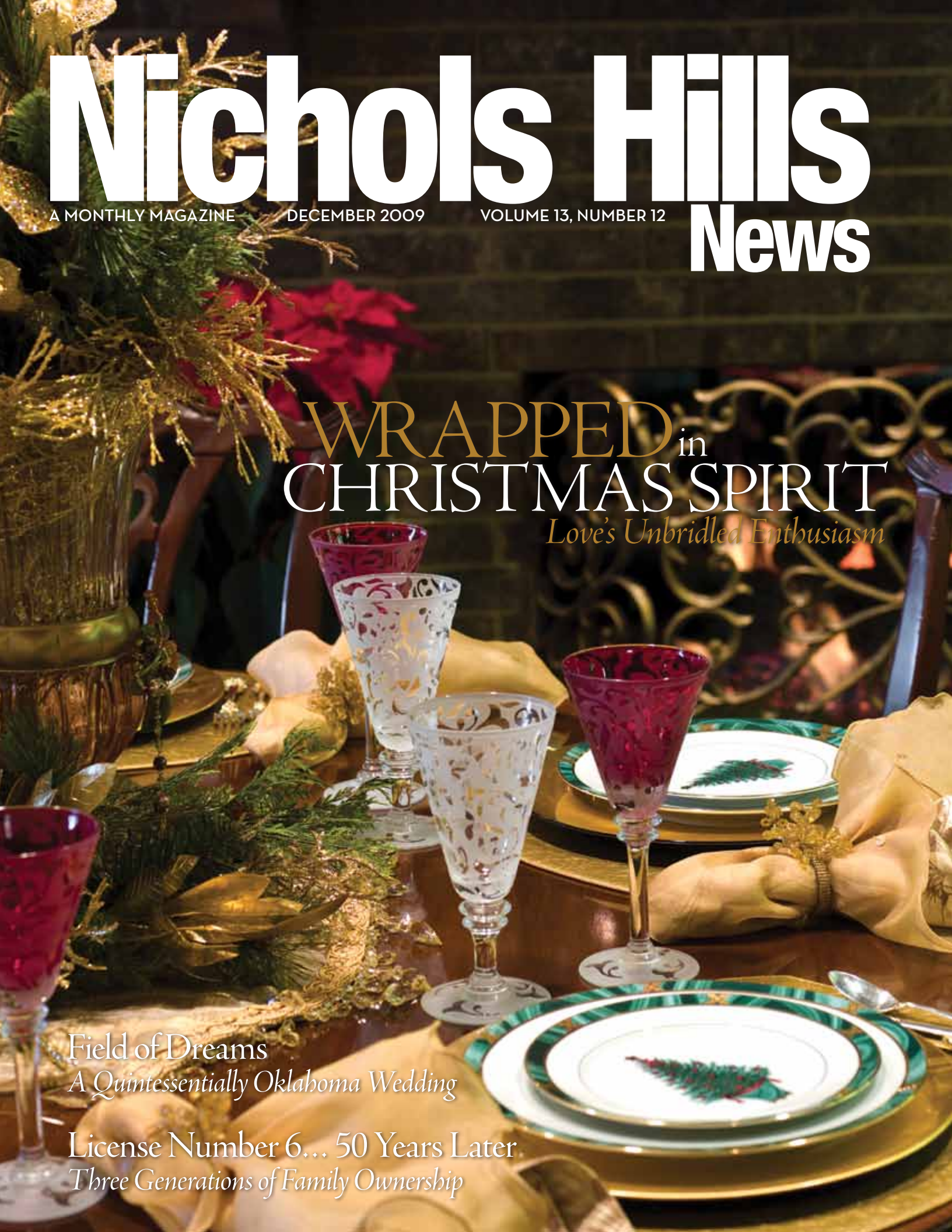
Nichols Hills News

A MONTHLY MAGAZINE DECEMBER 2009 VOLUME 13, NUMBER 12



WRAPPED in CHRISTMAS SPIRIT

Love's Unbridled Enthusiasm

Field of Dreams

A Quintessentially Oklahoma Wedding

License Number 6… 50 Years Later

Three Generations of Family Ownership

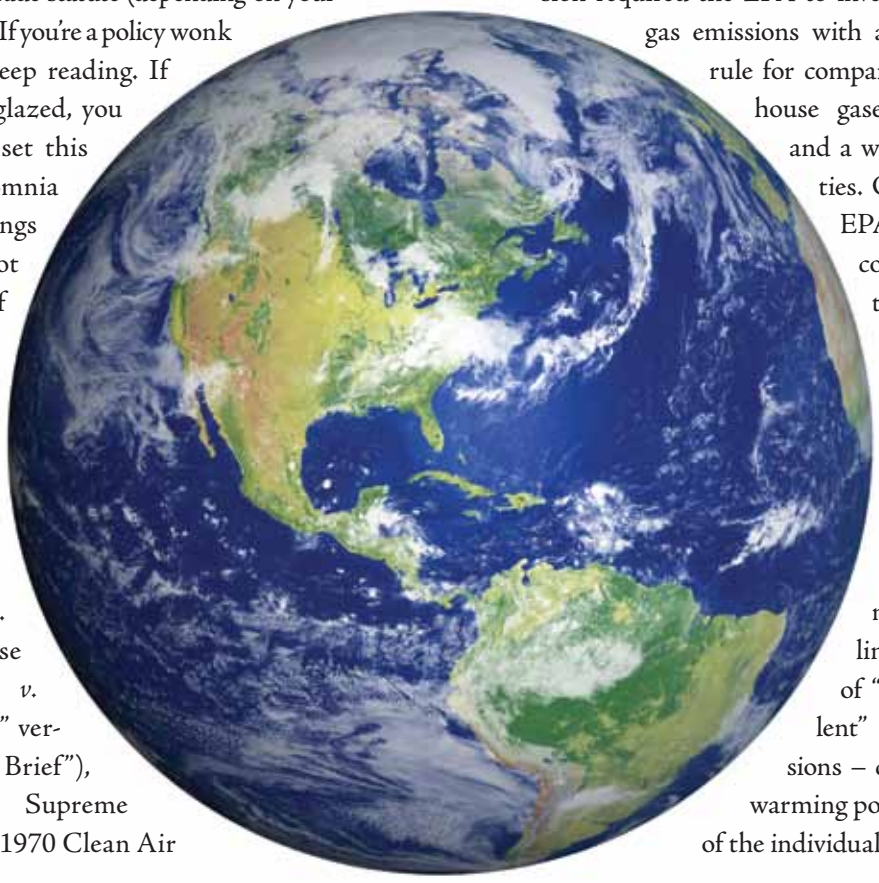
One Way or Another

Greenhouse Gas Regulation is Here

By **Mary Ellen Ternes**

Whether you buy in to climate change or not, September 2009 was more riveting than fiction. Michael Crichton's *State of Fear* didn't capture the combined U.S. legislative, executive and judicial branches' apparent *fait accompli* regarding climate change regulation. This feels more like "The West Wing" meets "The Pelican Brief" with a dash of "Class Action" thrown in.

Over the past few months, wheels have been set in motion that will almost certainly cause the United States to have climate change regulation in place in the next year or so. Greenhouse gas regulation is standing on our doorstep and pounding on our doors, either through crippling and costly EPA regulation, or on a case-by-case basis as argued by tort lawyers, or through the U.S. cap and trade/tax and trade statute (depending on your news channel of choice). If you're a policy wonk or lover of intrigue, keep reading. If your eyes are already glazed, you might be tempted to set this aside until your insomnia strikes, but note – things are about to become a lot more expensive, even if there's no Senate vote on the current energy bill this year.



How did we get here? No, we didn't join the European Union or sign any international treaties. Back in 2007, in a case called *Massachusetts v. EPA* (perhaps the "air" version of "The Pelican Brief"), the United States Supreme Court interpreted the 1970 Clean Air Act (and 1990 amendments). The Court found that the "sweeping" and "capacious" language of the Act clearly included greenhouse gases, as long as the EPA determined that the greenhouse gases might "endanger" our health and environment. So, the EPA had its marching orders: evaluate endangerment.

ERICK GFELLER

Mary Ellen Ternes

Now for "Class Action" – if you remember the buried report. While some at the EPA worked on "endangerment," others were responding to an unobtrusive 2008 appropriations bill provision. This little sleeper provision required the EPA to inventory U.S. greenhouse gas emissions with a mandatory reporting rule for companies which emit greenhouse gases, like power plants, and a whole lot of other facilities. On April 10, 2009, the EPA proposed for public comment this mandatory greenhouse gas reporting rule, setting the reporting threshold at 25,000 metric tons of carbon dioxide equivalent greenhouse gas emissions each year (25,000 $mtCO_2e$ for short – the lingo). That's metric tons of "carbon dioxide equivalent" greenhouse gas emissions – calculated using "global warming potential" factors for each of the individual greenhouse gases, like

methane. This "equivalency" allows the EPA to compare our emissions to the rest of the world's.

Turning now to "The West Wing." On April 24, 2009, in response to the Supreme Court's mandate, the EPA proposed for public comment its "endangerment finding," concluding that – lo and behold – greenhouse gas emissions are endangering us. While we were all mulling this over, on September 15, 2009, the EPA took action on the rule at the center of the Supreme Court's 2007 decision. The EPA proposed for public comment new greenhouse gas emission standards in the form of new fuel efficiency standards for cars and trucks ("light vehicles"). Then, on September 22, 2009, the EPA finalized the mandatory reporting rule it had proposed back on April 10, 2009. This means that over 10,000 facilities emitting greenhouse gases will have to monitor their greenhouse gas emissions starting January 1, 2010, and report these emissions by March 31, 2011.

While industry continues to reel from the shock of the final reporting rule, the EPA announced on September 30, 2009, that final adoption of its fuel efficiency standards proposed 15 days earlier automatically triggers Clean Air Act permitting (including mandatory emission reduction requirements) for all of those greenhouse gas emitters over – you guessed it – the same 25,000 $mtCO_2e$ threshold set as the reporting level in the September 22, 2009, final reporting rule. All of this activity is required, says the EPA, by the existing provisions of the Clean Air Act, as resuscitated by the U.S. Supreme Court in its 2007 *Massachusetts v. EPA* decision. With its actions on September 15, 22 and 30, 2009, the EPA has set the stage for expensive and litigious Clean Air Act permitting, including emission reduction requirements, for major greenhouse gas emission sources. No legislation required. None.

Now back to the courtroom. Into this mix and from a completely different direction, on September 21, 2009, the U.S. Court of Appeals for the Second Circuit dropped a bomb: *Connecticut v. American Electric Power*. This is an unprecedented decision from a case in which states sued power plants for the plants' perfectly legal carbon dioxide emissions, based upon common law public nuisance claims. The Second Circuit held that because there is no current greenhouse gas regulation, then there is no "political question defense" to common law claims of public nuisance arising from those greenhouse gas emissions. In English, this means that, because there is no current greenhouse gas emission regulation, plaintiffs can survive initial motions to dismiss and possibly go to trial (most cases filed never make it to trial) based on allegations of public nuisance caused by as-yet-unregulated and thus, completely legal, carbon dioxide emissions. This decision would seem to beg testing by those who have squeezed the last bit of blood from the most recent round of class action product liability settlements. It also creates incredible uncertainty for businesses, like power companies, that may be completely legal greenhouse gas emission sources.

Onto this stage, the U.S. Senate introduced the Kerry-Boxer "Clean Energy Jobs and American Power Act" on September 30, 2009. Unlike its U.S. House of Representatives sister bill, Waxman-Markey (adopted by the House in June of 2009), the Senate's Kerry-Boxer bill, as introduced, did not contain the Clean Air Act permitting exemption that would have preempted the complicated, expensive and litigious Clean Air Act permitting scheme discussed above.

Thus, the choice among climate change regulation alternatives now appears to be between (1) chaotic common law nuisance suits to fill in the lack of regulation, or (2) crippling EPA regulation, possibly in addition to (3) Congressional adoption of the Kerry-Boxer "Clean Energy Jobs and American Power Act," unless somebody figures out a way to include the Clean Air Act exemption that had been gifted away by Waxman-Markey.

The White House Climate Czar (former EPA Administrator Carol Browner) has proclaimed there will be no vote on the energy bill this year. That will give us all plenty of time to consider EPA regulation or regulation by judicial fiat as the alternative. While the academic might appreciate the intrigue, again, most of us will probably just take away this one thing: pretty soon, just about everything will become more expensive. ■

Mary Ellen Ternes, Esq. is a former chemical engineer from both the EPA and industry. She is currently a shareholder with McAfee & Taft and co-chair with Richard A. Riggs, Esq. of its Renewable and Sustainable Energy Group, and is serving a three-year term as City of Nichols Hills Environment, Health and Sustainability Commissioner.

BE INFORMED

To review the EPA's climate change activity, see
www.epa.gov/climatechange

To see history in the making, review the two court cases
Massachusetts v. EPA, Supreme Court Decision
www.supremecourtus.gov/opinions/06pdf/05-1120.pdf

Connecticut v. AEP, Second Circuit Decision
www.ca2.uscourts.gov/decisions/isysquery/d61f676c-fe65-4781-9551-c10d17104dba/1/doc/05-5104-cv_opn.pdf

For the Senate draft energy bill, see
kerry.senate.gov/cleanenergyjobsandamericanpower/intro.cfm