Trends May/June 2013
Table of Contents

Features

Section News

Got mask? All choked up in Beijing

Margret J. Kim And Robert E. Jones

Margret J. Kim is senior attorney at California Air Resources Board. Robert E. Jones is the author of Reading the Tea Leaves: Tales from Behind the Great Wall.

Editor's note: This is one of two articles in this issue dealing with different national standards and enforcement of standards regulating particulate matter smaller than 2.5 micrometers (PM2.5). Margret Kim and Robert Jones discuss laws and enforcement related to PM2.5 in China, while Margaret Peloso analyzes a D.C. Circuit decision reviewing EPA's efforts to regulate PM2.5 pursuant to the Clean Air Act. The editor recommends reading both articles for a better understanding of contrasting national approaches to the same pollutant problem.

This January, Beijing experienced suffocating smog, at the highest levels ever recorded. "Crazy Bad," "airpocalypse," and "airmegeddon" were just a few of the colorful phrases being used to describe it. Beijing's Air Quality Index reading for particulate matter less than 2.5 micrometers (PM2.5) was over 755, exceeding the maximum amount the equipment was designed to measure—it was literally "off the charts." The World Health Organization guidelines consider a reading of 25 or above as unhealthful, and New York City's was 19 at that time. After three decades of relentless economic growth, the residents of Beijing and most of China's other major cities are regularly treated to an intoxicating cocktail of various pollutants, PM2.5 being the most worrying of this witches brew. Beijing's immediate answer was to temporarily close down some dusty building sites and polluting factories, recommend that fewer fire-works be used to celebrate the Lunar New Year and remove a third of the official fleet of cars from the city's grid-locked roads. In the meantime, Beijing's main children's hospital was bursting at the seams with thousands of new patients and Beijing residents emptied store shelves of air purifiers and face masks.

How China got to airpocalypse

There are a number of reasons for this latest episode of Beijing's great smoke-out, not least of which is geography. Like Los Angeles, Beijing sits in a basin surrounded by mountains, which makes it subject to temperature inversions. Also, like Los Angeles, there has been an explosion of automobiles on the roads. Beijing is home to more than 5 million vehicles, and recently, China's auto sales overtook those in the United States. In addition, dirty burning, high sulfur coal still comprises about 70 percent of the country's primary energy mix. China burned through an additional 325 million tons of coal in 2011, accounting for 87 percent of the entire world's growth and a staggering 47 percent of global consumption—almost as much as the rest of the globe combined. A new study by Peking University and Greenpeace put the premature deaths from the effects of PM2.5 in four Chinese cities—Beijing, Shanghai,

Guangzhou, and Xi'an—at 8,600 and at a cost of $1 billion in economic losses for just 2012. With health care still in its infancy, the health effects of the smog, coupled with a rapidly aging population, pose enormous challenges. It is not clear what the economic fall-out nationally is, but some unofficial estimates put this at 3 percent to 5 percent of the country's gross domestic product.

Beijing's air quality recently entered the realm of international politics. Back in 2008 the U.S. Embassy began to monitor the air in Beijing mainly for the benefit of its employees. The results were so high that the Embassy decided to make these readings public through Twitter, much to the embarrassment of the Beijing government. After a mixture of pleas and warnings that the U.S. Embassy was in contravention of the Vienna Convention and that the offending data may have "unintended social consequences," the Beijing government began to publish its own readings (which were more often than not, considerably less hazardous than those of the Embassy). In fact, directly as a result of U.S. Embassy's publication of air quality data, the national government is now releasing hourly readings for 74 cities, almost half of which show a high level of pollution. With the "pea-soup" like conditions earlier this year, the Beijing government can no longer deny that there is a problem. Although the U.S. Embassy Twitter feed had been blocked by the "Great Chinese Firewall," many Internet users managed to gain access to the Embassy site, igniting a fire-storm in China's social media and causing the official Chinese press to acknowledge the problem.

China's existing regulations

China's air pollution problem is not necessarily a result of a lack of regulation. Rather, a most fundamental issue is a lack of compliance with—and enforcement of—existing environmental laws. The Atmospheric Pollution Prevention and Control Law (APPCL) is the supreme law for air pollution control, which was originally enacted in 1987, amended last in 2000, and is currently under further revision. The 2000 APPCL contains a rather broad and vague framework for air pollution regulation consisting of 66 articles, separated into seven chapters, covering items including prevention and control of emissions from major sources such as coal-fired power plants and motor vehicles/vessels, legal liability, and dust control.

Despite ostensibly covering key air quality problems, the APPCL is deficient in many ways. Broadly speaking, the current APPCL lacks "health-based" ambient standards, strong national government oversight, mechanisms to tackle regional air pollution issues, information disclosure, deterrence to environmental violations, and public participation. For example, while local government can establish more stringent standards subject to national government approval, local Environmental Protection Bureaus (EPBs) operate in significant isolation from the national government environmental agencies. Indeed, there is no oversight by national environmental agencies to help strengthen pollution management and they have no independent enforcement authority against non-complying entities.

Further, the law only covers control of air pollution at the city-level, and does not address regional approaches to air quality management, planning, permitting, and monitoring. Although the national government recently created regional offices for administrative and enforcement support of the national environmental agency, EPBs are not required to report or share information or otherwise cooperate with them. Also, there is insufficient funding and staffing levels at the regional offices. Additional problems with the APPCL include the lack of an information disclosure component, low

penalties—that do not accrue per day of violation—that fail to provide an adequate deterrent (or incentive to correct violations), and no explicit statement allowing public participation in the regulatory process.

Thus far, the municipality of Beijing did not have its own local air pollution regulations (unlike water pollution law) but only implemented the national APPCL. However, in January 2013, and largely in response to public pressure, the Beijing government took a bold step of circulating for public comment the Municipal Air Pollution Prevention and Control Regulations, known as the "strictest of its kind." The draft rules include measures to shut down factories and further limit the number of vehicles on the road. They also propose banning certain intensive industries (like iron and steel) from opening in Beijing, and would require certain companies to report their pollution emissions on their corporate websites.

Challenges to enforcement

While the recent proposal by the municipality of Beijing is encouraging, challenges remain. It is important to understand that while China's Ministry of Environment Protection plays the key role in designing pollution control policies and programs, the EPBs implement national environmental laws at the local level. Because China's environmental laws are general and often intentionally ambiguous, local governments and courts have significant flexibility. Further, China's post-1978 decentralization policies gave local officials strong financial incentives to expand their economies, meaning that local enterprises contribute significantly to municipal government revenues. Municipal EPBs, like the Beijing EPB, are units of municipal governments and as such are sensitive to how their enforcement of environmental requirements affects enterprises.

Moreover, a Chinese concept called g*uanxi* (social connection) has long been an important part of Chinese life. Individuals with extensive *guanxi* networks, despite "conflicts of interest," are able to influence greatly how regulations are implemented and often make compliance and enforcement difficult. In addition, unlike the litigious United States, disputes in China are generally resolved through informal negotiations. While legal institutions have strengthened, mediation and conciliation continue to be significant. Historically and culturally, China has long viewed the legal system as a means to implement state policy and less so for protecting citizens' rights. For this reason the Chinese legal system has developed in a way that often suppresses transparency and accountability and discourages people from challenging it. Even more frustrating is that judges are ultimately beholden to the local government and the Chinese Communist Party. The result is that citizens are discouraged to bring lawsuits (although citizen-based environmental suits have increased recently).

China also has an ancient tradition of allowing citizens to petition up to the highest level of government (Beijing, in this case) to seek redress for grievances at the local level. However, despite this tradition, most would-be petitioners with environmental issues who make it as far as Beijing find themselves cooling their heels in what are called "black jails" (illegal detention centers set up by local authorities to prevent access) before being sent home. A number of lawyers, who had the temerity to represent some of these individuals, have been roughed-up, while others have simply disappeared.

The Chinese government protects itself from criticism in other ways. For example, non-govermental organization (NGOs) must be registered with and approved by the government. Many are established to meet government agency objectives, resulting in NGOs that are unable to criticize the government's policies. The media is also tightly controlled, essentially making it part of the propaganda machine. Although the media has recently become more vocal on air issues, that attention may be temporary. With the help of Western media and NGOs, many local grass-roots organizations have emerged, but all are limited in just how far they can push the government.

Get a mask and hope for change?

With the lack of enforced laws and transparency, coupled with the general opacity of government and a culture of corruption, change will be difficult to come by. In the past, the government has pushed development at all cost so as to maintain social harmony, but that mentality has led to air pollution at such extreme levels that itself threatens social harmony.

So, what is the solution for Beijing? While the U.S. Clean Air Act is constantly under attack, Beijing is welcoming California Air Resources Board and the U.S. Environmental Protection Agency to learn about our laws and regulations. The Beijing municipal government has entered into Memorandums of Understanding to cooperate on environmental issues, including exchanges of information, experiences, and best practices; training of personnel and capacity building; and technical support through workshops, seminars, and exchanges of technical and policy specialists.

The hope is that through these exchanges and a better understanding of our environmental laws, China will open up and understand the benefits of public participation and the rule of law. In the meantime, Beijing is now waiting with bated breath for the "*feng sha*" to begin, the dust storms that blow in periodically from the Gobi Desert in the spring. Got a mask handy?

LA County Flood Control District v. NRDC, Inc.: A rejection of joint and several liability under the Clean Water Act?

Richard Montevideo

Richard Montevideo is partner and chair of the Environmental Law Practice Group at Rutan & Tucker, LLP, and is the chair of the Environmental Law Section of the Orange County Bar Association.

Until the Supreme Court's decision this January in Los Angeles County Flood Control District v. NRDC, Inc., 133 S. Ct. 710 (2013)(LA County Flood Control District), there had been little guidance from the High Court on the application of the Clean Water Act (CWA) to the unique issues raised by comingled urban runoff. And for sure, the decision put to rest one important question, i.e., does a local agency's improvements to a water of the United States (by lining it with concrete) impose responsibility on that agency for pollutants moving from the improved portion of the water body to the unimproved portion? The Court answered this question in the negative, and affirmed its holding in South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004), where it had held the transfer of polluted water between "two parts of the same water body" did "not qualify as a discharge of pollutants under the CWA." In short, whether the water body is improved does not alter the conclusion that there is no "addition" of a pollutant if the pollutant is simply moving from one part of the same water body to another. 133 S. Ct. at 713.

Interestingly enough, the holding itself was not controversial. In fact, all parties to the case (as well as the Solicitor General) agreed there is no "addition" of a pollutant where the pollutant merely moves from one part of the water body to another. The question then becomes: is there any other significance to the *LA County Flood Control District* decision? The short answer is that it remains to be seen, but what can be said is that the Court's reliance on certain critical findings of the district court, along with its reversal of the Ninth Circuit's decision in *NRDC, Inc. v. Los Angeles County Flood Control District*, 673 F.3d 880 (2011) (*NRDC*), is clear indication the High Court will not be receptive to a theory of joint and several liability for comingled urban runoff.

The Ninth Circuit's decision in NRDC

Relying on the citizen suit provisions of the CWA, the Plaintiffs, Natural Resources Defense Council and the Santa Monica Baykeeper, filed suit against the County of Los Angeles and the Los Angeles County Flood Control District, contending they discharged polluted urban/stormwater runoff collected by thousands of municipal separate storm sewer system (MS4) lines running throughout Los Angeles County, and flowing into various navigable waters within Southern California, namely the Santa Clara River, the Los Angeles River, the San Gabriel River, and Malibu Creek. Many of these rivers, particularly the Los Angeles River, had historically overflowed their banks, and the County Flood Control District had supervised and managed the "taming" of the rivers, largely by lining them with concrete channels. *See Rapanos v.United States,* 547 U.S. 715, 769 (2006) (Kennedy, J., concurring in part) (describing Los Angeles River). The Plaintiffs' argued that the level of pollutants discharged within the runoff exceeded limits allowed by the Los Angeles MS4 National Pollutant Discharge Elimination System (NPDES) permit, which governed municipal discharges throughout the County of Los Angeles (except Long Beach) and that the County Flood Control District (along with the county) was responsible.

There was no dispute that the levels of certain pollutants within the waters were in excess of water quality standards, but Defendants argued, among other things, there was no evidence they were responsible for the exceedances. The district court denied Plaintiffs' partial summary judgment motion and granted Defendants' cross-motion, finding:

> Plaintiffs failed to present evidence that the standards-exceeding pollutants pass through the defendants' MS4 *outflows* at or near the time the exceedances were observed. Nor do plaintiffs provide any evidence that the mass emissions stations themselves are located at or near a defendant's outflows.

673 F.3d at 891.

On appeal, the Ninth Circuit reversed this decision for two of the water bodies (i.e., the Los Angeles and San Gabriel Rivers), and although it reversed without expressly relying on the theory of joint and several liability, a review of the decision shows joint and several liability was at the core of its reasoning.

Initially, the Ninth Circuit determined: "While it may be undisputed that exceedances may have been detected, responsibility for those exceedances requires proof that *some entity* discharged a pollutant." *Id*. at 898. The court then framed the issue as whether the evidence shows "any *addition* of pollutants by County Defendants to the Watershed Rivers," recognizing Defendants argument "that by measuring mass-emissions downstream from where the pollutants enter the sewer system, it is not possible to pinpoint which entity, if any, is responsible for adding them to the rivers." *Id*. at 899. Plaintiffs then argued:

> . . . that the monitoring stations are downstream from hundreds of miles of storm drains which have generated the pollutants being detected. To Plaintiffs, it is irrelevant which of the thousands of storm drains were the source of polluted stormwater—as holders of the [NPDES stormwater] Permit, Defendants bear responsibility for the detected exceedances.

Id.

After framing the arguments, the Ninth Circuit then inexplicably found that the mass-emission stations were "located in a section of the MS4 owned and operated by the district," and consistent with a joint and several liability theory of recovery, held that:

> The discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways. We agree with Plaintiffs that the precise location of each outfall is ultimately irrelevant because there is no dispute that MS4 eventually adds storm-water to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations.

Id. at 900.

The Supreme Court's implicit rejection of joint and several liability under the CWA

The Supreme Court granted review on a single narrow issue: "Under the Clean Water Act . . . does the flow of water out of a concrete channel within a river rank as a 'discharge of a pollutant'?" The Court answered this question as follows:

> We hold, therefore, that the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA. Because the decision below cannot be squared with that holding, the Court of Appeals' judgment must be reversed.

133 S. Ct. at 713.

This decision was far from surprising, given all of the parties had agreed that the Ninth Circuit's "analysis was erroneous." *Id.* at n.1. Still, Plaintiffs argued the decision should be affirmed on a different ground, i.e., because "the exceedances detected at the instream monitoring stations are by themselves sufficient to establish the District's liability under the CWA for its upstream discharges." *Id.* However, instead of engaging Plaintiffs on the issue, the Supreme Court stated it had "no opinion on[] the issue the NRDC and Baykeeper seek to substitute for the question we took up for review." *Id.* at 714. Notwithstanding this statement, the unanimous opinion of the High Court shows it was actually rejecting this argument.

First, of significance is the Supreme Court's recognition it:

> was undisputed, the District Court acknowledged, that data from the Los Angeles River and San Gabriel River monitoring stations indicated that water quality standards had repeatedly been exceeded for a number of pollutants, including aluminum, cooper, cyanide, fecal coliform bacteria, and zinc. But *numerous entities other than the District*, the [district] court added, discharge into the rivers upstream of the monitoring stations.

Id.

Importantly, the Court noted the water quality standards were being "repeatedly" exceeded as a result of discharges from "numerous entities." Yet, none of this changed the Court's decision to reverse the Ninth Circuit's finding of liability.

Second, the High Court cited the district court's conclusion that the "record was insufficient" "to warrant a finding that the District's MS4 had discharged storm water containing the standards-exceeding pollutants detected at the downstream monitoring stations." *Id.* at 712. Thus, instead of agreeing with Plaintiffs, as the Ninth Circuit had, that the "precise location of each outflow is ultimately irrelevant because there is no dispute that MS4 actually adds storm-water to the Los Angeles and San Gabriel Rivers downstream from the monitoring stations," the Supreme Court cited the district court's opposite finding of insufficient evidence.

Finally, and importantly, is the Supreme Court's decision to reverse the Ninth Circuit's decision because it could not "*be squared*" with the Supreme Court's holding. Yet, the Supreme Court never explained what the Ninth Circuit got wrong. In fact, the only legal conclusion by the Ninth Circuit which could "not be squared" was its determination that the "precise location of each outfall *is ultimately irrelevant* because there is no dispute that MS4 actually adds storm-water to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations." 637 F.3d at 900 (emphasis added).

Other authorities show the CWA does not provide for joint and several liability

Other authority shows that joint and several liability cannot be "squared" with the CWA. For example, the federal regulations governing NPDES permits for MS4 systems provide that a municipal discharger is only to be responsible for exceedances resulting from its own discharge. 40 C.F.R. § 122.26(b)(1) (2013) (defining "Co-permittee" to mean "a permittee to a NPDES permit that is *only responsible* for permit conditions relating to the discharge for which it is the operator.") (emphasis added).

Furthermore, joint and several liability is a tort concept which, if imposed, allows one party, who has discharged, the liability of another (through a judgment or settlement), to then seek "contribution" against the other contributing tortfeasors. *See, e.g.,*RESTATEMENT (THIRD) OF TORTS § 23(a) ("when two or more persons are or may be liable for the same harm . . . the person discharging the liability is entitled to recover *contribution from the other* . . . .").

Yet, the CWA clearly does not allow for "contribution" by one alleged violator against another. *See,e.g.,Middlesex County Sewage Auth. v. Nat'l Seaclamers Ass'n,* 453 U.S. 1, 17–18 (1981) ("Thus, both the structure of the [CWA] and [its] legislative history leads us to conclude that Congress intended private remedies in addition to those expressly provided should not be implied," and that "the courts are not authorized to ignore this legislative judgment."). *See United States v. Savory Senior Housing Corp.*, No. 6:06cv031, 2008 U.S. Dist. LEXIS 17850 (W.D. Va. Mar. 6, 2008); *Envtl. Conservation Org. v. Bagwell*, No. 4:03-CV-807-Y, 2005 U.S. Dist. LEXIS 22027 (N.D. Tex. Sept. 30, 2005) (with both district courts expressly disallowing "contribution" claims under the CWA).

Understanding that there is no "contribution" under the CWA, a decision imposing joint and several liability on a defendant for commingled exceedances, as the *LA County Flood Control District* Plaintiffs argued should be the case, would lead to the absurd result of a defendant bearing 100 percent of the liability for penalties and injunctive relief, even if it were no more than 1 percent liable for the exceedances. This result "cannot be squared" with the Supreme Court's holding in *LA County Flood Control District*.

TSCA reform versus replacement: Moving forward in the chemical control debate

Charles Franklin

Charles Franklin is a senior counsel at the international law firm of Akin Gump LLP, in Washington, D.C. and is a vice chair on the Section's Special Committee on Congressional Relations.

At a time when our national leaders cannot come together to prevent the massive, poison-pill cuts of the so-called budget "sequester," it seems fanciful to ponder let alone propose legislative strategies for updating the often maligned Toxic Substances Control Act (TSCA). Yet, after 37 years without material change, the nation's flawed but critical chemical control statute may offer one of the few opportunities for lawmakers to exercise environmental bipartisanship. To be successful, however, Democrats and Republicans, as well as stakeholders, need to move beyond visions of a legislative "Grand Bargain" that replaces TSCA with a new comprehensive scheme and instead consider some targeted opportunities to "reform" the current statute.

As implemented and interpreted by federal courts, TSCA has been a disappointment, if not an abject failure, to most stakeholders. Some criticize TSCA as a "toothless" tiger, unable to support meaningful action and unable to prevent a patchwork of state analogs. Other critics note that TSCA's provisions for confidential business information (CBI) offend the public's right to know. Still others comment that TSCA's disclosure and reporting requirements discourage innovation. Stakeholders may disagree on the diagnosis, but most agree that TSCA is sick.

How did we get here?

When President Ford signed TSCA into law in October 1976, he dubbed it "one of the most important pieces of environmental legislation that has been enacted." TSCA, he proclaimed, promised to "close a gap in our current array of laws to protect the health of our people and the environment." Congress had already enacted a framework of statutes regulating industrial, commercial, and agricultural releases of pollutants to air, water, and land. Where these prior statutes regulated chemicals as unwanted pollutants, TSCA gave the U.S Environmental Protection Agency (EPA) the authority to manage chemical substances *before* they reached the stack, pipe, or landfill.

But TSCA was not a regulatory blank check. While TSCA gave EPA a range of options to manage unreasonable risks, section 6(a) also directed EPA to select "the least burdensome means" when regulating against such risks. Congress admonished EPA "not to impede unduly or create unnecessary economic barriers to technological innovation." TSCA established an Interagency Testing Committee (ITC) to help EPA identify and prioritize substances for testing and reporting requirements, but the testing process was cumbersome. While the statute required companies to provide sensitive product or business data, companies could claim non-safety related information confidential where its release would disclose legitimate trade secrets. TSCA's preemption provision precluded states from imposing additional testing or risk management requirements on substances where EPA had already acted. Finally, Congress bypassed the deferential "arbitrary and capricious" standard in favor of the more stringent "substantial evidence" requirement, raising the bar for sustaining governmental action on judicial review.

TSCA's focus on balanced regulation still resonates as a pragmatic approach to public policy, at least in theory. In practice, the carefully balanced wording of the statute prompted regulatory and judicial paralysis, not pragmatism. In 1980, the General Accounting Office (GAO) reported that "neither the

public nor the environment are much better protected," citing budget, staffing, organizational, and planning weaknesses of the new EPA program. In 1990, GAO amplified its concerns, finding EPA had made little progress in identifying chemicals for priority testing.

For many in the environmental community, the final blow came in 1991, when the Fifth Circuit largely overturned EPA's Asbestos Ban and Phase-Out Rule. *Corrosion Proof Fittings v. EPA* (5th Cir. 1991). After initiating the rulemaking proceeding in 1979, EPA reviewed over 100 studies, and held numerous public meetings in the lead up to the 1989 final rule. Concluding that asbestos posed an unreasonable risk to human health at all levels of exposure, the rule called for a three-stage ban on all asbestos products over ten years.

The Fifth Circuit reversed, vacating the asbestos ban rule on substantive and procedural grounds. Procedurally, the court held that EPA erred by adopting a new methodology for assessing certain risks without seeking adequate public comment. Substantively, the court held that EPA failed to heed TSCA's admonishment to use the "least burdensome" approach to addressing unreasonable risks; to consider, on a use-by-use basis, the availability of less burdensome control strategies as alternatives to a complete ban; and to assess the risks associated with potential substitutes for the banned material. The court also found EPA deficient in quantifying long-term costs and benefits of the action, violating TSCA's mandate to consider "reasonably ascertainable economic consequences" of the action. These failures, viewed through the lens of the substantial evidence test required to uphold the action, convinced the court to vacate the 1989 rule, remanding it to EPA.

The *Corrosion Proof Fittings* case was a landmark event for TSCA. While its legal significance was debatable, the lesson for EPA was that if ten years and thousands of pages of documentation were inadequate to ban asbestos, TSCA's section 6 risk management provision was a dead letter. EPA essentially put regulation pursuant to section 6 on a shelf and spent most of the next two decades seeking voluntary action from industry. Congress, for its part, remained remarkably disinterested in fixing the core provisions of TSCA, adding discrete new titles for asbestos, radon, lead, formaldehyde, and school environments, but leaving the core chemical control provisions untouched.

Efforts at "Grand Bargain" reform

In 2009, the Obama administration breathed new life into TSCA. Then-EPA Administrator Lisa Jackson identified TSCA legislative reform as a long-term goal, going so far as to offer "Essential Principles for Reform of Chemicals Management Legislation." In the short term, EPA gave TSCA's current mandate a fresh look, reevaluating both the language of the act and options for reinterpreting its existing authority to strengthen the federal program.

Democratic legislators in the Senate and House quickly responded, brushing off proposals to revamp TSCA. Yet, despite repeated efforts to find common ground through multi-stakeholder dialogue meetings, congressional hearings, and shuttle diplomacy, Democrats and Republicans have been unable to bridge the environmental policy partisan gap that pervades Washington today. These differences are

exacerbated by the sweeping nature of the TSCA reforms proposed to date. The bill introduced by Senator Frank Lautenberg would not "reform" TSCA—it would replace it with an entirely new legal framework.

But while a fresh start has an appeal, wholesale replacement is both politically cumbersome and exceedingly risky from policy and business standpoints, particularly given the difficulty in predicting how future administrations and courts will interpret a blank-slate framework. Would a comprehensive Lautenberg-style bill fix TSCA's prior flaws and reflect 37 years of lessons learned, or simply create a new blank canvas on which lawyers, judges, and activists can relitigate old issues afresh?

A more modest proposal

I would, respectfully, offer a more modest approach. Rather than start from scratch, why not conduct a targeted effort to clarify or eliminate the few specific provisions, words, and phrases that, through overbroad or overly narrow interpretation, knocked TSCA implementation out-of-kilter? Here are six suggestions, aimed at addressing issues of concern for both sides of the debate.

Keep, but clarify the "unreasonable risk" standard: Recent TSCA reform proposals have replaced the "unreasonable risk" safety standard with alternatives like "reasonable certainty of no harm"—the same standard applied to food-use pesticides, foods, and drugs—or "negligible risk," a term evoking something just north of zero risk. Such standards make sense in certain use scenarios, but for a standard applied across the entirety of TSCA's reach, we should think twice about eliminating the rule of reason. Rather than introduce an entirely new standard, why not work together to better define the meaning of "*unreasonable* risk"?

Eliminate the "least burdensome requirement": The court in *Corrosion Proof Fittings* relied heavily on TSCA's directive to use the "least burdensome requirement" in managing unreasonable risks, essentially converting TSCA's list of potential mitigation factors (notification, labeling, recordkeeping and reporting, testing and monitoring, use restrictions, use prohibitions, etc.) into a mandatory top-down analysis. This approach places too much discretion in the hands of judges, and should be unnecessary under a better-defined "unreasonable risk" standard.

Strengthen EPA's right to obtain exposure and use data, and simplify the test rule process: Early in TSCA's implementation process, stakeholders raised concerns that the statute's testing authority made it difficult for EPA to mandate health and exposure testing. EPA could require industry to conduct testing on the basis of substantial risk or exposure, but for many chemicals EPA lacked access to the use and exposure data needed to support a test rule finding. Congress fixed this problem, in part, when it passed the Emergency Planning and Community Right-to-Know Act of 1986—the basis for the Toxics Release Inventory and more recent chemical data reporting requirements. However, access to timely and comprehensive exposure data is arguably the most important component of ensuring a workable risk-based regulatory system. Congress should revise section 4 on testing or section 8 on reporting to give EPA more express authority to obtain chemical use information along the entire supply chain.

Adopt the arbitrary and capricious standard of review: For most environmental statutes, the judicial standard of review follows the Administrative Procedures Act standard of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This standard, which grants deference to EPA's administrative expertise, would provide EPA and regulated parties with a familiar and well-studied legal basis for reviewing "unreasonable risk" findings by EPA. In contrast, the substantial evidence standard has added yet another source of uncertainty to TSCA. Courts should apply the same standard for TSCA used for other statutes.

Strengthen, not weaken CBI provisions: If EPA is to receive the data it needs to make sound risk-management decisions industry will have to trust that it can provide confidential business information to the agency without fear of its release. EPA should strengthen, not weaken, TSCA's CBI provisions with respect to reported data and documentation that could reasonably be used by third parties for competitive advantage.

Tighten TSCA's preemption provision: TSCA's preemption provision was designed to "discourage state requirements which would put an undue burden" on companies engaged in interstate commerce. In practice, states have issued a wide range of state-specific mandates, from chemical bans and disclosure requirements to alternative assessment and substitution requirements, all without ever triggering the statute's preemption exemption process. A reformed TSCA needs to, at minimum, increase the coordination and oversight between state and federal regulators regarding state-specific requirements likely to affect interstate commerce.

To be sure, these modest changes will not resolve the lengthy list of complaints regarding TSCA, both as written and as implemented. But since the "Grand Bargain" approach keeps leading to "no sale," perhaps some small improvements are a good start.

D.C. Circuit PM2.5 decision raises challenges for PSD permit applicants

Margaret Peloso

Margaret Peloso is an associate with the firm of Vinson & Elkins LLP. Her principal areas of practice are environmental law and climate change.

Editor's note: This is one of two articles in this issue dealing with different national rules and enforcement of standards regulating particulate matter smaller than 2.5 micrometers (PM2.5) in the air. Margret Kim and Robert Jones discuss laws and enforcement related to PM2.5 in China, while Margaret Peloso analyzes a

D.C. Circuit decision reviewing EPA's efforts to regulate PM2.5 pursuant to the Clean Air Act. The editor recommends reading both articles for a better understanding of contrasting national approaches to the same pollutant problem.

On January 22, 2013, the D.C. Circuit issued an opinion in Sierra Club v. EPA, 705 F.3d 458 (D.C. Cir. 2013), invalidating U.S. Environmental Protection Agency (EPA) regulations that established Significant Impact Levels (SILs) and Significant Monitoring Concentrations (Monitoring Concentrations) for fine particulate matter with a size of less than 2.5 micrometers (PM2.5). The D.C. Circuit's decision raises important questions regarding potential impacts to both pending and future applications for permits under the prevention of significant deterioration (PSD) provisions of the Clean Air Act (CAA). This article explains the D.C. Circuit's decision and EPA's subsequent guidance and evaluates implications for the issuance of future PSD permits.

SILs and Monitoring Concentrations

Section 165 of the CAA requires that all new major sources of pollution in attainment areas obtain a preconstruction permit under the PSD program. Each preconstruction permit application must include one year of ambient air quality monitoring data, setting the baseline for air quality in the area where the new facility is to be constructed. The PSD permit application must also include an air quality impacts analysis in which the applicant provides a modeled demonstration that the permitted source will neither cause nor contribute to a violation of the National Ambient Air Quality Standard or consume the PSD increment—the amount by which emissions of a pollutant may increase in an attainment area.

EPA intended SILs and Monitoring Concentrations to be tools to streamline the PSD permitting process by allowing *de minimis* sources to forgo facility-specific ambient air quality monitoring and more extensive, multi-source air quality impacts analyses. EPA established specific Monitoring Concentrations for PM2.5 and exempted sources with projected impacts below this threshold from the requirement to supply one year of ambient air monitoring data. EPA also established SILs for PM2.5. Under the final rule, sources with projected impacts below the SILs were not required to conduct cumulative air quality modeling as part of the air quality impacts analysis.

The D.C. Circuit invalidates Monitoring Concentrations and remands SILs

In *Sierra Club v. EPA*, plaintiffs challenged EPA's regulations, alleging that EPA lacks the statutory authority under the CAA to issue SILs and Monitoring Concentrations. After the case was filed, EPA conceded that the provisions establishing SILs in the final rule unintentionally stripped permitting authorities of the ability to require an air quality impact analysis for a source with emissions below the pre-established SILs. As a result, EPA asked the D.C. Circuit to remand this portion of the rule for reconsideration.

Although EPA requested remand of the SILs, the Sierra Club urged the D.C. Circuit decide whether EPA has the legal authority to promulgate SILs under the CAA, arguing that EPA does not have the ability to issue *de minimis* exemptions from the act's requirements. An industry-based group, the Utility Air Regulatory Group, urged the court to accept the SILs, or alternatively, remand them without vacating that portion of EPA's final rule.

The court declined the Sierra Club's request to broadly rule on EPA's statutory authority, finding that on remand EPA could propose a new rule with or without SILs. While remanding the SILs themselves in the PSD permitting regulations and parallel regulations for SIPs, the court agreed with EPA that the provisions codifying the SILs in 40 C.F.R. § 51.165(b)(2)—deeming a source to cause or contribute to a violation of the ambient standards when it exceeds the SILs in any area not meeting the applicable standards—could stand.

With respect to Monitoring Concentrations, the court rejected that portion of EPA's rule. The D.C. Circuit concluded that EPA's decision to exempt some sources from the preconstruction monitoring requirements violated Section 165(e) of the act, which it held is "an 'extraordinarily rigid' mandate that a PSD permit applicant undertake preconstruction monitoring." As a result, the court vacated the portion of the rule establishing Monitoring Concentrations.

EPA's response to Sierra Club v. EPA

In response to the D.C. Circuit's ruling, EPA issued guidance on PM2.5 permitting on March 4, 2013. The guidance concludes that it is the responsibility of each permitting authority to align its permitting processes with the D.C. Circuit's decision. EPA provides guidance in four areas: (1) the status of pending permits, (2) the application of SILs, (3) the submission of monitoring data, and (4) the impact on state implementation plans (SIPs).

With respect to pending permits, EPA advises states to issue permits in a manner that is consistent with the D.C. Circuit's decision. Presumably, this means that no new PSD permits should be issued relying upon Monitoring Concentrations to forego monitoring or applying to exempt permittees from modeling requirements in a manner that is inconsistent with the D.C. Circuit's holding. While EPA's guidance advises states not to take actions that are inconsistent with the holding in *Sierra Club v. EPA*, it provides no concrete examples of situations in which states may still be able to exempt certain *de minimis* sources. As a result, pending permit applications may require modifications so that permitting authorities can ensure the PSD permits they issue conform with *Sierra Club v. EPA*.

EPA's guidance emphasizes that the D.C. Circuit did not preclude the use of PM2.5 SILs in their entirety. Rather, EPA encourages permitting authorities that choose to rely upon SILs to take extra care in their application and ensure that the permitting record supports the conclusion that the permitted source will not cause or contribute to a violation of the PM2.5 ambient air standards. EPA suggests one application in which it feels confident that SILs may still be applied. The guidance states that "[i]f preconstruction monitoring data shows that the difference between the PM2.5 NAAQS and the monitored PM2.5 background concentrations in the area is *greater than* the EPA's PM2.5 SILs value,

then EPA believes it would be sufficient in most cases for permitting authorities to conclude that a proposed source with a PM2.5 impact *below* the PM2.5 SILs value will not cause or contribute to a violation of the PM2.5 NAAQS and to forego a more comprehensive modeling analysis for PM2.5."

EPA's guidance further suggests that SILs may still have a role in cumulative analyses although EPA should be consulted directly before using SILs for this purpose.

Because the D.C. Circuit held that EPA lacks the authority to promulgate Monitoring Concentrations, EPA's guidance directs all permit applicants, including those who have already applied for but have not yet received their permits, to submit PM2.5 ambient monitoring data "whenever either direct PM2.5 or a PM2.5 precursor is emitted in a significant amount." While EPA's guidance requires that all permit applicants submit monitoring data, it also provides that existing data from ambient monitoring stations may be used to fulfill the monitoring requirement if the permitting authority believes that such data is representative. According to EPA's concurrently issued PSD permit modeling guidance, approximately 1,000 of the 1,500 ambient air quality monitors deployed after the PM2.5 ambient air standards were finalized in 1997 are still in place. As a result, EPA believes that applicants will generally be able to rely upon existing monitoring data to satisfy the requirements of section 165.

EPA's guidance also clarified that it cannot approve a SIP that contains regulatory language regarding Monitoring Concentrations and SILs that is the same as or similar to the language invalidated by the D.C. Circuit. Neither the Monitoring Concentrations nor the SILs were a required element of an approvable PM2.5 SIP and EPA suggests that, as a result, some states may have approved SIPs that already comply with the D.C. Circuit's holding. EPA concludes it will likely need to consider future rulemaking to remove the vacated language from the federal PSD regulations and suggests that states with approved SIPs that contain similar language should "begin preparations to remove these provisions." EPA further advises states whose approved SIPs incorporate the PM2.5 Monitoring Concentrations and SILs to consider these provisions unlawful and not rely upon them in issuing PSD permits.

Concurrently with EPA's permitting guidance, the agency issued draft PM2.5 modeling guidance for PSD permitting. The modeling guidance states that EPA will no longer rely on the Monitoring Concentrations to exempt sources from preconstruction air quality monitoring requirements and advises states to follow the same course. With respect to SILs, the modeling guidance states that EPA will promulgate new rules and that in the interim it advises against using the SILs in the 2010 final rule. EPA recommends that permitting authorities using SILs ensure that the permitting record and applicable regulations support their use. Further, the draft modeling guidance suggests that SILs may still be used as screening values. The draft modeling guidance states that "[i]f preconstruction monitoring data shows the difference between the PM2.5 NAAQS and the measured PM2.5 background concentrations in the area is greater that the applicable SILs value from the vacated sections…, then the EPA believes it would be sufficient in most cases for permitting authorities to conclude that a source with an impact below that SILs value will not cause or contribute to a violation of the NAAQS and to forego cumulative modeling analysis for PM2.5."

Finally, the draft modeling guidance notes that other regulations have resulted in substantial reductions in PM2.5 precursors. As a result, EPA believes that an assessment of the impacts of secondary PM2.5 "may be easily addressed through a qualitative assessment, supported by trends in available precursor data and ambient PM2.5 monitored concentrations."

Implications for PSD permitting

The full impacts of *Sierra Club v. EPA* are not clear. While all applicants with pending and soon-to-filed applications must now submit monitoring data, it is not yet apparent whether such applicants will be able to rely on existing ambient monitoring data, as EPA suggests. If ambient monitoring data acceptable to a permitting authority are not available, permit applicants will be faced with substantial delays while they gather the year of required monitoring data.

EPA suggested that it will issue new regulations that incorporate some form of PM2.5 SILs, but the guidance provides little certainty in how can be implemented in the interim. As a result, permit applicants and permitting authorities will be faced with substantial uncertainties should they choose to rely upon SILs in determining the scope of the air quality impacts analysis for a source. If SILs are not employed, then modeling of cumulative air quality impacts will be required for all permit applicants.

Finally, it is interesting to note that read in light of other recent D.C. Circuit decisions, this most recent decision is part of a move by EPA away from categorical exemptions under the CAA. For example, in a 2008 opinion, the D.C. Circuit struck down EPA's practice of exempting emissions of hazardous air pollutants during periods of startup, shutdown, and malfunction from compliance limits. In light of this 2008 decision and a 2011 petition from the Sierra Club, EPA recently issued a SIP call for portions of 36 states to remove categorical exemptions that apply to periods of startup and shutdown. Collectively, these developments suggest a tightening of the CAA enforcement regime and a move away from exemptions for relatively minor sources of emissions.

Marin Energy Authority: A community choice aggregation program for electricity service

Greg Stepanicich

Greg Stepanicich is a shareholder in the San Francisco office of Richards, Watson & Gershon. He prepared the formation documents for the Marin Energy Authority and continues to serve as its special counsel.

Marin County, located across the Golden Gate Bridge from San Francisco, is well-known for its environmental stewardship. The County government has been at the forefront in adopting climate change and greenhouse gas reduction plans. In 2006, based on initial studies, the County's Greenhouse Gas Reduction Plan called for the exploration of community choice aggregation (CCA) as a means to achieve the most substantial reduction in greenhouse gas emissions of all the identified programs that were within the power of Marin local government to implement.

Under a CCA program, the County, cities, and towns would purchase or generate the electricity provided to its customers. By controlling the generation component of electricity service, local government would have the power to make electricity greener in Marin. The exploration of this program was funded and staffed by the County of Marin and a task force made up of elected officials was formed to evaluate whether a CCA program should be implemented. On December 19, 2008, a joint powers authority called the Marin Energy Authority (MEA) was formed initially consisting of the County and seven cities and towns. Today the MEA consists of all eleven cities and towns in Marin, the County of Marin, and most recently the City of Richmond which is located across the Bay to the east in Contra Costa County. This article discusses the legal framework that was established and the key legal issues that had to be resolved in order to implement this innovative program.

The enabling statute

In 2002, after the electricity deregulation meltdown in California, the state legislature adopted a statute authorizing cities and counties—either individually or jointly through a joint powers authority—to conduct a CCA program. CAL. PUB. UTIL. CODE § 366.2. The local public agency conducting the CCA program is responsible for purchasing or generating electricity for its customers and the incumbent investor-owned utility is required to distribute this electricity to these customers through its existing infrastructure. The customers are charged a generation rate by the public agency and a distribution rate by the investor-owned utility.

Section 366.2 prohibits CCA programs within any area served by a local government-owned electric utility. Thus, CCA programs are limited to areas served by investor-owned utilities. A public agency seeking to serve its community through CAA must offer electricity service to all residential customers within its jurisdiction and may offer its service to commercial and industrial users. When a public agency establishes a CCA program, extensive notice about this program must be provided to all potential customers within its jurisdiction. This notice must explain that each customer may opt out of the CCA program and keep its electricity generation service with the incumbent investor-owned electric utility. In California, CCA is a customer opt-out program which means that each customer within a CCA agency's jurisdiction automatically will be enrolled unless the customer affirmatively states that it is opting out of the program.

Although the California Public Utilities Commission was given the power to review and approve the implementation plan for the CCA program, for the most part CCA agencies are authorized to operate without Public Utilities Commission oversight. Customer rates are set by the CCA agency's governing body and power purchase agreements may be entered into without Public Utilities Commission approval.

The legal structure for the Marin Energy Authority

Like many states, California law authorizes cities, counties, and other public agencies to join together to establish by written agreement a joint powers authority. CAL. GOV'T CODE § 6500 *et seq*. Under California's Joint Exercise of Powers Act, the parties to a joint powers agreement can exercise common powers throughout the jurisdiction of the member agencies. Public Utilities Code Section 366.2 expressly authorizes cities and counties in California to establish and operate a CCA program pursuant to a joint powers agreement. Under such an agreement, a separate legal entity may be established governed by its own governing board.

The MEA joint powers agreement provides for the MEA to be a separate legal entity governed by a board of directors consisting of one elected official appointed by the governing body of each member. The MEA has the power to enter into contracts in its name, acquire and manage buildings and other facilities including electricity generation facilities, incur debt as permitted by state law, and hire staff.

Key issues addressed before formation

Under California Government Code Section 6507, the joint powers agreement may provide that the debts, liabilities, and obligations of the joint powers agreement are not the debts, liabilities, or obligations of the individual members of the joint powers agreement. This was a critical protection to the local entities in Marin County when exploring CCA. None of the local public agencies were willing to risk exposing their general funds to the debts, liabilities, and contractual obligations of a CCA program under which power purchase agreements would be entered into to purchase electricity for distribution to its customers. Creating a liability firewall was an essential part of establishing the CCA program. Without it, the MEA would not have been formed.

In California only one published appellate court decision has addressed the liability of the members of a joint powers agreement for the liabilities of the energy aggregation authority. *Tucker Land Co. v. State of California*, 94 Cal. App. 4th 1191(2d Dist. 2001), *review denied* (2002), addressed a real estate deal gone bad in which the defendant Mountains Recreation and Conservation Authority (Mountains Conservation Authority) was held liable to the Tucker Land Company (Tucker) for over $6 million in damages in a prior lawsuit. In the subsequent action, Tucker sought a declaration that the constituent members of the Mountains Conservation Authority were jointly and individually liable for this obligation. The court of appeal rejected this argument relying upon Government Code Section 6507 and the language of the joint powers agreement insulating the members from the Authority's debts, liabilities, and obligations. Further the court rejected the argument that the members of the Mountains Conservation Authority should be liable for its obligations on an alter ego (piercing the corporate veil) theory. In rejecting this argument, the court noted that the Mountains Conservation Authority had followed the organizational formalities of establishing and operating a joint powers agreement and that Tucker presumably was aware of the provisions of its formation agreement. However, in dicta the court noted that this liability firewall only applied to contractual liabilities and not tort liabilities.

Due to the risk of potential tort liability arising from the MEA's operations, two safeguards were implemented by the MEA. First, the joint powers agreement provides that the MEA will defend, hold harmless, and indemnify the members from the negligent acts or omissions or willful conduct of the MEA. Second, this indemnity is supported by insurance policies held by the MEA naming the members as additional insureds.

In addition, the MEA has implemented a third layer of liability protection. All contracts entered into by the MEA require the party contracting with the MEA to agree that its only legal recourse is against the MEA and that it will have no legal rights or remedies against the individual members. This contractual provision substantially reduces the risk of an alter ego liability claim being brought against members of the MEA in a future dispute.

These multiple layers of liability protection provided sufficient assurances to Marin County and the participating cities and towns to enter into the joint powers agreement and participate in a CCA program.

Another key organizational issue was establishing a voting system for the MEA's Board of Directors that protected the interests of both large and small members. When the MEA was first formed, its membership was limited to Marin County which consists of cities and towns ranging from approximately 2,000 to 50,000 residents and an unincorporated County area similar in size to the larger cities. Thus, the electrical load of each member would vary greatly. The bigger members wanted a voting system that accounted for their larger electrical loads while the smaller members wanted to insure that Board decisions were not dominated by the larger members with the smaller members effectively having no voice.

The solution to this potential problem is a two-tiered voting system. For a matter to be approved, it must receive both a majority vote of the members and a majority vote of the electrical load. Exceptions are provided for a limited number of matters requiring a two-thirds vote such as amending the joint powers agreement or terminating a member for materially violating the provisions of the joint powers agreement.

The MEA needed to be established before a power purchase agreement could be negotiated and executed. However, the members were reluctant to commit to the CCA program until they knew whether a viable, financially sound power purchase agreement could be entered into with a reliable energy provider. To address this concern, a provision was added to the joint powers agreement requiring the MEA to provide a copy of the initial power purchase agreement at least 90 days prior to consideration of the agreement by the MEA's Board of Directors and each member was given the right to withdraw from the MEA without any cost upon 30 days prior written notice to the MEA and its members.

Looking forward

The MEA offers its customers two types of service—"light green" and "deep green." Light green service presently consists of 50 percent renewable energy while deep green service consists of 100 percent renewable energy. Prior to providing electricity service to customers in 2010, the MEA entered into a

full requirements power purchase agreement with a single provider that required at least 25 percent of the delivered electricity to be from renewable energy sources. Today, the MEA has 15 power purchase agreements with 10 providers, and in 2012, 51 percent of the energy mix came from a wide range of renewable sources, including wind, solar, biomass, and small hydroelectric. The customer base will reach approximately 120,000 customers by this July, which constitutes about 80 percent of the customers receiving electricity in the jurisdiction of the MEA. The MEA plans to enter into additional power purchase agreements for renewable energy in order to reach its goal of providing 100 percent renewable energy. From the start, the MEA has reliably provided electricity to its customers at a price comparable to the rates charged by the investor-owned public utility.

EPA streamlines Environmental Impact Statement filing process with e-NEPA

Justin Wright

Justin Wright is an environmental protection specialist in EPA's NEPA Compliance Division.

Editor's Note: This is one of the continuing series of articles on agency adoption of e-filing procedures for those who practice in the environmental, energy, and natural resources fields. For a detailed description of EPA's adoption of an electronic filing system for FOIA requests (e-FOIA), please see the article by Stephen Gidiere and Tal Simpson in our March/April 2013 issue.

In August 2012 U.S. Environmental Protection Agency (EPA) issued revised guidelines on filing Environmental Impact Statements (EISs) pursuant to the National Environmental Policy Act (NEPA). EPA's revised guidelines announced that as October 1, 2012, the agency would only accept EIS filings through its new e-NEPA, an online system for submitting EISs in .PDF format. This article describes the background of the required filing and EPA's new all-electronic filing system.

NEPA requires federal agencies to consider the environmental impacts of federal actions during their decision making process. For federal actions which may result in significant environmental impacts, agencies are required to prepare an EIS that analyzes the potential environmental impacts of the proposed action and reasonable alternatives to the action. Draft and final versions of the EIS documents are released for public comment prior to the lead federal agency making a final decision on whether to proceed with the action or an alternative. Pursuant to a 1977 Memorandum of Understanding between the Council on Environmental Quality and EPA, the agency has been designated the official recipient

of all EISs. These responsibilities have been codified in the Council of Environmental Quality NEPA Implementing Regulations (40 C.F.R. Parts 1500–1508), and are separate from the substantive EPA review performed pursuant to both NEPA and section 309 of the Clean Air Act.

Prior to October 2012, EPA had required federal agencies to submit one paper and two disc copies of the EIS documents. Now, one must register for an e-NEPA account, sign in, and then select "e-NEPA: NEPA Electronic Filing System—Submit an EIS" to fill out some basic information on the document and begin uploading an EIS along with any appendices.

Transitioning to electronic filing provides a number of advantages over traditional hard copy filing. EPA believes e-NEPA represents an opportunity for federal agencies to save time and money. Since EISs can span volumes and contain thousands of pages of data, maps, and analyses, submitting agencies will be able to realize savings by eliminating the printing, shipping, and delivery costs associated with filing. In addition, because EPA will now receive all EISs in digital form, e-NEPA creates an opportunity for the agency to make the documents available to a wider public audience. EPA will now permanently host all EISs filed after October 1, 2012, on its database webpage, making them available to the public in a centralized public resource. Indeed, in addition to hosting previously-filed EISs, the database provides a convenient listing of "EIS filings during the last week" that provides easy access to EIS filings by state, agency filing, and with a brief title of the project. This is far better than sending someone to read through the weekly Federal Register indices.

EPA has been accepting electronic versions of EISs through an e-NEPA pilot phase since February of this year. While the overwhelming majority of the feedback from federal agencies participating in the pilot has been positive, there have been some challenges in implementing the system. Frequent questions and concerns were raised about standardized file formatting, metadata, file naming, and file sizes. In response, the EPA's staff has worked to adapt to the needs of submitting agencies and worked with submitting agencies to create standards and instructional materials. It is important to remember that at this time government employees can register through the e-NEPA system as submitters, but contractors cannot. While there is no limit to the number of files that can be submitted at one time, each PDF file cannot exceed 50 MB. Prior to filing, submitters are required to ensure all PDFs of EIS documents are electronically searchable, including subjecting the document to optical character recognition scans if necessary. The e-NEPA guide, linked below, provides guidance on how to modify and compress PDFs. The guide also describes how to control metadata in your PDFs and how to create bookmarks for easier reading.

For more information about e-NEPA, visit the submittal page. For more information about NEPA generally, visit the agency's NEPA page. For answers to questions about how to file an EIS electronically, download the e-NEPA guide.

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.

CERCLA

The Ninth Circuit dismissed an interlocutory appeal of a lower court ruling granting relief to a county that was obligated by a consent decree to implement a remedial plan. *United States v. El Dorado County*, 704 F.3d 1261 (9th Cir. 2013). The district court held that the county's implementation costs had increased as a result of errors in a U.S. Forest Service cleanup plan and therefore that the U.S. Forest Service must pay those costs. The Ninth Circuit held that the suspension of the consent decree was not a final appealable order because it was not an order modifying an injunction under 28 U.S.C. 1292(a)(1).

A party to a 2002 administrative settlement with the government is not prohibited from seeking cost recovery against other potentially responsible parties under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 107(a). *Bernstein v. Bankert*, 702 F.3d 964 (7th Cir. 2012). Section 113(f)(3)(B) of CERCLA allows a person "who has resolved its liability to the United States … in an administratively … approved settlement" to bring a contribution action. The basis for a section 113 contribution action "is not the fact of settlement," the court stated, but "the resolution of liability through settlement" that occurs when remediation is certified as complete. Because in this case the party had not completed remedial action under the Administrative Order on Consent, the court reasoned, plaintiffs had not "resolved their liability" to the United States and thus could bring a claim under section 107(a) that is timely under that provision's statute of limitations period.

A district court held that a Canadian company could be responsible for contamination of soil in the United States. *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-LRS, 2012 WL 6546088 (E.D. Wash. Dec. 14, 2012). The company was an arranger because it intentionally released slag and other waste into the Columbia River with knowledge the waste would be transported to Washington State. The court also held that the exercise of jurisdiction did not conflict with the sovereignty of Canada because the application of CERCLA is not extraterritorial but rather the cleanup of pollution due to releases of hazardous substances in the United States.

A court of appeals upheld the government's refusal to provide reports, requested under the Freedom of Information Act (FOIA), that the government cited and relied on to support CERCLA settlements with third parties. *Appleton Papers, Inc. v. EPA*, 702 F.3d 1018 (7th Cir. 2012). The documents in question were prepared for the government's use in litigation and thus were work product, at least in part, and thus protected under FOIA exemption 5. The court rejected Appleton's attempted distinction between fact and opinion work product, stating that Federal Rule of Civil Procedure 26(b)(3) "protect[s] both types." The court noted that the requesting entity, Appleton Papers, Inc., has remedies in the event the government wishes to use the information against it in future litigation, but the "FOIA is not a substitute for discovery."

Air quality

The D.C. Circuit vacated EPA's 2012 projection of cellulosic biofuel production in EPA's 2012 renewable fuel standards. *Am. Petroleum Inst. v. EPA*, 706 F.3d 474 (D.C. Cir. 2013). The D.C. Circuit rejected API's challenge to EPA's refusal to lower the applicable volume of advanced biofuels for 2012. However, the court agreed with API that EPA's methodology for making its cellulosic biofuel projection reveals a bias in favor of "promoting growth" in the biofuel industry that has no basis in the Clean Air Act.

The D.C. Circuit vacated EPA's rules for "significant monitoring concentrations (SMCs)" and also EPA's "significant impact levels (SILs)" for fine particulate matter less than 2.5 microns in diameter (PM2.5). *Sierra Club v. EPA*, 705 F.3d 458 (D.C. Cir. 2013). The Sierra Club argued that various sources in an attainment area could cumulatively cause or contribute to a violation of the National Ambient Air Quality Standards (NAAQS) or allowable increases above a baseline, "increments." The court granted EPA's request that the SILs be vacated because EPA did not have authority to promulgate such a broad exemption of sources with a proposed impact below the SIL. With respect to SMCs, the court held that EPA does not have authority to exempt sources with PM2.5 impacts less than the SMC from preconstruction monitoring requirements. The decision stated that a permitting authority cannot know how close an area is to violating the NAAQS or increments unless it knows the existing ambient concentrations of PM2.5 before a source is constructed or modified. The court also noted Congress's mandate that the results of the air quality analysis be available to the public at the time of a hearing on a Prevention of Significant Deterioration permit.

The D.C. Circuit remanded EPA's fine particulate matter implementation rule and new source review rule for fine particulate matter less than PM2.5. *Natural Res. Def. Council v. EPA*, 706 F.3d 428 (D.C. Cir. 2013). The court agreed with petitioners that EPA erred in applying the general and less stringent provisions of Title I, Part D, Subpart 1 of the Clean Air Act rather than the particulate-matter-specific provisions of Subpart 4 of Part D. The court rejected EPA's argument that Subpart 4 expressly refers only to particulate matter with a diameter of 10 microns or less (PM10), holding the scope of Subpart 4 did not change when EPA subdivided PM 10 to include PM2.5.

Water quality

The Supreme Court held that stormwater discharges from logging roads are not "associated with industrial activity" and do not require permits under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) program. *Decker v. Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013). Northwest Environmental Defense Center filed a citizens suit alleging that Georgia-Pacific West uses logging roads that channel stormwater into ditches, culverts, and channels, and that the company had not obtained NPDES permits for stormwater runoff from the logging roads. The Court held that the prior Industrial Stormwater Rule, as permissibly construed by EPA, exempts discharges of channeled stormwater runoff from logging roads and instead extends only to traditional industrial buildings such as factories and associated sites and other relatively fixed facilities. The Court also held that EPA's amendment of the rule to expressly exempt such discharges, announced just prior to oral argument, did not render the case moot. Justice Scalia dissented in part, stating that the majority's deference to EPA's interpretation of its regulations contravened a fundamental principle of separation of powers, namely that "the power to write a law and the power to interpret it cannot rest in the same hands." Chief Justice Roberts wrote a concurring opinion, joined by Justice Alito, stating that it may be appropriate to reconsider the principle of deference to an agency's interpretation of its regulations in an appropriate future case.

A district court held that held that EPA does not have authority to regulate Total Maximum Daily Loads (TMDLs) for stormwater flow rates. *Virginia Dep't of Transp. v. EPA,* No.1:12 CV-775, 2013 WL 53741 (E.D. Va. Jan. 3, 2013). The opinion stated that "pollutant" is a statutorily defined term that does not include stormwater, and rejected EPA's argument that the agency could establish a TMDL for stormwater as a surrogate for regulating sediment that flows into an impaired water body. The district court concluded that: "Whatever reason EPA has for thinking that a stormwater flow rate TMDL is a better way of limiting sediment load than a sediment load TMDL, EPA cannot be allowed to exceed its clearly limited statutory authority."

RCRA

A court of appeals affirmed the dismissal of a suit against a company that shipped carpet waste to plaintiff's lessee for the purpose of manufacturing building materials. *Premier Assocs. Inc. v. EXL Polymers Inc.*, No 12-10325, 2013 WL 425972 (11th Cir. Feb. 5, 2013) (not for publication). The carpet selvedge at the site was not recycled but instead was stored on site. The court held that recovered materials are excluded from the definition of solid waste, and there was no genuine dispute of fact that the carpet waste could be feasibly used, reused, or recycled. The fact that the carpet waste was not recycled does not prevent it from qualifying as a recovered material, the court stated, and the lessee rather than defendant accumulated the material. Further, to the extent that plaintiff's nuisance claim was based on something other than a regulatory duty, the district court correctly rejected the contention that defendant had improperly disposed of the waste.

Views from the Chair: Trees, offsets, and recycling—oh my! The Section's green public service initiatives

Alexandra Dapolito Dunn

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

The best way to find yourself is to lose yourself in the service of others. — M. Gandhi

The brighter days and cool breezes of spring are an invitation to reflect on the opportunities the Section offers to engage in public service activities. This year, we consolidated the Section's key public service initiatives under the umbrella of a new Section-wide Special Committee on Public Service, chaired by the energetic and visionary Neil Johnston of Hand Arendall, Mobile, Alabama.

The One Million Trees—Right Tree for the Right Place at the Right Time nation-wide public service project is the centerpoint of our current public service efforts. Started in March 2009 as a Section-wide effort, the project was embraced by the ABA as a whole in fall 2012. Co-chaired by Maki Iatridis and Ann Rhodes at Berg, Hill, Greenleaf, & Ruscitti in Denver, this project calls on ABA members to contribute to the goal of planting one million trees across the United States by 2014—both by planting trees themselves and by contributing to partnering tree organizations.

The Section sponsors a tree planning event at most every multi-day program—giving attendees the opportunity to get their hands and boots dirty and to get to know one another before the CLE sessions begin. Through the One Million Trees project with the Section, I personally have had a great time planting trees in Austin, Texas, Salt Lake City, and Orlando, Florida, and look forward to future events. Section members and committees have helped law school environmental law societies, law firm summer associate programs, professional organizations, and state bars hold tree planting events, make the landscape a little greener in places like Detroit, Fitchburg, Wisconsin, the Temecula Gorge-headwaters of the Santa Margarita River, California, Birmingham and Tuscaloosa, Alabama, and White Plains, New York.

In addition, the Section's Special Committee on [ABA] Sections, Divisions, and Forums (SDF) Coordination, through its chair John Milner (Brunini Grantham, Jackson, Mississippi), has brought together representatives of other ABA SDFs to collaborate. We encourage all ABA members to consider organizing a tree planting event or cosponsoring one. Everything you need to know is on the Section's public service web page. Every tree counts—when I spotted my neighbor planting five cherry trees last spring, he agreed to my registering his trees towards our ambitious goal.

Another way to contribute is to donate to one of the Section's partnering tree organizations. For as little as a dollar, a tree will be planted on behalf of our project. The Section is even using social media to plant trees! In December 2012, and January and April 2013, the Section contributed $0.50 for every unique Section Facebook user page "like," up to $1,000 total for the year, to purchase trees as part of the One Million Trees project. As a Chinese proverb notes: "The best time to plant a tree was 20 years ago. The next best time is now."

A related project is the ABA-Environmental Protection Agency (EPA) Law Office Climate Challenge. This project began in 2007, and in 2009 the ABA House of Delegates resolved "[t]hat the American Bar Association urges law firms and other law organizations to adopt the ABA-EPA Law Office Climate Challenge." The Climate Challenge is co-chaired by Daniel Eisenberg, Beveridge & Diamond, Washington, D.C. and Howard Hoffman, U.S. Environmental Protection Agency, Washington, D.C. It encourages law organizations of all kinds, including law firms, government offices, citizens groups, courts, law schools, non-profit organizations, and other law-related entities to take simple, practical steps to steward environmental and energy resources. An organization can participate by implementing best practices for office paper management, or by joining at least one of three EPA partnership (voluntary) programs that encourage better office paper management, the use of renewable energy, and better energy management—WasteWise (focused on sustainable materials and lifecycle management), the Green Power Partnership (purchase some—or all—of the office's electricity from renewable sources), and/or ENERGY STAR (adopt an energy management plan and set a goal to reduce your electricity use by at least 10 percent). Check out the current list of more than 300 Law Office Climate Challenge Partners and Leaders and take the next step by filling out the Climate Challenge Enrollment Form.

The Section is also moving towards achieving carbon neutrality for our CLE programs. Co-chaired by Laura Kosloff, a solo practitioner in Portland, Oregon, and John Dernbach, Widener University School of Law, Harrisburg, Pennsylvania, the Achieving Carbon Neutrality effort has estimated that the average participation of an attendee to a Section program generates one metric ton of carbon emissions. For a $20 contribution, a program attendee can offset his/her carbon footprint by purchasing a one-ton carbon credit from a verified offset project that will reduce greenhouse gases. The Section has partnered with Native Energy to contribute to offsets at the Wewoka Biogas Project. At your next Section program, watch for the bright green "Carbon Offset" badge flags to recognize those attendees participating in this growing and important initiative.

Finally, Section committees continue to undertake a variety of important public service projects, such as the stream cleanup held with Keep Austin Beautiful, Texas, by the Waste and Resource Recovery Committee. We have educational materials on the website to allow any member to go to his/her local schools and talk about environmental issues. Indeed, there is no better time to go green and make a difference than today through the Section. To get involved, reach out to me at environ.chair@americanbar.org or to our public service chair Neil Johnston.

In closing, I often think about the powerful simplicity of the words of Theodor Seuss Geisel (Dr. Seuss) in The Lorax—"UNLESS someone like you cares a whole awful lot, nothing is going to get better. It's not."

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

Mark D. Christiansen has joined McAfee & Taft in the firm's Oklahoma City office where he will be the co-practice group leader for the firm's Energy and Oil & Gas Industry practice group. Christiansen is a past member of the Section Council, and is a past chair of both the Energy and Natural Resources Litigation Committee and the predecessor to what is currently titled as the Oil and Gas Committee of the Section.

Francis X. Lyons has joined the Environmental Group at Schiff Hardin as a partner in the firm's Chicago office. Lyons counsels clients on issues related to project development, regulatory compliance, brownfields redevelopment, corporate investigations, environmental audits and due diligence, enforcement, litigation, and permitting. Before entering private practice, he served as regional administrator for the U.S. EPA Region 5 and as a trial attorney with the Environmental Enforcement Section of the U.S. Department of Justice.

Alfred J. Malefatto has been elected a Shareholder of Lewis, Longman & Walker in the firm's West Palm Beach office. Malefatto has been practicing environmental, land use, and administrative law in Florida since 1980. He represents developers, home builders, large and small businesses, and local governments in a variety of environmental permitting, enforcement and transactional matters, and land use proceedings. Previously, he practiced at Greenburg Traurig and served as the assistant general counsel at the Florida Department of Environmental Regulation.

Corporate moves

David Platt has been appointed Assistant General Counsel, Environmental, at United Technologies Corporation in Hartford, Connecticut. Platt supports UTC's Environmental Health & Safety function on environmental remediation matters, acquisitions and divestitures, and regulatory compliance issues. Previously, he was with Murtha Cullina LLP, where he practiced in the firm's environmental practice group.

Government moves

Nancye Bethurem has joined the U.S. Army Corps of Engineers as the division counsel in the Southwestern Division in Dallas. Previously, Bethurem was environmental, health & safety counsel in the Compliance Department of the Office of General Counsel at URS/Savannah River Remediation LLC. She is a vice chair of the Section's In-House Counsel Committee.

Randy Hill has been appointed as a judge on U.S.EPA's Environmental Appeals Board (EAB) in Washington, D.C. The EAB is the final decision maker on administrative appeals under EPA's major statutes. Hill has served as the acting director of EPA's Office of Wastewater Management, deputy director of EPA's Office of Civil Enforcement, and assistant general counsel in the Water Law Office of the Office of General Counsel. He has received two EPA Gold Medals and one EPA Silver Medal. He is a contributing author on the second and third editions of the American Bar Association's The Clean Water Act Handbook and is a member of the Section's Book Publishing Board.

This and that

Lee A. DeHihns, III was awarded the State Bar of Georgia Environmental Law Section 2012 Award for Service to the Profession of Environmental Law. DeHihns is senior counsel in Alston & Bird LLP's Environmental & Land Development Group and co-chair of the group's Climate & Sustainability Team in the firm's Atlanta office. Before entering private practice, he served as deputy regional administrator of U.S. EPA Region 4 and associate general counsel of U.S. EPA in Washington, D.C. He is a former Section chair and currently serves as a Section delegate to the ABA House of Delegates.

George Wyeth is currently serving as a Fulbright-Nehru Environmental Leadership Fellow in Pune, India, where he is documenting the business case for sustainable manufacturing in the Indian economy. Wyeth has had a long career with the U.S. EPA and served as director of the Integrated Environmental Strategies Division, the director of Policy and Program Change, and in the Office of General Counsel. He is a former Section Council member and a former committee chair.