



# The Override

Every Landman Wants One!

Volume V, Issue 3

May, 2010



## Los Angeles Association of Professional Landmen

### Presidents Message

**Thomas G. Dahlgren,  
Warren E&P, Inc.**

I hope everyone enjoyed the BAPL golf tournament on April 16, 2010. Yours truly sank a 90 foot putt on the 5th hole and was feeling high spirited until later did I discover our team held the distinction of having the highest score of the day. For having the most "points," we were honored and praised by our fellow oil patch golfers and showered with gifts. I appreciate the tennis balls and praise. I put all the blame on myself for the team's placement. All of the semi-pro ringers I had originally signed on with had to cancel. Finding suitable replacements at the last minute required sacrificing talent for a warm body. I actually had to use two geologists on my team. I hope the BAPL had a financially successful tournament.

LAAPL will be having its tournament in August and more information will be forthcoming. Please start thinking about forming a team. Our tournament organizers are well-experienced and will do an excellent job of putting everything together, but they still need everyone's help with sponsorships and participants.

This month's luncheon meeting will

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*A semi-submersible exploratory offshore drilling rig burns in the Gulf of Mexico*

center on education and providing credit for certification of RL's, RLP's and CPL's. If you have oil in your blood you will want to attend. Please also try and bring someone along as your guest. This is one of the main reasons why the AAPL, BAPL, and LAAPL exist; we are very fortunate to have some of the best oil and gas attorneys in the country willing to educate and keep us updated on the latest case law. Please give yourself extra time for this luncheon meeting. We are asking our speaker for a full hour presentation to provide the proper credit for attendance. It is also a good idea to come early so that you can mingle and spread your business cards around the room.

I had the opportunity to attend the California Independent Producers Association (CIPA) Environmental Committee meeting on May 12th at Signal Hill Oil Company's office. We covered a number of issues:

(1) SB 827 was passed and took effect January 1st. The AQMD is still issuing permits with the caveat that they are

### Meeting Luncheon Speaker

#### Horizontal Drilling From a Land/Legal Perspective

Julie Carter is a partner at the law firm of Day Carter & Murphy LLP, which specializes oil, gas, energy, and natural resources transactions and litigation. Julie represents and advises oil, gas, and energy companies on a full range of transactional issues, including acquisitions, surface access, leases, exploration and operational transactions, and regulatory compliance issues. She also examines title and issues title opinions in connection with the drilling of oil and gas wells, acquisitions, and financing transactions. Julie further represents oil, gas, and energy companies in a broad range of oil, gas, and energy related litigation matters. Julie received a B.S. in minerals land management from the University of Colorado and her J.D. from the University of Oklahoma School of Law (Order of the Coif). Julie practiced oil and gas law for two years in Oklahoma City before moving to California. Julie has spoken numerous times at the West Coast Land Institute, and is a frequent author and speaker on oil and gas topics.

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## Editor's Corner

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### Joe Munsey, RPL Newsletter Chair

Southern California Gas Company  
Another term as your Newsletter Chair is rapidly coming to an end. My prognosticating ability to look into the future to hold onto the chair as your Editor has eluded me. I am very aware there is lurking in the shadows my replacement who yearns to wield the mighty pen and shape the future of this fine award winning publication. Thus my waning tenure weighs heavily my mind.

While we still have the strength to pull together this last column, I would like to first and foremost take this opportunity to express thanks to the following persons for making "The Override" a success; i). The LAAPL executive board and our current president, Tom Dahlgren of Warren E & P, Inc. ii). several of the legal community who have provided the content for our Case/Issue of the Month, more so Thierry R. Montoya, Esq. of Ardn, Yoss, Alvarado & Smith, who has provided a steady stream of cases for our publication, iii) Cliff Moore for his willingness to provide editorial oversight; and iv). Champion of this award winning publication, Randall Taylor, RPL, of Taylor Land Services.

I would be amiss if we did not acknowledge the lone reader; I know you are out there somewhere, who opens the LAAPL email notice and actually pauses for a moment to breeze through the publication and read some of the fine articles we publish and catch the latest rants being doled out in this space.

We have assembled several top notched articles as our last hurrah and thus blank space is a premium in this issue, which means I am left with less space and ink

to indulge my proclivity of the usual tirade for those who live on the left side of the political isle. Ah, but did you think I would go away without some lecture on their buffoonery? You are right, but instead of moi, - if I may - I will leave that to a wonderful article written by Craig Biddle, Editor of *The Objective Standard*. Craig's article, "Celebrate Exploit-the-Earth Day," is an excellent resource for hydrocarbon apologists [you and me] when up against eco-warriors, wanna-be eco-warriors and poser eco-warriors.

If you clamor for journalism that is flat-out capitalism, then I highly suggest a cruise by the website of *The Objective Standard* and pull out your credit card to begin your subscription. Although Craig's publication is not "related" to the Ayn Ryan Institute, there is certainly incest between the two of them, but it is worth the money to have this publication sent to your home or office every quarter.

Another gem we found concerns the discovery of the first gas well in North American. Except this time we are not talking about our Canadian brethren. Several issues ago we extolled the history of the founding fathers of the oil biz as belonging to our northerly neighbors. This time we found a gem of a piece off the website of the Natural Gas Supply Association of history which sheds the light on the discovery of the first gas well - in the Empire State no less.

Yes my oil/gas friends, the State of New York holds title to having drilled the first gas well. The last time I checked, New York is part of the good ole US of A and thus we hold the title to the humble beginnings of the gas industry; to the consternation of those in the Big Apple who have kicked off the anti fracking debacle that is winding its way through congress. It is a sad day in American for the fossil energy business when Henry Waxmen, Democrat from Los Angeles, has his fingers in trying to put the brakes on a process that has proven to be safe and effective time and again but/and more so today with the elephant shale plays across the fruited plains.

Our Case of the Month by contributing legal expert, Thierry Montoya, Esq., is interesting. More so his concluding

remarks on the EPA's interpretation of its own regulation. With the recent Supreme Court decision which broadens the EPA's authority to regulate carbon dioxide and other greenhouse gases as pollutants; and the push to regulate frac fluids under the Clean Water Act, the industry is facing uphill battles to affect every aspect of our lives - fossil fuel wise. One thing we could all do to assist in the carbon dioxide problem is exhale less each day. Be prepared to hear regulatory standards regarding that matter soon.

Ok, so I hoodwinked you into reading this column thus far, now for my last comments on the wrongheaded thinking that beguiles those left leaning types. In the May 10th issue of *Forbes* an article by Stephen Fitch titled "The Bicycle Economy" was featured. Forget thinking it is a story about everyone turning in their gas guzzlers for pedal power, it centers on a do-gooder capitalist, and we say that with all due respect. The article is about F. K Day who has proven his worth by successfully manufacturing, marketing and profiting in the high-end bicycle industry/business. The short of it is, he finds himself in the sub-Saharan Africa putting bicycles in the hands of the locals. However more importantly, he is helping others to become entrepreneurs in the bicycle maintenance business.

Here is the center piece of the article, in my opinion, wherein he makes a profound statement. "You can have all the goodwill in the world, but if what you're doing isn't driven by the invisible hand of Adam Smith, you're doomed to fail. Holy Moses! While this should not be profound for many of us, it certainly should be broadcasted to the world leaders, including those running around in Foggy Bottom, DC. It could not have been stated better.

For those looking for continuous educational credit, look no further than our luncheon this month. Be prepared to spend extra time to collect your Affidavit of Attendance for 1.0 hour of credit toward your RL, RPL or CPL accreditation/certification.

See you at the Petroleum Club May 20th. As always, bring a guest and God bless America.

Presidents Message  
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subject to whatever the EPA decides; (2) Proposed Rule 317 (nonattainment penalties) has been postponed until January 2011. The Board is setting up a Working Group to take issues to the California Congressional Delegation; (3) The SCAQMD Climate Change rule is set for Board adoption next month; (4) The DOGGR is having an all day seminar at their Bakersfield office on May 19th, to discuss AB 1960 rules. For example, under 1960 there are no thresholds on reporting spills, so the former 1 bbl or more is out when dealing directly with DOGGR. Tank testing using more stringent methods will be forthcoming along with new construction requirements. New tanks will either be put on concrete pads or you must install leak detection devices under tanks that are placed on gravel. No one at the meeting has heard anything about the DOGGR developing an appeals process, which may be another issue addressed at the seminar; (5) In dealing with CARB, there was some discussion on well cellar emission factors. Work is going forward with studies of actual emissions from cellars; (6) There was much discussion on greenhouse gas regulations, which is worth a full length report in a future newsletter; (7) Of course, everyone is wondering how much an effect the recent Gulf spill will have on California's oil industry.

See you at our May luncheon meeting.



**Randall Taylor, RPL**  
**Petroleum Landman**

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Joel W. Miller  
AAPL Director  
Transamerica Minerals Co.

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## SCHEDULED LAAPL LUNCHEON TOPICS AND DATES

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### May 20th, 2010

Julie Carter, Esq.  
Day Carter & Murphy LLP  
“Legal & Land Issues Affecting  
Horizontal Drilling”

Officer Elections

### September 17th

Chris Phillips, Chief Geologist  
OXY LA Business Unit  
“Technical Aspects of Horizontal  
Drilling”

### November 18th

Don Clarke, Geologist  
“Urban Operations in the LA Basin”



## Treasurer's Report

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No Treasurers Report  
this month.

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## New Members and Transfers

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**Our Chapter Board of Directors  
welcomes the following new member  
to the Los Angeles Chapter:**

None to Report

### Transfers

None to Report

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## OUR HONORABLE GUESTS

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March's luncheon topic brought out several guest to the Long Beach Petroleum Club. Our guests of honor who attended:

**Oops – who is responsible for  
recording the names of our guest?**



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## CHAPTER BOARD MEETINGS

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The Board of Directors board held its board meeting at the Long Beach Petroleum Club in March.

Issues discussed:

- LAAPL Annual Mickelson Golf Classic
- LAAPL supporting 2010 WCLI
- Other matters
- Transition of chapter officers

The Board of Directors meets on the third Thursday of the month at 11:00 AM at the Long Beach Petroleum Club. Board meeting dates coincide with the LAAPL's luncheons.

We encourage members to attend and see your Board of Directors in action.

## Educational Corner

Need continuous education credit? You can generally earn them by attending our luncheons based upon speaker and subject matter. Listed below are continuous educational courses available for the second quarter of 2010.

### **Horizontal Drilling from a Land/Legal Perspective**

Presented by the Los Angeles Association of Professional Landmen

When: May 20, 2010

Where: Long Beach, CA [L.B Petroleum Club]

RL/RPL Continuing Education Credits: 1.0

CPL Recertification Credits: 1.0

### **Vail Seminar - Pooling – Contractual and Regulatory**

Classes takes place during AAPL Annual Meeting

When: June 16, 2010

Where: Vail, CO

RL/RPL Continuing Education Credits: 6.0

CPL Recertification Credits: 6.0

### **JOA and Exploration Agreement Seminar**

When: July 8, 2010

Where: Midland, TX

RL/RPL Continuing Education Credits: 7

CPL Recertification Credits: 7

### **Oil & Gas Land Review & CPL/RPL Exams**

When: July 13 – 16, 2010

Where: Oklahoma City, OK

RL/RPL Continuing Education Credits: 18

CPL Recertification Credits: 18

(Includes 1 Ethics, 1 ESA)

### **Summer Land Seminar – Major Shale Plays: Environmental & Regulatory Issues**

When: August 18, 2010

Where: Houston, TX

RL/RPL Continuing Education Credits: 6

CPL Recertification Credits: 6

### **Santa Fe Land Institute**

When: September 20, 2010

Where: Santa Fe, NM

RL/RPL Continuing Education Credits: 7

CPL Recertification Credits: 7

For information regarding speakers, topics and cost please go to [www.landman.org](http://www.landman.org).



## SPECIAL EVENT

### **LAAPL Plans for 6th Annual Mickelson Golf Classic**

Mark your calendars Friday, August 27, 2010, as the 2010 LAAPL Charity Golf Tournament, commonly known as the Mickelson Golf Classic.

Joel Miller, Senior Energy Asset Analyst, Transamerica Minerals, has stepped up to the plate to volunteer to chair the event for 2010. The venue is the premier Malibu Country Club serving as the background for the event. One of the highlights of the event is to raise funds for the benefit of the R.M. Pyles Boys Camp. Joel is planning to continue the approach Edgar Salazar set forth last year by involving contractors, geologists and/or engineers to join us at the golfing event.

The 2010 Mickelson Golf Classic will be looking for sponsors to help raise the funds to cover costs, door prizes and above all, monies for the R. M. Pyles Boys Camp.

## Lawyers' Joke of the Month

### **Roger L. McNitt, Esq.**

A young attorney finds himself at the pearly gates one day. As Saint Peter approaches him the attorney ask why he is there at such a young age of 50.

Saint Peter responds by telling him that according to his billable hours he is 92 years old.

## LAAPL OFFICERS

### **LAAPL ELECTION FOR 2010 – 2011 OFFICERS**

*Officers will be elected by a vote of membership in attendance at the May 20, 2010 Regular Meeting at the Long Beach Petroleum Club.<sup>1</sup>*

President<sup>2</sup> - Stephen T. Harris, Independent

Outgoing President<sup>3</sup> - Thomas G. Dahlgren, Land Manager, Warren E & P Inc.

Region VIII AAPL Director<sup>4</sup> - Joel W. Miller, Senior Energy Asset Analyst, Transamerica Minerals Company.

### **OFFICE CANDIDATE**

Vice President - Joseph D. Munsey, RPL, Senior Land Agent, Southern California Gas Company

Secretary - Jennifer D. Evans, Vice President, Aeneas, Inc.

Treasurer - Sarah Downs, Independent

Director - Randall Taylor, RPL, President, Taylor Land Services, Inc.

Director - L. Rae Connet, Esq., Managing Partner, PetroLand Services

<sup>1</sup>*Per Section VII (7)(c), voting for the slate of officers is to be done by secret ballot. A motion will be brought to the floor asking the members to vote and pass a resolution permitting a departure from said Section VII (7)(c) at the May 2009 meeting.*

<sup>2</sup>*Per Section VII (7a) of the by-laws, at or prior to the regular meeting scheduled nearest [emphasis added] to April 15th of each membership year, the membership will be provided with a list of nominees for officers of Vice President, Secretary, Treasurer and two (2) Directors. Due to the scheduling of the Chapter's meetings, a list of nominees will be presented to the members at our May luncheon, including a list published in the May issue of the "Override." A motion will be brought to the floor asking the members to vote and pass a resolution permitting a departure from said Section VII (7)(a) at the May 2009 meeting.*

<sup>3</sup>*Per Section 7(3) the Vice President shall succeed to the office of the President after serving his or her term as Vice President and shall hold the office of President for the next twelve (12) months.*

<sup>4</sup>*Per Article 8 (2) the outgoing President shall serve as director.*

<sup>5</sup>*Not an elected position and not a member of the LAAPL Board – by Board appointment for a two year period. Joel W. Miller was appointed in 2008.*

**CELEBRATE EXPLOIT-THE-EARTH DAY**

by Craig Biddle

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Because Earth Day is intended to further the cause of environmentalism—and because environmentalism is an anti-human ideology—on April 22, those who care about human life should not celebrate Earth Day; they should celebrate Exploit-the-Earth Day.

Exploiting the Earth—using the raw materials of nature for one’s life-serving purposes—is a basic requirement of human life. Either man takes the Earth’s raw materials—such as trees, petroleum, aluminum, and atoms—and transforms them into the requirements of his life, or he dies. To live, man must produce the goods on which his life depends; he must produce homes, automobiles, computers, electricity, and the like; he must seize nature and use it to his advantage. There is no escaping this fact. Even the allegedly “noble” savage must pick or perish. Indeed, even if a person produces nothing, insofar as he remains alive he indirectly exploits the Earth by parasitically surviving off the exploitative efforts of others.

According to environmentalism, however, man should not use nature for his needs; he should keep his hands off “the goods”; he should leave nature alone, come what may. Environmentalism is not concerned with human health and wellbeing—neither ours nor that of generations to come. If it were, it would advocate the one social system that ensures that the Earth and its elements are used in the most productive, life-serving manner possible: capitalism.

Capitalism is the only social system that recognizes and protects each individual’s right to life, liberty, property, and the pursuit of happiness. Under capitalism, people are fully free to choose their goals, to identify the means of attaining them, and to act on their best judgment. Accordingly, those who recognize that in order to live well they and their loved ones need abundant energy, clean air, clean water, and the like tend to use the available resources rationally, with an eye to the distant future. Further, under capitalism, if a person (or corporation) spews toxins onto someone’s land, or

poisons his water supply, or in any other way violates his property rights, the offender is held accountable in a court of law. But, so long as a person does not violate anyone’s rights, he is free to act in accordance with his basic means of living: the judgment of his mind.

Environmentalism, of course, does not and cannot advocate capitalism, because if people are free to act on their judgment, they will strive to produce and prosper; they will transform the raw materials of nature into the requirements of human life; they will exploit the Earth and live.

Environmentalism rejects the basic moral premise of capitalism—the idea that people should be free to act on their judgment—because it rejects a more fundamental idea on which capitalism rests: the idea that the requirements of human life constitute the standard of moral value. While the standard of value underlying capitalism is human life (meaning, that which is necessary for human beings to live and prosper), the standard of value underlying environmentalism is nature untouched by man.

The basic principle of environmentalism is that nature (i.e., “the environment”) has intrinsic value—value in and of itself, value apart from and irrespective of the requirements of human life—and that this value must be protected from its only adversary: man. Rivers must be left free to flow unimpeded by human dams, which divert natural flows, alter natural landscapes, and disrupt wildlife habitats. Glaciers must be left free to grow or shrink according to natural causes, but any human activity that might affect their size must be prohibited. Naturally generated carbon dioxide (such as that emitted by oceans and volcanoes) and naturally generated methane (such as that emitted by swamps and termites) may contribute to the greenhouse effect, but such gasses must not be produced by man. The globe may warm or cool naturally (e.g., via increases or decreases in sunspot

activity), but man must not do anything to affect its temperature.

In short, according to environmentalism, if nature affects nature, the effect is good; if man affects nature, the effect is evil.

Stating the essence of environmentalism in such stark terms raises some illuminating questions: If the good is nature untouched by man, how is man to live? What is he to eat? What is he to wear? Where is he to reside? How can man do anything his life requires without altering, harming, or destroying some aspect of nature? In order to nourish himself, man must consume meats, fruits, and vegetables. In order to make clothing, he must skin animals, pick cotton, manufacture polyester, and the like. In order to build a house—or even a hut—he must cut down trees, dig up clay, make fires, bake bricks, and so forth. Each and every action man takes to support or sustain his life entails the exploitation of nature. Thus, on the premise of environmentalism, man has no right to exist.

It comes down to this: Each of us has a choice to make. Will I recognize that man’s life is the standard of moral value—that the good is that which sustains and furthers human life—and thus that people have a moral right to use the Earth and its elements for their life-serving needs? Or will I accept that nature has “intrinsic” value—value in and of itself, value apart from and irrespective of human needs—and thus that people have no right to exist?

There is no middle ground here. Either human life is the standard of moral value, or it is not. Either nature has intrinsic value, or it does not.

On April 22, make clear where you stand. Don’t celebrate Earth Day; celebrate Exploit-the-Earth Day—and let your friends, family, and associates know why.

Craig Biddle is the editor of *The Objective Standard* and the author of *Loving Life: The Morality of Self-Interest and the Facts that Support It*. He can be contacted at [cbiddle@theobjectivestandard.com](mailto:cbiddle@theobjectivestandard.com).

## FIRST GAS WELL IN AMERICA

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Natural gas is nothing new. In fact, most of the natural gas that is brought out from under the ground is millions and millions of years old. However, it was not until recently that methods for obtaining this gas, bringing it to the surface, and putting it to use were developed.

Before there was an understanding of what natural gas was, it posed somewhat of a mystery to man. Sometimes, such things as lightning strikes would ignite natural gas that was escaping from under the earth's crust. This would create a fire coming from the earth, burning the natural gas as it seeped out from underground. These fires puzzled most early civilizations, and were the root of much myth and superstition. One of the most famous of these types of flames was found in ancient Greece, on Mount Parnassus approximately 1,000 B.C. A goat herdsman came across what looked like a 'burning spring', a flame rising from a fissure in the rock. The Greeks, believing it to be of divine origin, built a temple on the flame. This temple housed a priestess who was known as the Oracle of Delphi, giving out prophecies she claimed were inspired by the flame.



*The Oracle at Delphi, Greece*  
Source: Pascal Troxler

These types of springs became prominent in the religions of India, Greece, and Persia. Unable to explain where these fires came from, they were often regarded as divine, or supernatural. It wasn't until about 500 B.C. that the Chinese discovered the potential to use these fires to their advantage. Finding places where gas was seeping to the surface, the Chinese formed crude pipelines out of bamboo shoots to transport the gas, where it was used to boil sea water, separating the salt and making it drinkable.

Britain was the first country to commercialize the use of natural gas. Around 1785, natural gas produced from coal was used to light houses, as well as streetlights.



*A Natural Gas Streetlight*  
Source: DOE

Manufactured natural gas of this type (as opposed to naturally occurring gas) was first brought to the United States in 1816, when it was used to light the streets of Baltimore, Maryland. However, this manufactured gas was much less efficient and environmentally friendly, than modern natural gas that comes from underground.

Naturally occurring natural gas was discovered and identified in America as early as 1626, when French explorers discovered natives igniting gases that were seeping into and around Lake Erie. The American natural gas industry got its beginnings in this area. In 1859, Colonel Edwin Drake (a former railroad conductor who adopted the title 'Colonel' to impress the townspeople) dug the first well. Drake hit oil and natural gas at 69 feet below the surface of the earth.



*A Reconstruction of 'Colonel' Drake's First Well in Titusville, Pa*  
Source: API

Most in the industry characterize this well as the beginning of the natural gas industry in America. A two-inch diameter pipeline was built, running 5 and ½ miles from the well to the village of Titusville, Pennsylvania. The construction of this pipeline proved that natural gas could be brought safely and relatively easily from its underground source to be used for practical purposes.

In 1821, the first well specifically intended to obtain natural gas was dug in Fredonia, New York, by William Hart. After noticing gas bubbles rising to the surface of a creek, Hart dug a 27 foot well to try and obtain a larger flow of gas to the surface. Hart is regarded by many as the 'father of natural gas' in America. Expanding on Hart's work, the Fredonia Gas Light

Company was eventually formed, becoming the first American natural gas company.

During most of the 19th century, natural gas was used almost exclusively as a source of light. Without a pipeline infrastructure, it was difficult to transport the gas very far, or into homes to be used for heating or cooking. Most of the natural gas produced in this era was manufactured from coal, as opposed to transported from a well. Near the end of the 19th century, with the rise of electricity, natural gas lights were converted to electric lights. This led producers of natural gas to look for new uses for their product.

*First Gas Well*  
*continued from page 6*

In 1885, Robert Bunsen invented what is now known as the Bunsen burner. He managed to create a device that mixed natural gas with air in the right proportions, creating a flame that could be safely used for cooking and heating. The invention of the Bunsen burner opened up new opportunities for the use of natural gas in America, and throughout the world. The invention of temperature-regulating thermostatic devices allowed for better use of the heating potential of natural gas, allowing the temperature of the flame to be adjusted and monitored.

Without any way to transport it effectively, natural gas discovered pre-WWII was usually just allowed to vent into the atmosphere, or burnt, when found alongside coal and oil, or simply left in the ground when found alone.

One of the first lengthy pipelines was constructed in 1891. This pipeline was 120 miles long, and carried natural gas from wells in central Indiana to the city of Chicago. However, this early pipeline was very rudimentary, and did not transport natural gas efficiently. It wasn't until the 1920's that any significant effort was put into building a pipeline infrastructure. After World War II welding techniques, pipe rolling, and metallurgical advances allowed for the construction of reliable pipelines. This led to a post-war pipeline construction boom lasting well into the 60's, creating thousands of miles of pipeline in America.

Once the transportation of natural gas was possible, new uses for natural gas were discovered. These included using natural gas to heat homes and operate appliances such as water heaters and oven ranges. Industry began to use natural gas in manufacturing and processing plants. Also, natural gas was used to heat boilers used to generate electricity. The transportation infrastructure made natural gas easier to obtain, and as a result expanded its uses.

#### A Brief History of Regulation

In 1938, the U.S. government first regulated the natural gas industry. At the time, members of the government believed the natural gas industry to be a 'natural monopoly'. Because of the fear of possible abuses, such as charging unreasonably high prices, and given the rising importance of natural gas to all consumers, the Natural Gas Act was passed. This Act imposed regulations and restrictions on the price of natural gas to protect consumers. In the 1970's and 1980's, a number of gas shortages and price irregularities indicated that a regulated market was not best for consumers, or the natural gas industry. Into the 1980's and early 90's, the industry gradually moved towards deregulation, allowing for healthy competition and market based prices. These moves led to a strengthening of the natural gas market, lower prices for consumers and the discovery of more natural gas.

Today, the natural gas industry is regulated by the Federal Energy Regulatory Commission (FERC). While FERC does not deal exclusively with natural gas issues, it is the primary rule making body with respect to the minimal regulation of the natural gas industry.

Competition characterizes the natural gas industry as it is known today. The opening up of the industry, and the move away from strict regulation, has allowed for increased efficiency and technological improvements. Natural gas is now being obtained more efficiently, cheaply, and easily than ever before. However, the search for more natural gas to serve our ever growing demand requires new techniques and knowledge to obtain it from hard-to-reach places.

Today, the natural gas industry has existed in this country for over 100 years, and it continues to grow. Deregulation and the move toward cleaner burning fuels have created an enormous market for natural gas across the country. New technologies are continually developed that allow Americans to use natural gas in new and exciting ways. With all of the advantages of natural gas, it is no wonder it has become the fuel of choice in this country, and throughout the world.



*A Typical Bunsen Burner*  
*Source: DOE*



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## Case of the Month

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### **EPA'S APPROVAL OF IOWA'S § 303(D) LIST OF IMPAIRED WATERS UPHELD JAMES G. THOMAS V. LISA P. JACKSON, IN HER CAPACITY AS ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY (CASE NO. 08-2152, 8TH CIR., SEP. 10, 2009)**

**By Thierry R. Montoya, Esq.  
Ardno, Yoss, Alvarado & Smith**

James Thomas et al ("Plaintiffs") filed a complaint challenging EPA's final decision partially approving and partially disapproving Iowa's 2004 list of impaired waters. Plaintiffs alleged various errors related to both the 2004 list and a superseded 2002 list. Plaintiffs asked that the district court declare that EPA's partial approval of the 2004 list was arbitrary or capricious and to vacate EPA's action. The district court dismissed Plaintiffs' complaint as they had "failed to meet [their] burden of proving that EPA's decision to approve in part and disapprove in part Iowa's Section 303(d) lists in 2002 and 2004 was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The Eight Circuit affirmed.

#### **Background**

Clean Water Act section 303(d) requires states to identify waters within their boundaries for which technology-based effluent limits and other pollution control requirements "are not stringent enough to implement any water quality standards." States must, therefore, identify those waters failing to meet water quality standards in spite of full compliance by dischargers with all conditions and limitations in National Pollution Discharge Elimination System permits and all applicable nonpoint source controls. States must prioritize their impaired waters based on the severity of the pollution and the type and use of the waterway. The states' lists of impaired waters, also called "waters quality limited segments," are commonly referred to as 303(d) lists.

After identifying and ranking water quality limited segments, states must prepare a TMDL for each pollutant impairing each segment. A TMDL is a calculation of the maximum quantity, or load, of a pollutant that may be added to a waterbody from all sources, including natural background sources, without exceeding the applicable water quality criteria for that pollutant. States must submit their section 303(d) lists and TMDLs to EPA every two years (states were exempted from this requirement in 2000), which then has 30 days to approve or disapprove them. If EPA disapproves a state's submittal, EPA must prepare its own list and/or TMDLs for the state's waters within 30 days. States must incorporate approved TMDLs into their water quality management plans.

Starting with 2002 reporting requirements, EPA recommended that each state submit an "integrated report" that comprised the state's § 303(d) list. EPA recommended that states designate bodies of water as belonging to five categories which included: "impaired or threatened for one of more designated uses but does not require the development of a TMDL...[that includes] impairment not caused by a pollutant..."

On December 17, 2002, the Iowa Department of Natural Resources (IDNR) submitted its 2002 § 303(d) list to EPA. Iowa's draft 2002 list omitted a large number of water bodies that had been listed on the State's 1998 303(d) list. IDNR also provided EPA its methodology for developing the 2002 list that explained its rationale for omitting many of the waters previously listed due to the insufficiency of data. After its review, EPA approved the list in part as to the omissions of 71 waters, concluding that Iowa provided sufficient rationale for the exclusions. However, EPA did add 18 of the waters to the final 2002 303(d).

On May 26, 2005, Iowa submitted its draft 2004 list. Waters were removed for several reasons including new data showing lack of impairment and the establishment of a TMDL. EPA approved this list in part. EPA determined that fourteen waters should have been added to the 2004 list and that six of the waters included on the 2002 list, but not on the 2004 list, should be included. After public comment, EPA concluded that seventeen waters should be added to the 2004 list.

As a result, Iowa's 2004 303(d) list does not include a number of waters that were included on Iowa's 1998 303(d) list. As the reasons for supporting omission of numerous waters from the 2004 list were originally forwarded as reasons for delisting in 2002, the Eight Circuit referred to the final 2002 and 2004 lists together.

Plaintiffs' August 10, 2006 suit alleged that EPA's decision partially approving Iowa's 2004 303(d) list was arbitrary or capricious because: EPA failed to consider relevant factors, including whether Iowa had to include on its § 303(d) list all waters found in its prior report, EPA allowed Iowa to exclude waters where the impairment was not caused by a pollutant, and that Iowa failed to demonstrate good cause for removing previously listed waters.





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## Case of the Month, continued

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### **Court's Rationale**

Plaintiffs' most stridently argued that Iowa's listed waters shown as not meeting their uses, only partially meeting their uses, or with threatened uses should necessarily be included on the 303(d) list. Although Iowa is generally required to "assemble and evaluate" data on all navigable waters within the State, the Clean Water Act's implementing regulations do not require Iowa to include all such navigable waters on its 303(d) list. Instead, Iowa must provide documentation to support its determination not to list a particular waterbody.

Here, Iowa's 2002 list did not include seventy-one segments that had been included on its 1998 list, which is the gravamen of Plaintiffs' concern. However, concurrent with its submission of the 2002 list, IDNR provided a waterbody-specific rationale to support each removal from the previous list. When requested by EPA, IDNR supplemented its rationale to sufficiently explain why it was delisting certain waters. Specifically, IDNR provided a waterbody-specific rationale to show that there was good cause for no longer listing these waters.

Iowa's rationale for not including in its 2004 list, waters that had been on its 2002 list was also supported by a sufficient rationale. For the 49 waters that had been on the 2002 but not on the 2004, IDNR provided a waterbody-specific rationale to show that there was good cause for no longer listing these waters. EPA determined that IDNR had demonstrated good cause for the exclusion or modification of most of these waters. EPA did conclude that IDNR did not demonstrate good cause for excluding six waters so EPA added those waters to the 2004 list.

The Eighth Circuit held that the record reflected EPA's careful consideration of important facts or information that supported its conclusion. EPA is provided significant discretion in the interpretation of its own regulation. In so doing, EPA "may" request a showing of good cause, but the regulations do not require it to do so. As good cause includes flaws in the original analysis, EPA could still determine that the insufficiency of the original data was "good cause" even if not strictly a "flaw in the original analysis." The optional nature of the good cause request and the broad definition of good cause only supported the deference EPA is afforded in these matters. Therefore, the Eighth Circuit held that the record demonstrated that EPA gave careful consideration to the information presented for each water segment, and to Iowa's rationale for not consistently listing certain waters. Plaintiffs failed to provide any evidence that would suggest why additional data was required to conclude that EPA could not rely on the existing data.

The Eighth Circuit held that EPA properly concluded that impaired waters should not be included on 303(d) lists when the waters are not impaired by pollutants. Plaintiffs alleged that EPA erred by allowing Iowa to omit from its 303(d) list waters that were impaired but not by any "pollutant," as that term is defined under Clean Water Act § 502(6). Plaintiffs argued that the Clean Water Act requires all impaired waters, including those not impaired by a pollutant to be included in a 303(d) list. EPA disagreed.

The Clean Water Act does not expressly limit the 303(d) list to waters impaired by pollutants. Plaintiffs relied on the Ninth Circuit Pronsolino case that addressed the interpretation of 303(d) lists for the proposition that a more inclusive 303(d) list supported the general purpose of the Clean Water Act. The Eighth Circuit held that the Pronsolino case was not dispositive. The issue in Pronsolino was whether a water that was impaired solely by nonpoint sources of pollutants (as opposed to pollutants from a point source) should be included on a § 303(d) list, and the court held that such waters should be included. Here, the issue did not involve a determination of the type of pollutants or the source for the impairment. The issue was limited to whether waters that are not impaired by a pollutant should be properly listed. As 303(d) lists are intended to identify the waters within a state for which TMDLs must be established, and TMDLs are only required for pollutants, as that term is defined in the Act, Pronsolino's rationale was not instructive.

### **Conclusion**

EPA is granted a high degree of deference regarding its interpretation of its own regulations. Plaintiffs had failed to point to any additional evidence that EPA should, arguably, have considered other than what Iowa had presented. Plaintiffs' failure to do so will keep a court focused on EPA deference.



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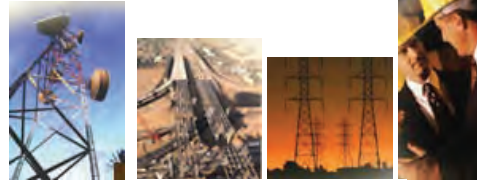


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