D.C. Circuit clears path for GHG rules, but politics remain

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What may have been the most important environmental decision of 2012 dismissed numerous challenges to the rules issued by the U.S. Environmental Protection Agency (EPA) to control emissions of greenhouse gases (GHGs). While further legal battles are looming, the most serious remaining threats to EPA's program to regulate GHGs are in the political sphere.

This article describes the D.C. Circuit's ruling in *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012)(per curiam), forecasts EPA's next moves, and describes the battles still ahead for EPA.

The ruling

As most *Trends* readers are aware, the Supreme Court's landmark 2007 decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), held that the Clean Air Act authorizes EPA to regulate GHGs from motor vehicles. EPA did not exercise this authority while President George W. Bush remained in office. Things changed rapidly as soon as Barack Obama became president in January 2009. Like most proponents of GHG regulation, President

Obama believed that the Clean Air Act was not ideally suited to addressing this global problem, and he supported legislation specifically addressing GHGs. The resulting Waxman-Markey bill, an economy-wide cap-and-trade program, narrowly passed the House in June 2009 but failed in the Senate. Thus the Obama administration was required to use its existing legal tools.

Proceeding under the Clean Air Act, after extensive hearings and opportunities for public comment EPA issued the "Endangerment Finding"—a formal determination that GHGs pose a threat to public health and welfare. This finding was the prerequisite to all further action on GHGs under the statute.

The Endangerment Finding triggered the need to regulate GHGs from motor vehicles. Thus EPA and the National Highway Traffic Safety Administration (NHTSA) issued the "tailpipe rule"—GHG and fuel economy standards for light duty vehicles for the model years 2012–2016.

This in turn triggered the need to regulate GHGs from stationary sources such as power plants and factories. Here a serious legal problem arose. The Clean Air Act specifies low numerical thresholds that make sense for conventional pollutants, but if applied to GHGs they could sweep in more than a million sources. EPA had no interest in requiring that many permits, so it raised the thresholds under what it called the "tailoring rule" so that only on the order of 10,000 sources would be covered.

EPA also issued the "timing rule," which specified that these permitting requirements for stationary sources would take effect on January 2, 2011.

These four rules led to an onslaught of litigation. Trade associations, coalitions, individual companies, and certain states filed more than 100 lawsuits. They were all joined together for purposes of argument before the U.S. Court of Appeals for the District of Columbia Circuit.

The court held a very unusual two days of argument on February 28–29, 2012. In the many post mortems that followed, every question and comment of the three members of the panel—Chief Judge David Sentelle (an appointee of President Reagan) and Judges David Tatel and Judith Rogers (appointees of President Clinton)—was scrutinized and analyzed.

The ruling came down on June 26 of this year. It was unanimous, and it was a resounding victory for EPA.

First, the court found that EPA had ample basis for the Endangerment Finding; EPA had independently and thoroughly scrutinized the available scientific studies, and there was more than enough in the record to uphold EPA's judgment. It declared that EPA "is not required to re-prove the existence of the atom every time it approaches a scientific question." The court also said the plain words of the statute required EPA to rest its finding solely on whether the pollutants caused an endangerment, without regard to the nature of the controls that might be imposed or their economic consequences.

Turning to the tailpipe rule, the court found that the Clean Air Act clearly provided that, once motor vehicle emissions were found to pose a danger, they must be regulated. It did not matter that this would trigger stationary source rules.

Finally, the court turned to the tailoring rule and the timing rule. Much ink had been devoted in the law reviews to the question of whether the tailoring rule, in particular, was an impermissible deviation from the statute, or whether it was allowable under such doctrines as "absurd results," "administrative necessity," and "one step at a time." The court did not get to any of that. Instead, it said that none of the plaintiffs had standing to challenge the rule. The effect of the tailoring rule was to regulate fewer sources, not more, and therefore no company was hurt by it.

EPA's next steps

Shortly before the court ruled, EPA proposed a New Source Performance Standard (NSPS) for GHG emissions from new fossil fuel-fired power plants. The rule would set emission standards that can easily be met by a modern natural gas-fired power plant, but not by a coal-fired plant unless it has carbon capture and sequestration—a technology that is not yet in commercial application anywhere in the world. With the court ruling, EPA is free to put this rule into final form when it is ready.

This proposed NSPS will not apply to existing power plants. EPA has not indicated when it will propose GHG controls that apply to them. However, a number of other recent adopted or proposed EPA standards on non-GHG pollutants are bad news for existing coal-fired plants, such as a rule that restricts emissions of mercury and other hazardous air pollutants. *See* EPA Website, *Mercury and Air Toxics Standards* (2012).

The NSPSs are a nationwide floor for the performance of new facilities. The prevention of significant deterioration and new source review programs are separate permitting programs, generally administered by the states. EPA has been issuing non-binding guidance documents on the technology standards that the states apply in those programs, and more of these guidance documents can be expected covering additional source categories.

Also pending are a number of other EPA standards, not directly involving GHGs but covering GHG-intensive industries or activities. Among these are rules on the disposal of coal ash, the national ambient air quality standards for fine particulates and ozone, air pollution standards for Portland cement plants, cooling water standards for power plants, and guidance on permitting hydraulic fracturing operations that use diesel fuel.

As noted above, the motor vehicle emission standards that the court upheld apply to light duty vehicles for the 2012–2016 model years. EPA and NHTSA have subsequently adopted standards for the model years 2017–2025. They have also established the first GHG standards for medium and heavy-duty vehicles, such as buses and large trucks, covering model years 2014–2018.

Upcoming legal challenges

One important aspect of the D.C. Circuit ruling is its resounding reaffirmation of the Endangerment Finding in the face of a ferocious onslaught from industry and anti-regulation states. This continues an unbroken streak for climate science in the U.S. courts. Not a single judge has expressed skepticism about anthropogenic climate change in a written opinion or dissent. There has only been one actual trial on the issue; a federal district judge found that Vermont's adoption of GHG standards for motor vehicles was supported by the scientific evidence about climate change. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007).

The scientific evidence about how human activities are changing the climate continues to accumulate and strengthen. Notably, no models or comprehensive theories have emerged that can explain recent changes in temperatures and other weather patterns without including the key influence of GHGs. Some of the anti-regulation groups are persisting in their claims that there is too little evidence to warrant action, but these claims have had zero traction in the courts, where actual evidence must be presented and subjected to scrutiny. (The situation in the political arena, of course, is completely different.)

The legal assault against GHG regulation continues. Some of the *Coalition for Responsible Regulation* plaintiffs have petitioned the D.C. Circuit for en banc review, and if this does not succeed, there will almost certainly be a certiorari petition to the Supreme Court. Lawsuits have already been filed challenging EPA's proposed GHG NSPS for fossil fuel power plants (even though it is not yet final). Texas and other states that

refused to cooperate with EPA's new GHG permitting programs and are challenging EPA's takeover of these programs in a case currently pending before the D.C. Circuit. *Utility Air Regulatory Group v. EPA*, No. 11-1037 (D.C. Cir.). Attempts may be made to find a party with standing to challenge the tailoring rule. Every regulatory action EPA takes concerning GHGs can be expected to generate a lawsuit.

Political challenges

Politicians, not judges, have been far the greater threat to GHG regulation. The November 2012 election represented a sharp fork in the road. President Obama and Vice President Biden have been reelected and the Democratic majority in the Senate was strengthened, but Republicans retained majority control of the House of Representatives. There is no longer the danger that a Romney/Ryan administration would attempt to repeal or freeze EPA's regulatory initiatives (as its candidates pledged to do), and any anti-regulation measures adopted by the House are likely to die in the Senate, and if not, to face a presidential veto.

However, EPA regulation in the area of climate change remains politically contentious and subject to myriad legal challenges. Congress still holds control of EPA's budget in its hands. Administration nominations subject to Senate confirmation can still be held up by a minority, as 60 votes are needed to break a filibuster; the Democrats will have 53 seats in the new Senate. Major new environmental legislation seems out of reach of both parties (unless the current buzz about a carbon tax as a deficit-filling measure bears surprising fruit), so the existing clunky mechanisms of the Clean Air Act will continue to be the primary tools for controlling GHG emissions. The recent judicial and electoral outcomes oil the machine but do not immunize it from occasional breakdowns.

RCRA and the Sixth Amendment: The Supreme Court holds that criminal fines go to the jury

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The Resource Conservation and Recovery Act (RCRA) is a "cradle to grave" hazardous waste statute notable for its comprehensive and complex regulatory scheme. 42 U.S.C. §§ 6901 et seq. Environmental disputes in the U.S. Supreme Court, however, rarely turn on the intricacies of regulatory schemes but instead such disputes generally focus on big picture concerns. This is true of Southern Union Co. v. United States, 132 S. Ct. 2344 (2012). As Deborah Tellier recently explained in the May/June 2012 issue of Trends, at the heart of this case is a constitutional issue—whether the principles of the Sixth Amendment established under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), apply to the imposition of criminal fines.

The case and the majority ruling

The Southern Union Company was convicted of illegally storing mercury without a permit under RCRA, which authorizes a fine of not more than $50,000 for each day of violation. The jury returned a verdict finding Southern Union liable for a RCRA violation,

but did not specify the number of days of the violation. The judge imposed a fine of $6 million, holding the company liable for over 700 days of violating RCRA. Southern Union argued under *Apprendi* that the maximum fine authorized by the facts implicitly found by the jury was $50,000. The question before the Supreme Court in *Southern Union* was whether, when the amount of a fine depended on the number of days of the environmental violation, the judge or jury had to find the number of days.

The Supreme Court held that the rule of *Apprendi* applies to the imposition of criminal fines. Justice Sotomayor's opinion for the 6–3 majority has—in simplified terms—three components. First, the majority rejected the United States' argument that criminal fines do not implicate the "core concerns" that underlie *Apprendi*. Specifically, the majority was not persuaded that a criminal fine is different from punishments involving a death sentence or imprisonment. The *Apprendi* rule, the majority found, should apply to criminal fines no differently than it does to sentences of imprisonment. The majority concluded that when a fine is substantial enough to trigger the Sixth Amendment's jury trial guarantee, it is sufficient to trigger the core concerns set forth in *Apprendi*. Second, the majority considered the historical record consistent with the Court's prior precedents holding that the scope of the constitutional jury right must be informed by the historical role of the jury at common law. The majority found historical evidence for the proposition that juries routinely found facts that set the maximum amount of fines. Finally, the majority rejected the government's arguments that extending *Apprendi* to criminal fines would interfere with legislative prerogatives and the administration of justice. The majority concluded by finding any policy objections attenuated given decade-long experience that lower courts had in applying *Apprendi*.

The minority view

The *Southern Union* dissenting opinion was authored by Justice Breyer, with whom Justices Kennedy and Alito joined. This combination of Justices in the dissent illustrates that the alignment of the Justices on Sixth Amendment issues does not break down along perceived ideological affiliations.

At the outset of his dissent, Justice Breyer stated his belief that the majority opinion was both ahistorical and would lead to problems in the administration of the criminal justice system. Indeed, Justice Breyer read the legal history differently from the majority and concluded that the "predominant practice in 18th-century England was for a judge, not a jury, to find sentencing facts related to the imposition of a fine" and that practice in the "early American States is even less ambiguous." 132 S. Ct. at 2361–64 (Breyer, J., with whom Kennedy & Alito join, dissenting). The stark contrast between the majority and dissenting opinions' conception of the legal history is also present with regard to the effects of the decision on the administration of justice. Justice Breyer suggested that the majority decision will undermine the goals of uniformity and deterrence that Congress sought to advance through statutes such as RCRA. In enacting such provisions Congress intended judges, and not juries, to determine fine-related sentencing facts that so often involve highly complex determinations. As an example, the dissent noted, in gain-or-loss provisions the jury may have particular difficulty assessing different estimates of resulting losses. 132 S. Ct. at 2369–2371. The dissent further observed that unfairness may result because "[a] defendant will not find it easy to show the jury at trial that (1) he committed no environmental crime, but (2) in any event he committed the crime on only 20 days, not 30." The dissent suggested that Southern Union (and other potential RCRA defendants) might now find potentially prejudicial evidence about the release of a hazardous waste into the nearby community admissible to show the number of days of their violation before the jury finder of fact. 132 S. Ct. at 2371–72.

This contrast between the dissent and majority reflects a substantial difference of opinion regarding the role of the jury in the criminal justice system. However, the majority of criminal matters don't go to the jury. In fact, the dissent noted that 97 percent of federal convictions result from guilty pleas. 132 S. Ct. at 2371. Whether applying the *Apprendi* rule to criminal fines will enhance or detract from the fairness and deterrent effect of such pleas is also likely to be the subject of debate.

Court vacates EPA 'Adjacency' determination under the Clean Air Act

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The U.S. Court of Appeals for the Sixth Circuit has ruled that the U.S. Environmental Protection Agency (EPA) improperly relied on a "functional interrelationship" analysis to determine that a natural gas sweetening plant and approximately 100 natural gas well sites scattered over 43 square miles constituted a single stationary source under the Clean Air Act (CAA). *Summit Petroleum Corp. v. United States Environmental Protection Agency*, 690 F.3d 733 (6th Cir. 2012). As a result, EPA may need to reconsider its longstanding position on how broadly the term "single source" sweeps, which could impact facilities far beyond the oil and gas industry.

Under CAA regulations, a group of emission sources can be aggregated into a single stationary source if they meet three criteria: (i) they are all under common ownership or operational control, (ii) they are located on one or more contiguous or adjacent properties, and (iii) they belong to the same major industrial grouping under the Standard Industrial Classification code.

Summit Petroleum Corporation's (Summit) natural gas plant removes sulfur dioxide from natural gas prior to sale. The removal of such compounds from natural gas is known as "sweetening." Approximately 100 natural gas wells, located at varying distances from 500 feet to 8 miles from the sweetening plant, supply the natural gas. Summit owns the wells and the underground pipes that connect the wells to the sweetening plant, but does not own the property between the individual well sites and the plant.

Summit's natural gas sweetening plant is a "minor source" under the CAA, but would be classified as a "major source" if it was aggregated with Summit's natural gas wells and field flares.

EPA determined in an administrative decision that Summit's sweetening plant and gas wells were "adjacent" based on the "nature of the relationship between the facilities" and the "degree of interdependence between them." Because the wells and sweetening plant together produced a single product and were thus interdependent, EPA determined that the distances between the plant and the individual wells did not preclude finding them to be "adjacent." Summit petitioned the Sixth Circuit to review EPA's determination.

EPA argued that the term "adjacent" in its regulations was ambiguous because it requires some context to determine what may be considered "adjacent" and that this context is supplied by considering the functional interrelationship among the facilities. The Sixth Circuit in a 2–1 decision disagreed, finding that the term "adjacent" involves nearness or proximity and held there was no authority suggesting that an assessment of the functional relationship between two activities was inherent in the concept of adjacency. 690 F.3d at 742–43.

Moreover, the court found that, even if there was some ambiguity in the meaning of "adjacent," EPA's use of a functional interrelationship test was contrary to the history of the regulation. When EPA adopted regulations defining "stationary source" in 1980, EPA considered and rejected a functional relationship test as part of the definition. EPA specifically found that assessing whether activities were sufficiently functionally related to constitute a single source would be "highly subjective" and would make administration of the rule difficult because EPA would find itself entangled in numerous fine-grained analyses. 690 F.3d at 747–48.

EPA argued that its rejection of functional relationship as a stand-alone prong of its definition of stationary source did not preclude it from considering functional relationship when assessing whether activities are adjacent. The Sixth Circuit majority disagreed, finding that EPA's decision not to employ a functional relationship test was categorical and unqualified because EPA clearly indicated it wanted to avoid such a

subjective test and the fine-grained analyses that it would involve. Accordingly, the court ruled that the use of a functional interrelationship test to resolve any ambiguities in determining whether different activities are adjacent was contrary to the history of the regulation.

Having found that the term "adjacent" is unambiguous, the majority opinion held that EPA's reliance on functional interrelationship to determine adjacency was contrary to the plain meaning of the regulation. Accordingly, the court vacated EPA's determination and remanded the issue to EPA with instructions to "reassess the aggregation of Summit's facilities under the ordinary understanding of its requirement that Summit's plant and wells be located on adjacent, i.e., physically proximate properties." 690 F.3d at 750–51.

Although this case involved a natural gas operation, EPA's use of the "functional interrelationship" test in making stationary source determinations has not been limited to oil and gas industry sources. EPA has previously used this type of analysis when evaluating facilities in the automotive industry, the brewing industry, the mining industry, the steel industry, and even a biomass-to-energy facility. Based on the ruling in this case, EPA may need to reconsider its approach to making stationary source determinations in these and other industries.

Solutia v. McWane: The Eleventh Circuit on CERCLA contribution

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Because the U.S. Environmental Protection Agency (EPA) lacks the resources to remediate the hundreds of Superfund sites across the country, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) encourages voluntary cleanup of such sites. CERCLA does this in two ways: section 107 "recovery claims," and section 113(f)(2) "contribution protection." In *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230 (11th Cir. 2012), cert. denied, No. 12-89 (Oct. 9, 2012), the Eleventh Circuit determined that those statutory provisions clashed.

At the center of *Solutia* is a polychlorinated biphenyl (PCB) plant in Anniston, Alabama, owned and operated by Solutia, Inc., which is a spinoff of the former owner Pharmacia Corporation and its predecessors. The plant manufactured PCBs from 1929 to 1971, releasing this hazardous substance into the local environment. In 2000 and 2001, Solutia entered into two consent orders with EPA, agreeing to perform some PCB sampling and cleanup activities in Anniston and to reimburse EPA for others. In 2002, the United States filed a CERCLA section 107 action against Solutia in connection with the PCB contamination and also lead contamination. During the litigation, the parties submitted a consent decree to the court to settle EPA's claims. In it, both parties expressly reserved any rights—including any right to contribution—that each party may have had against third parties. *Solutia, Inc. v. McWane, Inc.*, 726 F. Supp. 2d 1316, 1322 (N.D. Ala. 2010). Before the consent decree was entered, Solutia sued the owners and operators of

other industrial facilities (primarily foundries) in the Anniston area, seeking contribution under CERCLA section 113(f) and cost recovery under CERCLA section 107. *See id.* at 1323–24. The consent decree was subsequently approved, resolving the United States' action against Solutia. *Id.* at 1321.

Two years later, EPA entered into a separate administrative consent order with the foundry defendants. *Id*. at 1324. In exchange for reimbursement of EPA's remediation costs, among other things, EPA stipulated that the foundry defendants had met their obligations to EPA and were entitled to "contribution protection" from recovery claims. Armed with the consent order, the foundry defendants sought to stay the *Solutia* case, arguing that Solutia's claims were precluded by their consent decree with EPA. In response, Solutia moved to hold the government in contempt for violating its rights under its earlier consent decree with EPA. The court did not grant Solutia's motion but did suspend Solutia's obligations under its consent decree. *Id*. at 1326. In 2008, the district court granted summary judgment to the foundry defendants, concluding that Solutia's section 113(f) contribution claims were indeed precluded by the consent decree. *Id*. at 1326–27. The district court initially ruled that Solutia could still pursue cost recovery claims pursuant to section 107(a) but in 2010 it reversed itself, holding that "Congress intended § 113(f) contribution to serve as the exclusive remedy for a party to recoup its own costs incurred in performing a cleanup pursuant to a judgment, consent decree or settlement that gives rise to contribution rights under § 113(f)." *Id*. at 1342. The district court

concluded that where a private party seeks to recover costs that "arise out of a cleanup they performed pursuant to obligations under a consent decree or administrative settlement that would give rise to contribution rights under § 113(f)," it cannot pursue "those same costs" under a section 107(a) recovery claim. *Id*. at 1345–36.

On appeal, the Eleventh Circuit understood the issue as a dispute over the relationship between the cleanup recoupment provisions of section 107(a) and section 113(f). *Solutia*, 672 F.3d at 1235. The court explained that cleanup costs "incurred voluntarily and directly by a party are recoverable only under § 107(a)(4)(B), even if the claimant is not entirely innocent under CERCLA." *Id*. On the other hand, "if a person is forced to reim-

burse a third party for its cleanup efforts, as mandated by a legal judgment or settlement under CERCLA, then that person may only seek contribution for those reimbursement costs from other potentially liable parties under § 113(f).” *Id*. CERCLA “must be read as a whole” and the “structure of CERCLA remedies” would be “completely undermined” if a party subject to a consent decree “could simply repackage its § 113(f) claim for contribution as one for recovery under § 107(a).” *Id*.

By agreeing with its sister circuits, *see, e.g.*,*Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112 (2d Cir. 2010); *Morrison Enter., LLC v. Dravo Corp.*, 638 F.3d 594, 604 (8th Cir. 2011), that denial of the section 107(a) remedy under these circumstances is necessary “[t]o ensure the continued vitality of the precise and limited right to contribution,” the Eleventh Circuit strengthened potentially responsible parties’ (PRPs’) incentive to settle with EPA. *Id*. at 1237. Conversely, the decision may create a disincentive for voluntary cleanup efforts since a PRP will be limited to contribution actions if eventually it settles with EPA in a consent judgment that compels it to do the same remedial work that it had initially undertaken on a voluntary basis. The court did not address recovery of voluntary expenditures incurred *before* settlement. On July 19, 2012, Solutia and Pharmacia Corp. filed a petition for certiorari with the U.S. Supreme Court, *Solutia Inc. v. McWane, Inc.*, No. 12-89, which the Court denied on October 9, 2012.

Pleading standards in environmental cases following the Supreme Court's decisions in Twombly and Iqbal

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The U.S. Supreme Court's recent "adjustments" to the federal pleading standard may significantly affect toxic tort and long-tail environmental contamination claims. The Court began making these adjustments (some call it a clarification, others claim it is a real change) to the pleading standard in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The Court held that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (internal citations omitted). The Court characterized the standard as a question of plausibility: "[a]sking for plausible grounds to infer an agreement [to restrain trade] does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 556.

The Court further clarified its earlier "adjustment" in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), noting that while the pleading standard does not require the allegations to be probable, it does require more than a "sheer possibility that a defendant has acted unlawfully." "Where a complaint pleads facts that are 'merely consistent with' a defen-

dant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (citing *Twombly*, 550 U.S. at 557). *Iqbal* provided courts with a two-pronged approach:

> a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Id. at 679.

In dismissing certain of the plaintiff's allegations in *Iqbal*, the Court noted that it was the "conclusory nature of respondent's allegations . . . that disentitles them to the presumption of truth." *Id.* at 681.

The adjusted pleading standard in the environmental context

This adjusted pleading standard can raise issues in toxic tort or environmental contamination cases. These long-tail environmental contamination claims may not become apparent until many years after the polluting event(s) took place, making it especially difficult to pinpoint the details of the release of contaminants. In *Z-J, Inc. v. Pfizer Inc.*, Cause No. 2:10-cv-125-WTL-WGH (S.D. Ind. Feb. 11, 2011), this was a key issue. The plaintiff owned property adjacent to the defendant and asserted the defendant contaminated its property by operating a dump from approximately the 1940s to the 1970s.

Plaintiff sued in state court, asserting various claims including an Indiana Environmental Legal Action (Ind. Code § 13-30-9-2), Antidumping (Ind. Code § 13-30-3-13), nuisance, and trespass. The defendant removed to federal court and moved to dismiss the

claims under Federal Rule of Civil Procedure 12(b)(6). The defendant's primary argument was the complaint failed to meet the *Twombly* standard. The defendant claimed that by failing to specifically identify what substances (and in what amounts) had been released into the soil and groundwater, the complaint was "speculative" and did not provide sufficient allegations showing the claims were "plausible."

The court disagreed, noting:

> The boundary between a well-pled complaint and an insufficient one under *Twombly* and its progeny is, quite frankly, still evolving and therefore somewhat blurry. While it may be difficult for courts to articulate why a particular case falls on one side or the other of the line, the overriding principle of the new pleading standard is clear: notice pleading is still all that is required, and "a plaintiff still must provide only enough detail to give the defendant fair notice of what the claim is and the grounds upon which it rests, and, through his allegations, show that it is plausible, rather than merely speculative, that he is entitled to relief." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1083 (7th Cir. 2008) (citations and internal quotation marks omitted). The Plaintiffs' Second Amended Complaint satisfies this standard and is thus not subject to dismissal pursuant to *Twombly*.

Z-J, slip op. at *6.

It continued stating that under notice pleading, "conclusory statements are not barred entirely . . . and that 'the complaint merely needs to give the defendant sufficient notice to enable him to begin to investigate and prepare a defense.'" *Id.* at *7 (quoting *Tamayo*, 526 F.3d at 1083).

A district court in California confronted a similar issue in *Chubb Custom Ins. Co. v. Space Systems/Loral, Inc.*, No. C 09-4485 JF (PVT), 2010 U.S. Dist. LEXIS 15624 (N.D. Cal. 2010). In *Chubb*, the plaintiff filed an action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and various state statutes seeking recovery of costs it incurred in response to the release of hazardous materials. *Id.* One defendant argued that the complaint did not state a claim upon which relief could be granted, citing *Twombly* and *Iqbal*. The defendant claimed the

complaint contained "no facts describing where, when or how any of the alleged hazardous substances were released from the gasoline service station." *Chubb*, 2010 U.S. Dist. LEXIS 15624, *8–9 (citations to record omitted). Plaintiff countered that "nowhere does CERCLA require the level of factual specificity demanded by Defendants" and explained who caused the contamination, how much money was spent remediating it, the hazardous substances released, and generally when and how the contamination was released. *Id.* at *9. The court agreed with the defendant, holding that it must apply the *Iqbal* standard to every civil complaint—including one under CERCLA—and dismissed plaintiff's claim, but allowed plaintiff to amend its complaint. *Id.* at *11–12.

In *Chubb*, a second defendant also moved to dismiss plaintiff's claims, but on slightly different grounds. This defendant claimed the complaint failed "to allege disposal of hazardous substances during the period of [that defendant's] ownership, claiming only that '[t]here were releases of hazardous substances from [the location owned/operated by the defendant] during [the defendant's] period of ownership and/or operation." *Chubb*, 2010 U.S. Dist. LEXIS 15624, *13. The complaint also alleged that "[t]he presence of hazardous substances, including but not limited to, PCE and TCE, in the soil and groundwater at the Site constitute a release or threatened release of hazardous substances into the Environment." *Id.* The court found that while the plaintiff was "not required to plead the manner in which [the defendant] polluted its environment with pinpoint accuracy," the factual allegations in the complaint were insufficient to establish that the defendant was an owner or operator under the statute. *Id.* at *14. The court granted the motion to dismiss with leave for the plaintiff to amend the complaint. *Id.* at *28. The district court entered judgment on the dismissed claims in April 2011, and an appeal is now pending before the Ninth Circuit, *Chubb Custom Insur. Co. v. SpaceSystems/Loral Inc.,* No. 11-16272. Oral argument was held before a three-judge panel on November 8, 2012, but no decision has been released as of this publication.

Recent applications of the adjusted pleading standard

The law surrounding environmental claims and the new federal pleading standards continues to develop. *See, e.g.*, *J&P Dickey Real Estate Family L.P. v. Northrop Grumman Guidance & Elecs. Co.*, Cause No. 2:11cv37, 2012 U.S. Dist. LEXIS 36,497 (W.D.N.C. Mar. 19, 2012) (dismissing CERCLA claim because plaintiff failed to plead specific facts alleging the response costs were consistent with the National Contingency Plan); *Hinds Invs., L.P. v. Angioli*, Cause Nos. 10-15607 and 10-15951, 2011 U.S. App. LEXIS 15879, *3–4 (9th Cir. Aug. 1, 2011) (explaining that plaintiff did not meet the pleading standard for CERCLA arranger liability because it did not allege "facts showing that Defendants sold dry cleaning equipment for the purpose of disposing of [PCE] or that Defendants exercised control over the disposal process," even though the plaintiff alleged that defendants leased the dry cleaner and were responsible for arranging of disposal of perchloroethylene); *BancorpSouth Bank v. Envtl. Operations, Inc.*, Cause No. 4:11CV9 HEA, 2011 U.S. Dist. LEXIS 117010 (E.D. Mo. Sept. 30, 2011) (holding the complaint sufficiently alleged the defendant had control of hazardous waste so as to qualify as an operator or arranger under CERCLA because it alleged deliberate disturbance, unearthing, spilling, moving, and re-releasing hazardous materials); *Commercial Judgment Recovery Fund 1 LLC v. A2Z Plating Co.*, Cause No. SACV 11-0572 DOC, 2011 U.S. Dist. LEXIS 79116 (C.D. Cal. July 15, 2011) (affirming that the *Twombly* pleading standard applies to CERCLA claims); *Pateley Assocs. I, LLC v. Pitney Bowes, Inc.*, 704 F. Supp. 2d 140, 145–46 (D. Conn. 2010) (considering whether, under *Iqbal*, plaintiff properly pleaded owner and operator liability under CERCLA); *United States v. Halliburton Energy Servs.*, Cause No. H-07-3795, 2008 U.S. Dist. LEXIS 17476, *11 (S.D. Tex. Mar. 5, 2008) (commenting that who is an "arranger" under CERCLA is difficult to ascertain at the motion to dismiss stage, and that the court should determine that "once the parties are in a position to offer relevant evidence" but that plaintiff sufficiently pleaded that defendants sent radioactive waste to the site, including the time, place, and general conduct); *Vill. of Riverdale v. 138th St. Joint Venture*, 527 F. Supp. 2d 760, 766 (N.D. Ill. 2007) (holding plaintiff properly pleaded a Resource Conservation Recovery Act claim

when it set out factual assertions concerning ownership and operations at the site, an outline of defendants' storage and disposal activities, and an injury-in-fact caused by the defendants: actual and threatened release of pollutants).

Although most of the application of the "adjusted" pleading standard has been developed in lower federal courts, those prosecuting environmental actions (even state-court actions, if there is a possibility of removal) should be mindful of how courts are grappling with these pleading issues. Plaintiff and defense counsel alike should consider the Supreme Court's adjusted "plausibility" pleading standard for federal cases. The more information a plaintiff can provide in a complaint, the better chance you have defeating a 12(b)(6) motion. If defending an action, then *Twombly* and *Iqbal* provide justification for dismissing speculative claims against your client.

Natural gas update: Federal developments

Kirsten L. Nathanson and Sarah Bordelon

Kirsten Nathanson is a partner and Sarah Bordelon is a counsel with the firm of Crowell and Moring LLP where they practice in the Washington, D.C. office on energy and environmental matters.

It seems that each day the legal trade press is reporting a judicial or regulatory development that affects natural resources—and natural gas in particular. The boom in natural gas exploration and production activity in the United States over the past five years, due in large part to the technological advances in combining horizontal drilling and hydraulic fracturing, has brought increased regulatory scrutiny and accompanying legal actions. This article will update readers on select recent natural gas developments from the U.S. Environmental Protection Agency (EPA), the U.S. Department of the Interior's Bureau of Land Management (BLM), and federal courts.

EPA's Final Rule governing air emissions from oil and gas operations

On August 16, 2012, EPA published the final rule for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants for the oil and natural gas sector (Final Rule). The Final Rule regulates emissions from oil and gas wells, centrifugal compressors, reciprocating compressors, pneumatic controllers, storage vessels, and onshore natural gas processing plants.

Although the Final Rule has many elements, only the regulations for volatile organic compounds (VOCs), discussed below, break substantially new ground. The new VOC standards apply to owners and operators of onshore gas wells where construction, modification, or reconstruction is commenced after August 23, 2011. The operational standards apply when "well completion" is accomplished. "Well completion" is defined as the "flowback period," which begins after hydraulic fracturing and ends either when the well is shut in or when the well continuously flows to the flow line or storage vessel. Perhaps the most significant element of the regulation of VOCs is the requirement for "reduced emissions completions" (RECs) or "green completions" to complete wells. Prior to January 1, 2015, completed wells may comply with the VOC standards using either a "completion combustion device" (flare system) or using RECs. After January 1, 2015, RECs are generally required; however, RECs are not required for new exploratory (wildcat) wells, delineation wells, and hydraulically fractured low-pressure wells where natural gas cannot be routed to the gather line. For these wells, the final rule provides that flaring should be used to reduce emissions except where prohibited by state and local regulations.

The Final Rule also imposes a number of new equipment requirements at the wellhead, in transmission, and in processing. For example, the Final Rule limits emissions from natural gas-driven pneumatic controllers, storage tanks, and compressors.

EPA hydraulic fracturing study

EPA is currently conducting a wide-ranging study on the effects of hydraulic fracturing on drinking water. Congress instructed EPA to carry out a study on the relationship between hydraulic fracturing and drinking water in fiscal year 2010. EPA developed its Hydraulic Fracturing Study Plan (November 2011) (Study Plan) with input from state and federal regulators, industry, non-government organization, other stakeholders, and its own Science Advisory Board. EPA's first progress report is due at the end of 2012, with an additional report to follow in 2014. The Study Plan is designed to answer first, whether hydraulic fracturing can impact drinking water resources, and second, if so, what conditions are associated with these potential impacts. EPA's research plan targets all five phases of the hydraulic fracturing lifecycle: (i) water acquisition, (ii) chemical mixing, (iii) well injection and fracturing, (iv) flowback and produced water, and (v) wastewater treatment and waste disposal.

EPA will research these issues using a variety of methods including review of existing data, retrospective case studies, prospective case studies, generalized scenario evaluations, laboratory studies, and toxicological assessments. Notably, the "existing data" category includes information that EPA has "requested from hydraulic fracturing services companies and oil and gas well operators." Study Plan at ix. Further, the retrospective case studies "will focus on investigating reported instances of drinking water resource contamination" and will determine "the presence or extent of . . . contamination" and whether hydraulic fracturing contributed to the contamination. *Id.* at ix-x. The conclusions in EPA's study could be used in legal proceedings related to claims of contamination resulting from hydraulic fracturing, as well as lay the foundation for further federal regulation.

Induced seismicity

Induced seismicity refers to earthquakes caused by human activity. EPA's Underground Injection Control (UIC) National Technical Workgroup is currently evaluating "injection-induced seismicity" (i.e., earthquakes caused by injections permitted under EPA's UIC program). *See* EPA, "Underground Injection Control—Technical Information, Forms and Sample Documents." Informal statements indicate that that the UIC National Technical Workgroup is focusing on identifying best practices and recommendations for states administering the UIC program.

EPA's analysis may be aided by the National Research Council's recent report, "Induced Seismicity Technology in Energy Technologies" (June 2012). Congress instructed the U.S. Department of Energy to request the National Research Council to study induced seismicity.

The National Research Council's report explains that the physical mechanism by which human activity causes seismic events is well understood. Changes in pressure in rock, caused either via removal of liquid or gas or injection of the same can stress faults, sometimes resulting in seismic activity. Scientists do not have models capable of predicting when such activity may occur in a given location. Nevertheless, the National Research Council concluded that the net flow of fluid is key: where inflows and outflows are generally balanced, induced seismicity is less likely.

Thus, the National Research Council concluded that "the process of hydraulic fracturing a well as presently implemented for shale gas recovery does not pose a high risk for inducing felt seismic events" (i.e., seismic events large enough to be observed without instrumentation). In contrast, the Council concluded that carbon capture and sequestration may have a higher likelihood of causing felt seismic events because of the large net volumes of injected fluid.

EPA guidance on diesel fuels and hydraulic fracturing

In May 2012 EPA has also issued a new draft guidance document for permits issued under the Safe Drinking Water Act (SDWA) for hydraulic fracturing operations utilizing diesel fuels. Underground injection of fluids through wells is subject to the SDWA unless specifically excluded. The Energy Policy Act of 2005 revised the SDWA's definition of "underground injection" to exclude the injection of hydraulic fracturing fluids or prepping agents—other than diesel fuels. Thus, by being excluded from the 2005 statutory exemption, injection of diesel fuels could be subject to SDWA regulation..

EPA's draft guidance document is intended for EPA permit writers and covers a variety of technical topics, including: a description of diesel fuels (EPA's definition of diesel fuels is seen as overly expansive by the regulated community and some members of Congress), area permits for multiple wells, permit duration, well closure requirements, permit application materials and review, well construction requirements, operation, monitoring, and reporting requirements, and financial responsibility and public notice requirements.

The comment period for the draft guidance closed on August 23, 2012. While environmental organizations are calling for a complete ban of the use of diesel fuels in hydraulic fracturing, the regulated community questions the need for further regulation, given that Congress left it in EPA's discretion to regulate diesel fuels. Members of Congress have expressed concern over the draft guidance creating uncertainty and undermining the primacy of the 39 states with delegated power to regulate well injection. While all parties await the issuance of the final guidance, EPA's website makes clear that regulatory requirements are in place and need to be heeded now: "Any service company that performs hydraulic fracturing using diesel fuel must receive prior authorization through the applicable UIC program."

BLM hydraulic fracturing rule

The Bureau of Land Management (BLM) has proposed a rule to govern hydraulic fracturing on federal lands. BLM announced its proposed rule on May 11, 2012 (77 Fed. Reg. 27,691) and extended public comment through September 1, 2012, due to the complexity of the issues involved (77 Fed. Reg. 38,024 (June 26, 2012)). The rule would require public disclosure of the chemicals used in hydraulic fracturing on federal land, add regulations related to well bore integrity, and address issues related to produced water. Many officials from states with substantial hydraulic fracturing activity on BLM land criticized the rule as unnecessarily duplicative of existing state regulations on hydraulic fracturing, which already apply on federal lands. *See, e.g.*, Governor Mead's Statement on BLM's Draft Rule for Hydraulic Fracturing (May 4, 2012).

Action in the federal courts

Litigation over various federal initiatives, including long-standing EPA efforts to regulate a combination of wells and functionally related but geographically separate natural gas treatment plants, continues with vigor. This spring the Sixth Circuit rejected an EPA determination that a combination of natural gas extraction wells and a geographically distant sweetening plant could be aggregated into a "major source" for purpose of the Clean Air Act. *Summit Petroleum Corp v. U.S. Envtl. Prot. Agency,* 690 F.3d 733 (6th Cir. 2012). For a more detailed discussion, see the article by Lee Johnson in this issue of *Trends*.

Advice to the energy lawyer

Anyone advising clients in the field of natural gas regulation, whether through the Clean Air Act, the Safe Drinking Water Act, potential exploration on federal lands or elsewhere, must keep aware of the latest EPA and other federal agency initiatives. Litigation in the federal courts can also result in major changes in the regulatory regime, so stay tuned!

IN BRIEF

Theodore L. Garrett

Theodore L. Garrett is a partner of the law firm Covington & Burling LLP in Washington, D.C. He is a past chair of the Section and is a contributing editor of Trends.

Keystone XL

A federal court denied the Sierra Club's motion for a preliminary injunction to block the construction of segments of the Keystone XL pipeline. *Sierra Club, Inc. v. Bostick*, 2012 WL 3230552 (W.D. Okla. Aug. 5, 2012). Plaintiffs argued that the U.S. Army Corps of Engineers unlawfully concluded that the pipeline segments were covered by Nationwide Permit (NWP) 12. The court found that the Corps made the required minimal-impact determinations before reissuing NWP 12 and was not required to prepare a full environmental impact statement under National Environmental Policy Act. The court also rejected a challenge to NWP 12 as applied, concluding that the Corps offices consulted with one another to assess the cumulative impact of the entire project.

CERCLA

The Seventh Circuit affirmed a preliminary injunction requiring NCR to complete remediation work on the Fox River in Wisconsin, rejecting NCR's claim that NCR had already performed more than its share of the work. *United States v. NCR Corp.*, 688 F.3d 833 (7th Cir. 2012). NCR argued for apportionment and presented testimony that it

contributed only 9 percent and 6 percent of the polychlorinated biphenyls (PCBs) in two operable units. However NCR did not refute the government's evidence that NCR's contribution of PCBs would alone require approximately the same remedial measures. The Seventh Circuit's opinion distinguishes the U.S. Supreme Court's Burlington Northern decision from the present case where "multiple entities independently contribute amounts of pollutants sufficient to require remediation." The court noted, however, that NCR will be free to pursue whatever remedies are available to NCR for contribution or cost recovery.

Air quality

The D.C. Circuit vacated and remanded EPA's 2011 Cross-State Air Pollution Rule (Transport Rule), which required reductions in sulfur dioxide and nitrogen oxides from power plants and other sources in twenty-eight upwind states because of their contribution to downwind air pollution. *EME Homer City Generation,L.P. v. EPA*, 2012 WL 3570721 (D.C. Cir. Aug. 21, 2012) (petition for rehearing en banc pending). Because EPA based the rule upon the amount of pollution that each state could eliminate if plants in the state installed cost-effective controls, the majority found that the Transport Rule is invalid because it was not based on the amounts from upwind states that contribute significantly to nonattainment as required by statute. The majority also held that EPA unlawfully promulgated federal implementation plans without first giving affected states an opportunity to implement the required reductions to sources within their borders, contrary to the statutory scheme that the states, not EPA, "are the primary implementers" after EPA establishes the upwind state's obligations. The decision creates uncertainty concerning the status of related EPA rules and state implementation plans based on the Transport Rule.

The Sixth Circuit vacated EPA's determination that natural gas sweetening plant and gas production wells located in a 43-square mile area near the plant were "adjacent" and thus could be aggregated to determine whether they are a single major stationary source for Title V permit purposes. *Summit Petroleum Corp. v. EPA*, 2012 WL 3181429

(6th Cir. Aug. 7, 2012). The majority held that the EPA's position that "functionally related" facilities can be considered adjacent is contrary to the plain meaning of the term "adjacent," which implies a physical and geographical rather than functional relationship. The court also found EPA's interpretation to be inconsistent with the regulatory history of Title V and prior EPA guidance. The case was remanded to EPA for a reassessment with the instruction that Summit's activities can be aggregated "only if they are located on physically contiguous or adjacent properties."

The Fifth Circuit vacated EPA's belated 2010 rejection of a 1994 Texas implementation plan revision that included a flexible permit program for minor new sources. *Texas v. EPA*, 2012 WL 3264558 (5th Cir. 2012). The program allowed modifications without additional regulatory review as long as emissions would not exceed aggregate limits specified in the permit. The court concluded that EPA failed "to put forth a cogent theory" to support EPA's concern that the program might allow major sources to evade major source review. EPA's objection to the discretion afforded to the state under the program "significantly undermines the cooperative federalism that the CAA envisions."

The Fifth Circuit upheld EPA's approval of a Texas implementation plan creating an affirmative defense for excess emissions during unplanned startup, shutdown, and malfunction (SSM) events, noting that the affirmative defense for unplanned SSM events was consistent with EPA's guidance on the issue, is narrowly tailored and does not interfere with attainment of the National Ambient Air Quality Standards. *Luminant Generation Co. LLC v. EPA*, 2012 WL 3065315 (5th Cir. July 30, 2012). The court concluded that EPA's disapproval of the affirmative defense for planned SSM events, on the grounds that sources should be able to plan maintenance that might otherwise lead to excess emissions, was entitled to *Chevron* deference.

Water quality

A federal district court held unlawful EPA's July 2011 final guidance memorandum on conditions for permits for mountaintop mining operations for Appalachian coal mines. *National Mining Ass'n v. Jackson*, 2012 WL 3090245 (D.D.C. July 31, 2012). Because the guidance is being applied as binding by field offices in their review of draft permits, the court found that the guidance is a de facto legislative rule subject to judicial review. The opinion concludes that the guidance is an improper incursion into the authority of the Secretary of the Interior under the Surface Mining Control and Reclamation Act, and it usurps the state's role under the Clean Water Act to determine when and if a discharge has the reasonable potential to exceed water quality standards.

The U.S. Supreme Court has granted certiorari to review two Clean Water Act decisions. In *Los Angeles County Flood Control District v. NRDC* (No. 11-460), the question presented is whether there is "discharge" from an "outfall" under the act when water from one portion of a river flows through a municipal separate storm sewer system to a lower portion of the same river. In *Georgia-Pacific West Inc. v. Northwest Envtl. Defense Center* (No. 11-347), the question presented is whether channeled stormwater runoff from forest logging roads is a point source requiring a National Pollutant Discharge Elimination System permit.

Natural resources

The Ninth Circuit upheld regulations allowing the incidental take of polar bears and Pacific walruses resulting from oil and gas exploration activities in the Chukchi Sea and the adjacent coast of Alaska. *Center for Biological Diversity v. Salizar*, 2012 WL 3570667 (9th Cir. Aug. 21, 2012). The court held that the U.S. Fish and Wildlife Service permissibly determined, under the Endangered Species Act, that only relatively small numbers

of polar bears and Pacific walruses would be taken in relation to the size of their larger populations and that the anticipated take would have only a negligible impact on the mammals' annual rates of recruitment and survival.

Toxic torts

A federal district court dismissed claims against Union Carbide Corporation (UCC) for pollution allegedly caused by a UCC subsidiary at the Bhopal plant in India. *Sahu v. Union Carbide Corp.*, 2012 WL 2422757 (S.D.N.Y. June 26, 2012). The parent was consulted about waste disposal design but the subsidiary was the ultimate decision maker. The court rejected the notion that UCC's decision to produce pesticides at the plant "automatically equates to the creation of a nuisance."

Views from the Chair: Ethics developments and environment, energy, and resources practice

Alexandra Dapolito Dunn

Alexandra Dapolito Dunn is the executive director and general counsel of the Association of Clean Water Administrators.

"Environmental law presents ample opportunities for exploring legal ethics, policy, morality, and public interest. Indeed, at times, environmental practice may seem to present an unending series of ethical dilemmas." These wise words were written by immediate past Section Chair Irma Russell, dean of the University of Montana School of Law, in the Foreword to the Section's book Issues of Legal Ethics in the Practice of Environmental Law. Although Dean Russell's quotation and book title refer to environmental law, I believe the statement is also true as to energy and resources law. In this column, I explore some of the ethical issues facing our profession today, and the steps the Section is taking to provide guidance and expertise to our members. In preparing this article, I have drawn on the tremendous contribution to the Section's work on these issues, particularly on three ethics experts whom we are proud to count among our Section leaders, Dean and Professor Irma Russell, Professor Kim Diana Connolly, and Pamela Esterman.

First, a brief perusal of the ethics topics addressed at some past Section programs gives a very good sense of what may be keeping us up at night. For example, a recent program delved into when a lawyer deemed to "know" that a client is engaged in criminal, fraudulent, or other conduct that is likely to result in substantial injury to the client.

We have explored how a lawyer determines whether she has discretion—or a duty—to take action to prevent a corporate client from creating liability for itself. We have inquired—and offered guidance—on whether a blog is advertising, marketing, or has an editorial, personal, or business function. In a related question, we have asked where the First Amendment ends and the Model Rules of Professional Conduct begin. Our speakers have parsed ethical issues raised by lawyers employing the latest trends and technologies, including working in the "cloud." And, we have reflected on how U.S. lawyers can reconcile domestic ethics responsibilities with conflicting multinational rules.

Second, a journey through the ethical issues addressed in our various Section publications gives additional insights into current ethics topics. While Dean Russell's book content is still more than relevant, I am delighted to announce that the book is in the queue for a Second Edition, where it will be enhanced and expanded with additional contributors and new topics. You may have noted that a recent volume of *Natural Resources & Environment* was dedicated to ethics and disclosures. Volume 25, No. 3 contains brilliant articles on the merging of environmental law and ethics in the realm of environmental justice, the practical and ethical issues of blogging in environmental law, ethics and professional conduct for federal government lawyers, and an Environmental Law Practitioner's Guide to the Model Rules. This last article, written by the recent chair of the Section's Ethics Committee, Pamela Esterman, discusses conflicts of interest among current and past clients, confidentiality duties, opinion letters, the retention of expert witnesses, environmental liability disclosure and reporting requirements, technology and law firm websites, and metadata. Our 2011 *The Year in Review*—now online and hyperlinked—contains an overview of changes proposed by the ABA Commission on Ethics 20/20.

Third, at our August 2012 Meeting, the Section Council promoted our Ethics Committee to a Council level Special Committee on Ethics, chaired by Professor Kim Diana Connolly of SUNY Buffalo Law School. This new, high-level special committee is charged with ensuring that ethics issues remain front and center for our membership. It will identify and report on ethics developments, cases, and opinions relevant to the practice of environment, energy, and resources law; develop a new Section ethics web page; and of course—continue the trend of offering relevant and timely ethics CLE pro-

grams at our meetings. The special committee will add Section member value by synthesizing relevant activities of the ABA Commission on Ethics 20/20. For example, at the ABA Annual Meeting in August, the House of Delegates approved six commission proposals to update the ABA Model Rules of Professional Conduct to reflect current law practice. These proposals—which go into effect only when adopted by a state bar—touch on legal services outsourcing, protection of client confidences when new technology is employed, temporary bar access for relocated lawyers, the role of technology in marketing legal services, and disclosure of client information for certain limited, non-prejudicial conflicts checking where a firm relocates or changes in composition or ownership. The commission now is working on guidance on conflict of interest problems arising because some U.S. and foreign jurisdictions allow nonlawyer ownership of law firms, while others do not; and on guidance on fees division between lawyers in different firms where their jurisdictions differ in allowance of nonlawyer ownership of firms.

Pamela Esterman's *Natural Resources & Environment* article concludes that lawyers in environment, energy, and resource arenas "should keep abreast of revisions to the rules in jurisdiction in which they practice and remember that evolving technological norms may alter how existing rules apply to their day-to-day practice." I fully agree, and am both confident and proud that the leadership of our Special Committee on Ethics will support us in this essential endeavor.

People on the Move

Steven T. Miano

Steven T. Miano is a shareholder at Hangley Aronchick Segal & Pudlin in Philadelphia. He is a contributing editor to Trends.

Firm moves

William T. Gorton III was recently named chair of Stites & Harbison's Environmental, Natural Resources, and Energy Service Group. Gorton is a partner in the firm's Lexington, Kentucky office. His practice focuses on advising clients on compliance issues and assessing and mitigating risks related to natural resource, environmental regulatory and land and water resources issues. Gorton is chair of the Kentucky Bicycle and Bikeways Commission, a trustee to the Energy and Mineral Law Foundation, and an adjunct professor at the University of Kentucky, where he teaches Environmental Law and Regulation.

Jeremy N. Jungreis recently joined Rutan & Tucker, LLP as senior counsel in the Government & Regulatory Section, in the firm's Costa Mesa, California office. Jungreis's practice includes assisting clients in environmental compliance and litigation, land use/natural resource strategies, water rights, water supply development projects, public agency law, utility law, strategic planning/coalition building, and governmental relations at the state, regional, and local levels. Prior to joining the firm, he directed the Department of Defense's most complex water treatment system. Before that, he was of

counsel in the Land Use and Water Practice Groups at Nossaman LLP in Irvine, California and was a senior Marine officer. Jungreis is the co-chair of Section's Water Quality and Wetlands Committee. He also chairs the DOD Region IX Water Policy Forum.

Thaddeus R. Lightfoot recently joined Dorsey & Whitney LLP's Minneapolis office as a partner in the firm's Regulatory Affairs Group. Lightfoot will continue his environmental, energy and natural resources practice representing corporate clients, governmental units, and other public entities. He is a former trial attorney with the Environment and Natural Resources Division of the U.S. Department of Justice and was a legislative assistant for energy and environmental issues to Representative Thomas S. Foley, former speaker of the U.S. House of Representatives.

Clara Poffenberger, former counsel, Environmental and Safety Law for ExxonMobil Corporation, recently joined Bingham McCutchen LLP's Environmental, Land Use, and Natural Resources Practice Group as a partner in the firm's Washington, D.C. office. Poffenberger will continue to focus on national Clean Air Act and climate change issues. Prior to joining ExxonMobil, she was counsel with the Environmental Group at Baker Botts, LLP and an attorney at the U.S. Environmental Protection Agency, where she worked in EPA's Air Office.

David Rieser recently joined the Chicago-based law firm Much Shelist as special counsel in the Real Estate practice group. Rieser counsels clients in matters involving environmental law, including legislative, regulatory, compliance, and law enforcement matters, as well as corporate, commercial, and real estate transactions. He regularly advises Fortune 100s, midsize companies, trade associations, and industry groups. Rieser's clients include power generation, chemicals, petroleum, steel, railways, food and consumer products, financial services, waste management, and insurance clients. Prior to joining Much Shelist, he was a partner at McGuire Woods in Chicago.