 129, ¶48, 515 P.2d 1391, 1398.

33. See, e.g., *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 852 (3d Cir.1990), cert. denied sub nom. *General Elec. Co. v. Knight*, 499 U.S. 961, 111 S.Ct. 1584, 113 L.Ed.2d 649 (1991); *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 140, 522 S.E.2d 424, 431 (1999).

34. One federal district court has questioned whether Oklahoma law allows the recovery of such costs in the absence of physical injury while declining to certify a class action seeking such costs. See, *Cole v. Assarco*, 256 F.R.D. 690 (N.D. Okla. 2009).

35. 23 O.S. §61.

36. *Kinetics Technology Intern. Corp. v. Fourth Nat. Bank of Tulsa*, 705 F.2d 396 (10th Cir. 1983).

37. *N.C. Corff Partnership, Ltd. v. Oxy USA, Inc.*, 1996 OK CIV APP 92, 929 P.2d 288, 295.

38. *Id.* at ¶25.

39. *Id.*

40. 23 O.S. §9.1.

41. *Nichols v. Burk Royalty Co.*, 1977 OK CIV APP 17, 576 P.2d 317, 322.

42. *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373, 1384 (10th Cir. 1989). The rules of the Oklahoma Corporation Commission have the force and effect of law and must be followed. *See, Ashland Oil, Inc. v. Corporation Commission*, 1979 OK 17, 595 P.2d 423.

43. 50 O.S. §§8, 13. Note, however, that an action to abate a public nuisance may only be brought by one who has suffered a special injury due to the nuisance. *Smicklas v. Spitz*, 1992 OK 145, ¶ 8, 846 P.2d 362.

44. *Tenneco v. Allen*, 1973 OK 129, ¶ 14, 515 P.2d 1391, 1394.

45. *Meinders v. Johnson*, 2006 OK CIV APP 35, ¶19, 134 P.3d 858.

46. *Sharp v. 251st Street Landfill, Inc.*, 1991 OK 41, ¶22, 810 P.2d 1270 (*Sharp I*).

47. *Sharp v. 251st Street Landfill, Inc.*, 1996 OK 109, ¶4, 925 P.2d 546 (*Sharp II*).

48. 1962 OK 65, 369 P.2d 811.

49. *Id.* at ¶12.

50. 2006 OK CIV APP 35, 134 P.3d 858.

51. *Id.* at ¶12, n. 2.

52. *Id.* at ¶42.

54. *See*, notes 10, 11, *supra*.

54. *Sharp II*, at ¶16.

55. *Sharp I*, at ¶40.

56. *Sharp II*, at ¶16.

57. 1972 OK 66, 496 P.2d 1185.

58. *Id.* at ¶15.

59. *Id.* at ¶19.

60. *Angier v. Mathews Exploration Corp.*, 1995 OK CIV APP 109, 905 P.2d 826.

61. *Id.* at ¶¶7, 8.

62. *See, e.g., Hoery v. U.S.*, 64 P.3d 214 (Colo. 2003).

63. *Smicklas v. Spitz*, 1992 OK 145, ¶9, 846 P.2d 362.

ABOUT THE AUTHOR



Wes Johnston is a partner in the Chickasha law firm Johnston & Associates. He has a general civil litigation practice, which focuses on representing landowners in environmental, energy and condemnation matters. He received his B.A. and J.D. degrees from the University of Oklahoma and is licensed to practice in both Oklahoma and Colorado.

FROM THE PRESIDENT

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life. They fought for us on the battlefield, and now we have the opportunity to fight for them in the courtroom. These heroes need your assistance to resolve legal issues that may ruin their homecoming and their chance to pursue productive lives. I can promise you this — 20 hours of your time resolving a legal issue for a home state hero will be a life changer for both you and your hero. Details about the seminar may be found in the inside front cover of this bar journal or online at www.okbar.org.

SUPPORT LAWYERS HELPING LAWYERS FOUNDATION INC.

On Tuesday, March 27, the OBA Lawyers Helping Lawyers Assistance Program Committee (LHL) will sponsor an inaugural banquet, CLE and auction in Oklahoma City to raise money for the Lawyers Helping Lawyers Foundation Inc. The foundation, formed as an Oklahoma nonprofit corporation in 2003, was inactive while the activities of the LHL Committee and the scope of services offered to OBA members has increased each year. Recently, members of the LHL Committee re-energized the foundation and hope to provide through the foundation confiden-

tial financial assistance to qualified attorneys who are unable to complete a treatment plan because of financial difficulties.

The financial assistance and support of the foundation will help attorneys return to the practice of law and provide competent legal advice to their clients. Grant recipients are asked to use their best efforts when they are able to do so to repay the assistance monetarily or by donating services to the LHL Committee. The immediate beneficiary of the foundation will obviously be the grant recipient, but the ultimate beneficiaries are the clients served by attorneys.

The banquet keynote speaker is Jim Blackburn, author of *Flame-out*. Once a well-respected attorney, Mr. Blackburn states, "In a criminal courtroom, three important chairs face the judge and witness stand... one for the prosecutor, one for the defense attorney and one for the defendant. I have sat in all three." He will speak from personal experience about what he "learned from being on top, and then on the bottom, and all the while trying to survive and come back in life." His presentation is gripping and moving, plus one hour of ethics MCLE credit is available.

The banquet and auction will create the blueprint for future growth and development of a foundation created by attorneys for attorneys. More often than not, we all stumble. When that happens, the Lawyers Helping Lawyers Assistance Program and the LHL Foundation Inc. stand ready to assist the attorney and minimize the risk of harm to a client or the public. Information about the foundation and the banquet is available at www.okbar.org and in this bar journal. The foundation website, which will be online by March 1, will include a sampling of auction items and vacation destinations. If you are unable to attend the banquet and are interested in supporting the work of the LHL Foundation, tax deductible donations are welcome. *An envelope inserted into the center of this journal makes it easy to make a donation or to reserve your seats at the event.*

Mark your calendar now for Feb. 22 and March 27, and join me and many others at the February military CLE and the LHL banquet. Finally, February is Black History Month. I hope you have the opportunity to reflect upon the contributions of our African American lawyers and citizens.

You can make a difference — for the public and the profession.



Phase I Environmental Site Assessments Are Not All Created Equal

By Linda Crook Martin and Michael C. Wofford

Many general practitioners represent clients who purchase commercial property. Whether the client is a corporation, individual or a partnership, many lawyers know that some level of environmental due diligence on real property prior to its purchase should be performed to protect the client. The most common due diligence mechanism is the Phase I Environmental Site Assessment. Some attorneys may simply engage an environmental consulting firm to have a Phase I study performed on the property, and consider this exercise to satisfy the due diligence requirement. But does this always protect the client? The answer is “no” it does not.

The Phase I must be performed in accordance with established Environmental Protection Agency (EPA) standards in order to offer some of the most important legal protections to the client. Below is a discussion regarding the reason the Phase I was developed, the protections it offers if performed properly, what the EPA found when it investigated whether Phase Is were being done correctly, and some recommendations to better cover the associated risks.

STATUTORY FRAMEWORK – SUPERFUND

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or Superfund, 42 U.S.C. §9601, *et seq.* was enacted in 1980 in response to the problems caused by pollution at a hazardous waste dump site in Love Canal at Niagara Falls, New York — where the absentee “polluters” could not be held responsible under the existing hazardous waste laws to clean up the site. CERCLA authorizes the EPA to respond to releases or threatened releases of hazardous substances, and allows the EPA to compel responsible parties to clean up

the release by themselves or to pay for the clean-up by others. Generally, responsible parties under CERCLA are past and current owners and operators of a site, waste generators, transporters, and arrangers for disposal of hazardous substances at a site, 42 U.S.C. §9607. In other words, liability attaches to almost any person who has anything to do with the disposal or release of the hazardous substance at the site. In addition, liability attaches to anyone who just owns or operates the site, even if the landowner 1) acquired the real estate after the last load of hazardous substances was placed on the property and 2) knew nothing about its contamination. This was unfair to innocent purchasers of real estate. It also left such sites untouchable in the real estate market and prevented their restoration to economically beneficial uses and promoted economic stagnation in surrounding areas. It discouraged the acquisition and rehabilitation of old industrial sites. Eventually, the EPA developed ways for prospective purchasers of land that were not involved in the waste disposal to avoid CERCLA liability.

ALL APPROPRIATE INQUIRY

Under CERCLA, liability is typically joint and several and there are only limited defenses available. The defenses which are of concern primarily to the general practitioner are only available by the performance of proper due diligence prior to the purchase of real property by the client, *i.e.*, a Phase I. Performing a Phase I, or “all appropriate inquiry” (AAI) — provides the real estate purchaser under certain circumstances with the “innocent landowner defense” and the “bona fide prospective purchaser” (BFPP) defense to CERCLA liability. The BFPP defense 42 U.S.C. §§9607 (q) and (r) is available to purchasers of property upon which contamination has been found, provided certain requirements are met. This paper will focus on the BFPP defense.

The conduct of AAI before purchase of the property is required. The requirements for AAI are contained in 40 CFR §312 or American Society for Testing and Materials Standard (ASTM) E-1527-05, and must be carefully observed. Failure to follow these requirements closely will likely negate the BFPP defense.

The AAI is but one requirement of the BFPP defense. In general, to be a BFPP, all disposal of hazardous substances on the property must have occurred before the buyer acquired the property, *i.e.* the purchaser cannot dispose of hazardous substances on the property after the property is acquired. See 42 U.S.C. §9601 (40) for all components of the BFPP definition. The BFPP must also meet certain continuing obligations after purchase. *Id.* and ASTM Standard E 2790-11.

Those continuing obligations include, generally:

- 1) Complying with any land use restrictions imposed as a result of an environmental response action;
- 2) Honoring any institutional controls imposed upon property as a result of an environmental response action;
- 3) Taking steps to stop releases of hazardous substances on the property, prevent future releases and limiting exposure to humans and the environment of prior releases of hazardous substances;
- 4) Allowing full cooperation and access to persons (including government regulators) responding to releases on the property; and

- 5) Providing any legally required notices with respect to releases of hazardous substances at a property.

ASTM E 2790-11; 42 U.S.C. §9601(40)

Unfortunately, few cases have interpreted the BFPP defense, and at least one case decided in 2010 suggests that this defense will be strictly interpreted in an unexpected way. It has sent shockwaves through the environmental bar.

ASHLEY II CASE

In October 2010, the federal district court in South Carolina denied bona fide perspective purchaser status to a company sued for cleanup costs associated with a former fertilizer manufacturing plant in Charleston, S.C. *Ashley II of Charleston LLC v. PCS Nitrogen Inc.*, 2010 WL 4025885 (D.S.C. Oct. 13, 2010). The court decided that Ashley was not a BFPP as it claimed, and determined that the company was responsible for five percent of the cleanup costs of the Superfund site based upon, among other facts, the following:

- 1) Ashley had torn down some structures on the property in earlier years which allowed rainwater to contact cracked sumps containing hazardous substances. As a result, “disposal” of hazardous substances occurred after Ashley took possession of the property;
- 2) Ashley had not exercised appropriate care because it failed to address recognized environmental conditions that were identified in the Phase I, as well as other potential site hazards.

Ashley II is currently on appeal to the 4th Circuit Court of Appeals.

One lesson from *Ashley II* is that, because “disposal” may be defined very broadly, purchasers should thoroughly evaluate construction, demolition, and other site activities to determine if they could cause a “release” of hazardous substances in the process. Finally, when a Phase I is performed, it is critical that all recognized environmental conditions identified in the Phase I be addressed, beginning no later than the time the purchaser acquires the property and continuing for the duration of its ownership.

ALL PHASE Is ARE NOT CREATED EQUAL

The foregoing case addressed a situation where a contaminated property was purchased by an alleged BFPP. What happens if the Phase I is performed and it comes back with no suggestion that the property is anything other than pristine? Should counsel for the purchaser have any worries in this situation?

Unfortunately, the answer to this question is, “yes.” As noted above, unless the Phase I is performed in accordance with the standards, *i.e.*, the CFR standard or the ASTM standard, then it will not offer the protections to a Superfund claim under the BFPP. This happens more often than you may think.

On Feb. 14, 2011, the EPA’s office of the inspector general released a report, providing the results of its evaluation of 35 Phase I reports, randomly chosen, in connection with a certain EPA program (Brownfields). The inspector general found that none of the 35 reports contained all of the required elements to document that the Phase I was done in compliance with the AAI requirements. The AAI standards had been in effect for over five years after the EPA rule took effect in November 2006, detailing the requirements for AAI, and yet the Phase I reports were defective. A defective Phase I, based upon the strict interpretation of the BFPP defense by the South Carolina court discussed above, is likely to disqualify the purchaser from taking advantage of the defense.

WHAT’S A GENERAL PRACTITIONER TO DO?

So, what is a general practitioner to do to protect his or her client from a substandard Phase I? At the onset, the general practitioner should assess his own ability to manage the environmental due diligence process. In almost all cases, we recommend a team approach whereby the general practitioner, who may be most familiar with the client’s business objectives, teams up with an experienced environmental attorney to provide the legal consultation needed to ensure the performance of a compliant Phase I assessment. Merely requiring by contract that the environmental professional produce a Phase I report in compliance

with applicable rules cited above is not enough. Even the best environmental consultants cannot be expected to expertly interpret the applicable law. When a draft Phase I is completed, the environmental attorney should review the applicable ASTM standards, CFR provisions, and relevant EPA decisions and case law to ensure that the report contains all the necessary information. It is not advisable for the lawyer unversed in environmental law to perform this task.

While there is no way to guarantee compliance, the EPA study referenced above found that the insufficient Phase Is were all performed by qualified environmental professionals as defined by EPA rules. Clearly, oversight

by an experienced environmental attorney should lower that risk.

The environmental lawyer should be asked to interface with the general practitioner who may be most familiar with the basic business interests of the client and the objectives of the transaction itself. The environmental lawyer would work with the environmental professional to require that any deficiencies in the draft Phase I report be corrected. Since the environmental bar is versed in this type of review, generally, it is money well spent to avoid the issues which have come to the forefront in the *Ashley II* case, previously discussed.

As noted above, compliance with the due diligence process also involves activities that the client must be concerned with after the transaction is complete. Therefore, a continued relationship with the environmental attorney — a continued team approach to the issues associated with the development of the real estate as the business moves forward — is also recommended.

WHAT ELSE MIGHT BE DONE TO LOWER THE PROSPECTIVE PURCHASER RISK?

Very few of the professionals performing Phase Is are licensed environmental consultants. Generally they are not required to be. The qualifications for “environmental professional” for purposes of performing a Phase I in compliance with AAI are found in 40 C.F.R. §312.10, or in the ASTM E 1527-05 standard, appendix X2. All those requirements seem rea-

“So, what is a general practitioner to do to protect his or her client from a substandard Phase I?”

sonable at face value, but then there is a hole in the requirement which allows non-qualified persons to perform Phase Is:

A person who does not qualify as an environmental professional under the foregoing definition may assist in the conduct of all appropriate inquiries in accordance with this part if such person is under the supervision or responsible charge of a person meeting the definition of an environmental professional provided above when conducting such activities.

Id. at X2.1

Many of us on the “front line” easily envision cases where an environmental consulting firm may be short on personnel, and in a time crunch, so they send an inexperienced person to perform the Phase I and the qualified professional merely reads the final report. This practice could easily result in a substandard Phase I, noncompliant with the AAI standards, even though the ASTM definition of qualified professional may permit this to happen.

Since CERCLA liability is so financially devastating — and since the defenses to CERCLA liability are so critical — some in the industry think that states should require certification of environmental professionals who perform the Phase I reports detailing the AAI in connection with the federal standards. Connecticut, Massachusetts, New Jersey and Ohio require licensing of environmental professionals. Oklahoma does not. An effective certification process might entail minimum requirements for education and training and continuing education. The state could develop a somewhat more strict standard definition of “environmental professional” to avoid the “hole” in the ASTM standard which allows nonqualified persons to perform Phase Is.

Such a certification system might be another way of mitigating the risk of having the BFPP defense voided by a nonconforming Phase I,

particularly if the forecast from *Ashley II* is accurate and the BFPP defense is picked apart by the courts interpreting the law. CERCLA is a minefield for the general practitioner, and frankly, for the experienced environmental lawyer as well. Establishing a certification program for environmental consultants performing site assessments would possibly serve to eliminate some of the uncertainty for all of us in representing our clients in commercial real property transactions.

ABOUT THE AUTHORS



Linda Crook Martin received her law degree from the University of Tennessee in 1980, was admitted to practice in Oklahoma that year and in Arkansas in 2005. She handles cases in all areas of environmental law, including those arising under Superfund, Clean Water Act,

Resource Conservation and Recovery Act, and the Clean Air Act. She is a fellow in the American College of Environmental Lawyers and was elected to its 15-member board of regents in 2009.



Mike Wofford has served clients in government, the oil and gas industry, and through private practice. Starting out as Gov. David Boren’s environmental assistant, he worked for the state, Phillips Petroleum Company, and ConocoPhillips Alaska, where he served as business

manager of federal, state and Canadian environmental, regulatory, land and native relations. His practice with Doerner, Saunders, Daniel & Anderson LLP in Oklahoma City has mostly included environmental, regulatory, real estate and water law.

Environmental Law Section Members and Interested Attorneys

**Please join us at the first noon meeting of the
OBA Environmental Law Section for 2012**

Friday, March 9, 11:30 a.m. -1:00 p.m.

Oklahoma Bar Center

1901 N. Lincoln Blvd.

Oklahoma City, OK 73105

sandwiches and drinks provided

a conference call number will be provided through our section listserve to all current section members

Tentative agenda includes:

- Report on status of section scholarships and scholastic awards**
- Consideration of expansion of section mission and scope**
- Report of activities of new OBA Section Leaders Council**
- Location, dates and topics for 2012 section lunchtime/CLE meetings**

**Mike Wofford, Chair
Laura Finley, Secretary**

**Jeri Fleming, Chair-Elect
Betsey Streuli, Treasurer**

**RSVP needed for lunch. Please respond to tbrooks@dsda.com or
call Teena Brooks at 405-319-3508**



The Endangered Species Act: A Primer

By Ricky Pearce, Stephen Gelnar and Mary Kathryn Victory Walters

Imagine you have spent years researching and investing large sums of money in your latest well. You are all set to start drilling when you learn that some bird, lizard or insect with a scientific name you don't even recognize inhabits the same area and is under investigation by a wildlife agency for protection. Although you consulted the Endangered Species Act list as part of your research, you never found the Greater Sage-Grouse or the Gonzales Spring Snail, because these creatures are merely "candidate species," but they (and others like them) may soon be granted a protected status. What do you do?

A recent settlement in the multidistrict litigation of *In re Endangered Species Act Section 4 Deadline Litigation*, in the U.S. District Court for the District of Columbia, may ultimately result in a significant increase in the number of threatened or endangered species listed under the Endangered Species Act (ESA). At a minimum, the federal government will be required to make decisions on numerous candidate and other potentially threatened species. The species being reviewed for potential listing include fish, wildlife and plants that are found within Oklahoma's borders.

On Sept. 9, 2011, in *In re Endangered Species Act Section 4 Deadline Litigation*, the court approved two settlement agreements whereby the U.S. Fish and Wildlife Service (FWS) is required to make various ESA determinations regarding hundreds of species by September 2018.¹ The litigation consolidated numerous cases filed by two conservation groups, the WildEarth Guardians and the Center for Biological Diversity, who sought to compel the FWS to comply with ESA deadlines when making determinations regarding whether to list species as threatened or endangered.

Under the settlement agreements, the FWS agreed to review over 250 candidate species and determine as to each species whether to issue a proposed listing rule or to issue a finding that the listing is not warranted by the end of fiscal year 2016. Further, the FWS agreed to make findings on a suite of citizens' petitions for over 600 species by the end of fiscal year 2018, the majority of which must be made by the end of fiscal year 2012.² Some of the candidate species are located in Oklahoma, including the Arkansas Darter, the Lesser Prairie Chicken, the Neosho Mucket, the Rabbitsfoot and the Sprague's Pipit.

It is likely that at least some of the species at issue will be listed as threatened or endangered in the next several years. Moreover, a number of Oklahoma industries may be affected by these listings if their operations potentially harm the species. Therefore, a basic understanding of the ESA is especially relevant and useful at this time.

THE LISTING PROCESS UNDER THE ESA

The ESA establishes policies and procedures for identifying, listing and protecting species of fish, wildlife and plants that are endangered or threatened with extinction. The policies and procedures revolve around the stated purpose of the ESA: “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species...”³ The ESA authorizes the U.S. Secretary of Interior, acting through the FWS, and the Secretary of Commerce, acting through the National Marine Fisheries Service (NMFS), to designate certain species as endangered or threatened. Generally, the FWS manages land and freshwater species, while the NMFS manages marine and anadromous species. An “endangered species” is “any species which is in danger of extinction throughout all or a significant portion of its range,”⁴ whereas a “threatened species” is “any species which is likely to become an endangered species within the foreseeable future.”⁵

The FWS and the NMFS must follow strict regulatory procedures for listing a species. The process to list a species is initiated in one of two ways: 1) at the initiative of the FWS or the NMFS after a status review of the species,⁶ or 2) by a petition for listing filed by an interested person.⁷ Regardless of the mechanism through which a species is considered for listing, the actual listing determinations are made through a rulemaking process, with determinations published in the *Federal Register* for public notice and comment. If the managing service (the FWS for land and freshwater species, or the NMFS for marine and anadromous species) determines that listing a species is warranted, that service must publish a proposed rule to list the species as threatened or endangered in the *Federal Register*.⁸ Within a year of the publication of the proposed rule, the managing service is required by the ESA to render a final determination (to list the species or withdraw the proposed rule), or, if there is substantial disagreement about scientific data, to delay a final determination for up to six months to solicit more scientific information.⁹ In determining whether to list a species, the managing service must consider five factors:

- 1) The present or threatened destruction, modification, or curtailment of habitat or range;

- 2) Overutilization of the species for commercial, recreational, scientific or educational purposes;
- 3) Disease or predation;
- 4) The inadequacy of existing regulatory mechanisms; and
- 5) Other natural or manmade factors affecting its existence.¹⁰

Notably, economic impact may not be considered in determining whether to list a species under the ESA.

The ESA also requires the designation of a listed species’ critical habitat concurrently with the listing of the species, “to the maximum extent prudent and determinable,” although the designation may be delayed up to 12 months if habitat is not immediately determinable.¹¹ Critical habitat includes geographical areas occupied by a species that are essential to its conservation and that may require special management considerations or protection, as well as areas not currently occupied by the species but that are essential to its conservation.¹² As opposed to listing determinations, a critical habitat designation may include consideration of the economic impact of specifying any particular area of critical habitat, as well as the impact on national security and any other relevant impacts. Further, an area may be excluded from critical habitat if the benefits of exclusion outweigh the benefits of designation, unless the exclusion will result in the extinction of the species.¹³ Critical habitat designations affect only federal agency actions or federally-funded or permitted activities, and generally have no effect on situations that do not involve a federal agency.¹⁴ Federal agencies must avoid the destruction or adverse modification of critical habitat.¹⁵

The ultimate goal of the ESA is to recover a listed species, so that protection under the ESA is no longer necessary. Therefore, the ESA requires that the managing service develop and implement recovery plans for the conservation and survival of listed species, unless such a plan will not promote species conservation.¹⁶ Recovery plans must include site-specific management actions necessary to achieve conservation and survival, objective and measurable criteria — which when met, would result in a determination that the species be delisted — and estimates of time and costs needed to achieve the plan’s goals. A recovery plan is a non-regulatory document but rather provides

guidance on how to achieve the recovery of a listed species.¹⁷

PROTECTIONS AFFORDED TO ENDANGERED AND THREATENED SPECIES

Ultimately, if a species is listed as endangered or threatened, protective measures apply to the species and its habitat under Section Nine of the ESA.¹⁸ The ESA prohibits the possession, sale, import, and/or export of endangered species. Further, the ESA prohibits the “take” of a listed wildlife species by a private or public entity. The ESA defines the term “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”¹⁹ “Harm” is “an act which actually kills or injures wildlife,” including significant habitat modification or degradation which results in the significant impairment of essential behavioral patterns, including breeding, feeding or sheltering.²⁰ Finally, “harass” means “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns.”²¹ Notably, the definition of a “take,” which effectively includes the definitions for “harm” and “harass,” is exceedingly broad.²² Even activities that are not designed or intended to harm a species, but could do so indirectly, can constitute a take prohibited by the ESA. The ESA does not protect listed plants from take, but rather applies a different, lesser level of protection by prohibiting the import or export of endangered plant species, collection of plants from federal lands, and interstate commerce in endangered plant species.²³

The ESA subjects any person who violates the statute or its implementing regulations to an array of civil and criminal sanctions. Anyone who knowingly violates the statute, the regulations, or a permit issued under the ESA is subject to civil penalties. The ESA also makes it a crime to knowingly violate any of its provisions, authorizing criminal penalties of up to \$50,000 per violation.

WHAT TO DO IF A LISTED SPECIES IS LOCATED ON YOUR PROPERTY OR YOUR CLIENT’S PROPERTY AND ‘TAKE’ IS LIKELY TO OCCUR

Incidental Take Permits

Section 10 of the ESA authorizes the issuance of incidental take permits, which allow non-federal entities (including private landowners) to legally proceed with an activity that would otherwise result in the illegal take of a listed wildlife species.²⁵ Incidental take permits are required when non-federal, and otherwise lawful, activities will result in the take of threatened or endangered wildlife. An incidental

“The ESA defines the term ‘take’ to mean ‘harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.’”

take is “any taking otherwise prohibited, if such taking is incidental to, and the purpose of, the carrying out of an otherwise lawful activity.”²⁶ In addition to a permit application, a person or entity seeking a permit for the incidental take of a listed species must submit to the FWS a habitat conservation plan (HCP), describing the impact likely to result from the taking; the steps the applicant will take to minimize and mitigate adverse impacts and the funding that will be available to implement those steps; the alternative actions to such taking the applicant considered and the reasons why the applicant is not pursuing those alternative

actions; and any other measures the FWS may require as necessary or appropriate.²⁷ Further, issuance of an incidental take permit is a federal action subject to National Environmental Policy Act (NEPA) compliance. A draft NEPA analysis is usually required to be submitted with the permit application.²⁸

The FWS decides whether to issue the permit only upon finding that the taking will be incidental to an otherwise lawful activity; the impacts will be minimized and mitigated to the maximum extent practicable; adequate funding will be provided; the taking will not appreciably reduce the likelihood of the survival and recovery of the species; and any other necessary measures are met.²⁹ The permit process may take anywhere from three to 12 months to complete, depending on the complexity of the issues involved and the com-

pleteness of the documents submitted by the applicant.³⁰ The provisions of the HCP are made binding through the incidental take permit, and violation of the permit terms will result in an illegal take under Section Nine of the ESA.³¹

Through the permit, “no surprise” assurances are provided to the permittee — meaning that even if unforeseen circumstances arise, the FWS will not require the commitment of additional land, water or financial compensation, nor additional restrictions on the use of land, water, or other natural resources beyond the level agreed to in the HCP, without the consent of the permittee.³² However, the assurances will only be honored by the FWS if the permittee is properly implementing the HCP.³³

GOVERNMENT INCENTIVES FOR VOLUNTARY CONSERVATION

Safe Harbor Agreements, Candidate Conservation Agreements, and Candidate Conservation Agreements with Assurances

The FWS and NMFS have developed an array of tools and incentives to encourage voluntary efforts that benefit listed and at-risk species while protecting private interests, offered through various types of agreements. Although a detailed analysis of each type of agreement is beyond the scope of this article, a brief overview of the major agreements follows:

Safe Harbor Agreements provide non-federal property owners who voluntarily aid in the recovery of a threatened or endangered species with an “enhancement of survival permit,” authorizing an incidental take under Section 10 of the ESA, as well as regulatory assurances that if the property owner fulfills the conditions of the agreement, no additional or different future management activities will be imposed. Any non-federal property owner may request the development of a Safe Harbor Agreement with the FWS or NMFS.³⁴

Candidate Conservation Agreements with Assurances (CCAAs) are agreements, whereby non-federal property owners commit to implement voluntary conservation measures for a *proposed or candidate species*, and in return receive regulatory assurances that additional conservation measures will not be required and additional land, water, or resource use restrictions will not be imposed should the species become listed in the future.³⁵

Similar to CCAAs, Candidate Conservation Agreements (CCAs) have been developed to aid in the recovery and protection of proposed or candidate species on federal lands. Participation in the CCA provides a “high degree of certainty” that if the cooperator implements the conservation activities within the agreement, the cooperator will not likely be subject to additional restrictions if the candidate or proposed species becomes listed under the ESA in the future.³⁶

CCAs and CCAAs have been proposed and/or implemented for a number of candidate species and provide an important tool for property owners and industry operators to understand. Notably, CCAs and CCAAs are mechanisms that apply *before* a species is listed, so that time is of the essence for projects or operations that may harm candidate species currently under evaluation. Furthermore, the proactive conservation efforts performed through CCAs and CCAAs may remove or reduce threats to the covered species, so that listing the species under the ESA may become unnecessary.³⁷

IT MAY BE TIME TO BRUSH UP ON THE ENDANGERED SPECIES ACT

Under the recent settlement agreements in *In re Endangered Species Act Section 4 Deadline Litigation*, the FWS is required to make various ESA determinations regarding hundreds of species by September 2018, which may result in a marked increase in the number of species listed as threatened and endangered. In light of the settlement, it seems especially important to be knowledgeable about the ESA’s basic framework, the effect a listing decision may have on private property owners who may have threatened or endangered species on their property, and the options available to property owners with candidate or listed species on their property. Some of the tools available to property owners can be utilized in advance of listing and can provide protections and assurances that can be important if the species is ultimately listed. Awareness of the candidates and other species under consideration and whether any clients have land or operations potentially impacting those species could save some major headaches in the long run.

The overarching purpose of the ESA is to conserve imperiled species and the ecosystems upon which they depend. Ultimately, the goal of conservation under the ESA is to help listed species recover to the point where the ESA’s

protective measures are no longer necessary and the species may be delisted.³⁸ However, until the ESA is rendered unnecessary for each imperiled species, it may be time to brush up on the Endangered Species Act.

1. *In re Endangered Species Act Section 4 Deadline Litigation, Order Granting Joint Motion for Approval of Settlement Agreement*, MDL No. 2165, Doc. No. 55 (D.D.C., Sept. 9, 2011); *Order Granting Joint Motion for Approval of Settlement Agreement*, MDL No. 2165, Doc. No. 56 (D.D.C. Sept. 9, 2011).

2. *Joint Motion for Approval of Settlement Agreement*, Ex. 1, *In re Endangered Species Act Section 4 Deadline Litigation*, MDL No. 2165, Doc. No. 31-1 (D.D.C. May 10, 2011); *The Center's and Federal Defendants' Notice of Filing a Related Settlement Agreement*, Ex. 1, *In re Endangered Species Act Section 4 Deadline Litigation*, Ex. 1, MDL No. 2165, Doc. No. 43-1 (D.D.C. July 12, 2011).

3. 16 U.S.C. §1531(b).

4. 16 U.S.C. §1532(6).

5. 16 U.S.C. §1532(20).

6. 16 U.S.C. §1533(b)(1)(A).

7. 16 U.S.C. §1533(b)(3)(A).

8. 16 U.S.C. §1533(b)(5).

9. 16 U.S.C. §1533(b)(6)(A), (B)(i).

10. 16 U.S.C. §1533(a)(1).

11. 16 U.S.C. §1533(a)(3)(A); 16 U.S.C. §1533(b)(6)(C).

12. 16 U.S.C. §1532(5)(A).

13. 16 U.S.C. §1533(b)(2).

14. See www.fws.gov/endangered/what-we-do/critical-habitats-faq.html.

15. 16 U.S.C. §1536(a)(2).

16. 16 U.S.C. §1533(f)(1).

17. See www.fws.gov/endangered/esa-library/pdf/recovery.pdf.

18. Oklahoma is home to over 15 endangered and threatened species, including: the American Burying Beetle (E), the Leopard Darter (T), the Whooping Crane (E), and the Gray Bat (E), Indiana Bat (E), Ozark Bid-Eared Bat (E), Ozark Cavefish (T), Neosho Madtom (T), Winged Entire Mapleleaf (E), Scaleshell Mussel (E), Piping Plover (T), Ouachita Rock Pocketbook (E), Arkansas River Shiner (T), Least Tern (E), Black-Capped Vireo (E), Red-Cockaded Woodpecker (E). See http://ecos.fws.gov/tess_public/pub/stateListingAndOccurrenceIndividual.jsp?state=OK&s8fid=112761032792&s8fid=112762573902; www.wildlife.dept.state.ok.gov/wildlifemgmt/endangeredspecies.htm.

19. 16 U.S.C. §1532(19); ESA §3.

20. 50 C.F.R. §17.3.

21. *Id.*

22. 16 U.S.C. §1538(a)(1)-(a)(2); ESA, §9. Section 9 prohibitions do not apply directly to species listed as threatened. Those species are protected under section 4(d), which vests in the secretary of the interior the discretionary authority to issue regulations which he or she deems necessary and advisable for the conservation of threatened species. However, the secretary has adopted regulations extending to threatened wildlife the taking and related prohibitions applicable to endangered wildlife. 50 C.F.R. §17.31(a) ("All of the provisions in §17.21 [regarding prohibitions against endangered wildlife] shall apply to threatened wildlife," except that whenever a special rule applies to a threatened species, such rule provides all applicable prohibitions and exceptions.)

23. 16 U.S.C. §1538(a)(2).

24. 16 U.S.C. §1640(a)-(b).

25. Incidental take permits are not required for listed plants, because there are no federal prohibitions under the ESA for the take of listed plants.

26. 16 U.S.C. §10(a)(1)(B).

27. 16 U.S.C. §1539(a)(2)(A).

28. "Low Effect" HCPs are those involving minor or negligible effects on federally listed, proposed, or candidate species and their habitats and minor or negligible effects on other environmental values or resources. These HCPs do not require a NEPA document. *Habitat Conservation Plans*, www.fws.gov/endangered/esa-library/pdf/HCP_Incidental_Take.pdf.

29. 16 U.S.C. §1539(a)(2)(B).

30. *Habitat Conservation Plans*, www.fws.gov/endangered/esa-library/pdf/HCP_Incidental_Take.pdf.

31. *Id.*

32. *Id.*; See also 15 C.F.R. §17.22(b)(5); 15 C.F.R. §17.32(b)(5).

33. *Id.*

34. www.fws.gov/endangered/esa-library/pdf/harborqa.pdf.

35. *Final Policy for Candidate Conservation Agreements with Assurances*, 64 Fed. Reg. 32726.

36. See www.fws.gov/endangered/esa-library/pdf/cca.pdf.

37. www.fws.gov/endangered/esa-library/pdf/cca.pdf.

38. 16 U.S.C. §1532(3).

ABOUT THE AUTHORS



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E-Waste Our Fastest Growing Waste Stream

By Matthew Caves

As we strive to streamline our legal practice and life, by utilizing the latest technologic advances and quite frankly “keeping up with the Joneses,” we must be mindful of the waste we’re leaving in our path. Electronic waste or “e-waste” is reported by the Environmental Protection Agency (EPA) to be the fastest growing waste stream. Oklahoma took certain steps toward combating this growing waste stream when the governor signed Senate Bill 1631¹ into law on May 12, 2008.² As a result of this legislative action, the Oklahoma Computer Equipment Recovery Act became effective on Jan. 1, 2009.³

BACKGROUND OF THIS ‘NEWER’ WASTE AND WHY THE CONCERN?

As the fastest growing waste stream, we not only have to deal with the issue of “what can we do with this seemingly antiquated device I purchased only a few years ago,” but we also have to come to terms with the waste created by this ever changing, high tech and often times disposable world we live in. Certain components of electronic products contain materials that render them hazardous waste, depending on their condition and density. A cathode ray tube (CRT), for instance, from older traditional televisions and monitors contains hazardous waste, mainly lead. Human health and environmental concerns related to the presence of these substances arise if the equipment is improperly disassembled or incinerated.⁴ Accordingly, used CRTs are the only electronic device regulated as hazardous waste and whose export is specifically controlled by EPA.⁵ Newer flat-screen televisions, computer monitors, notebooks or tablets utilizing plasma and LCD screens, do not have

a CRT, but CRTs are not the only potential issue with e-waste.

The U.S. Geological Survey, for instance, reports that one metric ton of computer scrap contains more gold than 17 metric tons of ore and much lower levels of harmful elements common to ores, such as arsenic, mercury and sulfur.⁶ Because of high demand for the metals within electronic products, exported used electronics products are often dismantled by burning or acid baths, in developing countries with little or no local waste management systems or regulatory controls. While the United States has the landfill and institutional capacity to provide safe handling and disposal of used electronics domestically, many foreign countries, particularly those in the developing world, do not.⁷

Exporting used electronics, which supports reuse and recycling, does not have to be discouraged. Recycling electronics can provide social, economic and environmental benefits, both in the United States and abroad, such as providing affordable computers to the developing world.

WHAT'S OKLAHOMA DOING?

The Oklahoma Computer Equipment Recovery Act was created as part of an ongoing, nationwide effort to establish convenient and environmentally sound collection, recycling and reuse of electronics that have reached the end of their useful lives.⁸ Under the act, consumers, retailers, manufacturers and the Oklahoma Department of Environmental Quality (DEQ) share responsibilities.⁹

Senate Bill 1613 was drafted in response to the computer industry's request to the Oklahoma Legislature. The computer industry had been required to submit and implement recovery plans in other states, so they naturally requested that the same computer equipment recovery plans be required and implemented in Oklahoma. When you read the bill, you may notice the Legislature stated "computers and computer monitors have become indispensable to the strength and growth of the state's economy and the quality of life of its citizen. Equally important is the protection of our state's environment and natural resources which necessitates the implementation of a statewide system to properly dispose of or recycle these products. Many of these products can be refurbished and reused, and many contain valuable materials that can be recycled."¹⁰ The Legislature identified the importance of computers to the state's economy, yet there was a general oversight as to the importance of "other electronic products" that are equally important and should be addressed in a similar manner.

Further, Senate Bill 1613 stated "The purpose of the Oklahoma Computer Equipment Recovery Act is to establish a convenient and environmentally sound recovery program for the collection, recycling and reuse of computers and computer monitors that have reached the end of their useful lives. The program is based on individual manufacturer responsibility and shared responsibility among consumers, retailers and government."¹¹

HIGHLIGHTS OF OKLAHOMA COMPUTER EQUIPMENT RECOVERY ACT

The collection and recovery provisions of the act apply to "covered devices" used and returned by consumers in the state.¹² Manufacturers are encouraged to offer collection and recovery services to address the collection, recycling and reuse of computer and other electronic equipment not covered by the provisions of the act.

However, one must look to the definitions within the act to determine the full scope and coverage of the act. A "covered device" is defined as a desktop or notebook computer, or computer monitor which is no longer of use to a consumer.¹³ "Covered device does not include a television, any part of a motor vehicle, a personal digital assistant (PDA), a telephone or a medical device that contains a video display device."¹⁴ As a result, the act merely covers "desktop"¹⁵ and "notebook"¹⁶ computers. There remains a gap in coverage for a large portion of the e-waste stream, but the simple development and implementation of the act was a step in the right direction. During the first year after the effective date of the act, the recycling total for computer equipment in Oklahoma for 2009 was 817,277 pounds. In calendar year 2010, manufacturers reported collecting 2,554,632 pounds of electronics.¹⁸

A manufacturer shall not sell or offer for sale a covered device in the state unless the manufacturer has adopted and is implementing a recovery plan, either alone or in cooperation with other manufacturers.¹⁹ Recovery plans shall include a statement that the manufacturer will not dispose of covered devices in landfills or transfer covered devices to computer equipment recycling facilities that dispose of covered devices in landfills other than necessary incidental disposal in *de minimis* amounts.²⁰

A retailer shall not sell or offer for sale a covered device in the state unless the covered device is labeled as required by the act and the manu-

“The collection and recovery provisions of the act apply to ‘covered devices’ used and returned by consumers in the state.”



facturer of the covered device is included on the state list of manufacturers with recovery plans.²¹

The DEQ is required to assist in educating consumers about collection and recovery of covered devices.²² As part of the public information and education responsibilities placed on the DEQ, a computer equipment recycling page is available with information about approved manufacturers within the state, links to approved recovery plans, corporate recycling programs, drop-off sites, collections events, donation and other useful resources.²³

What are the responsibilities of consumers? Consumers remain responsible for any data or other information that a consumer placed on a covered device that is collected or recovered.²⁴ Manufacturers and retailers shall not be responsible for such data and information.²⁵

Further, no state agency shall contract for the purchase of covered electronic devices manufactured by any manufacturer that is not on the DEQ's list of registered manufacturers or that has been otherwise determined noncompliant with the provisions of the act.²⁶

FURTHER DEVELOPMENT OF TECHNOLOGY WILL FURTHER EXPAND THE E-WASTE STREAM

It doesn't take a rocket scientist or college drop-out (e.g. Steve Jobs or Bill Gates) to know that the e-waste stream will only continue to grow as newer technology advances. Computers, televisions, smartphones, notebooks, notepads — the list goes on and on — continue to be developed and marketed at a staggering pace. However, federal, state and even local regulations develop at a much slower pace.

The state of Texas has a program similar to Oklahoma's act.²⁷ This past year, they took the next step in the natural progression of e-waste recycling, by adding "televisions" to their program.²⁸ Adding "televisions" to the act would be the next logical step for Oklahoma, but it shouldn't stop there. The state should be mindful of the benefits of providing additional disposal and recycling options for all components in the e-waste stream.

CONCLUSION — REDUCE, REUSE, RECYCLE?

Americans have increasingly adopted the environmental tenet of "reduce, reuse, recycle," but when it comes to obsolete electronics, they

lack sound information on their disposal options.²⁹ Individuals and businesses can "reduce" their e-waste stream by developing and utilizing a technology procurement policy that utilizes well developed equipment procurement practices and routine maintenance. The same individual and businesses can "reuse" technology that may be "out-dated" for their own needs, yet "still useful" for area schools, non-profits, churches, etc. Consider looking into donating or selling your "out-dated" technology that may be useful for others. Everyone knows "one man's trash is another man's treasure!" Finally, "recycle" electronic components that simply cannot be repaired or are no longer useful. Oklahoma's Computer Equipment Recovery Act has laid the foundation for the recycling of computer equipment and as a result, the DEQ has made available additional resources that can be utilized for other electronic components or e-waste not currently addressed or required to be addressed by the act.

1. 27A O.S. §§2-11-601, *et seq.*

2. The Oklahoma Computer Equipment Recovery Act: A Summary of the 2009 Recovery Program Annual Reports

3. 27A O.S. §§2-11-601.

4. *See* Electronic Waste: EPA Needs to Better Control Harmful U.S. Exports through Stronger Enforcement and More Comprehensive Regulation, GAO-08-1044, August 2008.

5. *Id.*

6. *Id.*

7. *Id.*

8. The Oklahoma Computer Equipment Recovery Act: A Summary of the 2009 Recovery Program Annual Reports

9. *Id.*

10. 27A O.S. §§2-11-601(2)(A).

11. 27A O.S. §§2-11-601(2)(B).

12. "Covered device" as defined at 27A O.S. §2-11-603(3).

13. *Id.*

14. *Id.*

15. "Desktop computer" means an electronic, magnetic, optical, electrochemical or other high-speed data-processing device performing logical, arithmetic or storage functions, but does not include an automated typewriter or typesetter. A desktop computer has a main unit that is intended to be located in a permanent location, often a desk or on the floor. A desktop is not designed for portability and general utilizes an external monitor, keyboard and mouse. 27A O.S. §2-11-603(5).

16. "Notebook computer" means an electronic, magnetic, optical, electrochemical or other high-speed data-processing device performing logical, arithmetic or storage functions, but does not include a portable handheld calculator or a portable digital assistant." 27A O.S. §2-11-603(7).

17. The Oklahoma Computer Equipment Recovery Act: A Summary of the 2009 Recovery Program Annual Reports

18. The Oklahoma Computer Equipment Recovery Act: A Summary of the 2010 Manufacturer Annual Reports

19. 27A O.S. §§2-11-605(B).

20. 27A O.S. §§2-11-605(F).

21. 27A O.S. §§2-11-606.

22. 27A O.S. §§2-11-607(A).

23. www.deq.state.ok.us/lpdnew/ewasteindex.html

24. 27A O.S. §§2-11-608(A).

25. 27A O.S. §§2-11-608(B).

26. 27A O.S. §§2-11-610(A).

27. House Bill 2714 (80th Texas Legislature. 2007) and 30 TAC 328.137.

28. On June 17, 2011, Gov. Perry signed Senate Bill 329 into law, creating the Texas Television Equipment Recycling Program. The TCEQ is currently undergoing rulemaking for this program, and rules should be adopted by May 1, 2012.

29. See Electronic Waste: EPA Needs to Better Control Harmful U.S. Exports through Stronger Enforcement and More Comprehensive Regulation, GAO-08-1044, August 2008.

ABOUT THE AUTHOR



Matthew A. Caves joined Andrews Davis PC in March 2011. Prior to entering private practice, he worked as an environmental attorney at the Oklahoma Department of Environmental Quality (DEQ) for 10 years. He worked within the Air Quality, Land Protection and Water Quality Divisions of the DEQ, handling a multitude of regulatory compliance, enforcement and permitting matters. While at the DEQ, he oversaw the drafting and rulemaking process of the first set of administrative rules for e-waste recycling in Oklahoma.

NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill the following judicial office:

**District Judge
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Oklahoma County, Oklahoma**

This vacancy is due to the retirement of the Honorable Daniel L. Owens effective April 1, 2012.

To be appointed to the office of District Judge, Office 6, Seventh Judicial District, one must be a registered voter of Oklahoma County at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, such appointee shall have had a minimum of four years experience as a licensed practicing attorney, or as a judge of a court of record, or both, within the State of Oklahoma.

Application forms can be obtained online at www.oscn.net under the link to Judicial Nominating Commission, or by contacting Tammy Reaves, Administrative Office of the Courts, 2100 North Lincoln, Suite 3, Oklahoma City, Oklahoma 73105, (405) 556-9300, and must be submitted to the Chairman of the Commission at the same address **no later than 5 p.m., Friday, February 24, 2012. If applications are mailed, they must be postmarked by midnight, February 24, 2012.**

**Jim Loftis, Chairman
Oklahoma Judicial Nominating Commission**



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Guardians of Oklahoma's Environment

By Brita Cantrell

"We know we belong to the land, and the land we belong to is grand ...

OKLAHOMA!"

— Rodgers and Hammerstein

Oklahoma offers unique biological diversity, a state with 11 distinct ecosystems and majestic landscapes such as the Tallgrass Prairie, Black Mesa, Arbuckle Plains, Ozark Mountains, Ouachita Mountains, Kiamichi River basin and the western canyon lands. Oklahomans who work to preserve and promote our state's natural beauty include landowners, conservationists, industrial engineers, regulators, scientists, students, CEOs, consumers, birdwatchers and agency leaders, a collection as diverse as the Oklahoma landscape itself. This article identifies the actors on the Oklahoma environmental stage, a tool inspired by the OBA's environmental law issue.

REGULATORY PROGRAMS

"The Environmental Mission of the State of Oklahoma, as adopted by the state's environmental agencies, is to protect and enhance Oklahoma's environment and natural resources through preservation, conservation, restoration, education and enforcement in order to maintain and improve the environmental quality and natural beauty of our state and better the standard of living for all Oklahomans." See www.environment.ok.gov. The primary agencies involved in that effort are the Oklahoma Department of Environmental Quality, the Oklahoma Water Resources Board, the Oklahoma Department of Agriculture, the Oklahoma Department of Mines and the Oklahoma Corporation Commission.

The Oklahoma Secretary Of Environment

On Jan. 14, 2011, Gov. Mary Fallin appointed Gary Sherrer Oklahoma's sixth secretary of environment, a cabinet level position. See OKLA. STAT. tit. 27A, §1-2-101. As secretary of environment, it is Mr. Sherrer's duty to administer the State Revolving Fund Program, coordinate pollution control and complaint management activities of state agencies, develop a common database for water quality information, and serve as state trustee for natural resources under the federal Oil Pollution Act of 1990, the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, the federal Water Pollution Control Act, and any other federal law that requires designation of a state trustee. See OKLA. STAT. tit. 27A, §1-2-101(A). Additionally, it is the duty of the secretary of the environment to

develop or modify public participation in developing the state's federally required list of impaired waters (303(d) report), water quality assessment (305(b) report), nonpoint source assessment (319 report), and the continuing planning process document. *See* OKLA. STAT. tit. 27A, §1-2-101 (B).

The Oklahoma Environmental Quality Act

The Oklahoma Environmental Quality Act is found at OKLA. STAT. tit. 27A, §1 *et seq.* The Oklahoma Department of Environmental Quality (DEQ) implements that act, under the direction of DEQ Director Steve Thompson. The DEQ Mission "is to enhance the quality of life in Oklahoma and protect the health of its citizens by protecting, preserving and restoring the water, land and air of the state, thus fostering a clean, attractive, healthy, prosperous and sustainable environment." *See* www.deq.state.ok.us. The DEQ vision "is to eliminate the effects of unintended consequences of historic development, to prevent new adverse environmental impacts and to provide significant input into national decision making all the while enhancing both the environment and the economy of Oklahoma." *Id.*

To propose the rules that implement the Oklahoma Environmental Quality Act, enabling legislation established five advisory councils for the following: 1) water quality, 2) hazardous waste, 3) solid waste, 4) radiation and 5) laboratory services. OKLA. STAT. tit. 27A, §2-2-201. Council membership is appointed by the governor, the speaker of the House of Representatives, or the president pro tempore of the Senate, and includes representatives of the regulated industry, political subdivisions and the community. *Id.* The DEQ rulemaking body is the Oklahoma Environmental Quality Board, created to represent the interests of the State of Oklahoma and consisting of 13 members appointed by the Governor. OKLA. STAT. tit. 27A, §2-2-101.

The Oklahoma Environmental Quality Act, and related legislation, assigns Oklahoma regulatory responsibility based on the media protected and by type of regulated activity, best described as follows.

Regulated Activity

While there are instances of statutory overlap, Oklahoma's basic environmental regulatory structure developed out of historical agency control over regulated activity. In broad

terms, the Oklahoma Corporation Commission regulates oil and gas production and the Oklahoma Department of Agriculture regulates agriculturally based activity. The Oklahoma Department of Mines has authority over mine reclamation, and asbestos is the jurisdiction of the Oklahoma Department of Labor. The DEQ regulates the remainder which includes industry and public water supplies, hazardous waste, solid waste, radiation and laboratory services.

Asbestos: The Oklahoma Department of Labor is the lead state agency for asbestos abatement regulation. OKLA. STAT. tit. 40, §§450-57.

Oil and Gas: All activities associated with oil and gas production and storage are the exclusive jurisdiction of the Oklahoma Corporation Commission. OKLA. STAT. tit. 27A, §1-3-101(E). This responsibility includes all conservation, exploration, testing, wells, drilling, production and related operations. OKLA. STAT. tit. 27A, §1-3-101(E)(1)(a-d). The Oklahoma Corporation Commission has responsibility for identified reclaiming facilities related to its jurisdiction and underground injection control. OKLA. STAT. tit. 27A, §1-3-101(E)(1)(e-f).

The Oklahoma Corporation Commission regulates activities associated with the construction and operation of pipelines and transportation of oil, gas and brine, and treatment during transportation at or related to refineries and petrochemical or mineral brine processing plants. OKLA. STAT. tit. 27A, §1-3-101(E)(1)(h). In addition, the Oklahoma Corporation Commission has responsibility for the waste produced and spills associated with facilities for which it has jurisdiction, and for the subsurface storage of oil, natural gas and liquefied petroleum. OKLA. STAT. tit. 27A, §1-3-101(E)(1)(j-k).

Above-ground and below-ground tanks are regulated by the Oklahoma Corporation Commission. OKLA. STAT. tit. 27A, §1-3-101(E)(5). The Oklahoma Department of Environmental Quality has responsibility for regulating discharges of pollutants and other deleterious substances to waters of the state from refineries, petrochemical manufacturing plants, natural gas liquid extraction plants, and the manufacturing of equipment and products related to oil and gas. OKLA. STAT. tit. 27A, §1-3-101(E)(7).

The Oklahoma Corporation Commission also has responsibility for the tank farms storing crude oil and petroleum products located outside the boundaries of refineries, petrochemical manufacturing plants, natural gas liquid

extraction plants or other facilities. OKLA. STAT. tit. 27A, §1-3-101(E)(1)(g).

Forestry, Feedlots and Feed: The Oklahoma Department of Agriculture has jurisdiction over food and forestry, pesticides, nurseries and fertilizer. OKLA. STAT. tit. 27A, §1-3-101(D). The Department of Agriculture also has jurisdiction over swine and poultry waste disposal activities and confined animal feeding operations. OKLA. STAT. tit. §20-1 *et seq.*, §10-9.1 *et seq.*, and §20-40 *et seq.*, respectively.

The Oklahoma Department of Agriculture has jurisdiction over facilities which store grain, feed, seed, fertilizer and agricultural chemicals. OKLA. STAT. tit. 27A, §1-3-101(D)(1)(e). With respect to milk production facilities, the Oklahoma Department of Agriculture has jurisdiction over associated dairy waste and wastewater associated with milk production facilities. OKLA. STAT. tit. 27A, §1-3-101(D)(1)(f). The Oklahoma Department of Agriculture is also responsible for storm water discharges from the facilities that the department regulates. OKLA. STAT. tit. 27A, §1-3-101(D)(1)(j). The Oklahoma Department of Environmental Quality does not have responsibility for feedlots. OKLA. STAT. tit. 27A, §1-3-101(D)(2)(a)(2).

Emergency Disease Control in Livestock: The Oklahoma Department of Agriculture has jurisdiction over emergency procedures resulting from an outbreak of disease in livestock. OKLA. STAT. tit. 2, §6-400 *et seq.*

Mines: The Oklahoma Department of Mines has responsibility for mining regulation, reclamation at active mines, and groundwater protection at the mines it regulates. OKLA. STAT. tit. 27A, §1-3-101(G). The Oklahoma Conservation Commission manages abandoned mine reclamation. OKLA. STAT. tit. 27A, §1-3-101(F)(4).

Weather Modification: The Oklahoma Water Resources Board has responsibility for weather modification. OKLA. STAT. tit. 27A, §1-3-101(C)(2).

Pollution Cleanup at Federal Facilities: The U.S. Army Corps of Engineers in Tulsa is a designated Design District charged with providing technical support in the identification and clean-up of pollution. See www.swt.usace.army.mil.

Dam Safety: Oklahoma Water Resources Board has responsibility for state dam safety. OKLA. STAT. tit. 27A, §1-3-101(C)(3).

Hazardous Waste and Solid Waste: The DEQ has jurisdiction over hazardous waste and solid waste, including industrial, commercial and municipal waste. OKLA. STAT. tit. 27A, §1-3-101(B)(9).

Superfund Sites: The DEQ has responsibility for superfund sites under the Comprehensive Environmental Response Compensation and Liability Act. OKLA. STAT. tit. 27A, §1-3-101(B)(10).

Radioactive Waste: The DEQ has jurisdiction over radioactive waste and all regulatory activities concerning the use of atomic energy and sources of radiation. OKLA. STAT. tit. 27A, §1-3-101(B)(11). However x-ray facilities are not included. *Id.*

Transportation of Hazardous Materials: The transportation of hazardous materials is regulated by the Oklahoma Department of Public Safety. OKLA. STAT. tit. 27A, §1-3-101(I).

Emergency Management: The Oklahoma Department of Emergency Management manages training, planning and coordination of state efforts to address any emergency, including environmental disasters that threaten Oklahomans, their lives and property. OKLA. STAT. tit. 27A, §1-3-101(K).

Public and private water supplies: The DEQ has responsibility for public and private water supplies. OKLA. STAT. tit. 27A, §1-3-101(B)(6).

Waterworks and wastewater works operator certification: The DEQ has responsibility for waterworks and wastewater works. OKLA. STAT. tit. 27A, §1-3-101(B)(5).

Water

Broadly speaking, the Oklahoma Water Resources Board determines water quality standards for water bodies and addresses issues involving water quantity. The DEQ regulates point source discharges to water bodies, including the permitting system for industrial and municipal discharges. Nonpoint source discharges are regulated by the agency with oversight for the originating activity.

Water Quality: The Oklahoma Water Resources Board has jurisdiction over state water quality standards and accompanying use assessment protocols, anti-degradation policy and implementation. OKLA. STAT. tit. 27A, §1-3-101(C)(9). It also has responsibility for development and promulgation of a Water Quality Standards

Implementation Plan, in coordination with other state environmental agencies and the U.S. Geological Survey for water quality assessment and monitoring. OKLA. STAT. tit. 27A, §1-3-101(C)(11 and 14). The Oklahoma Water Resources Board has the responsibility for developing a state water quality monitoring report.

It is the duty of the DEQ to develop the comprehensive programs directed to the prevention, control and abatement of new or existing pollution of the waters of this state. OKLA. STAT. tit. 27A, §2-6-103(A). The DEQ has responsibility over surface water and groundwater quality and protection, including water quality certifications. OKLA. STAT. tit. 27A, §1-3-101(B). It also has responsibility for utilization and enforcement of Oklahoma Water Quality Standards and implementation documents, including responsibility for developing a Water Quality Standards Implementation Plan. OKLA. STAT. tit. 27A, §1-3-101(B)(18 and 21). Additionally, the DEQ has the duty to develop a water quality computer information system. OKLA. STAT. tit. 27A, §1-3-101(B)(20).

The Oklahoma Department of Agriculture, Food, and Forestry has jurisdiction over utilization and enforcement of Oklahoma Water Quality Standards and implementation documents. OKLA. STAT. tit. 27A, §1-3-101(D)(1)(h). It also has responsibility for the development and promulgation of a Water Quality Standards Implementation Plan pursuant to Section 1-1-202 of this title for its jurisdictional areas of environmental responsibility. OKLA. STAT. tit. 27A, §1-3-101(D)(1)(i).

The Oklahoma Corporation Commission helps to enforce the Oklahoma Water Quality Standards, and has the duty to develop a water quality implementation plan for those activities within its jurisdictional area of responsibility, primarily oil and gas production, processing, storing and related activities. OKLA. STAT. tit. 27A, §1-3-101(E)(1)(n) and (m).

The Oklahoma Scenic Rivers Commission: According to the Oklahoma Legislature, "some of the free-flowing streams and rivers of Oklahoma possess such unique natural scenic beauty, water conservation, fish, wildlife and outdoor recreational values of present and future benefit to the people of the state that it is the policy of the Legislature to preserve these areas for the benefit of the people of Oklahoma." OKLA. STAT. tit. 82, §1452. Oklahoma's designated scenic

rivers are the Flint Creek and the Illinois River above the confluence of the Barren Fork Creek, the Barren Fork Creek in Adair and Cherokee Counties, the Upper Mountain Fork River above Broken Bow Reservoir, Big Lee's Creek and Little Lee's Creek. The Oklahoma Scenic River Commission, headquartered in Tahlequah, is directed by Ed Fite. The commission consists of seven to 15 members, for four-year terms, appointed by either the governor, the president pro tempore of the Senate, the speaker of the House of Representatives, or elected by the registered voters in the scenic river region. OKLA. STAT. tit. 82, §1461(C). The Oklahoma Scenic Rivers Commission works with the DEQ, the Corporation Commission, the Department of Agriculture, the Oklahoma Water Resources Board, the Oklahoma Wildlife Conservation Commission and the Conservation Commission to develop coordinated watershed restoration and protection strategies for each watershed. OKLA. STAT. tit. 82, §1457.

Oklahoma Groundwater Protection: There are six agencies designated as groundwater protection agencies: the Oklahoma Water Resources Board, the Oklahoma Corporation Commission, the State Department of Agriculture, the DEQ, the Oklahoma Conservation Commission and the Oklahoma Department of Mines. OKLA. STAT. tit. 27A, §1-1-201(5). The Oklahoma Water Resources Board has responsibility for groundwater protection for activities within its jurisdictional areas of responsibility. OKLA. STAT. tit. 27A, §1-3-101(C)(10). The Oklahoma Department of Agriculture has jurisdiction over groundwater protection for activities subject to the jurisdictional areas of environmental responsibility of the department. OKLA. STAT. tit. 27A, §1-3-101(D)(1)(g).

Eutrophic Lakes: The Office of the Secretary of the Environment is charged with identifying which lakes are eutrophic, as defined by Oklahoma Water Quality Standards as lakes containing an excess of nutrients, primarily nitrogen and phosphorus, that can lead to increases in algae growth and depleted oxygen levels. No person or entity may discharge wastewater from a point source which will foreseeably enter a eutrophic lake. OKLA. STAT. tit. 27A, §1-2-102 (B).

Water Quantity: The Oklahoma Water Resources Board has jurisdiction over all water quantity issues, which would include water rights, and surface and underground water quality, such as interstate usage or water com-

pacts. OKLA. STAT. tit. 27A, §1-3-101(C)(1).

The Oklahoma Water Science Center: The Oklahoma Water Science Center, established by the U.S. Geological Survey, a division of the U.S. Department of Interior, is located in Oklahoma City, and has as its mission the collection, analysis and dissemination of the impartial hydrologic data and information needed to wisely manage water resources for the people of the United States and the state of Oklahoma. See <http://ok.water.usgs.gov>.

Discharges into Water

Point Source Discharges: The DEQ regulates all point source discharges of pollutants and storm water to waters of this state which originate from municipal, industrial, commercial, mining, transportation and utilities, trade, real estate and finance. OKLA. STAT. tit. 27A, §1-3-101(B)(1). The Oklahoma Department of Agriculture has jurisdiction over point source discharges from agricultural crop production or services, livestock production, silviculture, feed yards, livestock markets and animal waste. OKLA. STAT. tit. 27A, §1-3-101(D)(1)(a).

When point source discharges from a facility regulated by the Oklahoma Corporation Commission enters point source discharges regulated by the DEQ, the DEQ gains responsibility. OKLA. STAT. tit. 27A, §1-3-101(E)(3). Beyond that, discharges from a facility regulated by the Oklahoma Corporation Commission which require a federal NPDES permit are regulated by the Environmental Protection Agency, and not an Oklahoma state agency. OKLA. STAT. tit. 27A, §1-3-101(E)(4).

Nonpoint Source Discharges: Oklahoma regulates nonpoint source discharges to water only to the extent of its delegated authority pursuant to the federal Clean Water Act. 33 U.S.C. §1251. The DEQ has responsibility over all nonpoint source discharges and pollutants, except for those regulated by the Oklahoma Department of Agriculture, the Oklahoma Corporation Commission, and the Oklahoma Conservation Commission. OKLA. STAT. tit. 27A, §1-3-101(B)(2).

The Oklahoma Department of Agriculture regulates commercial manufacturers of fertil-

“...the DEQ regulates associated discharges of pollutants and storm water to waters of the state...”

izers, grain and feed products, and chemicals, manufacturing of food products, tobacco, paper, lumber, wood, textile mill and other agricultural products, slaughterhouses, aquaculture and fish hatcheries. OKLA. STAT. tit. 27A, §1-3-101(D)(2)(a). With respect to all of these types of facilities, the DEQ regulates associated discharges of pollutants and storm water to waters of the

state, surface impoundments and land application of wastes and sludge, and other pollution. OKLA. STAT. tit. 27A, §1-3-101(D)(2)(b). The DEQ issues NPDES storm water discharge permits for grain, feed, seed, fertilizer, and agricultural chemical storage facilities. OKLA. STAT. tit. 27A, §1-3-101(D)(2)(b).

Underground Injection: The DEQ has responsibility for underground injection controls, except for those wells governed by the Oklahoma Corporation Commission. OKLA. STAT. tit. 27A, §1-3-101(B)(7).

Dredge and Fill: The U.S. Army Corp of Engineers has responsibility for issuing permits for dredge or fill activities in navigable waters of the United States. 33 U.S.C.A. §1344. The Corps' Oklahoma headquarters is in Tulsa.

Flood Plains: The Oklahoma Water Resources Board has responsibility for flood plain management. OKLA. STAT. tit. 27A, §1-3-101(C)(4).

Lakes: The Oklahoma Water Resources Board has responsibility for assessing, monitoring and restoring Oklahoma lakes. OKLA. STAT. tit. 27A, §1-3-101(C)(8). The board receives funding, whether public or private, for lake restoration and implements a volunteer program (“Oklahoma Water Watch”) to monitor and assess state waters. *Id.*

Well and Pump Licensing: Water well drillers and pump installers are licensed by the Oklahoma Water Resources Board. OKLA. STAT. tit. 27A, §1-3-101(C)(7).

Water Treatment Systems: The DEQ has jurisdiction over water, waste and waste water treatment systems, including septic, public and private systems. OKLA. STAT. tit. 27A, §1-3-101(B)(12).

Financial Aid for Water

The Oklahoma Water Resources Board oversees state water and wastewater loans and grants. OKLA. STAT. tit. 27A, §1-3-101(C)(5). The board also administers the State Revolving Fund Program. OKLA. STAT. tit. 27A, §1-3-101(C)(6).

The Oklahoma Water Resources Board is lead agency for clean lakes eligible for funding under Section 314 of the Clean Water Act. OKLA. STAT. tit. 27A, §1-3-101(C)(8).

The Oklahoma Secretary of Environment administers and disburses funds from Federal Clean Water Act sources. OKLA. STAT. tit. 27A, §1-3-101(C)(8).

Air

The Oklahoma Clean Air Act: The DEQ is the designated administrative agency for the Oklahoma Clean Air Act for the state. OKLA. STAT. tit. 27A, §2-5-105, and has exclusive jurisdiction for air quality under the Clean Air Act and applicable state law. OKLA. STAT. tit. 27A, §1-3-101(B)(8). The DEQ has the responsibility for Air Quality under the Clean Air Act, and applicable state law, except for indoor air quality for workplace safety and asbestos. OKLA. STAT. tit. 27A, §1-3-101(B)(8). It has sole responsibility to regulate air emissions from all facilities and sources subject to federal operating permit requirements. OKLA. STAT. tit. 27A, §1-3-101(E)(8).

The DEQ is charged with the responsibility of establishing a permitting program for the state which will contain the flexible source operation provisions required by the Federal Clean Air Act Amendments of 1990 and for preparing a proper air quality management plan. OKLA. STAT. tit. 27A, §2-5-105(2) and (3). Cities, towns and municipalities retain authority to abate air quality, and to enact ordinances or codes with respect to air pollution which will not conflict with the Oklahoma Clean Air Act and which contain provisions more stringent than those fixed by that Act. OKLA. STAT. tit. 27A, §2-5-103(A).

The Oklahoma Clean Air Act shall not be construed to affect in any way the powers, duties or functions of the State Board of Agriculture except to the extent necessary to comply with the Federal Clean Air Act. OKLA. STAT. tit. 27A, §2-5-103(C).

The Oklahoma Air Quality Council is charged to recommend to the board rules or amend-

ments addressed to the prevention, control and prohibition of air pollution, and to develop safety tolerances for the discharge of contaminants as may be consistent with the Oklahoma Clean Air Act. OKLA. STAT. tit. 27A, §2-5-107. Prior to recommending rules, the council conducts thorough public rulemaking hearings. OKLA. STAT. tit. 27A, §2-5-107(3).

OSHA and Indoor Air Quality: Indoor air quality regulated under the Oklahoma Occupational Health and Safety Standards Act is the responsibility of The Oklahoma Department of Labor. OKLA. STAT. tit. 27A, §1-3-101(J)(3).

Rocks and Land

The Oklahoma Constitution established a State Geologic and Economic Survey. Oklahoma Constitution, Article 5, §38. According to its website, enabling legislation signed by Gov. Charles Haskell in 1908 mandated that the survey “[i]nvestigate the state’s land, water, mineral, and energy resources and disseminate the results of those investigations to promote the wise use consistent with sound environmental practices.” See www.ogs.ou.edu. The survey monitors earthquakes in Oklahoma and around the world, has a geologic mapping program, conducts basic geologic research and makes the findings available in workshops, as publications, maps and online material offered to the public at no charge. It also operates the Oklahoma Petroleum Information Center in Norman and a geophysical observatory near Leonard. The OGS is affiliated with the Mewbourne College of Earth and Energy at the University of Oklahoma in Norman.

The U.S. Geologic Survey (USGS) is a division of the U.S. Department of Interior and describes itself as a science organization that “provides impartial information on the health of our ecosystems and environment, the natural hazards that threaten us, the natural resources we rely on, the impacts of climate and land-use change, and the core science systems that help us provide timely, relevant and useful information.” See www.usgs.gov.

Climate

The Oklahoma Climatological Survey, the Climate Office of the State of Oklahoma, is located in Norman. OKLA. STAT. tit. 74, §245. The Climatological Survey operates under the direction of the Board of Regents of the University of Oklahoma. *Id.*

CONSERVATION PROGRAMS

Oklahoma's conservation organizations define their work and this state in terms of interrelated landscapes. Oklahoma lands are 97 percent privately owned, and thus, Oklahoma landowners and land managers partner with these organizations to map our state's future.

Private Sector

The Oklahoma Nature Conservancy: The Oklahoma Chapter of The Nature Conservancy, a private, non-profit conservation organization, manages preserves across the state. Led by Oklahoma community and business leaders, The Nature Conservancy uses privately funded initiatives to conserve the best of Oklahoma's ecological landscapes. The Nature Conservancy mission is to insure the health of diverse ecological communities, such as the Tallgrass Prairie, by protecting the lands and waters that are home to native plants, animals and natural bio-systems. The Nature Conservancy sets itself apart by the way it operates, using a non-confrontational, collaborative approach to on-the-ground conservation. Chief among its core values are honesty, accountability and trust earned by competence and consistency.

The Oklahoma chapter manages impressive landscapes, such as the J.T. Nickel Family Ranch on the Illinois River near Tahlequah — 17,000 acres of Oklahoma Ozark foothills populated by wild elk. The Four Canyon Preserve along the Canadian River protects 4,000 acres of mixed-grass prairie. Moreover, The Tallgrass Prairie Preserve, covering nearly 40,000 acres outside of Pawhuska and home to 2,500 free-roaming bison, is the largest preserved remnant of tall grass prairie left on Earth. The Nature Conservancy's work in these spectacular landscapes is a great gift to Oklahoma, attracting visitors from around the world.

Currently, The Nature Conservancy partners with the Oklahoma Department of Wildlife Conservation in the use of Voluntary Offset Program funding to purchase conservation easements in sensitive Lesser Prairie Chicken habitat regions. The Voluntary Offset Program funds are generated by energy companies that desire to "offset" any impact of wind farms to the habitat of the Lesser Prairie Chicken by making a donation to the Oklahoma Department of Wildlife Conservation program.

The Nature Conservancy also purchases with private funding or is gifted conservation ease-

ments in areas of ecological significance, such as real estate holdings surrounding its Tallgrass Prairie Preserve. To learn more about The Nature Conservancy, led by its state director, Mike Fuhr, and board chairman, John Groendyke, check out its website: www.nature.org.

George Miksch Sutton Avian Research Center: The Sutton Center is a private, non-profit organization that conducts research to find conservation solutions for birds and the natural world through science and education. The Sutton Center has conducted intensive research on declining grassland birds and developed and applied techniques for the reintroduction of Southern Bald Eagles. See www.suttoncenter.org.

Public Sector

The Oklahoma Department of Wildlife Conservation: In 1895, the Oklahoma territorial government passed our first game laws. See www.wildlifedepartment.com. Fourteen years later, a new Oklahoma Legislature established a Game and Fish Department in 1909. *Id.* In 1956, the Oklahoma Department of Wildlife Conservation was established constitutionally, governed by a Wildlife Conservation director and an eight-member commission, each gubernatorial appointments for eight-year terms. OK. CONST. art. 26, §1. Additionally, the department is authorized to acquire land to carry out its conservation directives. OK. CONST. art. 26, §2. More recently, in 2008 the Oklahoma Bill of Rights was expanded to endow Oklahomans with a constitutional right to hunt, fish, trap and harvest game and fish, subject only to the Oklahoma Legislature and the Oklahoma Wildlife Conservation Commission. OK. CONST. art. 2, §36.

Richard Hatcher is the director of the Oklahoma Department of Wildlife Conservation, the mission of which "is the management, protection, and enhancement of wildlife resources and habitat for the scientific, educational, recreational, aesthetic, and economic benefits to present and future generations of citizens and visitors to Oklahoma." The department is responsible for the day-to-day wildlife conservation work directed by the commission, including the issuance of Oklahoma hunting and fishing licenses that generate the department's funding. See the Oklahoma Wildlife Conservation Code, OKLA. STAT. tit. 29, §1-101, *et seq.* According to its website, the department owns and manages thousands of acres of land managed as natural areas for hunting and other compatible uses, and partners with pri-

vate landowners to help manage their wildlife resources.

The United States Fish and Wildlife Service: Title 16 of the U.S. Code Annotated, bound in 12 volumes, provides the federal conservation structure. With respect to Oklahoma, most prominent is the United States Fish and Wildlife Service, a division of the U.S. Department of the Interior, which works to implement the Endangered Species Act. *See* 16 U.S.C.A. §§1531-1544. The Endangered Species Act was established to conserve the ecosystems upon which endangered species and threatened species depend, to provide a program for conservation and to take such steps as may be appropriate to achieve the goals necessary to conserve species facing extinction. 16 U.S.C.A. §1531. The service mission is “working with others to conserve, protect and enhance fish, wildlife and plants and their habitats for continuing benefit of the American people.” *See* www.fws.gov/mission.html. Federal agencies work to ensure that acts taken, or which are federally funded, do not threaten species identified as endangered. 16 U.S.C.A. §1536. To accomplish this objective, federal agencies will request an opinion from the U. S. Fish and Wildlife Service to examine whether proposed acts would impact identified species. *Id.*

Dixie Bounds is field supervisor for the Oklahoma Ecological Services Field Office for the U.S. Fish and Wildlife Service, headquartered in Tulsa. *See* www.fws.gov/southwest/es/oklahoma. This office works to recover imperiled species through voluntary conservation. Service biologists identify Oklahoma plant, animal and bird species, and the best way to manage them on a landscape level, involving potential stakeholders such as land owners, tribal members and university scientists. According to Ms. Bounds, 97 percent of Oklahoma land is privately owned, and thus, the bulk of their work involves assisting and partnering with local land owners. Oklahoma projects include habitat preservation for the Lesser Prairie Chicken, assisting in the development of the Oklahoma State Water Plan, and implementing Partners for Fish and Wildlife, a habitat funding program that offers a 50/50 funding match to provide landowners resources to pay for habitat restoration at a local level.

The United States Forest Service: The U.S. Forest Service, a division of the United States Department of Agriculture, manages 193 million acres of national forests and grasslands.

See www.fs.usda.gov. In Oklahoma, the Ouachita National Forest extends from southeastern Oklahoma into Arkansas, covering a total of 1.9 million acres, and is managed from the service headquarters in Little Rock, Ark. The Ozark National Forest is found predominately in northwest Arkansas, with foothills in northeastern Oklahoma. The local Forest Service headquarters is in Russellville, Ark. Finally, the Cibola National Grasslands cover 263,954 acres including a portion in western Oklahoma, as well as northeastern New Mexico and northern Texas.

The Oklahoma Conservation Commission: The Oklahoma Conservation Commission, created as result of the 1930s dust bowl, promotes soil conservation, erosion control and nonpoint source management. *See* www.conservation.ok.gov; *see also* OKLA. STAT. tit. 27A, §1-3-101(F). The Conservation District Act established conservation districts as governmental subdivisions of the state to carry out this mission. OKLA. STAT. tit. 27A, §3-1-103. Oklahoma has 87 such districts, usually mirroring county borders, which work within their assigned communities to conserve renewable resources, control and prevent soil erosion and floods, and to develop water resources and improve water quality. OKLA. STAT. tit. 27A, §3-1-102. The Conservation Commission assists the work of the conservation districts, with responsibility for monitoring, evaluating and assessing streams impacted by nonpoint source pollution (except impacts that relate to industrial or municipal storm water). OKLA. STAT. tit. 27A, §1-3-101(F)(2). The commission also manages Oklahoma conservation programs related to wetlands, clean lakes watersheds, conservation education, flood control, groundwater protection for these activities and abandoned mine reclamation. OKLA. STAT. tit. 27A, §1-3-101(F). Mike Thralls is the director of the Oklahoma Conservation Commission.

The Natural Resource Conservation Service: This federal agency also has its roots in the dust bowl era. The Natural Resource Conservation Service, an agency within the U.S. Department of Agriculture, is the historical product of the 1937 federal initiative to conserve soil and water resources.

Future Issues

Kyoto Protocol: Neither the legislative or executive branch of the state of Oklahoma shall implement the Kyoto Protocol until such time

as it has been ratified by the U.S. Senate or otherwise entered into law. OKLA. STAT. tit. 27A, §1-1-207. This shall not impede state or private participation in voluntary initiatives to reduce greenhouse gasses. *Id.* This also shall not impair compliance with the federal or Oklahoma Clean Air Acts. OKLA. STAT. tit. 27A, §1-1-207(B)(1) and (2).

Oklahoma State Water Plan: Pursuant to OKLA. STAT. tit. 82, §1086.2(1), the Oklahoma Water Resources Board is directed to develop a strategic guide for managing Oklahoma's water resources over the next 50 years. The original plan was produced in 1980, updated in 1995, and is scheduled for an additional update in 2012. See okwaterplan.info.

Earthquake Hazards Program: On average, there are 50 earthquakes per year in Oklahoma. The Oklahoma U.S. Geological Survey is the lead agency for monitoring, reporting, and researching earthquakes and earthquake hazards in our state. See earthquake.usgs.gov. The USGS provides Oklahoma's earthquake data, which includes seismic hazard assessments, geoscience research and post-earthquake investigations. See www.nehrp.gov. The governor has general direction and control over all emergency management within the state. OKLA. STAT. tit. 63, §683.8. The Oklahoma Geologic Survey studies Oklahoma earthquakes, and operates a Geophysical Observatory in Leonard to capture seismic activity. See www.ogs.ou.edu/level2-earthquakes.php.

CONCLUSION

Perhaps of necessity, as a result of the footprints left by mankind on this planet, we welcome the efforts of the men and women dedicated to conserving Oklahoma's natural resources as we strive to make Oklahoma a better place for our children. One of our most revered conservationist presidents said it best:

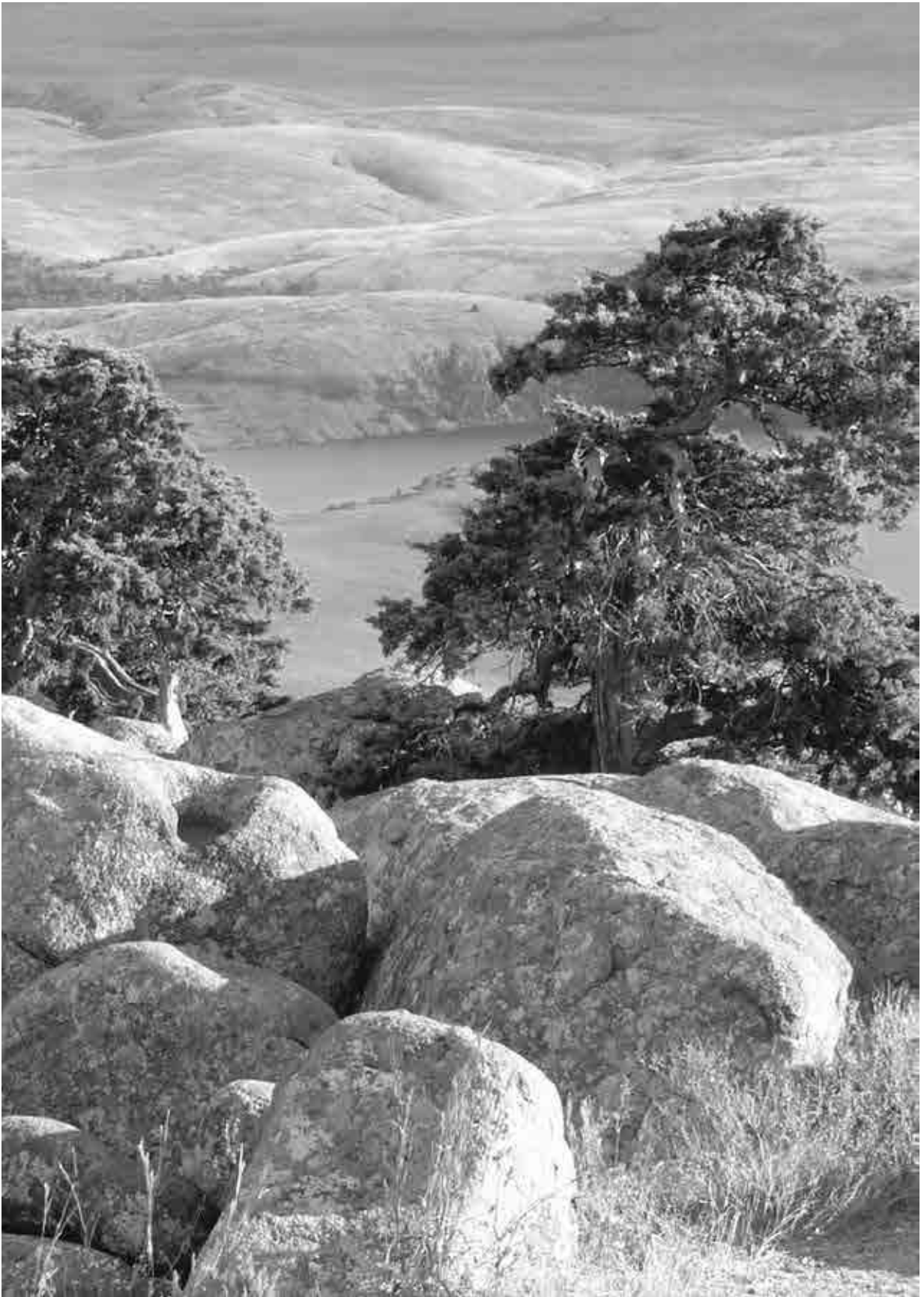
To waste, to destroy our natural resources, to skin and exhaust the land instead of using it so as to increase its usefulness, will result in undermining in the days of our children the very prosperity which we ought by right to hand down to them amplified and developed.

~Theodore Roosevelt, Dec. 3, 1907

ABOUT THE AUTHOR



Brita H. Cantrell practices with McAfee & Taft in Tulsa, and serves in her second five-year term as board member for the Oklahoma Department of Environmental Quality Board, a two-term past board chairman. She is a 1987 graduate of the OU College of Law, where she served on the *Law Review*, and a 1984 graduate of Wellesley College. She served for six years as executive director of the Oklahoma Chapter of The Nature Conservancy. Her current practice is comprised of product liability and family law litigation.



The Mechanics of DEQ Enforcement

By Laura Finley and Madison Miller

The purpose of this article is to provide a general overview of the Oklahoma Department of Environmental Quality's (DEQ) enforcement process and the duties and responsibilities of both the agency and the regulated community during the enforcement process.¹

JURISDICTION, POWERS AND DUTIES OF THE DEQ

The mission of the DEQ is "to enhance the quality of life in Oklahoma and protect the health of its citizens by protecting, preserving, and restoring the water, land, and air of the state, thus fostering a clean, attractive, healthy, prosperous, and sustainable environment."² The DEQ's jurisdictional areas of environmental responsibility include point source and non-point source discharges of pollutants and storm water to waters of the state; surface water and groundwater quality; public and private water supplies; air quality; hazardous and solid waste; Superfund responsibilities of the state; radioactive waste and regulation of the use of atomic energy and sources of radiation; water, waste and wastewater treatment; and emergency response.³

Pursuant to the Environmental Quality Code (code),⁴ DEQ has the power and duty to, *inter alia*: access any premises at any reasonable time to determine compliance; determine and assess administrative penalties; take or request civil action or request criminal prosecution for non-compliance with the code, rules, permits, and/or orders; investigate alleged violations of the code, rules, permits, and/or orders; review records; conduct hearings and issue subpoenas according to the Administrative Procedures Act; require the

establishment and maintenance of records, reports and monitoring equipment; and register persons, property and activities as required by the code.⁵

VIOLATIONS OF STATUTORY AND REGULATORY OBLIGATIONS

The DEQ enforces the state environmental rules promulgated in Title 252 of the Oklahoma Administrative Code (OAC), as well as the federal regulations incorporated by reference in the OAC. Certain issues of noncompliance are potentially more detrimental to the environment and/or public health than others, and are thus afforded a heightened level of enforcement action.⁶ DEQ enforcement broadly recognizes two levels of violations — Level One violations (sometimes referred to as significant noncompliance (SNC) or high priority violations (HPVs), depending on the DEQ program involved) — and Non-Level One violations.⁷ Each division within DEQ has the responsibility to establish what violations rise to the level of SNC and to determine the definition of Non-Level One violations. A Level One violation is based on "(a) actual significant harm or a substantial potential risk of significant harm to human health or the environment, or (b) the ability of the regulatory program to protect human health and the environment from actual significant harm or substantial potential risk is fundamentally impaired."⁸

For most DEQ programs, Level One, HPV and/or SNC violations are defined by the U.S. Environmental Protection Agency (EPA). Other "state-only" violations are defined by the DEQ.⁹ These definitions are based on actual or potential harm to the environment and/or public health. Many of the programs implemented by the DEQ are subject to EPA oversight and must be implemented in a manner consistent with the EPA's statutory and regulatory requirements. For instance, the Land Protection Division enforces federal programs such as Hazardous Waste pursuant to the Resource Conservation and Recovery Act (RCRA), which therefore must be enforced according to EPA policy and guidance. Similarly, in the Air Quality Division, the EPA has established a list of High Priority Violations (HPV) under the Clean Air Act, which must be enforced according to EPA policy and guidance and will follow the same enforcement process as Level One Violations.

ENFORCEMENT OF ENVIRONMENTAL REGULATIONS

The discovery by the DEQ of noncompliance with the code, any rules promulgated thereunder, or any order, permit or license issued pursuant thereto results in an enforcement action against the alleged violator (respondent).¹⁰ In pursuing such enforcement actions, the DEQ must proceed according to the statutory provisions found in the code, the rules promulgated thereunder and the Oklahoma Administrative Procedures Act (APA).¹¹ This process includes, with some variation, the issuance of a notice of violation for alleged noncompliance, an opportunity for a settlement or enforcement conference, and the issuance of an order specifying the applicable compliance tasks and necessary penalty for resolution of such noncompliance.

Notice of Violation

"Unless otherwise provided by the particular enabling legislation, administrative enforcement proceedings shall begin with a written notice of violation (NOV) being served upon the respondent."¹² There are instances in which no notice is required, such as when an imminent threat is posed to the public health and welfare, and the environment.¹³ One should note that the specific environmental statute under which the enforcement action is brought may prescribe a notice process that supersedes the general process.¹⁴ "A NOV may be a letter, inspection sheet, consent order or final order, if it meets the requirements of this Section."¹⁵ The form of notice depends on

the specific factual situation and the DEQ program involved; but, no matter the form, sufficient notice will be provided.

Issuance of Orders

The DEQ has the authority to issue an order for any noncompliance with the code, any rules promulgated thereunder, or any order, permit or license issued pursuant thereto.¹⁶ The DEQ may issue a unilateral order or a bilateral order, depending on the circumstances of the case.¹⁷ Regardless of type, the order will include a statement of facts section, a section for conclusions of law, and an order section specifying the penalty amount assessed for past violations and stipulated penalties for future violations.¹⁸ If additional tasks are required for the respondent to achieve compliance, those tasks and a corresponding compliance schedule are also stated in the order section.¹⁹

Unilateral Powers: The unilateral orders the DEQ may issue include administrative compliance orders (ACO), assessment orders (AO) and emergency orders.²⁰ An ACO will be issued when the respondent has not achieved compliance within the time period specified in the NOV.²¹ Every order issued by the DEQ includes stipulated penalties for noncompliance with the order, and an AO assesses that stipulated penalty.²² An AO will generally be issued when a respondent has failed to meet deadlines and/or accomplish tasks as required by any previously issued order.²³ As stated above, an emergency order is issued when there is an imminent threat to the public health and welfare or the environment, and no notice is required prior to the issuance of an emergency order.²⁴

Bilateral Powers: The DEQ may resolve any enforcement action through settlement agreement, stipulation, default or consent order.²⁵ Generally, the DEQ prefers to resolve enforcement cases through a bilateral settlement agreement, which is achieved through negotiation of an agreed Consent Order (CO). Unlike the process whereby the DEQ unilaterally issues the respondent an ACO, the CO process affords a respondent an opportunity to provide input on the terms of resolution.

Enforcement Conference

Typically, once a violation is discovered and notice is provided, the respondent is asked to participate in a settlement or enforcement conference. The goal of the conference is to appropriately address the relevant compliance issues

by reaching a consensus on the facts of the violations and the actions necessary to resolve the matter. Enforcement conferences take on different forms, depending on the DEQ program involved. It is customary for an attorney from the DEQ's office of general counsel to participate in all such conferences.

Administrative Hearings

Occasionally, an administrative hearing is held to resolve an enforcement action. If the DEQ issues a unilateral order, the respondent has a statutorily-specified number of days to request an administrative hearing. When an ACO or emergency order is issued, the respondent has 15 days from the date of service to request a hearing.²⁶ If an AO is issued, the respondent has seven days from the date of service to request a hearing.²⁷

Administrative hearings are conducted as individual proceedings under the APA, the code and the rules promulgated thereunder.²⁸ An administrative law judge (ALJ) presides over the hearing and issues a proposed order at the conclusion of the hearing.²⁹ The executive director may then enter the proposed order as the final order, reject any findings made by the ALJ and issue a final order accordingly, or remand the case to the ALJ for further proceedings.³⁰

Remedies

To resolve issues of noncompliance with environmental laws, the DEQ may pursue administrative, civil and/or criminal remedies.³¹

Penalty Assessment and Resolution: The DEQ proposes and assesses penalties through the issuance of the orders discussed above, and those penalties "shall not exceed \$10,000 per day of noncompliance."³² The code provides that penalties are cumulative, and each day or part of the day upon which a violation occurs is considered a separate violation.³³ The general statutory provision is superseded in some instances by specific statutory programs.³⁴

The way a penalty is calculated may differ by the DEQ program due to the nature of the program, the different rules being enforced and the EPA's penalty policy. In order to receive delegation or primacy from EPA for many of the programs implemented by the DEQ, the agency is required to assess and collect appropriate penalties for significant violations. Depending on the DEQ program involved, there may be a specific and formal penalty policy/formula available.³⁵

The compliance structure and nature of some DEQ programs necessitate a less detailed and more case specific penalty policy. In such instances, penalties are calculated and assessed based on statutory factors, including the nature, circumstances and gravity of the violation; the economic benefit resulting from noncompliance; the history of such violations and the responsible party's degree of culpability; and any good faith effort to comply.³⁶

Options are available for payment of penalties for eligible respondents, and those will be discussed during the enforcement conference. For instance, some DEQ programs have an accelerated enforcement process where a penalty may be reduced based on cooperation and an efficient resolution of the case. Alternatively, most DEQ programs allow respondents to complete a Supplemental Environmental Project (SEP) to mitigate a portion of the assessed penalty for certain, eligible violations.³⁷ Generally, a SEP is a project undertaken by the respondent that is environmentally beneficial and a project that the respondent is not otherwise legally obligated to complete.³⁸ Up to 75 percent of an assessed penalty may be mitigated through the completion of a SEP.³⁹ "The consideration of [a SEP] as a settlement option in any given case is strictly at the discretion of the DEQ; it is not mandatory."⁴⁰

In order to receive delegation or primacy from the EPA for many of the programs implemented by the DEQ, the agency is required to assess and collect appropriate penalties for significant violations.

Civil Enforcement Action: The DEQ may pursue a civil action in state or federal court on its own behalf to obtain a civil injunction or civil penalties.⁴² Additionally, the DEQ might refer a case to the attorney general or district attorney to obtain a civil injunction or civil penalties.⁴³ Such referrals will normally be based on the determination that the case is especially complex or that it is otherwise beyond the resources of the DEQ.⁴⁴

Criminal Prosecution: In general, "any person who violates any of the provisions of, or who fails to perform any duty imposed by" the code, rules promulgated thereunder, an order, permit or license, "shall be guilty of a misdemeanor[.]"⁴⁵ "[A]ny person who knowingly makes any false statement, representation, or certification in, or omits material data from, any application for a permit, license, certificate, or other authorization, or any notice, analysis, or report required

by this Code...shall, upon conviction, be guilty of a misdemeanor[.]”⁴⁶ Additionally, specific statutory programs in the code, as well as provisions of the Environmental Crimes Act, provide that certain offenses, upon conviction, rise to the level of a felony.⁴⁷

In addition to or in lieu of any administrative or civil enforcement proceedings available to the DEQ, the agency may request criminal prosecution through the attorney general or district attorney of the appropriate district court of Oklahoma for any violation of the code, rules promulgated thereunder, or orders issued, or conditions of permits, licenses, certificates or other authorizations.⁴⁸

CONCLUSION

As stated above, the DEQ’s mission is “to enhance the quality of life in Oklahoma and protect the health of its citizens by protecting, preserving, and restoring the water, land, and air of the state, thus fostering a clean, attractive, healthy, prosperous, and sustainable environment.”⁴⁹ Enforcement actions are taken to fulfill that mission. In pursuing such enforcement actions, the DEQ must proceed according to the statutory provisions found in the code, the APA and the rules promulgated thereunder.

1. The statements and opinions are those of the authors and not the agency.
2. Oklahoma Department of Environmental Quality, *DEQ Goals, Values and Behaviors*, DEQ Mission Statement, www.deq.state.ok.us/pubs/ASD/DEQvalues2010.pdf (last updated Oct. 31, 2011).
3. 27A OKLA STAT. (O.S.) §1-3-101(B).
4. 27A O.S. §2-1-101, *et seq.*
5. 27A O.S. §2-3-202(A).
6. DEQ follows a Standard Operating Procedure (Enforcement SOP) regarding enforcement actions. However, DEQ policies, guidelines, rules and statutes are subject to change (electronic copy is available at www.deq.state.ok.us/aqdnew/ComplianceEnforcement/index.htm).
7. Enforcement SOP at 2.
8. Enforcement SOP at 2.
9. See EPA, Office of Enforcement and Compliance Assurance, *Workbook, The Timely and Appropriate (T&A) Enforcement Response to High Priority Violations (HPVs)* (June 23, 1999); DEQ, *Air Quality Division Penalty Guidance*, (an electronic copy can be viewed at www.deq.state.ok.us/aqdnew/ComplianceEnforcement/index.htm).
10. See 27A O.S. §§2-3-502 and 2-3-504.
11. 75 O.S. §250, *et seq.*
12. OAC 252:4-9-1.
13. 27A O.S. §2-3-502(E).
14. See 27A O.S. §2-5-110(A) (stating the DEQ may “reduce the fifteen-day notice period as in the opinion of the [DEQ] may be necessary to render the order reasonably effectual.”)
15. OAC 252:4-9-1.
16. 27A O.S. §2-3-502(A),(B); OAC 252:4-9.
17. See 27A O.S. §§2-3-502(B)-(C) and 2-3-506(B).
18. OAC 252:4-9-2(b).
19. 27A O.S. §2-3-502(B)(2).
20. 27A O.S. §2-3-502(A)-(C), (E).
21. 27A O.S. §2-3-502(A), (B); DEQ Enforcement SOP, pg. 2.
22. OAC 252:4-9-4.
23. OAC 252:4-9-4(a).
24. 27A O.S. §2-3-502(E).
25. 27A O.S. §2-3-506(B); 75 O.S. §309(E).

26. 27A O.S. §2-3-502(B), (E).
27. 27A O.S. §2-3-502(C).
28. 75 O.S. §309; 27A O.S. §2-3-502(H); OAC 252:4-9-31 through 46.
29. *Id.*
30. *Id.*
31. See 27A O.S. §2-3-202(A).
32. 27A O.S. §2-3-502(K); OAC 252:4-9-3.
33. *Id.*
34. See *e.g.* 27A O.S. §2-5-110(D) (stating, “Any penalty assessed in the order shall not exceed ten thousand dollars (\$10,000.00) per day for each violation.” (emphasis added)); 27A §2-7-126(1)(b); 27A §2-7-129(4).
35. See AQD Penalty Policy (electronic copy available at www.deq.state.ok.us/aqdnew/ComplianceEnforcement/index.htm).
36. 27A O.S. §2-3-502(K); OAC 252:4-9-3; Enforcement SOP at 4-6.
37. See Enforcement SOP at 9-10.
38. *Id.*
39. *Id.*
40. *Id.*
41. AQD Penalty Policy, *supra* n. 35.
42. 27A O.S. §2-3-504(A)(4), (B).
43. 27A O.S. §2-3-504(E); DEQ Enforcement SOP.
44. *Id.*
45. 27A O.S. §2-3-504; 27A O.S. §2-3-505.
46. 27A O.S. §2-3-505.
47. See *e.g.* 27A O.S. §2-5-116(B); 21 O.S. §1230.8.
48. 27A O.S. §2-3-504(E) and (I)
49. DEQ, *supra* n. 2.

ABOUT THE AUTHOR



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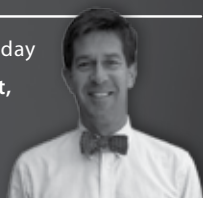


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Historical Overview of Environmental Laws

By Robert D. Kellogg

This article offers a brief overview of the many environmental laws.¹ By knowing how these laws came to be, we can not only understand them better, but also discern how they have deviated from their intended purpose. This article discusses how they developed in three phases (recognition, rejection and reaction) and concludes with the author's perspective on how the programs could be reformed to make them more efficient, and thus more effective.

RECOGNITION

Since biblical times, man has written of the value of a sound environment. A passage in the Old Testament reads: "The men of the city said to Elisha, 'Look, our lord, this town is well situated, as you can see, but the water is bad and the land is unproductive.'" 2 Kings 2:19

Because Mother Nature can be difficult to control, man must adapt to naturally occurring adverse conditions. For example, farmers seek fertile land with abundant irrigation water, and those with allergies seek dry mountain air. Naturally occurring arsenic that is now above recent EPA standards is being removed from some public water supplies.²

We also enact laws to control man's activities that could foul our environment. In early times, pollution was viewed as a resource that was out of place. The remedy was to move the resource, although moving a pollutant from one place to another can create new problems. For example, the British Alkali Act of 1863 converted hydrochloric gas to a liquid acid which was then dumped into waterways.

The first overtures were local laws, designed to address nuisances and poor sanitation. Chi-

cago and Cincinnati passed smoke control ordinances in 1881. Then came regional controls, as environmental insults were transported downwind and downstream. The Refuse Act of 1899 made it unlawful to discharge refuse into navigable waterways or onto their shores. The U.S. Army Corps of Engineers thus became the first federal agency with environmental authority, although the purpose of the law was to protect navigation, not the environment. 33 U.S.C. §407.

Today's environmental laws focus on protecting public health and the environment in various ways. And, of course, they have expanded our dictionary with such terms as CERCLA, NAAQS, NEPA, potentially responsible party and practicable, just to name a few.³

REJECTION

Following World War II, and being aware of interstate pollution problems, Congress wanted the states to take an active role in controlling the pollution that affects commerce.⁴ The states rejected the various offers by failing to take action. This section is broken down into the three key environmental areas covering air, water and land.

The first federal air pollution law was passed in 1955. It had no police power, and simply encouraged the states to act. 69 Stat. 322. This law followed the “killer fogs” in 1952 London, England (which reportedly claimed several thousand lives) and in Donora, Penn., in 1948. Donora, located just south of Pittsburgh, was home to a large steel mill. Twenty people died from thick industrial smoke during an air inversion.

The states did not respond, and in 1963 Congress enticed them with grants and authorized them to join in regional air pollution plans. Pub.L. 88-206. In 1965, Congress allowed the Department of Health Education and Welfare to set national emissions standards. Pub.L. 89-272. Then, Congress expanded the federal controls and renamed them as our modern Clean Air Act. Pub.L. 91-604, Dec. 31, 1970.

Environmentally, 1970 was a significant year. The National Environmental Policy Act (NEPA, discussed below) was enacted on Jan. 1. The first Earth Day was on April 22. On July 9, President Richard Nixon submitted a reorganization plan to consolidate parts of several agencies. Congress approved the plan and the EPA began on Dec. 2.⁵ The EPA’s primary task was “the establishment and enforcement of environmental protection standards consistent with national environmental goals.” Reorganization Plan No. 3 of 1970, 84 Stat. 2086.

The primary national ambient air quality standards (NAAQS) are for carbon monoxide, lead, nitrogen dioxide, ozone, particulates and sulfur dioxide. They are established with the advice of the National Academy of Sciences, and they are to be revisited on five-year intervals. 42 U.S.C. §7409. States must develop implementation plans (SIPs) to meet the standards. Today’s law also governs air pollution source permitting, sets emission and fuel standards for mobile sources, and much more, including noise pollution and industrial safety.

The Clean Air Act is undoubtedly the most complex, the least understood, and the most feared of the environmental laws. Industry

cannot comply without a team of consultants and lawyers who specialize in the myriad rules and interpretations which seem to change daily. This is partly because measuring air pollutants, and constructing and operating air pollution controls, is highly technical and expensive. It is also partly because of EPA’s iron-fist enforcement of their vast, unclear and niggling rules. But despite all these faults, when one compares today’s air quality to that of the 1960s, and to that of other nations, clearly we’ve come a long way.

The DEQ administers the Oklahoma analogue at 27A O.S. §2-5-101 *et seq.*, which EPA has approved along with many iterations of our SIP.

Water

As it did with air pollution, Congress began in 1948 by encouraging states and offering them federal aid to develop water quality protection standards.⁶ In the 1950s, the USPHS published a model pollution control act. But again, the states were slow to respond.

The modern federal water law began with amendments that were passed on Oct. 18, 1972. Pub.L. 92-500. The stated goal was “to restore and maintain the chemical, physical and biological integrity of the nation’s waters.” 33 U.S.C. §1251(a). It was renamed the *Clean Water Act* in 1977. Pub.L. 95-217.

A popular myth claims the 1972 amendments were brought about by the burning waters of the polluted Cuyahoga River near Cleveland, Ohio, in 1969. Indeed, Congress may have reacted to tales of the incident. However, the Cuyahoga River was not so

contaminated by constant oil and industrial discharges that the surface burned; rather, a gasoline tanker truck wrecked on a bridge and spilled its burning cargo into the river. Nevertheless, it was not safe to fish or swim in many of our nation’s waters because of unregulated municipal and industrial discharges.

The CWA intended that waters of the U.S. were to be fishable and swimmable by July 1, 1983, and that discharges of pollutants into the navigable waters would cease by 1985. This

“A popular myth claims the 1972 amendments were brought about by the burning waters of the polluted Cuyahoga River near Cleveland, Ohio, in 1969.”

was to be accomplished by a discharge permitting system (NPDES or National Pollutant Discharge Elimination System). The goals were not met because the NPDES system is restricted to point-sources (pipes). "Non-point source pollution, chiefly runoff, is widely recognized as a serious water quality problem, but the NPDES program does not even address it."⁷ In Oklahoma, municipal and industrial point-source discharges have been cleaned so well that nutrient runoff from concentrated animal and poultry feeding operations is the remaining threat to our waters.

EPA authorized DEQ to administer the NPDES permitting for municipal and industrial discharges, and the ODAFF to permit CAFOs (large feed lots). Before the DEQ (before 1993), the OWRB issued industrial discharge permits.⁸

Land

Congress passed the *Solid Waste Act* in 1965 to regulate trash. Pub.L. 89-272. The two major federal laws for air and water pollution focused waste disposal on the land, and so the Resource Conservation and Recovery Act (RCRA) was passed to regulate "hazardous wastes" and set standards for municipal solid waste landfills. 42 U.S.C. §6901 *et seq.*, Oct. 2, 1976.

RCRA governs hazardous wastes from first generation until final disposal. There are permits for generators, waste treaters, recyclers and waste disposal sites. Manifests must accompany the wastes during transportation. Although the program was initially resisted by industry (EPA's first rules were promulgated in May of 1979), the program has remained fairly straightforward and consistent, and it is now widely recognized and accepted. RCRA only governs operating hazardous waste businesses and not historical problems.

EPA authorized the DEQ to operate the hazardous waste program at 27A O.S. §2-7-101 and following. Although there is no solid waste program to delegate, the DEQ has adopted EPA's landfill standards and the EPA has approved Oklahoma's solid waste plan.

REACTION

Specialized environmental laws followed well-publicized disasters. Like most laws, perhaps, the origin of environmental laws can be traced to Isaac Newton's Third Law of Motion: "For every action there is an equal and opposite reaction."

1970 NEPA

The *National Environmental Policy Act* requires federal agencies to "take a hard look" at the environmental impacts of proposed construction projects that will use federal funds. 42 U.S.C. §4321 *et seq.* NEPA did not arise out of any one particular event. Rather, it was the federal buck-passing over many years of federal projects: nuclear power plants, dams, off-shore drilling, public housing, the Alaska pipeline, military bases and interstate highways.

NEPA's most conspicuous element is the requirement for an Environmental Impact Statement (EIS) for major federal actions. This provision directs all federal agencies to prepare an EIS that analyzes the environmental consequences of taking "major federal action significantly impacting the human environment" and to take comments from the public and other state and federal agencies. 42 U.S.C. §4332. Oklahoma has no statutory analogue to NEPA.

1972 FIFRA

Rachel Carson's 1962 book about DDT, *Silent Spring*, is largely credited with starting the environmental movement. *Silent Spring* certainly precipitated the 1972 revisions to the 1947 Federal Insecticide, Fungicide, and Rodenticide Act which authorized the U.S. Department of Agriculture to regulate pesticides. FIFRA was revised and transferred to the new EPA in 1972. FIFRA governs the manufacture, sale and use of pesticides, and sets licensing standards for pesticide applicators. Most pesticides are restricted to certified applicators, and only a few are available to the general public. Only EPA has authority over manufacturers, but the Oklahoma Department of Agriculture, Food and Forestry certifies applicators, 2 O.S. §3-81.

1973 ESA

By the 20th century, illegal commercial hunting of game species had threatened several animals to extinction, and the *Lacey Act of 1900* was enacted.¹⁰ It prohibited interstate trade in fish, wildlife and plants that were illegally taken, transported or sold under state laws. The modern Endangered Species Act of 1973 came on Dec. 28, 1973. 16 U.S.C. §1531.

The ESA was primarily designed to protect critically imperiled species (such as bison, whooping crane and bald eagle) from predation and extinction as a consequence of man's growth and development. Like other environ-

mental laws written during the 1970s, the text was loosely crafted and gave the government broad powers.

Over time, the broad language has fostered rules and policies that are more grand and sweeping than were first envisioned. Except for insects found to be pests, the secretary of the interior can list any species in danger of becoming extinct.¹¹ Over 1,200 animals and 750 plants are on the endangered or threatened lists. The U.S. Fish and Wildlife Service lists the areas and species covered by the ESA on their website: www.fws.gov. Oklahoma does not have an analogue to the ESA, but adopts the lists of threatened and endangered species and authorizes wildlife citations for violations. 29 O.S. §§2-109 & 5-402.

The broad ESA gives the government great power to tinker with Mother Nature. This also allows ESA's true purpose to be suborned to political agendas. Many cases indicate the ESA is used more to protest unwanted federal projects than to protect some unknown species. A series of west coast cases that pit hungry endangered California sea lions against spawning endangered Chinook salmon would be comical but for the toll on our judicial resources.¹²

1974 SDWA

The U.S. Public Health Service created the first federal drinking water standard, for coliform bacteria, in 1914. The 1944 USPHS program and its suggested guidelines were transferred to the new EPA, and the *Safe Drinking Water Act* with enforceable standards was added in 1974 to more fully protect drinking water. 42 U.S.C. §300f. The underground injection control (UIC) program was included here because its purpose is to protect ground water, an integral component of many public water supplies. The DEQ administers the Oklahoma analogue at 27A O.S. §2-6-301 (PWS) and 2-7-101 (UIC); and the Corporation Commission regulates salt water disposal wells (Class 2 UIC), 17 O.S. §500.

1976 TSCA

The *Toxic Substances Control Act* (15 U.S.C. §2601) was in reaction to a series of pesticide and worker-related scares in the 1960s. It is exclusively administered by the EPA to test the health and environmental effects of chemical products, control the manufacture of chemicals and otherwise regulate chemicals in commerce. The manufacturing ban of chlorofluorocarbons

to protect the stratospheric ozone layer, the regulation of PCBs and the asbestos testing in schools (AHERA) are done under TSCA. EPA has lead-based paint standards at 40 CFR Part 745. While there are no state analogues to TSCA, the Oklahoma DEQ has a lead-based paint program (OAC 252:110).

1980 CERCLA

The *Comprehensive Environmental Response & Compensation Liability Act*, a.k.a. "Superfund" is designed to redress historical problems, not hazardous wastes being regulated by RCRA. It came about because in 1890 William Love began building a canal to divert water from the Niagara River, but soon ran out of money. By the 1920s, his unfinished Love Canal then became a garbage dump, which Love sold in 1946 to Hooker Chemical, a pesticide manufacturer. Hooker finished the filling of the canal with its chemical wastes and sold it in 1953 to a school district for a dollar. An elementary school was built which attracted a housing development. In 1978 New York evacuated the housing development because of pollution and health complaints. CERCLA was enacted in 1980. 42 U.S.C. §9601 *et seq.*¹³

"Superfund" is the name of EPA's statutory cleanup fund. 26 U.S.C. §9507. Congress did not intend for only Superfund monies to be used for cleanups, but rather that the maximum amount possible first be obtained from those responsible for the hazardous sites, and that any monies drawn from Superfund be recouped from those individuals to the greatest extent possible.

Oklahoma has no direct analog to CERCLA, and no "Superfund."¹⁴ Nor is one needed. Successive landowners are as liable to abate a continuing nuisance as the one who created it. 50 O.S. §5. And the private takings clause of the Oklahoma Constitution precludes damaging a neighbor's real property. Art. 2, §23.

1986 EPCRA

In December 1984, there was a malfunction at a Union Carbide pesticide plant in Bhopal, India. Methyl isocyanate gas, heavier than air, was released from a tank in the middle of the night and flowed like the Angel of Death through a community killing 3,000 people that night. Two years later, the *Emergency Planning and Community Right to Know Act* required reporting and emergency planning for the presence of hazardous substances so that com-

munities can better respond to incidents. The right to know component informs of the presence and release of chemicals.¹⁵

1988 FMWTA

Evidently it was cheaper in the 1980s to dump medical wastes into the ocean than to pay landfill disposal costs. As a consequence, bandages and syringes began washing up on New Jersey swimming beaches and caused public health concern in 1986. Congress added the *Federal Medical Waste Tracking Act* to RCRA on Nov. 1, 1988. 42 U.S.C. §6992. This was a demonstration program that involved only a few eastern seaboard states and federal regulation was not found to be necessary. The DEQ has some medical waste criteria in the solid waste regulations (OAC 252:515-23).

1990 OPA

Shortly after midnight on March 24, 1989, the captain of the Exxon Valdez went below to his cabin. His tanker then ran aground on Bligh Reef, spilling some 11 million gallons of crude oil into Prince William Sound, Alaska. A year and a half later, Congress passed the *Oil Pollution Act*. 33 U.S.C. §2701. It established a superfund-like program for oil spills at sea, and is also the basis for SPCC plans (Spill Prevention, Control and Countermeasure) for on-shore facilities that store oils — any oil — that could reach navigable waters. These are federal programs only, not delegated to the states.

CONCLUSION AND PERSONAL OBSERVATION

Since 1969 I have been actively involved in the environment as a science student, limnologist and environmental lawyer. In that time our environment has improved greatly. But we're slipping now because our laws and regulations have grown logarithmically, masking the critical elements and making compliance difficult to discern. Prophetically, Will Rogers said, "If you stacked all our laws end to end there would be no end."

The EPA was primarily created to develop uniform national standards because the states were slow to respond to environmental problems. The EPA has adopted national standards, and delegated the programs to the states. The states have taken up the charge. Yet, we still have an EPA that duplicates or interferes with state efforts, demanding tighter controls every day and causing us to spend more to gain little.

Oklahoma greatly improved its water quality by upgrading sewage treatment plants across the state to meet the new standards. This was done not by EPA but under the vision and leadership of Mark S. Coleman, who then became the first executive director of the DEQ in 1993. Oklahoma's environment wasn't too bad 40 years ago, and it is very good today. Sure, it could use a little polishing, but Oklahomans know more about what they need than does the federal government. Indeed, every state, being close to its own ecological, political and economic climates, is better situated to meet its needs than is a one-size fits-all federal agency.

Environmental laws in general, and EPA rules in particular, have metamorphosed far beyond the standard-setting that was envisioned. EPA would have us address every man-made molecule, but that wastes resources that could be put to better use. Yesterday's arcane laws and all-embracing command and control rules stifle understanding, compliance and innovation today. We must be able to focus on the critical elements, and so I believe it is time to rewrite those old laws and rules and to reform the EPA, adhering to Albert Einstein's admonishment that, "everything should be as simple as possible, but not simpler."

1. See Brita Cantrell's article [Vol. 83 No. 5, page 353 OB] for a more comprehensive discussion of the requirements.

2. Treating arsenic is expensive, but the city of Norman meets the standard by blending water from deeper zones that have less arsenic. See, USGS Fact Sheet 2005-3111.

3. "Environmentalese" is a new judicial term of art. *Citizens Coal Council and Kentucky Research Council v. EPA*, 385 F.3d 969 (6th Cir. 2004) (the CWA is a "legislative labyrinth" and "an enigmatical piece of legislation ... the intricacies of which are virtually indecipherable").

4. The federal government lacks general police power, thus environmental laws are based on the Commerce Clause. "To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." Art. 1, Sect. 8, Cl. 3.

5. Following the reorganization procedures at 5 U.S.C. §901, President Nixon sent a letter to Congress on July 9, 1970. He found that pollution control was spread among many discrete departments, which defied effective and concerted action. He proposed to reorganize parts of the Health, Education and Welfare Department, Department of the Interior, USDA, AEC and the new Council on Environmental Quality into the EPA. Congress approved the plan on Dec. 2, 1970. Nixon appointed William D. Ruckelshaus as EPA's first administrator. At his confirmation hearing, Ruckelshaus told Congress that he supported "enforcement by the states," and he was confirmed on Dec. 4.

6. The *Federal Water Pollution Control Act*, 62 Stat. 1155.

7. *Friends of the Everglades v. S. Florida Water Mgt. District*, 570 F.3d 1210 (11th Cir. 2009). "What this illustrates is that even when the preamble to legislation speaks single-mindedly and espouses lofty goals, the legislative process serves as a melting pot of competing interests and a face-off of battling factions. What emerges from the conflict to become the enactment is often less pure than the preamble promises."

8. OWRB, 82 O.S. 1972, §926.3(9).

9. 1947 FIFRA, Pub.L. 61 Stat. 163; 1972 FIFRA begins at 7 U.S.C. §136.

10. Named after Iowa Congressman John Lacey, ch. 553, 31 Stat. 187, now 16 U.S.C. §3371.

11. See, 16 U.S.C. §§1532(6) and 1533.

12. See, *Humane Society of U.S. v. Locke*, 626 F.3d 1040 (9th Cir. 2010); *Humane Soc. of U.S. v. Gutierrez*, 558 F.3d 896 (9th Cir. 2009); *Humane*

Soc. of U.S. v. Gutierrez, 523 F.3d 990 (9th Cir. 2009); *Humane Soc. of U.S. v. Gutierrez*, 2008 WL 1885764, (9th Cir. 2008).

13. EPA finished cleaning Love Canal and removed it from its Superfund list in October 2004.

14. See *Oklahoma Petroleum Storage Tank Release Indemnity Program*, 17 O.S. §350 *et seq.*

15. EPCRA was a part of the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. §11001 *et seq.* Oklahoma analogs: 27A O.S. §4-1-101 and OAC 252:020.

ABOUT THE AUTHOR



Bob Kellogg practices with the Oklahoma City firm of Moricoli & Schovanec PC. He received a B.S. in zoology from OU in 1972, graduated from OCU School of Law in 1977, is a founding member of the Environmental Law Section and was the first general counsel of the Oklahoma Department of Environmental Quality.

NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill the following judicial office:

**Associate District Judge
First Judicial District
Harper County, Oklahoma**

This vacancy is due to the resignation of the Honorable G. Wayne Olmstead, effective January 11, 2012.

To be appointed to the office of Associate District Judge, an individual must be a registered voter of the applicable judicial district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, such appointee shall have had a minimum of two years experience as a licensed practicing attorney, or as a judge of a court of record, or both, within the State of Oklahoma.

Application forms can be obtained online at www.oscn.net under the link to Judicial Nominating Commission, or by contacting Tammy Reaves, Administrative Office of the Courts, 2100 North Lincoln, Suite 3, Oklahoma City, Oklahoma 73105, (405) 556-9300, and must be submitted to the Chairman of the Commission at the same address **no later than 5 p.m., Friday, February 24, 2012. If applications are mailed, they must be postmarked by midnight, February 24, 2012.**

**Jim Loftis, Chairman
Oklahoma Judicial Nominating Commission**

LHL Foundation Kickoff Event: Drafting a Blueprint for Success

By Lori Rasmussen

Millions of Americans struggle with depression and substance abuse, and lawyers are no exception. In fact, rates of these diseases have been shown to be even higher among members of the legal profession, putting not only those lawyers but their families and their clients at risk. But services to treat these challenges can be costly, often prohibitively expensive for attorneys struggling to make ends meet, creating a vicious downward spiral.

That's why a fundraising effort will get underway this year to ensure Oklahoma attorneys in crisis can get the help they need, regardless of financial circumstance. Lawyers Helping Lawyers Foundation Inc. will kick off this effort Tuesday, March 27, with the Cornerstone Banquet and Auction to begin at 5:30 p.m. at the Oklahoma Bar Center in Oklahoma City. Attendance includes one hour of ethics MCLE.

Lawyer Helping Lawyers Committee Chairperson Tom Riesen said, "The good news is that more lawyers are taking that first step and seeking the help they need. But that means resources are becoming stretched, and establishing a stable source of funding is criti-

cal in order to be able to continue this important work."

The event will include both a silent and live auction. Business attire is appropriate for the evening, and dinner will be served at 7 p.m. Two speakers will address those attending.



**Mark Your
Calendars**

**March 27
5:30 p.m.**

**Oklahoma Bar
Center**

Oklahoma lawyer Reggie Whitten will talk about his experience turning personal heart-break into productivity helping others, then author and former noted attorney James Blackburn will share his own story with the audience. Mr. Blackburn is the author of *Flame-out: From Prosecuting Jeffrey Mac-*

Donald to Serving Time to Serving Tables. He was well known as the young lead prosecutor in the Fort Bragg triple homicide case chronicled in the book and film *Fatal Vision*. He later went into successful private practice before suffering a very public and very humiliating fall from grace. His talk, "Night Falls Fast," focuses on the quickness with which his life turned out of control due to crippling depression, and his efforts to overcome his demons and turn his life around.

"Mr. Blackburn's story can be interpreted as a wake-up call for lawyers who may be recognizing the warning signs," said Mr. Riesen. "It's also the story of his redemption and finding purpose after his legal career ended. His broad message is staying positive, even during the darkest of circumstances."

Although the Lawyers Helping Lawyers Foundation Inc. was formed in 2003, this event marks the launch of revitalized fundraising efforts for the LHL initiative. The program offers assistance in the form of confidential assessment, counseling and treatment of lawyers in crisis. The foundation's fundraising efforts will go toward grants that will deepen the scope of services to be offered to those seeking assis-

tance, but the campaign also seeks to establish substantial, long-term support for the program.

"Our new OBA President Cathy Christensen has identified this program as one of her top priorities for 2012," said Mr. Riesen. "It benefits both OBA members and the public if we can intervene before problems spin out of control. This fundraising dinner and auction will launch our efforts to be able to assist more lawyers than ever before."

SPONSORSHIPS AVAILABLE

Lawyers Helping Lawyers Foundation Inc. is asking all Oklahoma attorneys to support this fundraising campaign with a financial contribution.

Use the envelope in this issue to register or donate.

During the Cornerstone Banquet and Auction, sponsorship opportunities will be available that will even further benefit the effort. Individual tickets are \$50 for lawyers and \$30 for non-lawyer guests. In addition, different levels of reserved seating and recognition will be available for purchase, in amounts ranging from \$250 - \$5,000. More details about the various levels of sponsorship are available at www.okbar.org, or by contacting the OBA at 405-416-7000.

Proceeds from the silent and live auction will also support the effort. A list and photos of

auction items will be available online. Among the items up for grabs will be a number of vacation stays at luxury properties. A registration form is available online at www.okbar.org.

MARK YOUR CALENDAR

Make plans now to attend the Lawyers Helping Lawyers Foundation Inc. Cornerstone Banquet and Auction. Formal invitations will be mailed soon, and seating is limited. An envelope is provided in this issue of the *Oklahoma Bar Journal* that will enable you to order tickets to the event, or if you are unable to attend, allow you to make a financial gift to this important fundraising effort.

Ms. Rasmussen is an OBA communications specialist.

Esther Roberts Bell is pleased to announce the establishment of Global Intellectual Property Asset Management, PLLC.

Global IP is a full-service intellectual property law firm. In addition to providing traditional IP protection via copyrights, patents and trademarks, Global IP offers intellectual property portfolio review, IP asset enhancement/risk analysis, and acquisition/licensing/technology transfer counsel.



GLOBAL
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Counsel for Creativity™

John R. Justice (JRJ) Student Loan Repayment Program for Public Defenders and Prosecutors

The Oklahoma District Attorneys Council (DAC) is pleased to announce that the DAC has been designated by the U.S. Department of Justice to award and disburse loan repayment assistance through the John R. Justice (JRJ) Loan Repayment Program. The state of Oklahoma has received a total of \$109,499.70 to be divided among eligible full-time **public defenders and prosecutors** who have outstanding qualifying federal student loans.

For more information about the JRJ Student Loan Repayment Program and how to apply go to <http://www.ok.gov/dac/>. Scroll down to "Newsroom and Links" and click on the "John R. Justice Student Loan Repayment Program" link. **Applications will be available online by February 22, 2012.** Completed application packets must be submitted to the DAC and postmarked no later than **April 11, 2012.**

Monitoring Committee Reviews Legislation

By *Duchess Bartmess*



On Saturday, Jan. 28, a group of bar members interested in legislation met for most of the day at the bar center to review bills introduced for consideration during the 2012 Regular Session of the Oklahoma Legislature. There are more than 1,700 bills and joint resolutions introduced for legislative action.

After the group met, it was decided that this year the bills to be reviewed for interest for OBA members should be divided into subject area groups similar to the subcommittees of the Legislative Monitoring Committee. That second review and division of bills and joint resolutions is still in progress.

Some of the subject areas being used for the division of bills are civil law and procedure, criminal law and procedure, children and family law, and public health and safety, just to name a few. As those lists of House and Senate bills and joint resolutions are completed, they will be distributed to Legislative Monitoring Committee members and others members of the group that met on Jan. 28. This information will also be posted online at www.okbar.org — look for the Legislative Monitoring link.

DAY AT THE CAPITOL

The committee encourages bar members to come to Oklahoma City to be part of OBA Day at the Capitol, March 14. This event gives you an opportunity to speak to your legislators in person about important issues.

Ms. Bartmess practices in Oklahoma City and chairs the Legislative Monitoring Committee.

OBA DAY at the CAPITOL

Wednesday, March 14, 2012

- 11:30 a.m. Registration — Oklahoma Bar Center
- 11:45 a.m. Lunch* — Oklahoma Bar Center
- 11:50 a.m. Welcome
Cathy M. Christensen, President
Oklahoma Bar Association
- 11:55 a.m. Views of the Supreme Court on the
Legislative Session
Chief Justice Steven W. Taylor
Oklahoma Supreme Court
- 12:10 p.m. Status of Bills Relating to General Civil
Practice of Law
Thad Balkman
- 12:20 p.m. Family Law
Phil Tucker
- 12:30 p.m. Criminal Law
Tim Laughlin
- 12:40 p.m. Constitutional Amendments and Issues
Duchess Bartmess, Chairperson
Legislative Monitoring Committee
- 12:50 p.m. OBA Bills and How to Talk to Legislators
John Morris Williams, Executive Director
Oklahoma Bar Association
- 1 - 3 p.m. Adjourn to Capitol and Meet with
Legislators — State Capitol

* Please RSVP if attending lunch to:
debbieb@okbar.org or
call 405-416-7014; 800-522-8065



**ANNUAL REPORT OF THE
PROFESSIONAL RESPONSIBILITY COMMISSION
AS COMPILED BY THE
OFFICE OF THE GENERAL COUNSEL OF THE
OKLAHOMA BAR ASSOCIATION**

January 1, 2011 through December 31, 2011

SCBD No. 5831

(Filed with Oklahoma Supreme Court, January 31, 2012)

Pursuant to the provisions of Rule 14.1, Rules Governing Disciplinary Proceedings (RPDP), 5 O.S. 2001 ch. 1, app. 1-A, this is the Annual Report of grievances and complaints received and processed for 2011 by the Professional Responsibility Commission and the Office of the General Counsel of the Oklahoma Bar Association.

THE PROFESSIONAL RESPONSIBILITY COMMISSION

The Commission is composed of seven persons — five lawyer and two non-lawyer members. The attorney members are nominated for rotating three-year terms by the President of the Association subject to the approval of the Board of Governors. The two non-lawyer members are appointed by the Speaker of the Oklahoma House of Representatives and the President Pro Tempore of the Oklahoma Senate, respectively. No member can serve more than two consecutive terms. Terms expire on December 31st at the conclusion of the three-year term.

Lawyer members serving on the Professional Responsibility Commission during 2011 were Melissa Griner DeLacerda, Stillwater; Angela Ailles Bahm, Oklahoma City; William R. Grimm, Tulsa; Jon K. Parsley, Guymon; and Stephen D. Beam, Weatherford. Non-Lawyer

members were Tony R. Blasier, Oklahoma City; and Debra Thompson, Carney. Melissa Griner DeLacerda served as Chairperson and Tony R. Blasier served as Vice-Chairperson. Commission members serve without compensation but are reimbursed for actual travel expenses.

RESPONSIBILITIES

The Professional Responsibility Commission considers and investigates any alleged ground for discipline, or alleged incapacity, of any lawyer called to its attention, or upon its own motion, and takes such action as deemed appropriate, including holding hearings, receiving testimony, and issuing and serving subpoenas.

Under the supervision of the Professional Responsibility Commission, the Office of the General Counsel investigates all matters involving alleged misconduct or incapacity of any lawyer called to the attention of the General Counsel by grievance or otherwise, and reports to the Professional Responsibility Commission the results of investigations made by or at the direction of the General Counsel. The Professional Responsibility Commission then determines the disposition of grievances or directs the instituting of a formal complaint for alleged misconduct or personal incapacity of an attor-

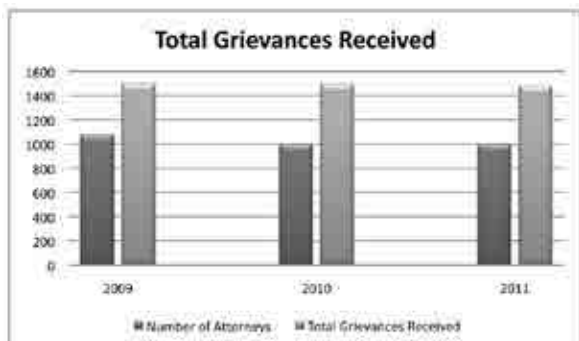
ney with the Oklahoma Supreme Court. The attorneys in the Office of the General Counsel prosecute all proceedings under the Rules Governing Disciplinary Proceedings, supervise the investigative process, and represent the Oklahoma Bar Association at all reinstatement proceedings.

VOLUME OF GRIEVANCES

During 2011, the Office of the General Counsel received 265 formal grievances involving 200 attorneys and 1214 informal grievances involving 907 attorneys. In total, 1479 grievances were received against 999 attorneys. The total number of attorneys differs because some attorneys received both formal and informal grievances. In addition, the Office handled 448 items of general correspondence, which is mail not considered to be a grievance against an attorney.

On January 1, 2011, 302 formal grievances were carried over from the previous year. During 2011, 265 new formal grievances were opened for investigation. The carryover accounted for a total caseload of 567 formal investigations pending throughout 2011. Of those grievances, 316 investigations were completed by the Office of the General Counsel and presented for review to the Professional Responsibility Commission. Therefore, 251 investigations were pending on December 31, 2011.

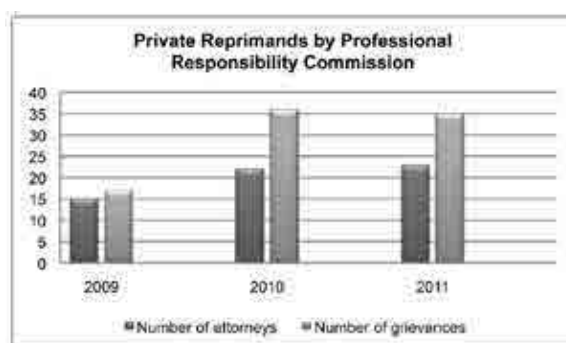
The time required for investigating and concluding each grievance varies depending on the seriousness and complexity of the allegations and the availability of witnesses and documents. The Professional Responsibility Commission requires the Office of the General Counsel to report monthly on all informal and formal grievances received and all investigations completed and ready for disposition by the Commission. In addition, the Commission receives a monthly statistical report on the pending caseload. The Board of Governors is advised statistically each month of the actions taken by the Professional Responsibility Commission.



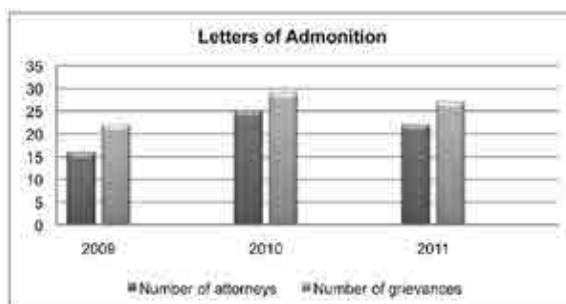
DISCIPLINE BY THE PROFESSIONAL RESPONSIBILITY COMMISSION

1. Formal Charges. During 2011, the Commission voted the filing of formal disciplinary charges against 16 lawyers involving 48 grievances.

2. Private Reprimands. Pursuant to Rule 5.3(c) of the Rules Governing Disciplinary Proceedings, the Professional Responsibility Commission has the authority to impose private reprimands, with the consent of the attorney, in matters of less serious misconduct or if mitigating factors reduce the sanction to be imposed. During 2011, the Commission issued private reprimands to 23 attorneys involving 35 grievances.



3. Letters of Admonition. During 2011, the Commission issued letters of admonition to 22 attorneys involving 27 grievances cautioning that the conduct of the attorney was dangerously close to a violation of a disciplinary rule wherein the Commission believed warranted a warning rather than discipline.



4. Dismissals. The Commission dismissed 205 grievances where the investigation revealed lack of merit or loss of jurisdiction over the respondent attorney. Loss of jurisdiction included the death of the attorney, the resignation of the attorney pending disciplinary proceedings, a continuing lengthy suspension or

disbarment of the respondent attorney, or due to the attorney being stricken from membership for non-compliance with MCLE requirements or non-payment of dues.

5. Diversion Program. The Commission may also refer matters to the Discipline Diversion Program where remedial measures are taken to ensure that any deficiency in the representation of a client does not occur in the future. During 2011, the Commission referred 42 attorneys to be admitted into the Diversion Program for conduct involving 65 grievances.

The Discipline Diversion Program is tailored to the individual circumstances of the participating attorney and the misconduct alleged. Oversight of the program is by the OBA Ethics Counsel with the OBA Management Assistance Program Director involved in programming. Program options include: Trust Account School, Professional Responsibility/Ethics School, Law Office Management Training, Communication and Client Relationship Skills, and Professionalism in the Practice of Law class. In addition to one or more of these instructional classes, the following resources can be made a part of the individual's Diversion Program Agreement: Management Assistance Program Office Review, Lawyers Helping Lawyers Assistance Program, Medical/Psychological Monitoring and Mentor/Peer Referral. Instructional courses are taught by OBA Ethics Counsel Travis Pickens and OBA Management Assistance Program Director Jim Calloway.

As a result of the Trust Account Overdraft Reporting Notifications, the Office of the General Counsel is now able to monitor when attorneys encounter difficulty with basic accounting procedures and management of their IOLTA accounts. Upon recommendation of the Office of the General Counsel, the Professional Responsibility Commission may place those individuals in a tailored program designed to address basic trust account issues.

2010-2011 Participation in Diversion Program Curriculum

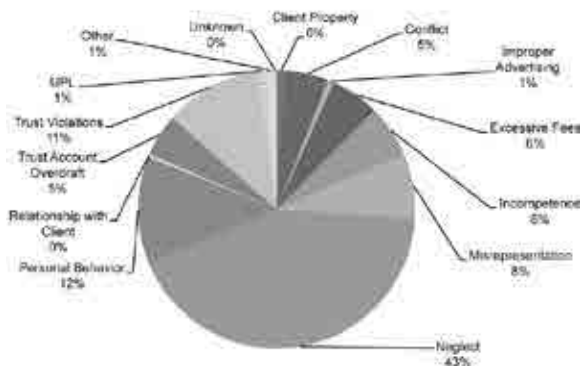
Law Office Management Training:	31 Attorneys
Communication and Client Relationship Skills:	30 Attorneys
Professionalism in the Practice of Law:	5 Attorneys
Professional Responsibility/Ethics School:	28 Attorneys
Client Trust Account School:	31 Attorneys

SURVEY OF GRIEVANCES

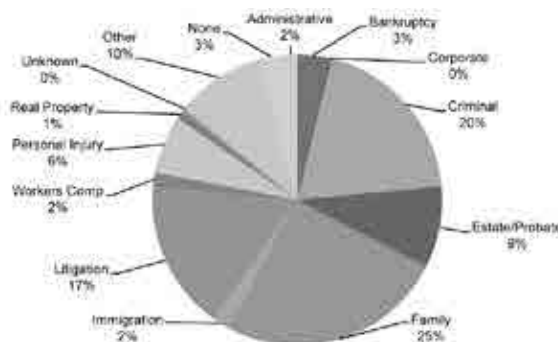
In order to better inform the Supreme Court, the bar and the public of the nature of the grievances received, the numbers of attorneys complained against, and the areas of attorney misconduct involved, the following information is presented.

Total membership of the Oklahoma Bar Association as of December 31, 2011 was 16,955 attorneys. Formal and informal grievances were submitted against 999 attorneys. Therefore, six percent of the attorneys licensed to practice law by the Oklahoma Supreme Court received a grievance in 2011.

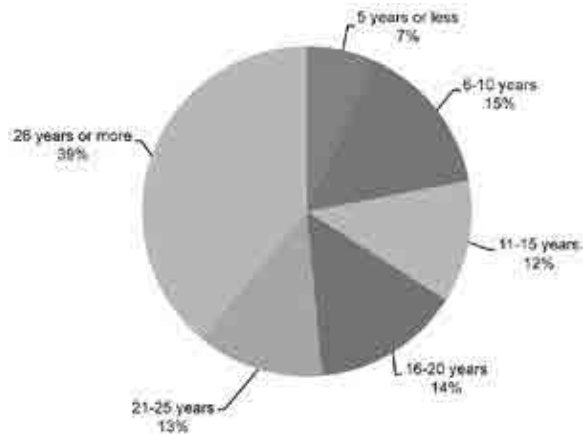
A breakdown of the type of alleged attorney misconduct alleged in the 265 formal grievances received by the Office of the General Counsel in 2011 is as follows:



Of the 265 formal grievances, the area of practice is as follows:



The number of years in practice of the 200 attorneys receiving formal grievances is as follows:



The largest number of grievances received were against attorneys who have been in practice for 26 years or more. Considering the total number of practicing attorneys, the largest number have been in practice 26 years or more.

Of the 265 formal grievances filed against 200 attorneys in 2011, 137 are attorneys in urban areas and 117 attorneys live and practice in rural areas. Eleven of the grievances were filed against attorneys licensed in Oklahoma but practicing out of state.

DISCIPLINE IMPOSED BY THE OKLAHOMA SUPREME COURT

In 2011, 27 disciplinary cases were acted upon by the Oklahoma Supreme Court. The Court consolidated one case and the public sanctions are as follows:

Disbarment:

Respondent	Effective Date
Gordon Jr., George David	05/03/11
Passmore II, Joe Richard	10/25/11

Resignations Pending Disciplinary Proceedings Approved by Court

Respondent	Effective Date
Woolverton, Daniel Allen	05/02/11
Taylor, Michael C.	05/02/11
Noland, Rhonda Virginia	05/24/11
Merritt, John Milton	06/27/11
Cathey, William Reeves	06/27/11

Lewis, Donald Reagan	06/28/11
Schraeder, Fred M.	11/14/11

Disciplinary Suspensions:

Respondent	Length	Effective Date
Edwards, Timothy Charles	2 years + 1 day	01/25/11
Clayborne, Mark Anthony	Rule 7/06/20/11 Indefinite	
Wilcox, Tom J.	Rule 7/06/30/11 Indefinite	
Hayes, John McPherson	30 days	07/06/11
Running, Jon R.	2 years + 1 day	08/17/11
Clark Jr., William Louis	Rule 7/08/17/11 Indefinite	
Latimer, Caesar Cooleridge	2 years + 1 day	09/20/11

Public Censure:

Respondent	Effective Date
Smith, Tracy	01/31/11
Strickland, Gray M.	06/14/11
Neeld, James Charles	06/27/11
Cox, Ronald D.	07/06/11

In addition to the public discipline imposed in 2011, the Court also issued the following non-public sanctions:

Suspension:

Respondent	Length	Effective Date
Rule 10 Confidential	Indefinite	02/15/11
Rule 6/10 Confidential	Indefinite	03/21/11
Rule 6/10 Confidential	Indefinite	04/25/11
Rule 6/10 Confidential	Indefinite	04/25/11

Interim Suspension:

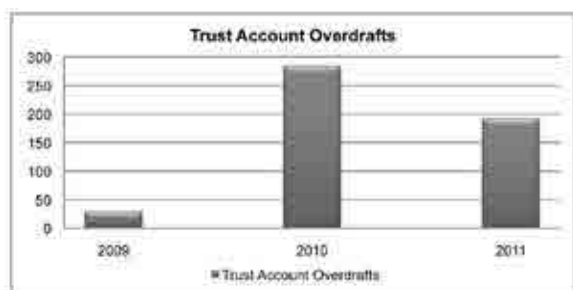
Respondent	Length	Effective Date
Rule 10		
Confidential	Indefinite	01/11/11

There were 24 discipline cases filed with the Supreme Court on January 1, 2011. During 2011, 16 new formal complaints, three Rule 7 Judgments and four Resignations Pending Disciplinary Proceedings were filed for a total of 47 cases. On December 31, 2011, 19 cases remained filed and pending before the Oklahoma Supreme Court.

There were 10 active reinstatement cases filed with the Oklahoma Supreme Court as of January 1, 2011. There were nine new petitions for reinstatement filed in 2011. In 2011, the Supreme Court approved four reinstatements, dismissed two and three were withdrawn. On December 31, 2011, there were 10 petitions for reinstatement filed and pending before the Oklahoma Supreme Court.

TRUST ACCOUNT OVERDRAFT REPORTING

The Office of the General Counsel under the supervision of the Commission has implemented the Trust Account Overdraft Reporting requirements of Rule 1.15(j), Oklahoma Rules of Professional Conduct, 5 O.S. Supp. 2008, ch. 1, app. 3-A. Trust Account Overdraft Reporting Agreements have been submitted by and approved for depository institutions. In 2011, 192 notices of overdraft of a client trust account were received by the Office of the General Counsel. Notification triggers a general inquiry to the attorney requesting an explanation for the deficient account. Based upon the response, an investigation may be commenced. Repeated overdrafts due to negligent accounting practices have resulted in referral to the Discipline Diversion Program for instruction in proper trust accounting procedures.



UNAUTHORIZED PRACTICE OF LAW

Rule 5.1(b), Rules Governing Disciplinary Proceedings, 5. O.S. 2001 ch. 1 app. 1-A, authorizes the Office of the General Counsel to investigate allegations of the unauthorized practice of law (UPL) by non-lawyers.

REQUESTS FOR INVESTIGATION

The Office of the General Counsel has processed over 61 requests for investigation of the unauthorized practice of law requests for investigations since 2010. In 2011, this office received 27 complaints concerning the unauthorized practice of law. The Office of the General Counsel fielded many additional inquiries regarding the unauthorized practice of law that are not reflected in this summary. This Office investigates only those complaints alleging harm to the public caused by the unauthorized practice of law.

PRACTICE AREAS

Allegations of the unauthorized practice of law encompass various areas of law. Most complaints concern individuals assisting *pro se* litigants defending foreclosure actions. In the chart below, the "General Practice" category denotes non-lawyer individuals that advertise or allegedly perform legal services relating to family law, criminal law (including appellate relief), civil rights, guardianships, small claims, wills, trusts, estate matters, business entities, property issues and name change petitions. The remaining categories are reserved for non-lawyer individuals that advertise or allegedly perform legal services in a specific area of law.



REFERRAL SOURCES

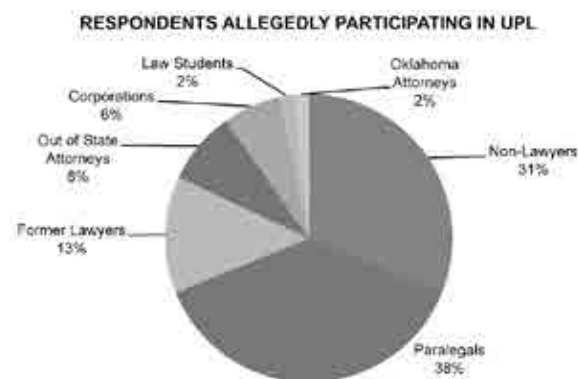
Requests for investigations of allegations of the unauthorized practice of law stem from multiple sources. Oklahoma attorneys and attorneys from other jurisdictions are the most

frequent source for requests for investigation. Judicial referrals, requests from State and Federal agencies, harmed members of the public, the Professional Responsibility Commission and the Office of the General Counsel also report alleged instances of individuals engaging in the unauthorized practice of law.



RESPONDENTS

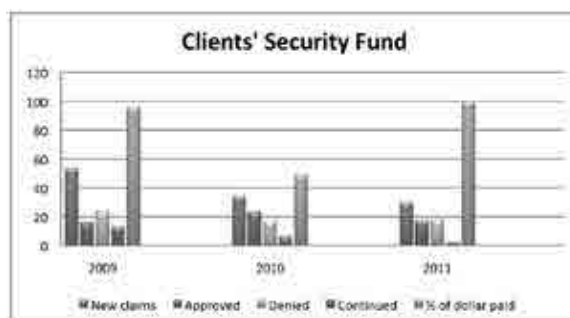
Most requests for investigation into allegations of the unauthorized practice of law concern paralegals (or paralegal firms) and non-lawyers. For purposes of this summary, the category “non-lawyer” refers to an individual who does not advertise as a paralegal, but performs various legal tasks for their customers. Recently, most “non-lawyers” claim to have expertise in the foreclosure process. The “Former Lawyers” category includes lawyers who have been disbarred, stricken, resigned their law license pending disciplinary proceedings or otherwise voluntarily surrendered their license to practice law in the State of Oklahoma.



CLIENTS' SECURITY FUND

The Clients' Security Fund was established in 1965 by Court Rules of the Oklahoma

Supreme Court. The Fund is administered by the Clients' Security Fund Committee which is comprised of 16 members (13 lawyer members and 3 non-lawyers) who are appointed in staggered three-year terms by the OBA President with approval from the Board of Governors. The Fund furnishes a means of reimbursement to clients for financial losses occasioned by dishonest acts of lawyers. It is also intended to protect the reputation of lawyers in general from the consequences of dishonest acts of a small few. The Board of Governors budgets and appropriates \$100,000.00 each year to the Clients' Security Fund for payment of approved claims. In years when the approved amount exceeds the amount available, the amount approved for each claimant will be reduced in proportion on a prorata basis until the total amount paid for all claims in that year is \$100,000.00. The Office of the General Counsel provides staff services for the Committee. In 2011, the Office of the General Counsel investigated and presented to the Committee 30 new claims. The Committee approved 17 claims, denied 18 claims and continued 2 claims to the following year for further investigation.



CIVIL ACTIONS (NON-DISCIPLINE) INVOLVING THE OBA

The Office of the General Counsel has represented the Oklahoma Bar Association in the following civil (non-discipline) matters during 2011:

1. *Fent v. Henry et al.*, Oklahoma Supreme Court, Case No. 109026, filed December 20, 2010. Fent filed an application to assume original jurisdiction and petition against Governor Henry, Oklahoma Bar Association and the Judicial Nominating Commission. On February 8, 2011, the Court heard oral argument. The petition was *denied* on February 15, 2011.

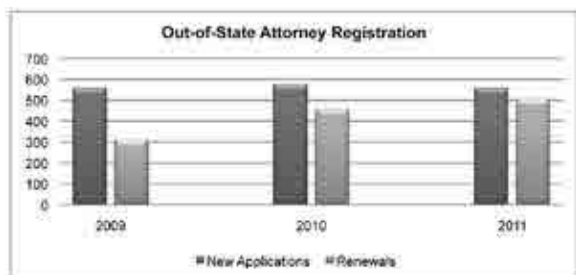
2. *State of Oklahoma ex rel. Oklahoma Bar Association v. Mothershed*, Oklahoma Supreme Court, SCBD 4687.

- *State ex rel. Oklahoma Bar Association v. Mothershed*, Oklahoma Supreme Court, SCBD No. 4687, December 2010. Mothershed filed Petition to Vacate and Motion for Order Nunc Pro Tunc under the closed SCBD disciplinary case number with the Oklahoma Supreme Court. This Office filed its Response on January 5, 2011. Petition *denied* on October 11, 2011. Mothershed filed Petition for Rehearing on October 13, 2011 that was *denied* on November 21, 2011.
 - *Mothershed v. Justices of the Supreme Court of Arizona, et al.*, U.S. District Court for Arizona, Case No. CIV-02-2375-PHX-RCB. On December 1, 2011, Mothershed filed Notice of Grounds for this Court's Nondiscretionary Duty to Upon its *Sua Sponte* Motion to Partially Vacate Judgments and Reinstate Federal Plaintiff's Claims. On December 2, 2011, the Court ordered Mothershed's Motion/Notice stricken from the record.
 - *Mothershed v. State of Oklahoma ex rel. Oklahoma Bar Association*, U. S. District Court for the Western District of Oklahoma, Case No. CIV-10-199-F. Mothershed filed "Notice of Grounds for this Court's Nondiscretionary Duty to Upon its *Sua Sponte* Motion to Vacate Judgment and Reinstate Federal Plaintiff's Claims" on November 28, 2011. Motion/Notice was *denied* on November 29, 2011. On December 5, 2011, Mothershed filed a Motion for Reconsideration with Supplement. The Motion was *denied* on December 7, 2011.
 - *Mothershed v. State of Oklahoma ex rel. Oklahoma Bar Association*, Tenth Circuit Court of Appeals, 11-6329. On December 12, 2011, Mothershed filed a Docketing Statement, Entry of Appearance, Motion for Summary Reversal and Application for Electronic Filing. *Pending*.
3. *Fournierat v. Wisconsin Law Review et al.*, United States Supreme Court, Case No. 11-5273.
- *Fournierat v. Wisconsin Law Review, et al.*, United States District Court for the Western District of Oklahoma, Case No. CIV-09-391-M, Tenth Circuit Court of Appeals, Case No. 10-6131, filed June 3, 2010. Fournierat appealed the dismissal of his claims to the Tenth Circuit. *Affirmed* April 12, 2011.
 - *State of Oklahoma ex rel. Oklahoma Bar Association v. Fournierat*, Oklahoma Supreme Court, SCBD No. 4613. On December 7, 2010, Fournierat filed Motion to Re-Open his disciplinary case. OBA responded on January 18, 2011. The Court *denied* Respondent's motion on February 28, 2011.
 - *Fournierat v. Wisconsin Law Review, et al.*, United States Supreme Court, Case No. 11-5273, docketed July 14, 2011. Certiorari *denied* October 3, 2011.
4. *Antone Knox v. Hendryx et al.*, Pittsburg County District Court, Case No. CV-2010-152, filed January 11, 2011. Knox filed petition against Hendryx, Williams and certain directors of the Oklahoma Health Department. *Dismissed* on February 16, 2011 as to defendants Hendryx and Williams.
5. *Gather v. OKARNG, et al.*, Tenth Circuit Court of Appeals, Case No. 11-6212.
- *Gather v. OKARNG, et al.*, United States District Court for the Western District of Oklahoma, Case No. CIV-11-260-F, filed March 10, 2011. *Dismissed* May 18, 2011.
 - *Gather v. OKARNG, et al.*, Tenth Circuit Court of Appeals, Case No. 11-6212, filed August 15, 2011. *Dismissed* August 19, 2011.
 - *Gather v. OKARNG, et al.*, United States Supreme Court, Case No. 11-7176, docketed November 3, 2011. Certiorari *denied* January 9, 2012.
6. *Kerchee et al., v. Smith et al.*, Western District of Oklahoma Case No. CV-11-459-C, filed April 26, 2011. The Kerchees filed suit against approximately 40 defendants, including the OBA, Loraine Farabow, John M. Williams and others. Motions to Dismiss filed for Farabow, Williams and OBA. Court approved report and recommendation dismissing defendants — final judgment to be entered at conclusion of case. Unidentified employees of OBA to be dismissed with prejudice.
7. *State of Oklahoma ex rel. Oklahoma Bar Association v. Butler et al.*, Tulsa County Case No. CV-2010-592. (Unauthorized Practice of Law). Permanent Injunction entered on October 17, 2011.
8. *State of Oklahoma ex rel. Oklahoma Bar Association v. Metcalfe*, Pontotoc County Case No. CV-2010-163. (Unauthorized Practice of Law). Temporary Injunction in effect.
9. *Antone Lamandingo Knox v. Hendryx*, Oklahoma Supreme Court Case No. MA-110,182, filed December 9, 2011. Petitioner's Application for Writ of Mandamus and Application to Assume Original Jurisdiction was *denied* on January 17, 2012.

ATTORNEY SUPPORT SERVICES

1. Registration of Out of State Attorneys:

In 2011, the Office of the General Counsel processed 557 new applications, 505 renewal applications and \$3,800.00 in renewal late fees submitted by out-of-state attorneys registering to participate in a proceeding before an Oklahoma Court or Tribunal. Out-of-State attorneys appearing pro bono to represent criminal indigent defendants, or on behalf of persons who otherwise would qualify for representation under the guidelines of the Legal Services Corporation due to their incomes, may request a waiver of the application fee from the Oklahoma Bar Association. In 2011, the Office of the General Counsel also processed 38 waiver requests of the application fee. Certificates of Compliance are issued after confirmation of the application information, the applicant's good standing in his/her licensing jurisdiction and payment of applicable fees. All obtained and verified information is submitted to the Oklahoma Court or Tribunal as an exhibit to a "Motion to Admit Pro Hac Vice."



2. Certificates of Good Standing:

In 2011, the Office of the General Counsel prepared 854 Certificates of Good Standing/Discipline History at the request of Oklahoma Bar Association members. There is no fee to the attorney for preparation of same. .



ETHICS AND EDUCATION

During 2011, the General Counsel, Assistant General Counsels, and the Professional Responsibility Commission members continued to speak to county bar association meetings, Continuing Legal Education classes, law school classes and various civic organizations. In these sessions, disciplinary and investigative procedures, case law, and ethical standards within the profession were discussed. This effort directs lawyers to a better understanding of their ethical requirements and the disciplinary process, and informs the public of the efforts of the Oklahoma Bar Association to regulate the conduct of its members. In addition, the General Counsel was a regular contributor to *The Oklahoma Bar Journal*.

RESPECTFULLY SUBMITTED this 31st day of January, 2012, on behalf of the Professional Responsibility Commission and the Office of the General Counsel of the Oklahoma Bar Association.

/s/ Gina Hendryx,
General Counsel
Oklahoma Bar Association



PROFESSIONAL RESPONSIBILITY TRIBUNAL ANNUAL REPORT

2011

SCBD No. 5832

The Professional Responsibility Tribunal (PRT) was established by order of the Supreme Court of Oklahoma in 1981, under the Rules Governing Disciplinary Proceedings, 5 O.S. 2001 Ch. 1, App. 1-A (RGDP). The primary function of the PRT is to conduct hearings on complaints filed against lawyers in formal disciplinary and personal incapacity proceedings, and on petitions for reinstatement to the practice of law. A formal disciplinary proceeding is initiated by written complaint which is a specific pleading filed with the Chief Justice of the Supreme Court. Petitions for reinstatement are filed with the Clerk of the Supreme Court.

COMPOSITION AND APPOINTMENT

The PRT is a 21-member panel of Masters, 14 of whom are lawyers and 7 are non-lawyers. The lawyers on the PRT are active members in good standing of the OBA. Lawyer members are appointed by the OBA President, with the approval of the Board of Governors. Non-lawyer members are appointed by the Governor of the State of Oklahoma. Each member is appointed to serve a three-year term, but limited to two terms. Terms end on June 30th of the last year of a member's service.

Pursuant to rule 4.2 of the Rules Governing Disciplinary Proceedings ("RDGP"), members are required to meet annually to address organizational and other matters touching upon the PRT's purpose and objectives. They also elect a Chief Master and a Vice-Chief Master, both of whom serve for a term of one-year. PRT mem-

bers receive no compensation for their services, but they are entitled to be reimbursed for travel and other reasonable expenses incidental to the performance of their duties.

The lawyer members of the PRT who served during all or part of 2011 were: Jeremy J. Beaver, McAlester; Dietmar K. Caudle, Lawton; Lorenzo T. Collins, Ardmore; Patrick T. Cornell, Clinton; Luke Gaither, Henryetta; William G. LaSorsa, Tulsa; Susan B. Loving, Edmond; Kelli M. Masters, Oklahoma City; Stephen R. McNamara, Tulsa; Louis Don Smitherman, Oklahoma City; Neil E. Stauffer, Tulsa; F. Douglas Shirley, Watonga; James M. Sturdivant, Tulsa.

Non-lawyer members who served during all or part of 2011 were: Norman Cooper, Norman; Bill Pyeatt, Norman; Jason Redd, Elk City (resigned September 15, 2011); John Thompson, Nichols Hills; Mary Lee Townsend, Tulsa; James Richard Daniel, Oklahoma City (term began September 30, 2011); and Susan Savage, Oklahoma City. As of December 31, one non-lawyer member vacancy existed.

The annual meeting was held on June 30, 2011, at the Oklahoma Bar Association offices. Agenda items included a visit by the General Counsel,¹ recognition of new members and members whose terms had ended, and discussions concerning the work of the PRT, including approval of new Guidelines and Procedural Rules. F. Douglas Shirley was elected Chief Master and William G. LaSorsa was elected

Vice-Chief Master, each to serve a one-year term.

GOVERNANCE

All proceedings that come before the PRT are governed by the RGDP. However, proceedings and the reception of evidence are, by reference, governed generally by the rules in civil proceedings, except as otherwise provided by the RGDP.

The PRT is authorized to adopt appropriate procedural rules which govern the conduct of the proceedings before it. Such rules include, but are not limited to, provisions for requests for disqualification of members of the PRT assigned to hear a particular proceeding.

ACTION TAKEN AFTER NOTICE RECEIVED

After notice of the filing of a disciplinary complaint or reinstatement petition is received, the Chief Master (or Vice-Chief Master if the Chief Master is unavailable) selects three PRT members (two lawyers and one non-lawyer) to serve as a Trial Panel of Masters. The Chief Master designates one of the two lawyer-members to serve as Presiding Master. Two of the three Masters constitute a quorum for purposes of conducting hearings, ruling on and receiving evidence, and rendering findings of fact and conclusions of law.

In disciplinary proceedings, after the respondent's time to answer expires, the complaint and the answer, if any, are then lodged with the Clerk of the Supreme Court. The complaint and all further filings and proceedings with respect to the case then become a matter of public record.

The Chief Master notifies the respondent or petitioner, as the case may be, and General Counsel of the appointment and membership of a Trial Panel and the time and place for hearing. In disciplinary proceedings, a hearing is to be held not less than 30 days nor more than 60 days from date of appointment of the Trial Panel. Hearings on reinstatement petitions are to be held not less than 60 days nor more than 90 days after the petition has been filed. Extensions of these periods, however, may be granted by the Chief Master for good cause shown.

After a proceeding is placed in the hands of a Trial Panel, it exercises general supervisory control over all pre-hearing and hearing issues. Members of a Trial Panel function in the same

manner as a court by maintaining their independence and impartiality in all proceedings. Except in purely ministerial, scheduling, or procedural matters, Trial Panel members do not engage in *ex parte* communications with the parties. Depending on the complexity of the proceeding, the Presiding Master may hold status conferences and issue scheduling orders as a means of narrowing the issues and streamlining the case for trial. Parties may conduct discovery in the same manner as in civil cases.

Hearings are open to the public and all proceedings before a Trial Panel are stenographically recorded and transcribed. Oaths or affirmations may be administered, and subpoenas may be issued, by the Presiding Master, or by any officer authorized by law to administer an oath or issue subpoenas. Hearings, which resemble bench trials, are directed by the Presiding Master.

Respondents in disciplinary or incapacity proceedings and petitioners in reinstatement proceedings are entitled to be represented by counsel.

TRIAL PANEL REPORTS

After the conclusion of a hearing, the Trial Panel prepares a written report to the Supreme Court. The report includes findings of fact on all pertinent issues, conclusions of law, and a recommendation as to the appropriate measure of discipline to be imposed or, in the case of a reinstatement petition, whether it should be granted. In all proceedings, any recommendation is based on a finding that the complainant or petitioner, as the case may be, has or has not satisfied the "clear and convincing" standard of proof. The Trial Panel report further includes a recommendation as to whether costs of investigation, the record and proceedings should be imposed on a respondent or petitioner. Also filed in the case are all pleadings, transcript of proceeding, and all exhibits offered at the hearing.

Trial Panel reports and recommendations are advisory only. The Supreme Court has exclusive jurisdiction over all disciplinary and reinstatement matters. It has the constitutional and non-delegable power to regulate both the practice of law and legal practitioners. Accordingly, the Supreme Court is bound by neither the findings nor a recommendation of action, as its review of each proceeding is *de novo*.

ANNUAL REPORTS

Rule 14.1, RGDP, requires the PRT to report annually on its activities for the preceding year. As a function of its organization, the PRT operates from July 1 through June 30. Annual reports, however, are based on the calendar year. Therefore, this Annual Report covers the activities of the PRT for the preceding year, 2011.

ACTIVITIES IN 2011

At the beginning of the calendar year, 19 disciplinary and 7 reinstatement proceedings were pending before the PRT as carry-over matters from a previous year. Generally, a matter is considered “pending” from the time the PRT *receives notice* of its filing until the Trial Panel report is filed. Certain events reduce or extend the pending status of a proceeding, such as the resignation of a respondent or the remand of a matter for additional hearing. In matters involving alleged personal incapacity, orders by the Supreme Court of interim suspension, or suspension until reinstated, operate to either postpone a hearing on discipline or remove the matter from the PRT docket.

In regard to new matters, the PRT received notice of the filing of 23 disciplinary complaints and 8 reinstatement petitions. Trial Panels conducted a total of 25 hearings; 19 in disciplinary and 6 in reinstatement proceedings.

On December 31, a total of 22 matters, 15 disciplinary and 7 reinstatement proceedings, were pending before the PRT.

Proceeding Type	Pending Jan. 1, 2011	New Matters in 2011	Hearings Held 2011	Other Dispositions	Pending Dec. 31, 2011
Disciplinary	19	23	13	27	15
Reinstatement	7	8	6	10	7

CONCLUSION

Members of the PRT demonstrated continued service to the Bar and the public of this State, as shown by the substantial time dedicated to each assigned proceeding. The members’ commitment to the purpose and responsibilities of the PRT is deserving of the appreciation of the Bar and all its members, and certainly is appreciated by this writer.

Dated this 17th day of January, 2012

PROFESSIONAL RESPONSIBILITY
TRIBUNAL

/s/ F. Douglas Shirley
F. Douglas Shirley,
Chief Master

1. The General Counsel of the Oklahoma Bar Association customarily makes an appearance at the annual meeting for the purpose of thanking members for their service and to answer any questions PRT members may have. Given the independent nature of the PRT, all other business is conducted in the absence of the General Counsel.

OBA Leadership Class Inspires Optimism

By John Morris Williams

Last week I got to spend a day with our third leadership class. I had a blast and left nothing short of wildly optimistic. What an exceptional group of young lawyers. I appreciate the firms and others who support their participation. Past President J. William "Bill" Conger was an enthusiastic supporter when I first mentioned the concept to him. It was an idea we borrowed from other bar associations around the country that were interested in grooming future leaders. It was a good steal.

Over the past few years, Generations X and Y have gained the reputation as nonjoiners and not as likely to take on association tasks or leadership roles. The facts have not borne that out. As most general statements, they are generally wrong. The OBA leadership classes certainly are not reflective of the proposed generational trends.

The agenda focused on leadership in public roles. Speakers included Lt. Gov. Todd Lamb, Attorney General Scott Pruitt, legislators Randy Grau, Aaron Stiles and Cory Williams, Oklahoma County Commissioner Ray Vaughn, Administrative Director of the Courts Mike Evans and Jari Askins. All great lawyer leaders in our state. I appreciate their willingness to come and teach and share their wisdom. While many of their leadership paths have been pri-

marily outside the OBA, they are always willing to come and participate and help out whenever we ask.

It is very satisfying to see many of the graduates of our first two classes actively participating in the OBA and growing in leadership positions. Lawyers are leaders all over our state. OBA members occupy leadership roles from university presidents to city council members and a myriad of other public and civic positions. If it's happening in Oklahoma, you will find an OBA member somewhere serving and leading!

“Our existence as an organization is solely dependent upon the recruiting and grooming of future leaders.”

This year's leadership class is no different. It is a talented and inspiring group who were chosen through a very competitive process. Each year we have a very tough time selecting the class members for a limited

number of slots. The selection committee works hard to make the classes diverse in all respects including geography. Thankfully, many applicants have been patient and reapplied and gotten into a later class. How lucky can we be that a group that has been branded as nonjoiners max out our leadership classes every time? If you are interested in being in one of the classes, watch for details on our website. Final plans for the next class have not been made. I promise it will have a wow factor like the previous classes.

My thought is that it is not luck at all that has made these classes so popular. The research also shows that regardless of generational status, good programming and good leadership attracts great people. In our case, a string of great elected bar leaders and the exceptional creativity and hard work of Donita Douglas, who is our director of educational programs, and her staff have made the leadership class concept first class in all respects.

It has been my good fortune to interact with each of the classes in some way. There are few things in my job that are more satisfying than seeing the OBA continue to train young leaders to take over in the future. Our existence as an organization is solely dependent upon the recruiting and grooming of future leaders. I can think

of few other things we do around here as critical as continuing our line of exceptional leaders.

I would be remiss in not again thanking Bill Conger for his leadership in starting this program and the hard work put in by Governor (and former Vice President) Linda Thomas who worked diligently to set up the first class and develop the model for future classes. This is

a shining example of what great leaders do. They train their successors. I have full confidence that the room full of future leaders I was with will in a few short years be training yet another generation of great leaders.

In short, you don't have to worry about the future when you can see so plainly the great things ahead. Optimism is assured.



To contact Executive Director Williams, email him at johnw@okbar.org.

**NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT
OF BRYCE MATTHEW HERKERT, SCBD #5823
TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION**

Notice is hereby given pursuant to Rule 11.3(b), Rules Governing Disciplinary Proceedings, 5 O.S., Ch. 1, App. 1-A, that a hearing will be held to determine if Bryce Matthew Herkert should be reinstated to active membership in the Oklahoma Bar Association.

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Friday, March 16, 2012**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

Most Lawyers Wear Many Hats

By Jim Calloway

Years ago a promotional piece from the American Bar Association Law Practice Management Section featured a pile of hats to illustrate the point that lawyers, particularly small firm lawyers, wear many hats.

A solo practitioner is his or her own chief executive officer, chief information officer, director of marketing, HR professional, along with being both management and labor.

Once I told a group that it was harder for small firm lawyers to bill as many hours as large firm lawyers. Before I could complete my thought, someone questioned if I was saying that large firm lawyers work harder than small firm lawyers.

I responded that I didn't mean that at all. There was simply a difference in the way that a small firm is arranged versus a larger law firm. Larger law firms, particularly back at that time, had a lot of support staff whose job was to keep the lawyer focused on client services and billing hours for client matters. A lawyer with lots of staff support might be able to bill 80 percent of the time actually worked, while a small firm lawyer who also has to "mind the store" might average 60 percent. Larger firm lawyers have nonbillable tasks too; serving on law firm committees, client development, continuing education, serving on

bar association committees, pro bono services and the like.

Once I was talking to a lawyer on the phone and we were interrupted by a baby's voice. The lawyer laughed and explained that he was holding a baby because his assistant's childcare had fallen through that day when a brief was due in an appeal. "I don't know how to do everything on the computer to finalize a brief," he said, "but I know how to take care of a baby." So sometimes babysitting could be part of a lawyer's duties to the firm.

For small firm lawyers, "being their own boss" may give them some more flexibility and control of some parts of their lives, like attending children's events, but all of the proverbial "bucks" stop at their desk. It may not be in the official job description to clean the carpet or do the dishes in the office break room, but you either do that or pay someone to do it for you. And, like the lawyer holding the baby while talking on the phone, there will be times it makes more sense for the highly educated lawyer to do a clerical task while the staffperson who types 90 words per minute pounds the keyboard.

But now the economic realities of current law firm practices have changed some of the differences that I noted years ago between small and large



firm lawyers. For many, if not most large firm lawyers, the days are behind us where a lawyer can have two or three staff people assigned just to their needs. Even partners at most larger law firms now share secretaries and use the typing pool to get their assignments done. I recall when some traditional lawyers claimed a computer or word processor was a tool for staff, not for lawyers. Now it is the rare lawyer indeed who could not complete a legal document using their computer and there are many lawyers who operate as "true solos" with no staff support.

But looking at the various "hats" lawyers wear can actually help them in their management duties and professional growth.

Consider trying on one of these imaginary hats each week and look at the practice from that point of view. You may just take an uninterrupted hour during the day to focus with one particular hat in mind or

you might schedule a meeting with staff organized by hats.

Some readers are probably confused by now, but hopefully you will be rewarded by reading on.

CFO HAT

As chief financial officer, you are concerned with the economic well-being of the law firm. This is a different role from the working lawyer in the firm who may just want to have as much take-home pay as ethically possible. The CFO is supposed to develop good systems and controls.

The CFO wants to make certain there is no loss of firm funds. Even though the CFO may trust everyone in the firm, financial controls are not about individuals, but about the business. Do you receive such a large volume of checks each day that two people should be assigned to open the mail and log incoming payments? What protections do we have in place when clients pay in cash? At a minimum, all cash payments should require that the client be given a receipt from a book that leaves a copy for the firm. The CFO knows that firm management cannot make good decisions without good data. Regular financial reports must be prepared for management. (It is OK if the CFO has to ask his or her CPA for a little help if needed.)

A good CFO will make sure hours worked for a client are billed to the client, that billing goes out promptly and clients who fall behind on fee payments are contacted. A CFO appreciates the need for a budget even while the lawyers say revenues are just too unpredictable. A good CFO will examine expenses for the good of the firm. A good CFO will create

written policies on financial matters.

MARKETING DIRECTOR HAT

The marketing director will recognize that new client development is essential for a healthy law practice, even while the lawyer may feel it is a bit unprofessional and not the way things have always been done. The marketing director will take careful note of referral sources and brainstorm ways to increase referrals. The marketing director recognizes the importance of a fresh webpage that is updated much more than once a year. The marketing director has an eye on social media, knowing that it is in some part the future of marketing. The marketing director will arrange for the lawyer to write an article for a local newspaper or a national specialty publication — and then harangue the lawyer until it is completed.

CHIEF INFORMATION OFFICER HAT

The chief information officer may not be an expert in IT, but the IT director answers to her (be that person an employee or a local “computer guy.”) The CIO doesn’t just look at what technology the firm has but also looks at needs and future plans. The CIO is responsible for being 100 percent certain that critical law firm data is backed up properly and that lawyers and staff have the tools they need to complete their job. The CIO may have the duty of telling the lawyer that the firm cannot afford the latest cool gizmo when there are business critical requirements still on the firm shopping list. But the CIO reads enough legal tech blogs and magazines to see when a hot new tech trend may impact

the office. The CIO looks at law firm workflow processes to see how they can be improved.

HR DIRECTOR HAT

Human resources often takes a lot of grief from the other department hats — er, heads. But happy and productive employees are key to a productive work environment. The lawyer may be proud of his negotiating skills in keeping staff raises to a minuscule level. But HR recognizes the cost of replacing experienced staff. HR sets up regular evaluations and reviews of staff. HR knows how to improve performance and give clear critiques without seeming hostile or mean.

Fewer lawyers get to be just lawyers these days. They all wear these different hats. But by trying one hat on at a time, there is the potential for focus, growth and improvement.

Wearing each of these hats, and then having a discussion with the lawyers as to these various business areas is very important. Input is always needed to arrive at the best decision.

The sole practitioner who gets caught by staff looking in the mirror talking to himself or herself about these issues can explain or refer staff to this article. Or maybe they can just say they are wearing their director-of-clowning-around-and-entertaining-the-staff hat that day.

Mr. Calloway is director of the OBA Management Assistance Program. Need a quick answer to a tech problem or help resolving a management dilemma? Contact him at 405-416-7008, 800-522-8065 or jimc@okbar.org. It's a free member benefit!

Annual Reports Summarize Discipline Action

By Gina Hendryx

In this issue of the *Oklahoma Bar Journal*, you will find the 2011 annual reports of the Professional Responsibility Tribunal (PRT) and the Professional Responsibility Commission (PRC). The PRT is the panel of masters who conduct hearings on formal complaints filed against lawyers and on applications for reinstatement to the practice of law. The panel consists of 21 members, 14 of whom are active members in good standing of the Oklahoma Bar Association (OBA) and seven members who are nonlawyers. When a formal complaint or application for reinstatement is filed, the presiding master of the PRT selects three members from the panel to preside over the discipline hearing. At the conclusion of the hearing, the trial panel files a written report with the Oklahoma Supreme Court which includes findings of fact on all pertinent issues and conclusions of law and a recommendation as to discipline. In 2011, the PRT conducted a total of 19 hearings including 13 discipline matters and six reinstatement proceedings.

The PRC considers and investigates any alleged ground for discipline or alleged incapacity of any lawyer. The commission consists of seven members, five of whom are active members in

good standing of the OBA and two nonlawyers. Under the supervision of the PRC, the

“It was not surprising to learn that 45 percent of the complaints in 2011 were in matters relating to criminal law and family law representations.”

office of the general counsel investigates all matters involving alleged misconduct or incapacity of any lawyer called to the attention of the general counsel by grievance or other manner. The PRC determines the disposition of all formal grievances.

The 2011 annual report of the PRC, as compiled by the office of the general counsel, surveys the grievances received, the disposition of same, as well as, the activities of the office during the year.

The Office of the General Counsel received 1,479 complaints against 999 attorneys in 2011. Complaints must be in writing and signed by the complainant. No anonymous complaints are processed. At the end of 2011, the OBA membership was 16,955. Considering the total membership, only 6 percent of the licensed attorneys in the state of Oklahoma received a complaint in 2011. This is fairly consistent with the previous two years and coincides with the national average.

It is always instructive to review which practice areas of law receive the most grievances and what types of complaints are routinely lodged against attorneys. It was not surprising to learn that 45 percent of the complaints in 2011 were in matters relating to criminal law and family law representations. And, this was not an aberration. Year after year, these two areas of practice consistently receive the most complaints. While still disconcerting especially if these are your two primary areas of practice, it is understandable given the nature of the legal needs facing a criminal defendant or family law litigant. There are arguably no other areas of law wherein the parties find themselves with more at risk albeit either loss of liberty or family.

The primary complaint lodged against Oklahoma attorneys continues to be client/file neglect. Nearly one out of every two grievances filed with the Office of the General Counsel alleges dissatisfaction due to the attorney's failure to respond to client inquiries or the delay in moving the matter to conclusion. In 2011, 43 percent of the grievances received were categorized as "neglect" complaints followed by 12 percent based upon the personal behavior of the attorney and 8 percent alleging some form of misrepresentation by the lawyer.

TIPS TO PREVENT A COMPLAINT

What can be learned from these statistics? First, if you practice in the areas of family law or criminal law, the likelihood of receiving a bar complaint is high. Regardless of practice area, the most common complaint will be that you have failed to keep the client informed and/or are taking too

long to achieve a result. This information is not novel. As attorneys, we have been repeatedly warned of the risks of procrastination. There is a wealth of classes, seminars, books and opportunities to address your own shortcomings when it comes to personal work habits. In addition, you should also be directing your clients' expectations. From the initial client intake, discuss such issues as return of phone calls, return of email and expected length of the representation. Set realistic response time with your clients. Tell the client when you return phone calls and email. Repeat the information in the representation agreement. Call or email even when you have nothing to report. Clients want to know that you are working on their matters and that you are responsive to their concerns.

UNAUTHORIZED PRACTICE OF LAW

In addition to attorney grievances and reinstatement

proceedings, the Office of the General Counsel increased its investigations in 2011 of allegations of the unauthorized practice of law. Over 20 requests to review these practices were acted upon in 2011. The majority of referrals came from lawyers and judges and concerned nonlawyers assisting pro se litigants. These investigations involved allegations of improper forms and actual harm to the pro se litigants.

The reports set forth detail the day to day workloads of the PRT, PRC and Office of the General Counsel. Whether investigating discipline matters, prosecuting the unauthorized practice of law, or representing the OBA in nondiscipline matters, these entities work together to promote the practice of law while protecting the public.

Ms. Hendryx is OBA general counsel.

Oklahoma Bar Journal Editorial Calendar

2012

■ March

Work Life Balance

Editor: Joseph M. Vorndran

joe@scdtlaw.com

Deadline: Oct. 1, 2011

■ April

Law Day

Editor: Carol Manning

■ May

Nonprofit Law

Editor: Dietmar Caudle

d.caudle@sbcglobal.net

Deadline: Jan. 1, 2012

■ August

Family Law

Editor: Sandee Coogan

scoogan@coxinet.net

Deadline: May 1, 2012

■ September

Bar Convention

Editor: Carol Manning

■ October

Opening a Law Practice

Editor: Melissa DeLacerda

MellssDE@aol.com

Deadline: May 1, 2012

■ November

Homeland Security

Editor: Erin Means

means@gungolljackson.com

Deadline: Aug. 1, 2012

■ December

Ethics & Professional Responsibility

Editor: Pandee Ramirez

pandee@sbcglobal.net

Deadline: Aug. 1, 2012

If you would like to write an article on these topics, contact the editor.

December Meeting Summary

The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Friday, Dec. 16, 2011.

REPORT OF THE PRESIDENT

President Reheard expressed her appreciation to the many bar members who had stepped up and accepted her challenges for the ambitious projects undertaken during the year. She thanked them for their support and hard work. As a token of her appreciation, her gift to board members was an Oklahoma Lawyers for America's Heroes custom medallion, which she explained is a military tradition that began during World War I.

REPORT OF THE VICE PRESIDENT

Vice President Strubhar reported she attended the Annual Meeting, General Assembly, Canadian County Bar Association meeting and Oklahoma and Canadian County judiciary holiday breakfast. She also hosted Canadian County's Veterans Day Clinic and spent 10 days in Hawaii with OBA members.

REPORT OF THE PRESIDENT-ELECT

President-Elect Christensen reported she attended the Annual Meeting, General Assembly, Lawyers Helping Lawyers Committee meeting, Hartzog Conger holiday party, first OBA-CLE movie night at the Supreme Court, Diversity Committee meeting, OAMIC

quarterly board meeting and a technology presentation by Grant-Thornton with the OBA IT Department and Executive Director Williams. She presided over the House of Delegates, participated in the Oklahoma County Veterans Day Clinic, presented the 2012 OBA budget to the Oklahoma Supreme Court in conference and worked a Yellow Ribbon event with President Reheard at the VA Medical Center in Oklahoma City. She was involved in meetings with LHL Foundation Inc. directors, OCU President Henry and Educational Program Director Douglas to plan an evening event with retired U.S. Supreme Court Justice O'Connor and a Law School for Educators event on April 24, 2012, planning for a March 27, 2012, spring dinner and auction event for the Lawyers Helping Lawyers Foundation, finalizing appointments with Executive Director Williams and Debbie Brink, Administration Director Combs to finalize the board's 2012 calendar of meetings and venues and Director Douglas and Director Calloway regarding the 2012 Solo and Small Firm Conference.

REPORT OF THE PAST PRESIDENT

Past President Smallwood corrected an error that had been made in the invitation to the upcoming party for outgoing board members. He said he had served on the board for the past six years and pointed out this would be his last board meeting forever. He

expressed how much he enjoyed his time on the board and was honored to serve. He also reported he attended the Veterans Reception at the Tulsa County Bar Association and worked out details for the upcoming party.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he participated in Annual Meeting and various events, House of Delegates, General Assembly, presentation of the budget to the Supreme Court, monthly staff celebration, meeting with technology auditors for preliminary reporting, staff directors meeting, Tulsa County Bar Association holiday party, Oklahoma County Veterans Day clinic, meetings and conversations with members of the Legislature regarding OBA House of Delegates legislative agenda items, staff meeting to prepare strategic plan report, staff holiday party, Lawyers Helping Lawyers Assistance Program Committee meeting, meeting with Supreme Court Liaison Justice Kauger and various meetings with elected leadership on 2011 year end and 2012 planning.

BOARD MEMBER REPORTS

Governor Carter reported via email that she attended the OBA Annual Meeting events in Tulsa, including the board meeting, General Assembly and House of Delegates, Tulsa County Bar Association veterans reception and judicial con-

ference on Enhancing Judicial Skills in Handling Domestic Violence Cases in Santa Fe, NM. She also assisted in organizing the TCBA veterans' clinic. **Governor Devoll** reported he attended the Annual Meeting, Rules Committee meeting and worked on Garfield County Bar Association matters. **Governor Dobbs** reported via email that he attended the November board meeting, judicial reception and OBA Annual Meeting. He also had an article published in the December *Oklahoma Bar Journal*. **Governor Meyers** reported he attended the Annual Meeting including the General Assembly and House of Delegates, Veterans Day legal clinic and Comanche County Bar Association meeting. **Governor Pappas** reported she attended the Annual Meeting, House of Delegates, General Assembly and Reba McEntire concert. She also participated in the Payne County veterans clinic and sent letters to District Eight county bar presidents regarding Law Day. **Governor Poarch** reported he attended the Annual Meeting, House of Delegates, General Assembly, Board of Bar Examiners meeting and Cleveland County Bar Association Christmas party. **Governor Shields** reported she attended the Annual Meeting, House of Delegates and General Assembly. She also worked on the IRS filing for the LHL Foundation and assisted in the organization of the Veterans Day legal clinic in Oklahoma County.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported the Professional Responsibility Commission did not meet in November and

reviewed status of cases pending against the OBA.

OKLAHOMA SUPREME COURT CASE E-FILEING SYSTEM

Supreme Court MIS staff member Frank Holdsclaw reviewed the court's strategic plan for e-filing, the project process and the time frames for the various steps to implementation projected to begin in 2013 and to be completed in 2016. Administrative Office of the Courts Executive Director Mike Evans shared information during the question and answer part of the presentation.

CLIENTS' SECURITY FUND REPORT

CSF Chairperson Micheal Salem recognized General Counsel Hendryx and Manni Arzola for their staff support of the Clients' Security Fund Committee. Mr. Salem reported the committee considered 37 claims and recommends that 17 claims be paid for a total of \$88,244.99. He also asked the board to approve the distribution of a news release about the claims and to authorize the president and himself to approve the text of the release. The board voted to approve the claims as recommended by the committee, distribution of the news release and authorization to approve the news release text.

REPORT ON STRATEGIC PLAN COMPLIANCE

President Reheard explained that traditionally the president-elect chairs the Strategic Plan Committee. She had asked Executive Director Williams to gather reports from the staff on the status of strategic plan goals. Executive Director Williams reviewed the report and explained the information on each goal was dropped into a spreadsheet,

making it easier to see what has been accomplished. Previously, the plan was reviewed but no report was presented to the board.

PERSONNEL MANUAL CORRECTIONS AND PROPOSAL FOR OPEN DOOR POLICY

President Reheard reported amendments to the OBA Personnel Manual were approved by the Board of Governors a few years ago; however, typographical errors were found. It was also discovered that for a variety of reasons no action was ever taken on a recommendation by Crowe and Dunlevy attorney Jerry Tubb Jr. to add an open door/whistleblower policy to the manual. The board reviewed the proposed policy and approved the correction of the typos and the open door policy with an amendment.

BOARD OF EDITORS APPOINTMENTS

The board approved President-Elect Christensen's recommendations to reappoint Melissa DeLacerda, Stillwater, as chairperson with a term expiring 12/31/12; appoint as member to represent District 1 Mark Ramsey, Claremore, and reappoint as members Emily Duensing, Tulsa - District 6 and January Windrix, Poteau - District 2 for terms expiring 12/31/14.

CLIENTS' SECURITY FUND APPOINTMENTS

The board approved President-Elect Christensen's CSF appointments:

Chairperson — Reappoint Micheal Salem, Norman, term expires 12/31/12

Vice Chairperson — Reappoint William Brett Willis, Oklahoma City, term expires 12/31/12

Attorney Members:

Reappoint — Micheal Salem, Norman, Luke Gaither, Henryetta and Lincoln Clay McElroy, Oklahoma City, terms expire 12/31/14

Appoint — James Von Murray, Stillwater, to replace Donna Dirickson, term expires 12/31/14

Lay Member — Reappoint Janice Stotts, McLoud, term expires 12/31/14.

MCLE COMMISSION APPOINTMENTS

The board approved President-Elect Christensen's recommendations to reappoint Daniel Sprouse, Pauls Valley, as chairperson with a term expiring 12/31/12; reappoint as members Amber Peckio Garrett, Tulsa, and Debra Schwartz, Laguna Woods, Calif., with terms expiring 12/31/14; appoint as member Fred Slicker, Tulsa, with a term expiring 12/31/14; appoint W. Mark Hixson, Yukon, to complete the unexpired term of Wade Gungoll whose term expires 12/31/13.

OKLAHOMA INDIAN LEGAL SERVICES APPOINTMENTS

The board approved President-Elect Christensen's recommendations to reappoint Tyson Branyan, Cushing; Casey Ross, Oklahoma City; and Julie Strong, Clinton, for three-year terms expiring 12/31/14.

CHILD DEATH REVIEW BOARD NOMINATIONS

The board approved President-Elect Christensen's recommendations to submit the following names for consideration for appointment to the Child Death Review Board (term will expire 12/31/14 or at the expiration of board, whichever comes first): Jenni-

fer King, Yukon; G. Gail Stricklin, Oklahoma City; and Lou Ann Moudy, Henryetta.

COMMITTEE ON JUDICIAL ELECTIONS APPOINTMENTS

President Reheard and President-Elect Christensen recommend the following non-attorneys be appointed to the Committee on Judicial Elections — lay member Shelly Kushmaul, Oklahoma City, for a four-year term to expire 12/31/2015; and lay member Loise Washington, McAlester, for an eight-year term to expire 12/31/2019. A third lay member with an eight-year term will be named at the January 2012 meeting.

OBA RESERVE ACCOUNTS

President Reheard reported Oklahoma City travel agency Bentley Hedges donated about \$1,000 to the Military Assistance Committee and several other OBA entities have funds they have not spent and are requesting the funds be held in reserve for 2012. The board voted to hold funds in reserve for the Leadership Academy, Military Assistance Committee and Communications Committee.

2012 YLD LIAISONS FOR OBA STANDING COMMITTEES

2012 YLD Chairperson Kirkpatrick announced the liaison appointments she has made to OBA standing committees for the next year.

NOMINATIONS

President-Elect Christensen recommended the names of the following lawyers be submitted to the Child Abuse Training & Coordination Council (CATCC) for consideration to serve on the Commission on Children & Youth: Rene Gish, Oklahoma City;

Gail Stricklin, Oklahoma City, and Jennifer King, Yukon. (Exhibit No. 7)

APPOINTMENTS

President-Elect Christensen made the following appointments:

Legal Ethics Advisory Panel:
Panel Coordinator — Reappoint Jim Drummond, Norman, term to expire 12/31/12

Members — terms expire 12/31/14

OKLAHOMA CITY PANEL

Reappoint — Timila Rother, Oklahoma City, and Micheal Salem, Norman

Appoint — John Hermes, Oklahoma City

TULSA PANEL

Reappoint — Lynnwood Moore, Tulsa, John R. Woodard, Tulsa, and Allan E. Mitchell, McAlester

Investment Committee:

Chairperson — Reappoint Joe Crosthwait, Midwest City, term expires 12/31/12

Vice Chair — Reappoint Jon Trudgeon, Oklahoma City, term expires 12/31/12

Members — terms expire 12/31/14

Reappoint — Stephen Beam, Weatherford; Chuck Chesnut, Miami; Judge Mike DeBerry, Idabel; Bill LaSorsa, Tulsa; Alan Souter, Tulsa; Jon Trudgeon, Oklahoma City; Jerry Tubb Jr., Oklahoma City and Harry Woods, Oklahoma City

Appoint — O. Chris Meyers II, Lawton.

ANNUAL MEETING RECAP

President Reheard reported that after the Annual Meeting a bar member called her office and shared his story that he

had not attended the bar convention in a very long time. He found the Lawyers Helping Lawyers table among the vendor booths which he found very helpful, and he left the meeting feeling good to be a lawyer. Governor DeMoss explained how the trial college was organized and that this was a first-time event at Annual Meeting. She said 78 people registered for the event, sponsored by the Litigation Section. It was noted lawyers from all age groups attended the trial college. YLD Chairperson Roy Tucker reported President Reheard challenged him to motivate YLD members to attend the meeting, and he did using Facebook to promote events. He said it was a good move to combine the casino event with the president's reception, and he heard positive comments about the YLD speed networking event. A YLD friends and fellows reception was held, and a larger reception is planned for next year. Educational Programs Director Douglas reported there were 642 registrants, 490 CLE participants

and 214 annual luncheon attendees. Registration numbers do not include lawyers who came only for section or committee meetings, Family Law Section members who attended only section programming or judges, and a total number of attendees was estimated at about 1,000 people.

SECTION LEADERS COUNCIL

President-Elect Christensen appointed Roy Tucker, Muskogee, and Deborah Reheard, Eufaula, as co-chairs with terms expiring 12/31/12. The new council is designed to encourage sections to talk to one another, and its first meeting will be in late January or early February.

ADDITIONAL COMMITTEE CHAIR/VICE CHAIR APPOINTMENTS

President-Elect Christensen appointed:

Diversity Committee — Co-Chair, Marcus Bivines, Norman (spelling correction only)

Member Services Committee — Co-Chairs Sarah Schumacher, Oklahoma City, and Roe Simmons, Edmond

Work/Life Balance Committee — Co-Chairs Cheri Gray, Oklahoma City, and Sarah Schumacher, Oklahoma City.

CLOSING REMARKS

President Reheard expressed appreciation to board members and to Justice Kauger. She said her goal for the year was team building, and she was honored to serve as OBA president.

EXECUTIVE SESSION

The board voted to go into executive session, met in session and voted to come out of executive session.

NEXT MEETING

The Board of Governors met in Oklahoma City on Jan. 19, 2012, and a summary of those actions will be published after the minutes are approved. The next board meeting will be held during the President's Summit Feb. 16-18, 2012, at Post Oak Lodge, near Tulsa.

Today Was a Great Day To Be a Lawyer

By Shon T. Erwin with Bronwen Llewellyn, Megan Martin and Robin Wilson

A career providing legal services to victims of domestic violence is not for the faint of heart. These selfless Oklahoma lawyers who sacrifice much to serve the most vulnerable among us deserve our support and our thanks. The National Institute of Health estimates that every year, as many as four million women in the United States are victims of domestic violence. One in three women will, during their lifetimes, experience domestic violence. Victims of domestic violence often suffer in silence unless they can somehow find an advocate to give them a voice. Your Oklahoma Bar Foundation makes grants to fund legal services for victims of domestic violence. Here are but a few of their success stories.

Bronwen Llewellyn, an attorney with Domestic Violence Intervention Services Inc. (DVIS/Call Rape) in Tulsa tells us the story of Carrie who came to DVIS/Call Rape for assistance with a protective order and criminal advocacy after being brutally beaten by her niece and her niece's significant other. Carrie was hospitalized for her injuries and had to undergo surgery to repair much of the damage ravaged on her body. The perpetrators believed Carrie was

dead when they left her residence. They had beaten her, knocked her unconscious, and then continued to beat her, kick her and jump on her body. Carrie had over \$50,000 in medical bills and still required ongoing treatment. The DVIS legal staff assisted Carrie in applying for financial assistance through the Oklahoma Attorney General's Crime Victim's Compensation Fund and advised her creditors that a claim had been made to cover her medical expenses. Staff also tracked the criminal cases against both perpetrators over the course of approximately one year to completion, and staff was available to attend any hearings where Carrie might have to give testimony or a victim's statement. Both perpetrators ultimately received substantial sentences for assault and battery with intent to kill. Legal staff was successful in securing a protective order against the niece, but the client allowed the second protective order to lapse after she relocated. Carrie came to a point in her life where she felt safe thanks to the help of DVIS.

Megan Martin, another attorney with DVIS/Call Rape tells the story of Danni, a mother of three young children. After many years of

trying, she was finally able to leave her abusive husband. With the help of DVIS Legal, her divorce from her abusive husband was finalized right before Christmas and Danni was able to gain sole custody of all her children with supervised visits for the father. Since Danni has come to DVIS Legal seeking help, she has gained more independence and has been able to sever all



ties with her abusive husband. They have not spoken since Danni filed for divorce last year and she is moving on to becoming a better mother thanks to the help of OBF Fellows. She recently sent a photo of her three smiling children that reads, **"You put the smile on my children's faces. Thank you."**

Robin Wilson, an attorney in the Oklahoma City office of Legal Aid Services of Oklahoma (LASO), tells the story of Sandy who was 17 when she first came to LASO. Sandy's

mother died approximately eight years ago and she had been living with her father and step-mother. This past summer her father became violent with her. She filed a VPO and came to LASO for help. LASO assisted her in getting a three year final order. Before coming to LASO, Sandy went to live with a friend. The friend's mother was instrumental in getting her set up with Circle of Care which is a girls' group home in Tahlequah. LASO also assisted the friend's mother in preparing a pro se guardianship. Robin walked through the paperwork with the guardian and got an emergency order so Sandy could go to Circle of Care. Her father was completely unresponsive in giving his consent for Sandy to be admitted to the group

home. Now, Sandy is excelling. She turned 18 yesterday and the guardianship was dismissed this morning. Sandy had been haunted by leaving her younger brother behind in the abusive home. The brother's situation became very bad and DHS recently took him into custody. The good news is that he will soon be placed with a maternal aunt who has been visiting Sandy at the group home. Sandy would have faced further violence had LASO not helped. She is now a happy high school senior with good grades and is college bound. After closing Sandy's LASO case file, Robin concluded, **"Today was a great day to be a lawyer."**

Your Oklahoma Bar Foundation is a proud supporter of both DVIS/Call Rape and

Legal Aid Services of Oklahoma. OBF funds critical legal services for victims of domestic violence and will do so until there are no more Carrie, Danni and Sandy stories to tell. Thank you, Bronwen, Megan and Robin. You are the best of us. **By providing support to those among us who give voice to the voiceless victims of domestic violence, OBF helps ensure that there will be many more great days to be a lawyer.**

Shon T. Erwin is president of the Oklahoma Bar Foundation. He can be reached at shonlaw@gmdde.com; Bronwen Llewellyn may be reached at bronwen.llewellyn@gmail.com; Megan Martin may be reached at mmartin@dvis.org; Robin Wilson may be reached at robin.wilson@laok.org.

**NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT
OF BRIAN DAVIS, SCBD #5822
TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION**

Notice is hereby given pursuant to Rule 11.3(b), Rules Governing Disciplinary Proceedings, 5 O.S., Ch. 1, App. 1-A, that a hearing will be held to determine if Brian Davis should be reinstated to active membership in the Oklahoma Bar Association.

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Wednesday, March 21, 2012**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

The Oklahoma Innocence Project at Work

By Laurie W. Jones

On Aug. 15, 2011, Oklahoma City University School of Law launched the Oklahoma Innocence Project, the only free-standing enterprise of its kind in the state dedicated to identifying and remedying cases of wrongful convictions. In five months, the OIP's case count has risen to 455. Many of those cases are new and awaiting review, 113 are in review, 30 have been reviewed, and 11 are in progress, which means that they are on the clinic "floor," being actively worked by students under the supervision of the OIP director, with ongoing investigation and supplemental records collection underway.

Shortly before it opened, the program changed its name from the Oklahoma Innocence Clinic to the Oklahoma Innocence Project to represent its more comprehensive mission. The clinic is the class itself, and the project refers to "the scope of activity that will take place outside of the class, including investigation, litigation and other work," states Professor Tiffany Murphy, Oklahoma Innocence Project director. OIP pursues cases in which there is credible evidence of actual innocence.

“Until OIP, Oklahoma was one of only a handful of states without a standing organization to evaluate post-conviction claims of innocence.”

Nine students are currently enrolled in the clinic, and five students were enrolled in the inaugural semester this past fall after completing a prerequisite course, "Wrongful Convictions." One of those students was Jill Swank, who learned the following skills in the clinic: how to use the state court records systems and PACER, how to request records, how to navigate a court clerk's office, how to call attorneys and track down witnesses, how to interview clients and how to evaluate case files. She values not only the acquisition of these skills, but also the education she received about the criminal justice system.

"I see the Oklahoma Innocence Project and Clinic as more than a microcosm of the law school with its function limited to working cases," Ms. Swank said. "I see it as the catalyst for educating our community and for participating in the larger, nationwide discussion about the problem of wrongful convictions. The OIP has sparked a dialogue that extends beyond the borders of the campus and across the state about the causes of wrongful convictions and the means for remedying and *preventing* them. It is awareness and dialogue that enable the exchange of information, which is the essence of education. It allows those individuals and entities who work within the criminal justice system or whose work is relied on for obtaining criminal convictions to examine the system and make it better."

OIP is part of the Innocence Network, an affiliation of similar projects throughout the nation. Network members are committed to using significant resources to secure exonerations of wrongful convictions. Until OIP, Oklahoma was one of only a handful of states without a standing organization to evaluate post-conviction claims of innocence. Hun-

dreds of inmates have been exonerated in the United States, including 18 in Oklahoma.

Generous donors from across the nation have made OIP a reality. OCU Law alumna Carly Maderer and her husband, Jason Maderer, are two of those donors. They note that, "The Oklahoma Innocence Project not only gives a voice to the wrongly

accused and their families, it helps improve our justice system and law enforcement. And now ... students in Oklahoma have hands-on experience with real cases and the opportunity to make a difference. We are grateful to be able to contribute to such a worthy cause that touches so many lives." The strong commitment to the integrity of our system of justice and respect for the rule of law

demonstrated by these donors, and all the individuals, companies and non-profit organizations that have contributed to OIP, have improved access to justice in Oklahoma, and we are all grateful for that.

Ms. Jones is an OBA Access to Justice Committee member. She serves as interim associate dean for Academic Affairs at OCU School of Law.

OKLAHOMA LAWYERS FOR AMERICA'S HEROES NEEDS YOU!

seeking family law attorneys in particular



www.okbar.org/heroes

Why Serve?

By Jennifer Heald Kirkpatrick

The Young Lawyers Division is off to a great start in 2012! We held an orientation for newly elected board members followed by our first board meeting of the year in January at the Renaissance Hotel and Convention Center in Oklahoma City. We were privileged to have ABA YLD Chair Michael Bergmann and ABA YLD Secretary/ Treasurer Mario Sullivan as guests. They provided information about the division's current and upcoming projects and initiatives. Following the meetings, we had the "Roast and Toast" of OBA YLD Immediate Past Chair Roy D. Tucker. The YLD board enjoyed dinner followed by many fun and entertaining stories of our outgoing chair.

In planning this year for the YLD, I wanted to keep in mind that the division was created to be the public service arm of the OBA. I consider this stated purpose to be the mission statement of the YLD. Yet too often, I've felt that we haven't done enough, or served enough, despite the hard work of many current and former members of our division. I began to wonder "why" the YLD was not being more effective.

As it turns out, "why" is a very important question.

When most of us consider volunteering our time or contributing in some way, we often start with the questions "how" or "what." For example, you may have asked yourself at some point in time "how should I get involved?" or "what volunteer opportunity fits in my schedule?" I've often asked myself similar questions both personally and in planning events and projects for the YLD. And then I heard about the "Golden Circle" theory developed by author and consultant Simon Sinek. Very simply put, the "Golden Circle" explains that those who ask "why" first, rather than starting with "how" or "what" are more often successful. So I asked myself "why serve?" I challenge you to do the same. When you find your "why," the "how" and "what" will fall into place.

For YLD member Nicole Longwell, the "what" is the Mock Trial program. She has contributed many volunteer hours to the program and currently serves as Mock Trial Committee chair. There is always a need for volunteer attorneys of any age and experience.



Jennifer Kirkpatrick
2012 YLD Chair

to serve as scoring panelists and judges. If you have not participated in the Mock Trial program before, I highly encourage you to do so this year. You will be amazed at the skill level of these high school students, and you might even learn something. Qualifying rounds run through Feb. 8. Quarterfinal rounds begin on Feb. 13 and end on Feb. 22. Semifinal rounds will be held in Tulsa on Feb. 28 and in Oklahoma City on Feb. 29. The final round will be held on March 6 at 5:30 p.m. in the Bell Courtroom at the OU College of Law. If you are interested in volunteering, please contact Nicole Longwell at nlongwell@mlak-law.com or OBA Mock Trial Coordinator Judy Spencer at mocktrial@okbar.org.

Ms. Kirkpatrick practices in Oklahoma City. She can be reached at jkirkpatrick@hallestill.com.

Calendar

February



13 OBA Law-related Education State Social Studies Meeting; 3:45 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell 405-416-7024

14 OBA Bench & Bar Committee Meeting; Oklahoma Judicial Center, Oklahoma City and OSU Tulsa; Contact: Barbara Swinton 405-713-7109

OBA Legal Intern Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Candace Blalock 405-238-3486

OBA Civil Procedure and Evidence Code Committee Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton 918-591-5229

15 OBA Law-related Education Close-Up; 8:45 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell 405-416-7024

OBA Women in Law Committee Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Deirdre Dexter 918-584-1600

16 OBA Law-related Education Close-Up; 9:15 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell 405-416-7024

OBA Access to Justice Committee Meeting; 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Rick Rose 405-236-0478

OBA Law-related Education Close-Up Teachers Meeting; 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell 405-416-7024

OBA Justice Commission Subcommittee Meeting; 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Drew Edmondson 405-235-5563

OBA Justice Commission Meeting; 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Drew Edmondson 405-235-5563

16-18 OBA President's Summit; Post Oak Lodge, Tulsa; Contact: John Morris Williams 405-416-7000

17 Oklahoma Association of Black Lawyers Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donna Watson 405-721-7776

20 OBA Closed – President's Day Observed

22 OBA Law Day Committee Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Tina Izadi 405-522-3871

Ruth Bader Ginsburg American Inn of Court; 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donald Lynn Babb 405-235-1611

23 OBA Work/Life Balance Committee Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Sarah Schumacher 405-752-5565

OBA Men Helping Men Support Group; 5:30 p.m.; The University of Tulsa College of Law; 3120 East 4th Place, Tulsa, John Rogers Hall (JRH 205); RSVP to: Kim Reber 405-840-3033

OBA Mock Trial Committee Meeting; 5:45 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Judy Spencer 405-755-1066

24 Oklahoma Uniform Jury Instructions Meeting; 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Chuck Adams 918-631-2437

OBA Lawyers Helping Lawyers Assistance Program Training; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Donita Douglas 405-416-7028

OBA Rules of Professional Conduct Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Paul Middleton 405-235-7600

27 OBA Alternative Dispute Resolution Section Meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: D. Michael O'Neil Jr. 405-239-2121

February 28 – March 2

OBA Bar Examinations; Oklahoma Bar Center, Oklahoma City; Contact: Oklahoma Board of Bar Examiners 405-416-7075

March

- 1 **OBA Men Helping Men Support Group;** 5:30 p.m.; The Oil Center – West Building, Suite 108W, Oklahoma City; RSVP to: Kim Reber 405-840-3033
OBA Women Helping Women Support Group; 5:30 p.m.; The University of Tulsa College of Law 3120 East 4th Place, Tulsa, John Rogers Hall (JRH 205); RSVP to: Kim Reber 405-840-3033
- 6 **OBA Law-related Education Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Suzanne Heggy 405-556-9612
OBA Government and Administrative Law Practice Section Meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Tamar Scott 405-521-2635
- 7 **OBA Law Day Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and videoconference in Tulsa; Contact: Tina Izadi 405-522-3871
- 8 **OBA Leadership Academy;** 11 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb 405-416-7027
OBA Women Helping Women Support Group; 5:30 p.m.; The Oil Center – West Building, Suite 108W, Oklahoma City; RSVP to: Kim Reber 405-840-3033
- 9 **Board of Bar Examiners Meeting;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Oklahoma Board of Bar Examiners 405-416-7075
OBA Leadership Academy; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb 405-416-7027
OBA Solo and Small Firm Conference Planning Committee Meeting; 1:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Charles W. Chesnut 918-542-1845
OBA Bar Association Technology Committee Meeting; 1:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Gary Clark 405-744-1601
OBA Family Law Section Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Kimberly Hays 918-592-2800
- 12 **OETA Festival Volunteer Night;** 5:45 p.m.; OETA Studio, Oklahoma City; Contact: Jeff Kelton 405-416-7018
- 13 **OBA Communications Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and videoconference in Tulsa; Contact: Dick Pryor 405-740-2944
OBA Legal Intern Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Candace Blalock 405-238-3486
- 14 **OBA Board of Governors Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams 405-416-7000
OBA Day at the Capitol; 11:30 a.m.; Oklahoma Bar Center, Oklahoma City and State Capitol; Contact: John Morris Williams 405-416-7000
OBA Diversity Committee Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Kara Smith 405-923-8611
OBA Women in Law Committee Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Deirdre Dexter 918-584-1600
- 15 **OBA Appellate Practice Section Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Greg Eddington 405-208-5973
OBA Justice Commission Meeting; 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Drew Edmondson 405-235-5563
- 16 **OBA Lawyers Helping Lawyers Assistance Program Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donita Douglas 405-416-7028
OBA Awards Committee Meeting; 1:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: D. Renee Hildebrant 405-713-1423
- 17 **OBA Title Examination Standards Committee Meeting of the OBA Real Property Law Section;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Scott Byrd 918-587-9762
- 20 **OBA Bench & Bar Committee Meeting;** Oklahoma Judicial Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Barbara Swinton 405-713-7109
OBA Civil Procedure and Evidence Code Committee Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton 918-591-5229

Bacharach Nominated to Appeals Court



Judge Robert Bacharach

Judge Robert E. Bacharach has received a presidential nomination for a position on the U.S. 10th Circuit Court of Appeals. He had served as a federal magistrate judge for the Western District of Oklahoma since 1999.

The Mississippi native holds a B.A. in history from OU, and earned his law degree in 1985 from Washington University in

St. Louis. He began his career in 1985 as a law clerk to Judge William Holloway Jr. of the 10th Circuit Court. In 1987, he joined the Oklahoma City law firm Crowe & Dunlevy, where he was named a shareholder and director in 1994. He has been appointed to replace Robert H. Henry on the court.

Judge Bacharach was recently awarded the ABA's highest rating for judicial nominees, unanimously well-qualified.

Writing Contest for Lawyers Announced

Are you the next John Grisham, Scott Turow or Meg Gardiner? In between writing legal briefs, do you find yourself writing powerful prose? This recently announced contest may be for you. The 2012 National Fiction Writing Competition for Physicians and Lawyers sponsored by SEAK Inc. encourages lawyers (and their medical brethren) to become more interested in and adept at writing fiction.

Contest entrants are asked to submit a fictional short story or novel excerpt, typed and not exceeding 2,500 words by Aug. 1. The submissions will be judged on originality, quality of writing and the potential of the author. First prize is \$1,000 along with exposure to literary agents.



Send submissions to SEAK, Inc. — Fiction Writing Competition, ATTN: Steven Babitsky, P.O. Box 729, Falmouth, Mass., 02541. More information about the contest is available online at www.okbar.org/s/jp07y.

Legal Aid 'Campaign for Justice' a Success



Jari Askins

Legal Aid Services of Oklahoma has met its fundraising goal of \$750,000. The Campaign for Justice concluded in January, and its chairpersons, OBA members Jari Askins and Kathy Taylor, praised Oklahoma's legal community for their efforts to meet the goal.

Former Tulsa Mayor Taylor said, "In these economic times, raising \$750,000 seemed to be an impossible task, yet attorneys and law firms from the entire state gave, made phone calls and used their skills and creativity to make sure low-income and elderly Oklahomans have access to quality civil legal services."



Kathy Taylor

Former Lt. Gov. Askins said she and Ms. Taylor wanted to co-chair the campaign because they both are aware that low income Oklahomans are often left without recourse, even in simple civil matters such as wrongful eviction or domestic violence.

"We believe in justice for all in Oklahoma and so our state's justice system must respect and nurture the role of Legal Aid," said Ms. Askins.

OBA Member Named to University's Top Post

John deSteiguer has been named as the sixth president of Oklahoma Christian University in Edmond. The 2,200-student university recently announced he will take office this summer when the outgoing president retires. A native of Tahlequah, Mr. deSteiguer has spent almost two decades in higher education. He served at his alma mater, NSU in Tahlequah, as a senior development officer before arriving at Oklahoma Christian in 2002. A record \$110 million dollars has been donated to the university during his nine-year tenure as chief advancement officer.

He is a member of several civic organizations, including the Edmond Chamber of Commerce executive committee, Oklahoma Planned Giving Council and Edmond Rotary. He received his undergraduate degree at NSU *summa cum laude* in 1984. He was a Rotary International Scholarship recipient at the University of Kingston, Jamaica, and earned his J.D. from Pepperdine University *magna cum laude* in 1989.



John deSteiguer

He and his wife, OBA member Darla deSteiguer, have two children. He is a frequent Bible class teacher and a deacon at Memorial Road Church of Christ.

What's Cooking with OBA Members?

One of the OBA's own is lighting up the competition, and taking a shot at the \$1 million grand prize, during this year's annual Pillsbury Bake-Off. Lawyer Kathy Ault of Edmond has made the list of 100 finalists with her "Stuffed Three-Seed Braid." This isn't her first trip to the kitchen, in the past her pecan pie ginger cheese-cake and chocolate chip bacon cookies have wowed the judges, but not garnered the top prize. The finals are set for March 26 in Orlando, Fla., and will be hosted by Martha Stewart.

Holiday Hours

The Oklahoma Bar Center will be closed Monday, Feb. 20 in observance of Presidents Day.

OBA Member Resignations

The following members have resigned as members of the association and notice is hereby given of such resignation:

Darren Bret Griffin
OBA No. 17287
903 Shady Bend Lane
Friendswood, TX 77546

Alan Max McIlvain
OBA No. 6011
16008 Deer Court
Edmond, OK 73013

Save the Date – Solo and Small Firm Conference Dates Announced!

The 2012 OBA Solo and Small Firm Conference is set for June 21 -23 at the Choctaw Casino Resort in Durant.

Special guests have been announced, and they include NFL referee Walt Coleman, who will speak on "Turning Boos into Cheers: How Effective Are You?," and Oklahoma Supreme Court Justice John F. Reif. Also on tap are Catherine Sanders Reach of the Chicago Bar Association (formerly with the ABA Legal Technology Resource Center) and blogger/columnist Brett Burney, who writes about using Macs in the legal profession at www.macsinlaw.com.

The conference facilities are beautiful, especially the Grand Tower and swimming pool. Take a sneak peak online at www.choctawcasinos.com/Durant/Hotel.aspx.

More information will be available in the March bar journal, and registration will open at that time. And remember, the YLD Midyear Meeting will be held in conjunction with the conference. Make plans now to attend!

Kudos

Assistant U.S. Attorney **Edward J. Kumiega** of the Western District of Oklahoma was recently selected as the OBA Criminal Law Section's Professional Advocate of the Year. The award recognizes the prosecutor or defense attorney, "who exhibits superior advocacy skills before the court, either at the trial or appellate level, and consistently shows professionalism, courtesy and respect to opposing counsel in the spirit of the adversarial system." Mr. Kumiega, a 22-year veteran of the U.S. Attorney's Office, is assigned to the violent crime and drug section. He is a graduate of the TU College of Law.

Oklahoma City Assistant U.S. Attorneys **Arvo Mikkanen** and **Jim Robinson** have each received the 2011 "Exceptional Service Award" from the National Association of Former United States Attorneys. They were recognized for the successful prosecution of a long-term public corruption investigation involving theft and embezzlement from a tribal government that resulted in the conviction of 14 individuals.

Tulsa lawyer **Kathy Taylor** has been selected as one of seven resident fellows for Harvard University's Institute of Politics located at the John F. Kennedy School of Government in Cambridge, Mass. As part of her fellowship, she will take a sabbatical from her

corporate law practice with McAfee & Taft for the spring 2012 academic semester. While at Harvard, the former Tulsa mayor and her resident fellow colleagues will interact with students, participate in the intellectual life of the Harvard community and lead weekly study groups on a wide variety of issues.

OCU School of Law Associate Dean for Students, **Deborah R. Felice** (formerly Fathree) is the 2011 recipient of the Peter N. Kutulakis Award. She received this national award at the annual Association of American Law Schools meeting in Washington, D.C., in January. The annually presented award recognizes the outstanding contributions of an institution, administrator or law professor in the provision of services to law students. She is a graduate of the TU College of Law.

Tulsa attorney **Mac D. Finlayson** has been elected 2012 president-elect and general counsel of the American Board of Certification of Bankruptcy and Creditors' Rights Attorneys. Mr. Finlayson, who is certified in business and consumer bankruptcy and creditors' rights law, will serve as the organization's president in 2013. The organization also has announced the election of **Timothy D. Kline** (business and consumer bankruptcy) of Oklahoma City, **Andrew R. Turner** (business bankruptcy) of Tulsa and **James Vogt** (business bankruptcy and creditors' rights) of Oklahoma City to its Board of Directors.

The Tulsa Chapter of the American Board of Trial Advocates has announced its officers for 2012. They are: **Dan S. Folluo**, Rhodes, Hieronymus, Jones, Tucker & Gable, president; **G. Calvin Sharpe**, Phillips Murrah, president-elect; **William R. Grimm**, Barrow & Grimm, treasurer; **Gary B. Homsey**, Homsey, Cooper, Hill & Carson, secretary; **Benjamin Butts**, Butts & Marrs, (immediate past president); and **Monty Bottom**, Foliart, Huff, Ottaway & Bottom, (national board member). The chapter held its annual banquet in January at the Tulsa Summit Club, where Oklahoma Supreme Court Justice **Noma Gurich** was given special recognition.

Andy Lester of Edmond was named "Citizen of the Year" by the Edmond Chamber of Commerce at the chamber's annual banquet in January. He is a partner in the Edmond firm Lester Loving & Davies PC.

Judge **Gene Prigmore** has been nominated and accepted as a fellow in the National College of Workers' Compensation Lawyers.

On The Move

Oklahoma City lawyer **Ed Blau** recently entered private practice, focusing in the area of criminal defense. He previously served with

the Oklahoma County District Attorney's Office, where he served as the head of Oklahoma County's drug court program, after which he served as a drug and violent felony prosecutor. He is a 2001 graduate of OU and a 2005 graduate of the OU College of Law. He may be reached at his new offices, Blau Law Firm PLLC, 7 Mickey Mantle Drive, Suite 377, Oklahoma City, 73104; phone: 405-232-2528; email: edblau@blaulawfirm.com.

The shareholders of McAfee & Taft have elected **T. Michael Blake** as the newest member of its seven-member board of directors. He is a tax and corporate law attorney whose practice is focused on tax and transaction planning and implementation for corporations, limited liability companies, partnerships and individuals. He has worked on numerous highly complex transactions affecting a wide variety of business interests including the energy industry, private equity, advanced manufacturing, the food industry and the healthcare industry. Mr. Blake earned his law degree from the OU College of Law, his LL.M in taxation from New York University and his bachelor's degree from Duke University.

McAfee & Taft has named two attorneys as new shareholders. **Bonner J. Gonzalez** is a corporate and tax attorney who represents individuals, privately held businesses and public companies in the areas of business and tax planning, tax-advantaged activities, complex business transactions, family wealth and estate planning, and local, state and federal taxation. He has also successfully represented clients in tax dis-

putes with the Oklahoma Tax Commission and Internal Revenue Service. **Joshua D. Smith** is a corporate attorney who practices in the areas of commercial transactions, real estate, corporate and securities law, and taxation. He has represented clients in mergers and stock and asset acquisitions and sales of all sizes as well as various other transactions, including private equity and venture capital investments, real estate transactions, public and private securities offerings, complex 1031 like-kind exchanges, commercial lending transactions, general corporate governance and regulatory compliance matters.

The law office of Richardson Bou-dreaux Keesling PLLC has moved to a new location: 7447 South Lewis Ave., Tulsa, 74136-6808. The phone number is 918-492-7674; email: info@rrbklaw.com; website: www.rrbklaw.com.

The law firm of Mahaffey & Gore PC announces that **Travis P. Brown, Cody J. McPherson** and **Richard L. Rose** have been elected as new shareholders, and that the firm has hired **Brady L. Smith** as an associate. Mr. Brown joined the firm in 2006. His legal practice primarily focuses upon matters relating to the oil and gas industry. He has substantial experience in complex civil litigation, covering a wide variety of industry issues. He is a 2005 graduate of the OU College of Law, where he graduated with highest honors. Mr. McPherson joined the firm in 2005. He earned a B.A. from OU in 2001 and a law degree from OCU School of Law in 2004. His practice focuses on the representation

of both landowners and businesses on oil and gas and business matters. Mr. Rose joined the firm in 2008. He earned a B.S. from SNU and a J.D. from OCU School of Law, graduating *magna cum laude* in 2003. His practice encompasses individual and business-related litigation, oil and gas litigation, contract disputes, surface damages and other commercial controversies, at both the trial and appellate levels. He has successfully tried several jury and non-jury trials throughout the state. Mr. Smith received a B.S. from UCO and a J.D. from OCU School of Law, graduating *cum laude* in 2011. He joined the firm in May 2010 as a law clerk and began as an associate in 2011. He practices in the area of general civil litigation, and his practice encompasses oil and gas litigation and leasing, contract disputes, surface damages and other commercial controversies.

Benton T. Wheatley has joined the firm of Munsch Hardt Kopf & Harr PC as a shareholder in its Austin, Texas, office. He has experience in the areas of construction/surety, litigation and has represented clients on a national and international basis. His practice includes litigating numerous complex construction and environmental matters, as well as the negotiation and drafting of construction and design contracts. He is a 1991 graduate of the OU College of Law.

The Tulsa law firm of Winters & King Inc. announces that **Ted J. Nelson** has joined the firm as an associate. He brings nearly 30 years of experience to the firm in the areas of business law and litigation, real estate and landlord-tenant matters as

well as work with tax-exempt religious organizations and churches. He returns to the Tulsa legal community after having spent the past two years working in the nonprofit sector in Los Angeles. Prior to joining the firm, he was a senior associate with the Joyce Law Firm in Tulsa. He is a 1982 graduate of the O.W. Coburn School of Law at ORU.

The Oklahoma City Human Resource Society has named **Courtney K. Warmington** general counsel for the organization. In her role, she will advise the Board of Directors on all legal matters before the chapter. She currently serves as a director for Crowe & Dunlevy's Labor and Employment practice group.

GableGotwals announces the firm has named four new shareholders. **Erin Dai-ley** has been an associate with the firm since 2005. Her civil litigation practice includes work in the areas of ERISA and insurance defense, labor and employment law and commercial litigation. She is a 2004 graduate of the TU College of Law, and a 2000 *summa cum laude* graduate of the University of Oklahoma. **Tom Gruber** has been of counsel with the firm since 2011. He has more than 34 years of legal experience, including more than a decade as Oklahoma's first assistant attorney general. He served two terms as district attorney for Woods, Woodward, Alfalfa, Major and Dewey counties and was twice elected president of the Oklahoma District Attorneys Association. He attended NWOSU and received his J.D. from the OU College of Law. **Mark D.G. Sanders** has been of counsel

with the firm since 2009, focusing his practice primarily in the areas of bankruptcy, creditors' rights and commercial litigation. He served the preceding 15 years as law clerk to U.S. Bankruptcy Judge Albert S. Dabrowski. Prior to his tenure with the court, he spent eight years in private practice in Missouri and Connecticut. His B.A. is from Occidental College and his J.D. is from the Columbia University School of Law.

Mia Vahlberg has been with the firm since her graduation from law school in 2004, focusing her practice on oil and gas matters as well as regularly representing public and private energy companies in commercial disputes. Before becoming an attorney, she worked as a natural gas marketer for a major oil company, co-founded a natural gas marketing company and worked as a CPA. She graduated with highest honors from the TU College of Law.

Michael C. Wofford has been named a partner in the firm of Doerner, Saunders, Daniel & Anderson LLP. He has practiced law for 35 years and has been of counsel with the firm in its Oklahoma City office since 2009, focusing on environmental and energy law. He serves on the legislative committees of both the Oklahoma State Chamber of Commerce and the Environmental Federation of Oklahoma, a statewide industry group. He currently chairs the OBA Environmental Law Section. He graduated from OU in 1974 and earned a J.D. from the OU College of Law in 1977.

Doerner, Saunders, Daniel & Anderson LLP announces **Tod J. Barrett**

is joining the firm in its Oklahoma City office. He will represent employers in employment litigation and on other employment issues, including matters pending before federal and state administrative agencies. He also will counsel on entertainment law issues, particularly those relating to the music industry, and conduct mediations. He has served as a federal administrative judge for the EEOC and as an assistant Oklahoma attorney general. He graduated *cum laude* from TU with a bachelor's degree in journalism and graduated with distinction from the OU College of Law.

The law firm of Norman Wohlgemuth Chandler & Dowdell announces that **Jo Lynn Jeter** has been named a shareholder and director of the firm. She joined the firm in 2004, and her practice consists primarily of commercial litigation in state and federal courts. She took a six-month leave of absence from the firm in 2008 to serve as judicial law clerk for Judge Gregory K. Frizzell in the U.S. District Court for the Northern District of Oklahoma. A 2001 graduate of OSU, she obtained her law degree from the OU College of Law in 2004.

Esther Roberts Bell announces the establishment of Global IP Asset Management, a full-service intellectual property law firm, of which she will serve as CEO. The firm is located at 507 S. Gay Street, Suite 910, Knoxville, Tenn., 37902. Ms. Bell served as an attorney with the U.S. Department of Energy and National Nuclear Security Administration from 2001 until 2011. She most recently was a shareholder in

the firm of Pitts, Lake & Bell PC. She is a 2001 *cum laude* graduate of the University of Tennessee College of Law.

Judge Gene Prigmore has announced his retirement from the Workers' Compensation Court effective July 1. He was first appointed to the court in 1998.

**At
The
Podium**

Oklahoma Court of Civil Appeals Judge **Jane Wiseman** was the featured speaker during the Tulsa Chapter of the American Board of Trial Advocates annual banquet on Jan. 21, 2012, at the Tulsa Summit Club.

Submit news items via email to:
Lori Rasmussen
Communications Dept.
Oklahoma Bar Association
(405) 416-7017
barbriefs@okbar.org

Articles for the March 10 issue must be received by Feb. 13.

IN MEMORIAM

Hugh A. Baysinger died Feb. 1. He was born June 24, 1938, in Kansas City, Mo. He graduated with honors from Yale University in 1960 with a B.E. in civil engineering. He earned a graduate degree in civil engineering in 1961, and earned his J.D. from the OU College of Law in 1966, teaching engineering at OU while attending law school. He practiced law with Pierce, Couch, Hendrickson, Baysinger & Green from 1966 until his death, becoming a partner in 1974. He was a member of the Oklahoma County Bar Association, ABA, Oklahoma Association of Defense Council (serving as its president in 1983-84), International Association of Defense Council, Defense Research Institute Inc. and the American Arbitration Association. During his law career, he enjoyed speaking as a guest lecturer for his peers and as a mentor for both younger attorneys and high school students. He was a lifelong member of the United Methodist Church, where he enjoyed many years as a member of the church choir. He enjoyed music and had a great passion

for singing, and he was a member of the Oklahoma Master Chorale. The things he loved most in life were family, music, law and food. Memorial donations may be made to Village United Methodist Church, Music Department.

Gaillynn Brooks Coopridge died Nov. 3, 2011. She was born Feb. 9, 1951, in Chicago, Ill. She studied accounting at Northern Illinois University, and completed her accounting degree at the University of Central Oklahoma when she moved to Oklahoma. She earned her law degree at the OU College of Law, where her course of study included a term at Oxford. During her legal career she practiced law for Berry Petroleum and for the firm Thom and Hendrick. She performed pro bono legal work after retiring. Her hobbies included gardening, collecting and repairing porcelain statuettes, beading and numerous styles of stitching. Memorial donations may be made to the Jimmy Fund, Dana-Farber Cancer Institute of Boston, Mass.

Judge Willard L. Driesel Jr. of Broken Bow died Dec. 29,

2011. He was born Dec. 7, 1953, in Ponca City, and he was a 1985 graduate of the OU College of Law. He had lived in McCurtain County since 1986, and he was district judge for 17 years in McCurtain, Pushmataha and Choctaw counties. He had served as presiding judge for the past four years, supervising all state courts in the nine counties that make up southeastern Oklahoma. He was appointed three years ago to serve on the Trial Court on the Judiciary. He established the first drug court in southeastern Oklahoma, and he was very proud of the role he played in helping people become drug free. Before he became a judge, he was a prosecutor, and was named Oklahoma Drug Prosecutor of the Year. His background also included 11 years in law enforcement as a police officer in Oklahoma City. He was an active member of Faith Christian Center, and he also was an avid hunter and fisherman. Memorial donations may be made to the Willard Driesel Scholarship Fund at the Idabel National Bank.

Elliott T. Everett died Jan. 25. He was born Feb. 6, 1979, in Santa Ana/Tustin, Calif., graduating from Fort Gibson High School in 1997. **He served in the U.S. Marine Corps, serving as a Spanish linguist and an intelligence analyst and reporter. He obtained the rank of sergeant, and received many decorations including USMC Good Conduct Medal, Joint Service Achievement Medal, Joint Service Commendation Medal and an NSA Star Award.** He completed his undergraduate degree through Wayland Baptist University in 2002, while serving his country. He graduated from the OCU School of Law in 2005. He began his practice with the personal injury law firm of Foshee and Yaffe before venturing out on his own, forming The Law Office at Indian Hills in 2009. His primary areas of practice were family law, criminal defense, auto accidents and all matters of personal injury representation. He was also an instructor for the Oklahoma Self Defense Act concealed carry gun course and proprietor of Sgt. Everett's Concealed Carry Classes and Indoor Pistol Range in Norman. Memorials donations may be made to the Lawyers Helping Lawyers Foundation Inc. in care of the OBA.

Paul Quackenbush Haddock of Tulsa died Jan. 1. He was born Oct. 14, 1955,

and graduated from the OU College of Law in 1995. **He served in the U.S. Navy during the Gulf War, specializing in electronic warfare.** He was an active bar member, involved with the Council Oaks/Johnson-Sontag Inn of Court, editor for the TU *Nimrod Journal*, judge at the TU Board of Advocates Regional National Trial Competition; participant in the OBA Ask a Lawyer Program; volunteer at the TU Law Chilifest Cookoff; and mentor to new attorneys and law students. Prior to attending law school, he worked as a master jeweler. In lieu of memorial donations, the family asks all to consider becoming an organ and tissue donor.

Hedy Steincamp Jackson of Lawton died Jan. 16. She was born April 30, 1949, in Wichita Falls, Texas, and grew up in the Fort Worth area. She was a 1991 graduate of the OCU School of Law and practiced in the Lawton-Duncan area for several years. She enjoyed watching sports and being with friends, and she is remembered as a wonderful mother, daughter, sister and aunt. She was very proud of her children and family.

Joseph James Mowry of Houston died Dec. 12, 2011. He was born March 25, 1966, and grew up on his family farm outside of Casey, Iowa. He participated in 4-H and FFA throughout high school, attending Northeastern Okla-

homa A&M and later Drake University to earn his B.A. in political science. He graduated in 1991 from Drake University Law School and enjoyed practicing law in Iowa and Oklahoma throughout his career. He had a love for adventure and enjoyed experiencing new places, and his greatest joys in life were his children. Memorial contributions may be made to the Mowry Family Scholarship Fund in care of Johnson Family Funeral Home of Stuart, Iowa.

Carol Roth Thomas of McAlester died Jan. 5. She was born Dec. 10, 1950, and attended St. John's School, serving as valedictorian of the class of 1968. She attended NSU and graduated with a B.S. degree in business and later attended TU for graduate study. While employed by the Petro-Lewis Corporation in Denver, she became a certified paralegal before graduating from the OU College of Law. She practiced oil and gas and corporate securities law in Tulsa for a number of years before opening a family law practice in McAlester. She is a former president of the Pittsburg County Bar Association and the St. Thomas More Legal Society in Tulsa. She was also a member of the ABA. She loved water and snow sports and was an avid reader, and she felt a strong obligation to protect children and aid families through her legal practice.

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TULSA LAW FIRM IS SEEKING an experienced workers' compensation legal assistant. Send resume to "Box L," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

DOWNTOWN OKLAHOMA CITY AV-RATED FIRM has immediate opening for attorney with 3-8 years experience in commercial transactions and litigation; experience in commercial real estate transactions is a plus. Compensation commensurate with experience; excellent benefits. Send resume with writing sample to gbryant@mswerb.com.

OKLAHOMA CITY AV-RATED INSURANCE DEFENSE FIRM seeks associate attorney with 0-3 years experience. Excellent research and writing skills required. All replies kept confidential. Resume and writing sample should be sent to "Box V," Oklahoma Bar Association, P.O. Box 53506, Oklahoma City, 73152.

LAW FIRM IS SEEKING individual that is good on phones and some PI and W/C experience. Please include desired salary. Send resume to "Box G," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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LITIGATION FIRM WITH OFFICES IN DALLAS, TULSA AND OKLAHOMA CITY seeks two to three experienced litigators for the firm's Tulsa and Oklahoma City offices. New hires will be located in downtown Tulsa and downtown Oklahoma City. The firm is a litigation firm with a broad client base and a strong, growing presence in Oklahoma and Texas. The law firm recently was recognized as one of the 40 fastest growing companies in eastern Oklahoma, and the only law firm on the list. The firm seeks attorneys with 4 to 7 years of experience or more in litigation. Those seeking a top litigation environment in which to mentor and be mentored are encouraged to inquire. Salary is above the norm when compared with commensurate job opportunities. Please send resume to "Box C," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

IMMIGRATION ATTORNEY NEEDED for busy Tulsa law practice. Must have 2+ years of experience. Salary and benefits commensurate with experience. Goal-based bonuses. A signing bonus will be paid to those with foreign language proficiency. Send resume to "Box Z," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

RECEPTIONIST/SECRETARY – Midsized OKC law firm seeking experienced receptionist/secretary with excellent people skills. Pleasant telephone voice and cheerful greeting skills a must, as well as organization, filing, typing and Internet research. Must be willing to learn, be a team player and possess at least 1-2 years receptionist and/or secretarial experience. Send resume to "Box M," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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THE CITY OF TULSA IS CURRENTLY SEEKING a legal division manager for its real property division. This senior-level position directs the division's diverse activities in real estate and zoning matters, such as drafting ordinances, Board of Adjustment appeals, condemnations, infrastructure developments and annexation issues. Interested candidates can obtain additional information and apply online at www.cityoftulsa.org/jobs.

NORTHEASTERN OKLAHOMA LAW FIRM seeks attorney experienced in state and federal court brief and appellate writing. Trial, civil litigation experience or property law knowledge helpful, but not required. Send resume and writing sample to "Box X," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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TITLE ATTORNEY: Law firm in OKC seeking an attorney to prepare oil and gas title opinions. No portable business necessary. Strong preference will be given to attorneys who have experience checking land records or writing title opinions. All applications will remain confidential. Please send resume to "Box D," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

FULL-TIME POSITION AS ASSOCIATE ATTORNEY for large Tulsa law firm. Must be fluent in Spanish and have a broad knowledge of the law and good telephone skills. Send resumes to: Human Resources Dept., P.O. Box 1046, Tulsa, OK 74101.

MIDSIZED TULSA LAW FIRM SEEKS PERSONAL INJURY ATTORNEY with 0-5 years experience. Position requires ability to handle all phases of litigation. Salary commensurate with experience. Please reply to "Box K," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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Announcement 12-C0014BU

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OKLAHOMA CHILD SUPPORT SERVICES is seeking a full-time attorney for our North Office located at 2409 N Kelley Ave., Room 103 Oklahoma City, OK 73111. The position involves negotiation with other attorneys and customers as well as preparation and trial of cases in child support related hearings in district and administrative courts. In addition, the successful candidate will help establish partnership networks and participate in community outreach activities within the service area in an effort to educate others regarding our services and their beneficial impact on families. In depth knowledge of family law related to paternity establishment, child support and medical support matters is preferred. Preference may also be given to candidates who live in or are willing to relocate to the service area.

Active membership in the Oklahoma Bar Association is required. This position has alternate hiring levels. The beginning salary is at least \$40,255.08 annually with an outstanding benefits package including health & dental insurance, paid leave & retirement. Interested individuals must send a cover letter noting announcement number # **12-C0014BU**, an OKDHS Application (Form 11PE012E), a resume, three reference letters, and a copy of current OBA card to: Department of Human Services, Human Resource Management Division, Box 25352, Oklahoma City, OK 73125 or email the same to jobs@okdhs.org. OKDHS Application (Form 11PE012E) may be found at <http://www.okdhs.org/library/forms/hrmd>. Applications must be received no earlier than 8 a.m. on February 10, 2012, and no later than 5 p.m. on March 3, 2012. For additional information about this job opportunity, please email Stephanie.Douglas@okdhs.org.

THE STATE OF OKLAHOMA IS AN EQUAL OPPORTUNITY EMPLOYER

Voice Mail

By Margaret Travis

You wanna know what I hate?

I hate, despise, abhor, can't stand, curse, detest, disdain, loathe people who call and leave rambling, convoluted, disconnected, confused, disjointed, incoherent, long-winded, wordy voice mail messages. Then, when they get to the end, they leave their phone number in one long incomprehensible, breathy sigh.

So you get something like this: "Hello...Ohm...This is...ugh... Ben... and ah...we're involved... ohm...in that litigation...ah... involving...hum...Mr. Smith... and...ugh...anyway...we've set up this ... ohm ... mediation... in that case...for...next Wednesday and please-callmeat555-1212 (click)." Did you get all that?

So I had to listen to his stupid, convoluted, long-winded, incoherent message THREE times before I actually got his phone number. And you know what? My client DOESN'T care. But I had to get his number on the off chance that my client MIGHT actually care and want to attend or want me to attend or want me to try to put a stop to it or something.

I remember the first answering machine I ever heard. It belonged to a friend's boyfriend. I didn't like the boyfriend and the answering machine gave me even more reason to hate him. It was in the early eighties. I remember at the time calling and hearing his cheesy recorded message and thinking, "I hate these machines."

I didn't know what they would become, but I predicted then that they would be the

downfall of human civilization as we know it. We may actually be there because stupid people call and leave these long stupid messages and then rush through their phone numbers at the end.

Anyone who has gotten trapped in voice mail hell understands what I'm talking about. Don't you hate being trapped in that loop that won't let you talk to a person but none of the options are what you need? I learned from a client recently that the reason you can't talk to a live person is because there often isn't one. He set up voice mail for his business and gave his customers



lots of options, but none of them were "talk to a live person" because he didn't want to pay a live person for them to talk to.

I think there should be rules about voice mail. Give your full name first, give your phone number second in a slow and controlled voice so someone listening to it can actually understand it. And finally, if you must, a message of 10 words or less. For instance: "Hi Honey! I'm on my cell phone. Call me." That would qualify as a good voice mail mes-

sage. As would: "Hello, this is Ben Dover. My number is 5-5-5-1-2-3-4. Call me about this mediation in the Smith case." That would be a good voice mail message. Anything else and they should take away your voice mail privileges. Not allow you to send or receive ANY voice mail messages. Banish you to communicating via snail mail or, maybe, if you were really good, via fax.

That's not to say I'm not a fan of technology.

Email? I'd rather communicate via email than any other mode of communication, including getting up and talking to someone in the next office, face to face. I've had whole conversations in email just to set up lunch with the guy in the office next to me. My email: "You wanna go to lunch?" His email: "Sure. When?" My email: "Donno. 12:30?" His email: "OK. Where you wanna go?" My email: "I don't know. You decide." You get the picture. All without having to actually get up from my desk and speak to anyone.

Caller ID. Talk about something I DO like: *Ring, Ring*. "Do I wanna talk to my mother right now? No, I don't think so, thank-youverymuch."

I just hate despise, abhor, can't stand, curse, detest, disdain, loathe people who call and leave these rambling, convoluted, disconnected, confused, disjointed, incoherent, long-winded, wordy messages on my voice mail.

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