

**Litigation Forecast 2014  
Environmental Regulation  
and Litigation Risks  
March 4, 2014**

The webinar will begin shortly. The presentation will be sent to you after the program.

# **Litigation Forecast 2014 Environmental Regulation and Litigation Risks March 4, 2014**

Panelists:

Kevin Mayer

Dan Wolff

Susan Mathiascheck

Moderator:

Kirsten Nathanson



**Kirsten Nathanson**  
Partner | Washington, D.C.

Kirsten L. Nathanson is a partner in the firm's Environment & Natural Resources Group focusing on environmental litigation, enforcement defense, risk assessment, and regulatory counseling under the major federal environmental and public lands statutes. Her litigation experience covers the Clean Water Act, Clean Air Act, Endangered Species Act, FIFRA, NEPA, SMCRA, RCRA, and CERCLA, encompassing citizen suit defense, regulatory challenges, remediation cost recovery and defense, Administrative Procedure Act actions, and EPA enforcement. Kirsten has been recognized as a leading environmental lawyer in Washington, D.C. by *Chambers and Partners USA 2013*.



**Kevin Mayer**  
Partner | Los Angeles

Kevin C. Mayer is an accomplished trial attorney with deep experience litigating on behalf of clients in a wide variety of complex commercial and mass tort actions. He counsels clients facing regulatory enforcement at both the state and federal level. He is counsel-of-record in some of the most important appellate decisions assisting the defense in tort litigation over the past 15 years. His clients include members of the oil and chemical, energy, pharmaceutical, medical device, industrial and consumer products, mining, manufacturing, entertainment, construction, and financial industries.



**Dan Wolff**  
Partner | Washington, D.C.

Dan Wolff is a partner with Crowell & Moring's Environment & Natural Resources Group and resident in the firm's Washington, D.C. office. His practice extends broadly from appellate and trial litigation and administrative counseling in a number of areas of environmental and natural resources law, to the workplace safety and health laws applicable to the group's clients. Dan counsels clients on a host of federal regulatory programs and related litigation risks, and regularly appears in federal district and appellate courts around the country and before a host of federal administrative tribunals.



**Susan Mathiascheck**  
Partner | Washington, D.C.

Susan Mathiascheck works extensively with oil and gas, mining, nuclear, and other businesses to develop and defend energy and resource production, as well as product manufacturing and transport, in the face of environmental and public lands challenges. She has more than twenty years of experience pursuing and defending federal project authorizations, defending enforcement actions, citizen suits and cost recovery actions, and challenging and defending federal rulemaking actions under the federal environmental laws, including: the Clean Water Act, Clean Air Act, Safe Drinking Water Act, Endangered Species Act, Marine Mammal Protection Act, NEPA, RCRA, CERCLA, FLPMA, OCSLA and the CZMA.

# Overview

- Activist opposition and litigation risk
- Regulatory developments and litigation risk
- Climate change litigation—a next wave?
- Emerging tort litigation risks

“An ineffectual attempt to direct an uncontrollable sphere into an inaccessible hole with instruments ill-adapted to the purpose.”

--Winston Churchill

# There oughta be a law....

- What if something you don't like is perfectly legal?
- Using legal and litigation tools to drive policy-level changes can lead to odd, unpredictable, overly broad results.
- For industries engaged in those perfectly legal activities, these attacks are difficult to guard against and challenging to defend.

# Dust in the wind

Novel applications of longstanding statutory claims:

- *Alaska Community Action on Toxics v. Aurora Energy Services*, 940 F. Supp. 2d 1005 (2013)
- **Subsequent attacks:**
  - Other terminals
  - Railroads
  - Ports

# It ain't what you do it's the way that you do it --

Using NEPA and Wildlife Law to drive climate change policy:

- Attacking extraction, transport, use
- Broadening foreseeability and scope in impacts analyses
- Interplay of NEPA and Wildlife Law
- Prudential standing— a small bright spot for industry?



# Breaking up is hard to do --

- What rhymes with “hydraulic fracturing”?
  - Diesel guidance
  - EPA study
  - State law challenges regarding jurisdiction and authority
  - Federal alphabet soup: CERCLA? RCRA? TSCA? FIFRA? CWA? SDWA? EPCRA?
  - Always lurking in the background — Tort (Kevin) and Health and Safety (Dan)

# Silica: What Would a More Stringent OSHA PEL Mean for Tort Exposure?

- Sept 2013: OSHA proposes a long-anticipated revised crystalline silica PEL of  $50 \mu\text{g}/\text{m}^3$
- Numerous industries affected
- Broad Industry Challenge to Proposed Rule
  - Flawed Data and Scientific Methodology
  - Feasibility
  - Cost
  - Effect on small businesses
- MSHA rule will follow

# Silica: What Would a More Stringent OSHA PEL Mean for Tort Exposure?

- Implications beyond regulatory compliance:
  - Sets new (lower) benchmark for torts suits (negligence per se?)
  - Calls renewed attention to silica
  - Provides a compendium of industry targets (e.g., hydraulic fracturing)
  - Provides a compendium of medical/scientific literature

# Climate Change Litigation: Is There a Next Frontier?

- *Massachusetts v. EPA*:
  - GHG may be covered under the Clean Air Act
  - States get "special solicitude" for standing
- Global Warming Tort Cases 1.0:
  - *AEP v. Connecticut* (S. Ct.)
  - *Kivalina v. ExxonMobil* (9th Cir.)
- Theory: GHG emissions = nuisance
- Fate: CAA, per *Mass v. EPA*, displaces claims

# Climate Change Litigation: Is There a Next Frontier?

- New battle lines:
  - *Bell v. Cheswick G.S.* (3d Cir.): CAA does not displace nuisance claim for harm stemming from air emissions from local power plant
  - *Wash. Env. Council v. Belton* (9th Cir.): ENGOs lack standing in citizen suit attacking state air agency for not regulating GHG from refineries absent demonstration of "material contribution" by refineries to global climate change

# Climate Change Litigation: Is There a Next Frontier

- Global Warming Tort Case 2.0?
  - Heede report postulating that 90 largest oil, gas, coal, and cement producers are responsible for 63% of CO<sub>2</sub> and CH<sub>4</sub>.
  - *Cheswick*-like circumstances (demonstrable local impacts) + state plaintiff (special solicitude) + Heede report defendant (material contribution)
  - Natural Resource Damages claim?

# Emerging Litigation Issues

- Silica & Flocculants
- Diesel Exhaust
- Vapor Intrusion
- *Lone Pine* Orders

# Silica

- “Frac sand rush”
- > 60 M lbs. in 2014
- Local moratoria on mining permits
- Chronic long-term health concerns –  
silicosis and lung cancer
- The threat



# Fracking – Flocculants

- Remove impurities in “frac sand”
- Polyacrylamide is preferred (GRAS)
- Acrylamide monomer
  - neurotoxin / carcinogen
- Ground water contamination risk?
- Incomplete knowledge re alternatives

# Diesel Exhaust

- IARC Group 1 / California Prop. 65
- Cancers to erectile dysfunction
- Focus on single point source
- Emissions are highly variable

# Diesel Exhaust

- Key Issues
  - What is emitted?
  - General causation
  - Specific causation
  - Alternative explanations
  - Expert opinion admissibility

# Vapor Intrusion

- Migration of VOCs from contaminated soil and ground water into buildings
- Odors
- Explosions
- Acute and chronic health effects

# Vapor Intrusion

- Media remediation
- Current control systems
- Additional controls based on future uses

# Vapor Intrusion

- Final EPA Guidance expected this year
  - Investigation protocols
  - Implementation of remedies
- VI to be a “scored pathway” for NPL sites
- Tension with the states?

# Vapor Intrusion

- Principal Threats
  - Re-opening of closed sites
  - Notice to building occupants
  - Fear of future disease
  - Medical monitoring

# *Lone Pine Orders*

- Named after 1986 NJ case
- CMO
- Court's "inherent authority"
- Provide basic evidence to support *prima facie* case



# *Lone Pine Orders*

- Expert affidavits required?
- Identify:
  - Products / Sources
  - Exposure(s)
  - Injuries (Personal / Property)
  - Causation
- Split of authority

# *Lone Pine Orders*

- Manage unwieldy discovery
- Eliminate baseless claims
- Define key issues
- Assist in determining case value

# Questions

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