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SECTION NEWS

Regulation of air pollutants in the Obama administration

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During President Barack Obama's first term, the U.S. Environmental Protection Agency (EPA) dedicated much of its effort to regulating air pollutants. Of all the major environmental rules promulgated from 2009 to 2012, more than 60 percent were adopted under just one statute, the Clean Air Act (CAA),

according to the Congressional Research Service. In a sharp departure from the Bush administration, many of those regulations addressed greenhouse gases (GHGs). Yet while the Obama administration's work on climate change may have generated the most media coverage, EPA also promulgated many other important rules that addressed more traditional "criteria" pollutants, like ozone and fine particles, or hazardous air pollutants (HAPs), such as mercury and arsenic.

EPA's regulatory initiatives under the CAA were quite controversial. Operators of coal-fired power plants, for example, felt their facilities were under attack, asserting that the agency imposed costly requirements on the industry unjustified by the science or the law. More generally, critics argued the many requirements imposed by EPA, covering broad swaths of the American economy, were hampering the nation's recovery from the recession. Indeed, House Republicans included seven air programs in a list of the "top 10 job-destroying regulations" from the federal bureaucracy, and they repeatedly introduced measures to block EPA's rules.

Supporters, on the other hand, contended the Obama administration was simply complying with statutory mandates and court-ordered deadlines. Although many states and environmental organizations praised EPA's work, some complained the agency and the president were not doing enough to protect air quality. Thus, from both ends of the political spectrum, EPA's extensive air regulatory program spurred debate.

HAPs

EPA was very active on HAPs, adopting standards under CAA section 112 for everything from the production of polymers and resins, to steel pickling facilities and asphalt processing plants, along with many other industrial sectors. Some of the agency's most controversial rules, however, addressed new and existing sources in three major industries: Portland cement manufacturing, industrial boilers, and power plants. In all three actions EPA was criticized for what industry representatives dubbed the "FrankenMACT" approach, in which the agency ostensibly cobbled together pollutant limits that reflected the "maximum achievable control technology" (MACT) at many different facilities to create a set of requirements that no single regulated plant could meet. Rather than this pollutant-by-pollutant approach, the industry believed that EPA should have identified MACT on a source-by-source basis. *See, e.g.*, National Association of Manufacturers, *Comments on National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial and Institutional Boilers*, 7 (Feb. 21, 2012). Environmental advocates, on the other hand, argued these latest rules were entirely consistent with EPA's long-standing methodology for setting MACT standards.

After initially promulgating the three regulations, EPA reopened them for further consideration, either per a court order or its own choice. For the Portland cement standards, the U.S. Court of Appeals for the D.C. Circuit remanded the regulation for further consideration because EPA improperly used data from both cement kilns and solid waste incinerators in setting the MACT limits. For industrial boilers, EPA announced the reconsideration at the very moment it issued the MACT standards. The agency needed additional time to address more than a dozen issues that could not be resolved before EPA had to release the rule to meet a court-ordered deadline. Finally, as to power plants, after receiving petitions for administrative reconsideration, EPA agreed to reopen a few "technical" issues for new sources, including how to measure compliance with the mercury limits.

EPA issued the reconsidered requirements for Portland cement plants and industrial boilers in December 2012. It expects to issue the revised mercury standards for new power plants in March 2013. None of the new regulations changed the agency's controversial practice of setting limits pollutant-by-pollutant, rather than source-by-source. That key issue—and many others on these HAP rules—will now be litigated before the D.C. Circuit.

Criteria pollutants

The Obama EPA also took significant action on national ambient air quality standards (NAAQS) for criteria pollutants under CAA section 109. It adopted more stringent "primary" NAAQS, designed to protect human health, for nitrogen dioxide (NO2) and sulfur dioxide (SO2). The nitrogen dioxide rule was upheld by the D.C. Circuit, and in a separate opinion the circuit court upheld the sulfur dioxide rule. The agency also initially proposed new "secondary" NAAQS for NO2 and SO2 designed to avoid harms to the ecosystem but later reversed course, prompting lawsuits from environmentalists. In addition, EPA chose to retain the existing NAAQS for carbon monoxide and coarse particles. For fine particles, the agency issued more stringent primary NAAQS in December 2012 that likely will be challenged in the D.C. Circuit.

Perhaps the biggest NAAQS story, however, is not the rules EPA finalized, but the agency's proposed ozone NAAQS that eventually succumbed to political opposition. After the new administration announced in March 2009 that EPA would reevaluate the ozone standard put forth under President Bush, the agency spent months reassessing all the data and eventually proposed a stricter standard. Critics in the regulated community and in Congress used EPA's own data to highlight the regulation's enormous compliance costs. On September 2, 2011, after political pressure continued to mount, President Obama asked EPA to withdraw the proposal, greatly disappointing his environmental supporters. All sides will now be watching closely as the agency moves forward with a revised proposal, expected in late 2013.

Separately, the Obama administration and its allies suffered a significant defeat when EPA's Cross-State Air Pollution Rule (CSAPR) was struck down by the D.C. Circuit. That regulation was designed to help downwind states in the eastern United States comply with the NAAQS for ozone and fine particles by limiting upwind emissions of SO2 and nitrogen oxides (NOx) from power plants. *See* M. Campbell & B. Kilpatrick, *The Cross-State Air Pollution Rule and EPA's Rush to Regulate*, 43 TRENDS (Section of Env't, Energy, & Res., Am. Bar Ass'n), No. 3, Jan./Feb. 2012. CSAPR was an attempt to replace the Bush-era Clean Air Interstate Rule (CAIR), which itself was remanded (but not vacated) by the D.C. Circuit, and so now EPA must work even more carefully to comply with the court's various opinions on the difficult issue of interstate air pollution.

GHGs

GHGs, of course, represent one of the major areas of controversy for the Obama administration. Many of the developments over the last four years are well summarized in recent Trends articles and so will not be repeated here. *See*, *e.g.*, M. Gerrard, *D.C. Circuit Clears Path for GHG Rules, but Politics Remain*, 44 TRENDS (Section of Env't, Energy, & Res., Am. Bar Ass'n), No. 2, Nov./Dec. 2012. Highlighted here

are two particular rulemakings from 2012 that are receiving great scrutiny, in part, because of their implications for future regulations.

The first is EPA's proposal for "new source performance standards" (NSPS), under CAA section 111(b), for GHGs from new power plants burning fossil fuels. This highly contentious proposal received nearly three million comments during the public review period. The utility industry believes the rule will effectively ban the construction of new coal – and oil-fired power plants, because the agency set a GHG limit that can only be met by burning natural gas or using carbon capture and sequestration techniques that, in the industry's view, are costly and unproven. EPA and its allies, on the other hand, believe the standards simply reflect current market conditions, in which natural gas is far cheaper than other fuels so that operators are choosing—even without the NSPS—to build only new power plants fueled with natural gas. The rule is important for both sides not only in its own right, but because it will trigger EPA's obligation under CAA section 111(d) to adopt emission guidelines for *existing* power plants, which by far represent a greater source of GHGs than new plants. Hence, utilities are fighting vigorously to defeat the NSPS—even bringing legal challenges before it is final—and environmentalists will fight just as hard to protect what they view as a key to GHG policy over the coming decade.

The second rulemaking does not directly regulate GHGs and, indeed, that is one of its criticisms. For the first time, EPA issued an NSPS for hydraulic fracturing operations at new natural gas wells. While environmental advocates supported that initial step, some sued the agency for failing to directly regulate methane emissions—a powerful GHG—and instead relying on the restrictions on volatile organic compounds (VOCs) to reduce methane emissions as a co-benefit. Here, too, the real battle is about GHG emission guidelines for *existing* sources, because directly regulating methane from new wells would trigger EPA's obligation to do so for existing wells also.

Air priorities in the future

In the coming years, EPA will not only be defending its recent final rules but also moving forward with new rules (and new fodder for litigation) in the pending matters noted above, including the MACT limit on mercury from power plants, a response to the CSAPR vacatur, and a revised NAAQS for ozone. The agency must also finalize the NSPS for GHGs from new power plants and consider emissions guidelines for existing plants.

The environmental community is anxious to see developments on other fronts as well. For example, EPA missed a December 2011 deadline for regulating GHG emissions at petroleum refineries, and the agency is separately considering revisions to the refinery limits for criteria pollutants and HAPs. Also of high priority for environmentalists are the "tier 3" emission standards for light duty vehicles, which would require auto manufacturers to further reduce tailpipe emissions of NOx, VOCs, and other common pollutants. To help car manufacturers comply, EPA is also expected to require oil refineries to reduce the sulfur content in gasoline.

Over the longer term, some states and environmental groups hope EPA will consider two related, over-arching issues on GHGs. The first is how to coordinate federal requirements—especially for existing facilities—with state programs that already regulate GHGs in California, the Northeast states, and

elsewhere. The second issue is how, if at all, EPA could create a nationwide GHG trading scheme that involves multiple industrial sectors, when its authority under the CAA may extend at most to intra-sector trading. *See* D. van der Vaart & J. Evans, *GHG Regulation: The Siren Song of Cap and Trade*, 43 TRENDS (Section of Env't, Energy, & Res., Am. Bar Ass'n), No. 5 (May/June 2012). Some argue that EPA might be able to facilitate a national trading program if it promulgated a NAAQS for GHGs. In fact, one advocacy group, the Center for Biological Diversity, petitioned the agency in December 2009 for just such a NAAQS, but to date EPA has not responded.

In sum, EPA already has many important CAA items on its agenda for President Obama's second term, and the number of air issues will only increase as time goes on.

EPA issues final revisions to Non-Hazardous Secondary Materials Rule, but questions remain

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On February 7, 2013, the Environmental Protection Agency (EPA) published in the Federal Register the final rule on "Non-Hazardous Secondary Materials That Are Solid Waste" (New NHSM Rule). This Rule was published in the same Federal Register notice as the final "Commercial and Industrial Solid Waste Incineration Units" (New CISWI Rule). EPA published another related rule, the "Final Emission Standards for Major Source Industrial, Commercial, and Institutional Boilers and Process Heaters" (New Boiler MACT Rule), on January 31, 2013.

The New NHSM Rule sets forth the process and criteria for determining whether a non-hazardous secondary material (NHSM) is deemed a waste (rather than fuel) when combusted. Combustion units that burn non-hazardous wastes are regulated under section 129 of the Clean Air Act (CAA), while boilers and industrial furnaces that burn fuel are subject to standards under section 112 of the act.

If a boiler located at a commercial or industrial facility burns a waste it triggers regulation as a commercial and industrial solid waste incineration (CISWI) unit. In fact, if a combustion unit burns a NHSM and the operator does not keep records demonstrating that the NHSM is not a waste, the combustion unit becomes regulated as a CISWI unit. 40 C.F.R. §§ 60.2265 and 60.2875. Once a boiler becomes a CISWI unit, it stays regulated as a CISWI unit for six months. Thus, if a boiler inadvertently burns a waste material and cannot meet the CISWI emissions standards, the combined impact of the NHSM Rule and the CISWI Rule is to shut down that boiler for six months.

The final Rules

The New NHSM Rule amends a final NHSM Rule that EPA published in March 2011. The New NHSM Rule retains the earlier regulatory structure, in that a combusted NHSM is a waste *unless* the operator can

demonstrate that the material meets certain criteria showing that the combustion is a legitimate use of the NHSM as a fuel or an ingredient and not waste disposal.

There are three avenues for determining that a NHSM is not a waste when combusted as a fuel: (1) self-determination, (2) petition for a non-waste determination, and (3) categorical non-waste determination by rule.

A combustor can determine for itself that a NHSM is not a waste if the material has not been discarded and the combustor and generator are the same entity. Or, if the material has been discarded (e.g., abandoned tire piles), a combustor can determine for itself that the material has been processed into a non-waste. Any person (not just the generator) may combust the processed non-waste in a unit that meets Boiler MACT (as opposed to CISWI) standards. According to EPA, processing a waste into a non-waste must involve the removal of contaminants, not just drying or sizing a material.

Both generator-combusted material and processed material must meet EPA's legitimacy criteria to be considered a fuel rather than a waste. Specifically, the fuel must:

- be managed as a valuable commodity;
- have meaningful heating value (if the fuel value is at least 5000 Btu on an as-fired basis you can presume that this criterion is met); and
- have contaminants (CAA pollutants contained in the material before combustion) at levels that are lower than or comparable to the traditional fuel that the unit is designed to burn.

Under the contaminant criterion, EPA looks at contaminants in the NHSM before combustion, rather than emissions. Both industry and environmental advocates have criticized this approach because it does not focus on public health impacts. EPA admits emissions are more relevant to risk but defends its approach by noting that the objective of the New NHSM Rule is to identify when discard is taking place and not risk reduction. New NHSM Rule, 78 Fed. Reg. 9112, 9141 (Feb. 7, 2013).

EPA has issued "comfort letters" agreeing that specific materials are non-wastes. Most of the comfort letters involve processing. EPA has posted these comfort letters on its website related to NHSM regulations.

Absent processing, a third party cannot combust a NHSM in a boiler or industrial furnace unless EPA has made a determination that the material is not a waste. The first avenue for this determination is to petition EPA. In the New NHSM Rule, EPA made changes to the petition process to allow petitions for categories of fuels, not just individual facilities, and to allow petitions to EPA Headquarters, instead of the EPA region, if the fuel is to be combusted at facilities in multiple EPA regions. The petition must describe how the combustion of the fuel meets EPA's legitimacy criteria.

The second avenue for a determination that a material qualifies as a fuel is a rulemaking. In the New NHSM Rule, EPA lists four categories of NHSM as fuels:

- scrap tires;

- resinated wood;
- coal refuse;
- pulp and paper sludges combusted on-site.

The definitions that establish the scope of the scrap tire and resinated wood listings are found at 40 C.F.R. 241.2. The conditions that govern the scope of the coal refuse and pulp and paper sludge listings are found in 40 C.F.R. 241.4(a).

Potentially regulated entities may petition EPA for a rulemaking to add additional materials to this list of fuels. In the preamble to the New NHSM Rule, EPA identified construction and demolition wood, paper recycling residuals, and, with more data, creosote-treated railroad ties, as potential candidates for future categorical listings, and promised to begin a rulemaking to list additional materials in the near future. In making a determination by rule, EPA may find that a material is not a waste even if it does not meet EPA's legitimacy criteria. Relevant factors identified by EPA include whether the use of the NHSM is integrally tied to the production process and the extent to which the NHSM is functionally the same as the comparable traditional fuel. EPA also acknowledges that the existence of a contract between the generator and the combustor is relevant. 78 Fed. Reg. at 9159–60.

Some questions under the New NHSM Rule

In the New NHSM Rule, EPA made some changes to make it easier to demonstrate that a NHSM is not a waste when combusted. EPA clarified that contaminants may be grouped such that aggregate levels of categories of contaminants that share physical and chemical properties (such as volatile organic compounds and semi-volatile organic compounds) be compared. Metals may be grouped, but volatile, semi-volatile, and low-volatile metals must be grouped separately.

EPA also clarified that it is permissible to compare contaminants in NHSMs to maximum contaminant values in traditional fuel as long as a relevant comparison is being made. For example, you can compare the Upper Prediction Limit at the 90 percent confidence level for each contaminant or group of contaminants in a NHSM to the maximum value for each contaminant or group of contaminants in the appropriate traditional fuel. Notwithstanding this increased flexibility, EPA also limited the ability to make contaminant comparisons by allowing comparisons to a traditional fuel only if a combustion unit has a delivery mechanism for that traditional fuel, whether or not the combustor ever plans to combust it.

The New NHSM Rule also applies to ingredients that are combusted, but it is unclear what ingredients are actually affected by the Rule. According to EPA's Office of Air and Radiation, if combustion of an ingredient does not take place (where combustion is a chemical process accompanied by the evolution of heat and light), then an ingredient is not subject to the New NHSM Rule or the CISWI Rule. *See* 76 Fed. Reg. 28,318, 28,322 (May 17, 2011); Keith Barnett, April 25, 2011, Memorandum to the CISWI Docket on Combustion in a Cement Kiln and Cement Kilns' Use of Tires as Fuel. However, in the preamble to the New NHSM Rule, EPA's Office of Solid Waste and Emergency Response stated that unless an ingredient remains in the product that is produced by the combustion process, the use of a NHSM as an ingredient would fail to meet EPA's legitimacy criteria for ingredients. *See* 78 Fed. Reg. at 9141. If the ingredient remains in a final product, it is difficult to understand how it has been combusted. EPA

recommends that combustors seek an applicability determination from EPA if they are not sure whether their ingredients are being combusted. Summary of Public Comments and Responses for: Commercial and Industrial Solid Waste Incineration (CISWI) Rule (EPA-HQ-OAR-2003-0119-2494), at 265.

Finally, in the revisions to the CISWI Rule, EPA reinstated the definition of contained gaseous material: "contained gaseous material means gases that are in a container when that container is combusted." 40 C.F.R. §§ 60.2265, 60.2875. The Resource Conservation and Recovery Act (RCRA) definition of solid waste includes contained gaseous material, but not uncontained gases. Thus, gaseous material is not a waste when it is combusted, unless combustion occurs in a container and the container itself is combusted. This clarification is important for the continued use of landfill gas, fuels developed from the gasification of wastes and other secondary materials, and the continued combustion of gases in air pollution control equipment. Here, too, EPA has raised some questions. In particular, in footnote 5 of the preamble to the New CISWI Rule, EPA has said that containers that are combusted while holding a gas, thereby making the gas a waste, can include stationary containers. It is difficult to imagine how anyone would combust a stationary container that is containing a gas, unless there is a fire or explosion. In addition, EPA appears to be reserving the right to regulate gaseous material under RCRA in other (non-combustion) contexts.

The New Boiler MACT Rule became effective on January 31, 2012, but the date for complying with the attendant emissions standards is three to four years away. Meanwhile, operators must notify EPA by May 31, 2013, that they are subject to the Boiler MACT standards. Combustors also must immediately begin keeping records relating to the combustion of NHSMs that have been determined not to be solid wastes. 40 C.F.R. § 63.7555(d)(2).

Under the New CISWI Rule, 40 C.F.R. subpart CCCC now takes effect August 7, 2013. The amendments to the emission guidelines in 40 C.F.R. subpart DDDD became effective on February 7, 2013. However, for existing sources no new regulatory requirements (including record-keeping related to non-waste determinations) take effect until a state modifies its program or five years from now, whichever is earlier.

The New NHSM Rule is effective on April 8, 2013.

Given the draconian consequences to a combustor of misclassifying a NHSM, EPA is likely to find itself in the business of making non-waste determinations for a very long time.

What the energy industry can expect from President Obama's second term and a new Congress

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The general consensus among Beltway insiders is that the 112th Congress, which concluded at the end of 2012, was the least productive Congress in recent history. And the session did not end on a high note. Facing a fiscal cliff that included the expiration of the Bush tax cuts and sequestration (the mandatory cuts in defense and non-defense discretionary programs), as well as the looming debt ceiling and expiration of the continuing resolution, Congress only managed to address the expiring tax cuts. Nevertheless, much of the energy industry fared quite well during the 112th Congress and the first four years of the Obama administration, notwithstanding one of the worst financial crises in modern history. This was due, at least in part, to the passage of the American Recovery and Reinvestment Act of 2009 (ARRA).

ARRA and the energy industry

ARRA was passed at the height of the financial crisis. In terms of renewable energy, ARRA provided a critical safety net for the industry. Section 45 and Section 48 of the Internal Revenue Code (IRC) provide for production tax credits and investment tax credits, respectively, for qualified renewable energy technologies. Even so, the renewables sector lost half of its available tax equity partners during the financial crisis. That lack of available tax equity partners placed in jeopardy the financing for many such renewable projects, since renewable developers—as start-up entities—have little or no ability to use tax benefits themselves. The Treasury Grant Program in ARRA (Section 1603) provided a cash grant equal to 30 percent of the basis of the property to the renewable energy developer, thereby providing substitute financing for commitments lost during the financial crisis. ARRA allocated additional funding for renewable and clean energy technologies, as well as funding for transmission and smart grid technologies. Congress, however, declined to extend Treasury's Section 1603 grant program beyond 2011.

The renewables industry began to see a decline in new projects in 2012 resulting from a combination of factors, including the loss of Treasury's cash grant financing, low natural gas prices, and the impending expiration of the Production Tax Credit (PTC) for wind technologies. Congress extended the PTC for wind technologies as part of the American Taxpayer Relief Act of 2012, and changed the PTC availability. Now, developers may use technologies qualifying under IRC Section 45 to claim the PTC as long as the project construction begins prior to December 31, 2013. *See* D. Levitan, *Wind Power Tax Credit Survives Fiscal Cliff Deal*, FORBES, Jan. 2, 2013. These changes should spur some additional renewables projects; but long-term support for these technologies continues to remain in doubt.

In addition to the funding provided through ARRA, the Obama administration was able to take some steps to further support clean energy technologies during the president's first term. For example, the president issued Executive Orders No. 13514 and No. 13423, directing agencies to take certain actions to improve the environmental, energy, and economic performance of federal facilities and to ramp up support for increased industrial combined heat and power systems. The Department of Defense (DOD) has also been instrumental in providing support both for renewable energy and biofuels. DOD believes that such technologies will help the military to become more secure and reduce its vulnerabilities in combat.

Yet to come

Looking ahead to the 113th Congress and the second Obama term, the big question is whether the past political battles portend further political gridlock. Regardless of the importance of particular issues in the energy field, little will get done in Washington if political gridlock between Republicans and Democrats continues. The extension of the PTC for wind occurred at the 11th hour and likely because the House allowed the Senate to essentially write the bill. The last-minute efforts included a significant number of tax extender provisions. And because Congress addressed only one of the "fiscal cliff" issues, the potential for more gridlock remains. Although the debt ceiling was temporarily raised, sequestration was delayed until the beginning of March, and the current appropriations continuing resolution will expire at the end of March. It is extremely unlikely that Congress will consider any other energy issues while they attempt to resolve the overall budget debate. Moreover, how Congress resolves these issues and what they decide could have a significant impact on whether and what energy issues are addressed.

Congress has signaled that it intends to take up comprehensive tax reform. Beyond the question of whether Congress will actually be able to address such a large and complicated issue is the question of how tax reform would impact both conventional and renewable resources. The wind industry has signaled that it would be willing to phase out the PTC, but would want that phase-out to extend over a number of years. Comprehensive tax reform could include such a phase-out. Tax reform also presents an opportunity for new tax benefits for the renewables industry. One option discussed would permit renewable energy companies to organize as master limited partnerships to attract new investors. On the other hand, tax reform could entirely eliminate both the PTC and the investment tax credit. Tax reform is also of concern to the non-renewable energy sectors. For example, the oil industry will likely be resistant to any changes to its tax benefits.

Regardless of whether Congress has the appetite or the ability to pass energy legislation, the Senate Energy and Natural Resources Committee will likely be busy because of a change in leadership. Senator Ron Wyden (D-OR) is the committee's new chairman and he has committed to working on a bipartisan basis with Ranking Member Lisa Murkowski (R-AK). Among the issues the committee may consider are energy innovation, energy efficiency, coal and natural gas exports, cybersecurity, nuclear waste storage, and the transmission grid. While Senator Wyden signed onto Senator Jeff Bingaman's Clean Energy Standard (CES) last year, the prospects for a CES in 2013 are low. Regardless, the question of the appropriate role for government in renewable energy will likely be an important issue for the committee.

Hydraulic fracturing (or fracking) could be an area that gains attention this year, both on the Hill and with the administration. Fracking has grown significantly over the last decade, with shale gas now accounting for nearly 30 percent of total U.S. natural gas production in 2010, according to the Energy Information Administration. This significant increase in production has also been matched with reductions in the price of natural gas, which has made it more difficult for coal and renewable generation to compete with gas generation. At the same time, fracking has been a boon for the economy. In 2010, the production of shale gas sustained 600,000 jobs. Domestic job growth from fracking is expected to grow over 30 percent by 2015. The economic benefit is estimated to be approximately $120 billion to the overall economy.

Both Congress and the administration have been struggling with whether and how to address fracking, and that will likely continue. In the Energy Policy Act of 2005, Congress exempted fracking from the Safe Drinking Water Act's Underground Injection Control (UIC) rules, except where diesel fuel is used. Since 2009, members of both the House and Senate have tried to revoke the exemption from UIC regulation, and such efforts will likely persist in the coming years. The administration has also been engaged in fracking issues, while recognizing the limitations on federal authority and the need to tread lightly on state regulation of fracking. Given the impact cheap natural gas has had and will continue to have on other generation technologies and the national economy, any actions taken on fracking will likely be vigorously debated.

In addition to fracking, policy issues regarding liquefied natural gas (LNG) imports will be debated. The Department of Energy (DOE), which has authority to approve natural gas export permits, has numerous applications pending. DOE has also recently asked for public comments on two key studies addressing LNG exports. How DOE addresses this issue and how Congress responds to such actions could have a huge impact on power suppliers and natural gas producers seeking additional revenues and end users worried about increased prices.

While fracking is often thought of as a natural gas play, most recent fracking activity has involved obtaining oil, so that any actions taken by Congress or the administration will also have an impact on the oil industry. A recent report from the International Energy Agency suggests that the United States could become "energy independent" by 2035 if current oil production levels from fracking continue. But likely the most visible oil issue in 2013 relates to the Keystone Pipeline, which proved politically divisive in the last few years. Many insiders believe the project could be quietly approved this year using an alternative route through Nebraska.

Finally, issues relating to climate change continue to percolate in Congress and within the administration. The financial crisis pushed climate change proposals off the agendas of the relevant House and Senate committees over the last few years, but recent weather events (including Hurricane Sandy) have again raised congressional interest in the subject. In addition, the idea of a carbon tax has resurfaced and will likely be included, at least in the discussion phase, in the comprehensive tax reform debate.

The 113th Congress and the Obama administration's second term could prove critical to the renewables industry, as tax credits and the long-term continuation of other government incentives are considered. Low natural gas prices are expected to remain for the next few years as a result of the shale gas boom, which could negatively impact both renewable generation and coal-fired generation. How Congress and the administration address fracking issues, as well as renewable generation and coal, could have a significant impact on the generation portfolio of electric energy companies for years to come. New national policies on energy innovation, in terms of enhanced generation and transmission efficiency, as well as storage and transportation technologies, could make the United States a less energy intensive and more energy independent country. The challenge for both Congress and the administration during the 113th Congress will be when and how to engage on these issues—provided that engagement is possible in this stormy political climate.

Federal information access gets an upgrade
Stephen Gidiere and Tal Simpson

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Two new government websites launched in Fall 2012 aim to improve public access to federal information. FOIAonline is a web tool for submitting, tracking, and reviewing prior Freedom of Information Act requests. Congress.gov, still in beta, will replace the Library of Congress's existing congressional information system, Thomas.

FOIAonline

Several federal agencies have jointly launched a new website for processing, tracking, and storing the results of FOIA requests. Spearheaded by an Environmental Protection Agency (EPA) team and the Office of Government Information Services, the effort to create the new site began as a sort of inversion of Regulations.gov, which EPA administers. On Regulations.gov, agencies post proposed rules and accept public comments; on FOIAonline, they accept FOIA requests from the public and produce responsive documents. The site has been live since October 1, 2012, and current participating agencies include EPA, the Department of Commerce, Department of the Treasury, Federal Labor Relations Authority, Merit Systems Protection Board, and National Archives and Records Administration. The extent of each agency's participation varies somewhat.

FOIAonline allows registered users to request information under FOIA from participating agencies, track the status of and modify or withdraw those requests, and file appeals. Registration is simple and free. Registered users are also able to communicate with the staff handling their requests directly through the site and receive records electronically, which should prevent delivery costs and delays. Users who do not register are still able to submit requests but have more limited tracking and communication capabilities.

One of the site's key features—and one that does not require registration to utilize—is users' ability to search past FOIA requests and responses across all participating agencies. The agencies will post requests they receive and materials they produce in response—in searchable form, in fact—so that subsequent would-be requesters might access information that they otherwise would have to request and agency employees may likewise avoid duplicating past responses. In other words, requests and released documents are now available to the general public rather than only to the original requester. This takes one step further the existing requirement in FOIA for agencies to post frequently-requested records. The information one can search varies by agency, but generally, it is possible to search for requests, appeals, and records released in response to a request. This feature will no doubt increase efficiency on both ends of a FOIA request or a would-be FOIA request. However, so far, the participating agencies have not consistently fulfilled their pledge to post produced data or to make posted material searchable by keyword.

The site also enables users to generate reports on participating agencies' FOIA activities during a given period of time. Using data from the agencies' annual FOIA reports, this feature can produce reports on the disposition of requests, processing times, invocation of FOIA exemptions, and more. Then again, the data from which reports can be generated on FOIAonline dates back only to October 1, 2012—the inception of the site—whereas the Department of Justice's FOIA.gov site offers a similar feature for *all* federal agencies and includes several years' worth of data. FOIAonline's Public User Guide explains the reports feature, along with all other aspects of the site, in moderately helpful terms. Computer-based training on the site is allegedly "coming soon."

FOIAonline should also streamline and increase the efficiency of agencies' FOIA-request processing. With requests received electronically, FOIA officers should be able to quickly pass them to the agency component most likely to have responsive materials, which is additionally significant because the FOIA's mandatory response timelines begin when the request is received by the appropriate agency component.

Environmental and natural resources law practitioners should be pleased that EPA and the Department of Commerce (including its National Oceanic and Atmospheric Administration) were among the first agencies to utilize FOIAonline, but, since participation is voluntary, more agencies need to be encouraged to join the site. For lawyers in the energy field, participation by the Department of Energy would be a useful addition. Additionally, participating agencies must adhere to their commitment to transparency by posting requested materials and making them easily searchable. And hopefully, FOIAonline will not become a crutch for FOIA officers, tempting them to simply direct new requesters to posted documents instead of performing a new search specific to the requester.

Congress.gov

The Library of Congress, in conjunction with the Senate, House, and Government Printing Office, launched Congress.gov last September, beginning a transformation from the existing, outdated legislative information system, Thomas (launched in 1995), to a more modern, user-friendly configuration. All of the information available on Thomas will eventually be incorporated into the new beta site, but presently, some older congressional information remains available only on Thomas. Like Thomas, Congress.gov includes all federal legislation, the Congressional Record, and other congressional information like schedules and calendars. One handy new feature offers a profile of each member of Congress, complete with a list of, and links to, legislation each has sponsored or cosponsored. Congress.gov, when completed, will essentially just be the new Thomas—with improved searching capabilities, a more readable design, and a few more bells and whistles.

FOIAonline and Congress.gov both promise new accessibility to public documents and public record requests. Time will tell if enough agencies join FOIAonline and fully participate to make its potential features truly useful to environmental, energy, and natural resources lawyers.

How federal wildlife laws impact development of wind energy

Alan M. Glen, Rebecca D. Barho, and Laura M. Evans

Alan M. Glen is a partner in the Austin, Texas, office at Sedgwick LLP and enjoys a national federal environmental law practice. Rebecca D. Barho and Laura M. Evans are associates in the Land Use and Natural Resources Section of Sedgwick LLP's Austin office.

Wind energy is one of the most established and promising of the renewable energies. The U.S. Department of Energy reports that wind power could provide 20 percent of the nation's electricity by 2030, support 500,000 jobs, reduce greenhouse gas emissions, and save four trillion gallons of water (a 40-year supply for the city of Phoenix). While the wind industry is generally touted as a beneficial, clean source of energy, wind development is not entirely without environmental consequences. For example, potential effects to federally listed species and migratory birds from activities associated with construction and/or operation of wind energy facilities may include loss of habitat, habitat fragmentation, habitat avoidance, and collisions with turbines, towers, or transmission lines. These impacts will continue to play a significant role in wind facility siting, development, and operation nationwide. The federal laws that affect domestic wind farms with respect to migratory birds and federally listed species—the Endangered Species Act (ESA), the Migratory Bird Treaty Act (MBTA), and the Bald and Golden Eagle Protection Act (Eagle Protection Act)—have various implications on wind development projects and several tools are available to comply with each law.

ESA regulation and compliance

The ESA prohibits the unauthorized "take" of endangered species. "Take" is defined by the ESA as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1533. The U.S. Fish & Wildlife Service (Service) issued regulations that define "harm" as "an act which actually kills or injures wildlife . . . [and] may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. §17.3.

The ESA can and does affect wind energy development and operations. For example, in 2009, a federal court enjoined the operation and expansion of a wind facility until the developer obtained an incidental take permit for potential take of the endangered Indiana bat. *Animal Welfare Institute v. Beech Ridge Energy*, LLC, 675 F. Supp. 2d 540 (D. Md. 2009). Not all potential impacts to listed species rise to the level of "take' as defined in the ESA, however, and consultation with qualified biologists and legal counsel is advisable to assess, avoid, and minimize the potential impacts to listed species. There are three basic ESA compliance options for the construction and operation of a wind energy facility: take avoidance, authorization through the ESA section 7 interagency consultation process, and authorization through an ESA section 10(a) incidental take permit.

To utilize the take avoidance approach, the developer must construct and operate the wind energy facility to minimize the likelihood of take of listed species to the point that it is not reasonable to obtain an incidental take permit. Whether the activity rises to the level of take initially is determined by the wind developer, who accepts the risk that the Service through an enforcement action, or a third party through

an ESA citizen lawsuit, may challenge that conclusion. Early consultation with a qualified biologist is critical to avoid those challenges. One current tool to use as an ESA avoidance approach is implementation of the Service's Land-Based Wind Energy Guidelines (Guidelines), which were originally developed through a facilitated, collaborative effort of the Wind Turbine Guidelines Advisory Committee. The Guidelines are voluntary and provide a process to evaluate risks and plan for species of concern when siting, constructing, and operating wind facilities. The Guidelines state that "if a violation occurs the Service will consider a developer's documented efforts to . . . adhere to the Guidelines."

ESA compliance can also occur through the ESA section 7 interagency consultation process, which prohibits federal agencies from carrying out, authorizing, or funding activities that jeopardize the continued existence of a listed species in the wild or result in the adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2). Section 7 is frequently triggered by a non-federal party applying for a permit under another regulatory scheme (e.g., a Clean Water Act section 404 permit). It is also triggered by projects needing permission to operate on federal lands (e.g., a Bureau of Land Management right-of-way grant). At the end of the section 7 consultation process, the Service issues a biological opinion and an "incidental take statement," which authorizes take of listed species incidental to the agency action. 16 U.S.C. § 1536(b)(4).

ESA section 10(a)(1)(B) authorizes the Service to issue an incidental take permit allowing a "take" that is incidental to an otherwise lawful non-federal activity. 16 U.S.C. § 1538(a)(1)(B). An applicant seeking such a permit must prepare a habitat conservation plan (HCP) demonstrating that adverse effects on the species will be minimized and mitigated to the maximum extent practicable. Processing an HCP is a time-consuming process that frequently requires a year or more, includes compliance with the National Environmental Policy Act (NEPA), and requires opportunity for public comment. The Service's issuance of an incidental take permit is also considered a federal action that triggers an ESA section 7 "intraService" consultation. Incidental take permits are becoming a much more common mode of ESA compliance for the industry, particularly since *Beech Ridge*. There are several pending incidental take permits for individual wind projects around the country as well as two multi-state permits, the Great Plains Habitat Conservation Plan and the Midwest Wind Energy Multi-Species Habitat Conservation Plan, which is under development.

MBTA regulation and compliance

The MBTA makes it unlawful to "pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, offer to purchase, purchase, deliver for transportation, transport, or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird. . . ." 16 U.S.C. § 703. "Take" is not defined in the MBTA, but the Service's implementing regulations define it as "to pursue, hunt, shoot, wound, kill, trap, capture or collect." 50 C.F.R. § 10.12. The MBTA regulates a narrower set of effects, albeit across far more species, than does the ESA, because there is no parallel provision under the MBTA prohibiting "harm" to MBTA-protected species and there is no mechanism for "incidental take" authorization. A district court recently held that the death of migratory birds resulting from lawful commercial activity does not constitute "take" under the MBTA. *United States. v. Brigham Oil and Gas, L.P.*, 840 F. Supp. 2d 1202 (D.N.D. 2012). However, another district court recently held that a defendant is liable under the MBTA for bird

mortalities if it is reasonably foreseeable that its activities would result in bird deaths. *United States v. Citgo Petroleum Corp.*, 2012 WL 4068675 (S.D. Tex. 2012). Although the MBTA contains no mechanism for incidental take authorization, there are several considerations regarding MBTA compliance, which include prosecutorial discretion and utilization of avian protection plans (APPs).

Unfortunately, if one assumes that bird collisions with wind farms violate the MBTA, there is virtually no method to avoid some level of violation, as essentially all wind farms cause some death of migratory birds, although at a tiny fraction of other anthroprogenic causes of bird mortality such as birds colliding with buildings or being killed by housecats. Wind developers are left to rely on the Service's prosecutorial discretion as a result, but as of this writing, there have been no reported instances of a Service prosecution of a wind farm under the MBTA. According to a 2005 U.S. Government Accountability Office report, in most cases, the Service has declined to prosecute wind energy facilities under the MBTA because of the "relatively low levels of mortality" caused by such facilities.

An evolving method to address MBTA compliance for wind generation facilities is development and implementation of APPs. APPs have been commonplace in the electric transmission industry for a number of years, but wind industry use has been limited. In general, APPs include protocols to employ during the construction and operation of wind farms that avoid, minimize, and monitor avian mortalities. There are several unresolved issues with respect to APP implementation in the context of wind facilities. First, it is unclear whether the Service's formal "approval" of an APP triggers NEPA and is subject to review under the Administrative Procedure Act (APA). Second, there is a question as to what extent the Service may exercise blanket prosecutorial discretion as to prospective activities. Finally, should the Service exercise its prosecutorial discretion for an extended period, there is question as to whether that commitment is subject to third-party review under the APA.

Special consideration for eagles

Bald and golden eagles receive additional legal protections pursuant to Eagle Protection Act. 16 U.S.C. §§ 668–668d. The act prohibits the "take, sale, purchase, barter, offer for sale, export or import, at any time or in any manner" of any bald or golden eagle, alive or dead, or any bald or golden eagle part, nest, or egg. 16 U.S.C. § 668. In 2009, the Service established a permitting process for take of bald and golden eagles where the take is "compatible with the preservation of the bald eagle and the golden eagle; necessary to protect an interest in a particular locality; associated with but not the purpose of the activity; and (1) For individual instances of take where the take cannot practicably be avoided; or (2) For programmatic take where the take is unavoidable even though advanced conservation practices are being implemented." 50 C.F.R. § 22.26.

The Draft Eagle Conservation Plan Guidance (Draft Eagle Guidance) published by the Service in 2011 specifically addresses wind-facility projects, explains how the Service will approach the issuance of programmatic take permits for wind projects. The Draft Guidance provides guidelines for the development of Eagle Conservation Plans that support the issuance of programmatic permits. The Draft Eagle Guidance provides recommendations for conservation practices and adaptive management to meet Eagle Protection Act standards. Although the Service has not finalized the Draft Eagle Guidance at this time, a few wind developers are using its framework to apply for eagle programmatic permits. The act

and the accompanying Draft Eagle Guidance present a number of problems for wind developers, such as high compliance costs, no assurances because the Service can impose additional restrictions in the future, and a mandatory 5-year permit term with no guarantee of renewal. In April 2012, the Service did, however, issue a Proposed Rule to revise Eagle Protection Act regulations to allow for 30-year programmatic permits (but seemingly without assurances). The Service also issued an Advance Notice of Proposed Rulemaking to gather public comment on potential revisions to the programmatic permit regulations. Even with the Service's recent actions, it remains unclear how current problems will be resolved. Meanwhile, the Service is pursuing enforcement actions for wind farms alleged to have caused take of eagles.

What's needed

Wind energy facilities have been operating within the United States for many years, and bring some acknowledged environmental benefits. Yet, there remains a need for ongoing and increased collaborated efforts among numerous stakeholders to bolster the collective knowledge of the effects of wind development upon listed species and migratory birds, develop techniques to minimize adverse impacts on birds, and develop efficient regulatory assurances with respect to construction and operation of wind facilities.

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.

Constitutional law

The Supreme Court held that government-induced flooding of land may be a takings compensable under the Fifth Amendment even if it is limited in duration. *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 ((2012). From 1993 to 2000 the U.S. Army Corps of Engineers (Corps) periodically authorized flooding into a 23,000 acre wildlife management area during the peak timber growing season. The Arkansas Game and Fish Commission sued the United States, alleging that the temporary flooding adversely impacted the wildlife management area and constituted a taking of property that entitled the commission to compensation. The Court of Federal Claims' judgment in favor of the commission was reversed by the Federal Circuit, which held that the Corps' actions could give rise to a taking claim only if the flooding is "permanent or inevitably recurring." The Supreme Court reversed, finding no justification for setting flooding apart from other government intrusions on property. The Court rejected the government's argument that reversing the Federal Circuit's decision risks disrupting public works dedicated to flood control. The government's other arguments relating to causation, foreseeability, and substantiality remain open to consideration upon remand.

A land owner who was denied a Clean Water Act (CWA) § 404 permit to fill wetlands to develop his property was held not entitled to compensation under the Fifth Amendment. *Mehaffy v. United States*, 2012 WL 6097768 (Fed. Cir. Dec. 10, 2012) (not certified for publication). The plaintiff purchased the property in May 2000, long after the enactment of the CWA, and thus he did not have a reasonable, investment-backed expectation that he could develop the property without being subject to the permit requirements of the act. The fact that an easement was granted to a prior owner before the passage of the CWA is not probative, because the reasonableness of plaintiff's expectations must be considered as of the time he purchased the property and plaintiff knew as early as 1980 that the Army Corps of Engineers intended to apply § 404 to the property.

Clean Water Act

The Supreme Court held 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 Clean Water Act. *L.A. Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 133 S. Ct. 710 (Jan. 8, 2013). The Natural Resources Defense Council, Inc. and other parties had filed a citizen suit alleging that the District was violating the terms of its separate storm water system permit based on water stations located at monitoring stations where water flowed out of concrete-lined portions of the rivers to the unlined portions of the same rivers. The Court relied on its opinion in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109–112 (2004), holding that the transfer of contaminated water between two portions of the same water body did not constitute a discharge of pollutants under the act.

CERCLA

A district court granted summary judgment to the United States concerning the propriety of the remedy to clean up the Lower Fox River Site. United States v. NCR Corp., No. 10-C-910, 2012 WL 5879106 (E.D. Wis. Nov. 21, 2012). A 2007 Record of Decision (ROD) remedy involved dredging, sand covering and capping PCB-contaminated sediment. By 2009 it had become clear that the ROD remedy would cost $701 million and that capping, which was estimated to cost $484 million, would be much cheaper. The district court agreed with the agencies that the cost increases alone are not a "fundamental" change in the basic nature of the remedy and thus do not require a ROD amendment. Rather, issues such as the method of remediation, the public impact, and feasibility "might be amenable to public comment, which is the very purpose of the ROD amendment procedures." The initial cost estimates for the remedy had anticipated as much as a 50 percent cost overrun, and the record demonstrates a substantial effort by the agencies to "consider all options fairly and honestly—without prejudice, without arbitrariness and without caprice."

Air quality

The D.C. Circuit upheld EPA's regulation of hazardous air pollutants (HAPs) from gold mine ore processing and production. *Desert Citizens Against Pollution v. EPA*, 699 F.3d 524 (D.C. Cir. 2012). The D.C. Circuit rejected petitioner's claim that whenever EPA sets maximum achievable control technology (MACT) standards for a source under Clean Air Act (CAA) § 112(c)(6), which governs seven specific

HAPs, it must impose MACT standards for emissions from that source of any HAP listed anywhere in § 112 of the CAA. The court deferred to EPA's interpretation of the statute, noting that petitioner's view would risk undercutting the priority that Congress assigned to the § 112(c)(6) HAPS. The court also held that EPA properly concluded that the record before it provided insufficient information to regulate fugitive emissions.

The D.C. Circuit vacated EPA's determination that it had met the regulatory obligations imposed on it by CAA § 112(c)(6) to list sources accounting for not less than 90 percent of the aggregate emissions of the pollutants subject to standards under § 112(d)(2) or (4). *Sierra Club v. EPA*, 699 F.3d 530 (D.C. Cir. 2012). The court held that EPA failed to provide notice and an opportunity for comments on the determination in violation of the Administrative Procedure Act. The court also rejected EPA's argument that the Sierra Club was using the present suit as a back door to attack long past rulemakings as satisfying the requirements of § 112(c)(6).

A coal-fired electric plant that replaced reheaters was held not entitled to the "routine maintenance, repair or replacement" (RMMR) exception to the new source review requirements for major modifications. *United States v. La. Generating*, LLC, No. 09-100-JJB-CN, 2012 WL 4107129 (M.D. La. Sept. 18, 2012). The district court reviewed the nature, extent, purpose, frequency, and cost of the work, the "WEPCO Factors," and emphasized that one should look across the industry at similar work on similar units in determining whether the work is routine. The court concluded that "[c]ommon sense dictates that when a generating facility takes 25 days and spends $4.5 million—the largest amount ever spent on the unit—with the intent to decrease forced outages and therefore increase future generation, this work cannot in any way be considered routine."

Endangered Species Act

The Ninth Circuit invalidated the approval of a 678-mile natural gas pipeline project from Wyoming to Oregon. *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101 (9th Cir. 2012). The court held that the biological opinion by the U.S. Fish and Wildlife Service (FWS) improperly relied on voluntary measures not part of the proposed action and not enforceable under the Endangered Species Act. The court also found that the FWS failed to consider the impacts on fish of withdrawal of groundwater, along the pipeline, that could affect surface water levels, and the court invalidated the Bureau of Land Management's Record of Decision that relied on the Biological Opinion.

31st Annual Water Law Conference: One sure thing—water supply uncertainty

Kathy Robb

Kathy Robb is a partner with Hunton & Williams in New York City. She is the program chair for the 31st Annual Water Law Conference.

Where do you find water in the desert? Why, at the 31st Annual Water Law Conference, to take place from June 5–7, 2013 at the stunning Red Rock Casino, Resort and Spa in Las Vegas! The country's

premier gathering of water resource lawyers is being held this year in the Mojave Desert, where issues surrounding the availability, ownership, storage, allocation, conveyance, and use of water are inescapable.

This year's conference theme is "Water for the Future: Coping with Scarcity." The program will engage lawyers of all experience levels on the issues surrounding the response to water supply uncertainty. As the impact of unpredictable water supplies is a central concern for energy production, practical strategies for securing water for solar power, shale oil and gas extraction, and hydropower generation will be explored. We'll also hear from federal, state, and local policy-makers on new initiatives for regulating streamflow by applying existing laws in new ways and by promulgating new rules. And as water dependent industries require new approaches to the management and disclosure of water-related risks, experts will discuss these emerging needs and the range of responses from business and investors.

Other panels will address the implications for water management of recent rulings and newer conflicts arising under the Endangered Species Act, client management in the negotiation of complex tribal water rights settlements, and the evolving role of the U.S. Army Corps of Engineers in water supply management—both East and West. Changes in international water law involving Canada and Mexico will be examined—changes that will affect just about every region in between. Additional offerings will include the popular Water Law 101 panel, focusing this year on the legal issues associated with analyzing and presenting complex mathematical modeling—a key ingredient of almost any dispute involving water availability, allocation, streamflow, or quality. The ethics session will focus on ethical issues commonly encountered by water law practitioners.

Three outstanding keynote speakers will join us for the 2013 conference: Patricia Mulroy, Robert Glennon, and John Cruden. Mulroy, general manager of the Las Vegas Valley Water District and the Southern Nevada Water Authority, is one of the arid West's most influential and innovative water management leaders and is internationally known. Glennon, professor at the University of Arizona James E. Rogers College of Law, is the insightful author of the best-selling *Unquenchable: America's Water Crisis and What to Do About It*. Cruden is the president of the Environmental Law Institute, and served as the U.S. Department of Justice Deputy Assistant Attorney General, Environment and Natural Resources Division, from 1995–2011. Their provocative and practical ideas on our nation's water future are sure to be a highlight of the program.

Conference attendees will have numerous opportunities for networking with colleagues. In addition to networking breaks throughout the one-and-a-half day program at Red Rock Resort, join us for a public service project in the nearby Red Rock Conservation Area on Wednesday before the official start of the conference. You are invited as well to register for a special hard hat, behind-the-scenes tour on Friday afternoon of Hoover Dam, one of the eight engineering wonders of the world.

The conference location—10 miles from the excitement and bright lights of the Las Vegas Strip—is at the gateway to the awe-inspiring Red Rock Canyon Conservation Area with its 19 trails, scenic loop drive and visitors' center, and views of the canyon's breathtaking crimson cliffs. Red Rock Canyon is just one of half a dozen of this nation's most beautiful parks and recreation areas within five hours of Las Vegas, and McCarran International airport is the closest airport to these parks. From Red Rock, Hoover Dam is a mere 45-minute drive, and Valley of Fire State Park is an hour away. Further afield are the Zion National

Recreation Area, Bryce Canyon National Park, and Grand Canyon National Park. Proximity to these spectacular destinations—all created by water, featuring water, or remarkable for the absence of water—makes the 2013 Water Law Conference a great jumping off point for a summer vacation that involves fun and opportunities for learning about the challenges of water scarcity.

Plan now to join us for the 31st Water Law Conference in June for great information on water law and policy issues central to your practice, terrific networking opportunities, and a truly breathtaking desert setting. Check out the 2013 Water Law Conference web page for more information as it becomes available and convenient online registration. I look forward to seeing you in Las Vegas!

Views from the Chair: The highest calling: Cultivating our future leaders

Alexandra Dapolito Dunn

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

"The growth and development of people is the highest calling of leadership."—Harvey S. Firestone

The lifeblood of any professional organization is the development and support of its new members. Offering valuable resources and opportunities often leads to the organization becoming a key device in a new member's professional career development tool box and to the member becoming a future leader in the organization. In my years in Section leadership, I have seen significant growth in and commitment to initiatives supporting law students, young lawyers, diversity, and new members. I'd like to take a few moments to highlight these programs and their dedicated lawyer leaders.

One of the Section's crown jewels this year is the establishment and conferring of the ABA Distinguished Environmental Advocates Award on twelve Rising Stars in the profession at a luncheon on March 22 during the Section's 42nd Spring Conference in Salt Lake City. Eligible candidates met the ABA's definition of "Young Lawyer"—those lawyers under the age of 36 or in practice fewer than five years—whose accomplishments are above and beyond those of their peers, and are deserving of recognition. They were required to hold a Juris Doctorate, and be leaders whose contributions to NGOs, communities, neighborhoods, the government, academia, and the practice of law are significant and belie their years and experience. The award recipients are:

- Brian Accardo, Florida Department of Environmental Protection, Tallahassee (University of Miami School of Law)
- Rita Bolt Barker, Wyche, P.A., Greenville, South Carolina (Harvard Law School)
- Marisa Blackshire, Alston & Bird LLP, Los Angeles (Southwestern University Law)
- Janice Dean, New York State Attorney General, Environmental Protection Bureau, New York City (Pace University School of Law)
- Hella Jordan Diamond, Environmental Law Institute, Washington, D.C. (University of California Berkeley School of Law)

- Reda Hicks, Diamond McCarthy LLP, Houston (University of California Berkeley School of Law)
- David Johnson, Arizona Department of Water Resources, Phoenix (Southern Methodist University Dedman School of Law, LLM Pace University School of Law)
- Melissa Meirink, Greenberg Traurig, LLP, Denver (Seattle University School of Law)
- Tina Meyers, Blue Water Baltimore.org, Baltimore (SUNY Buffalo Law School)
- Jessica O'Neill, Hangley Aronchick Segal Pudlin & Schiller, Philadelphia (Georgetown University Law Center)
- Jessica Scott, U.S. Environmental Protection Agency, Office of General Counsel, Washington, D.C. (Vermont Law School)
- Jennifer Sorenson, Natural Resources Defense Council, San Francisco (Yale Law School)

The Section's Rising Stars Committee, which reviewed nominations and selected the award recipients, was chaired by Karen Mignone of Verrill Dana LLP and included Professor John Bonine, University of Oregon School of Law, Eugene, Oregon; Robert J. Martineau, Jr., Tennessee Department of Environment & Conservation, Nashville; Vickie Patton, Environmental Defense Fund, Boulder, Colorado; William W. Kinsey, Bonneville Power Administration, Portland, Oregon; Catherine M. Wieman, California Attorney General's Office, Los Angeles; Elizabeth Bennett, Sheldon Lobel, P.C., New York City; Diana Csank, personal capacity, White House Council on Environmental Quality, Washington, D.C; Steven Schell, Chevron Corporation, San Francisco; and Karen M. Wardzinski, U.S. Department of Justice, Washington, D.C.

Another signature Section program is our Leadership Development Program (LDP), designed to support members interested in expanding a current leadership role or growing their Section knowledge so that they can assume a future leadership role. These individuals reflect diversity and help the Section support the ABA's Goal III. At the conclusion of each year's LDP, the class members have a stronger sense of Section operations and of leadership opportunities, and are better able to focus future Section involvement. The LDP has accepted both new and long-time Section members into the classes, making it a terrific laboratory for new leadership ideas. LDP benefits include registration fee waivers, a Section mentor, and travel and lodging assistance for one conference for those in government, academic, or public interest practice; young lawyers; or solo/small firm practitioners. The LDP is headed this year by Section Vice Chair Steve Miano of Hangley Aronchick Segal Pudlin & Schiller, Philadelphia. Watch for a call for applications this summer if you are interested in the 2012–2013 LDP.

The Section's Special Committee on Young Lawyers, chaired by Emily N. Masalski, Deutsch Levy & Engel Chartered, Chicago, offers a place to meet fellow Section members, opportunities to become more involved in the Section, and ways to learn about the practice. Closely related is the Section's Special Committee on Law Students, chaired by Susan Floyd King, Brunini, Grantham, Grower & Hewes PLLC, Jackson, Mississippi. The Section's law student members have access to career podcasts, complimentary participation in teleconferences via their Environmental Law Societies, and scholarship opportunities to Section conferences.

Together, the Young Lawyer and Law Student special committees host dynamic "Speed Networking" events at the Section's Spring and Fall conferences. Imagine a room packed with over 100 seasoned

lawyers, young lawyers, and law students talking in three-minute segments for over an hour about career paths and the ABA, and you have one of the Section's most popular events. In addition, at Section conferences our Guide Program matches experienced lawyers with a young lawyer or law student to provide advice and a friendly face. Law student achievement is recognized through the Section's annual award for the "The Law Student Environment, Energy, and Resources Program of the Year." The special committees are also working on several "meet the ABA" events at law schools and in major cities throughout the year.

The Section also supports activities which bring together practitioners, academics, and students to promote knowledge and learning. For example, on April 18, 2013, we are holding a Symposium with the University of Montana School of Law's Public Land & Resources Law Review entitled *Balancing Act & Paradigm Shift: The Role of Public Lands in America's Energy Future*. Chaired by Jeffrey Dennis, Federal Energy Regulatory Commission, Washington, D.C., the Symposium is also the School's 35th Public Land Law Symposium and the ABA's 41st National Spring Conference on the Environment. All members should consider attending this event. The Section also financially contributes to, and sends Section leaders to meaningfully participate in, other law student moots and law school forums, such as the Stetson Law International Environmental Moot Court Competition, a world-wide moot court, particularly its North America Regional Round to be held in Gulfport, Florida, in March 2013; the National Environmental Law Moot Court Competition at Pace Law School in New York, also held in February; and the University of Utah S.J. Quinney College of Law annual Wallace Stegner Center Conference, set for April 2013. Hopefully, the Section's presence at these events draws future Section members and demonstrates our commitment to students pursuing our fields of practice.

The Section's Membership Diversity Enhancement Program (MDEP) is designed for lawyers historically under-represented in our Section membership. Chaired by Professor James Hickey of Hofstra University School of Law, Hempstead, New York, the MDEP is open to minority lawyers, female lawyers, lawyers with disabilities, and lawyers with differing sexual orientation and gender identification that are young lawyers (by the ABA definition), or in government, public interest, academic, or solo practice. Through the MDEP, we can enhance Section activities, programs, and publications to better reflect the diverse perspectives and interests of lawyers who practice in the environment, energy, and resources areas. The Section pays 50 percent of an MDEP participant's ABA dues and waives his or her Section dues.

Hopefully this snapshot demonstrates the Section's commitment to the next generation of leaders. If you have ideas regarding ways we can improve our programs, or any questions, do not hesitate to reach out to me at Environ.Chair@americanbar.org or to the Section's Membership and Diversity Officer, Pam Barker, Appleton Papers Inc., Appleton, Wisconsin. Given the focus on the future members of our profession in this column, I end with the Latin word for "ever upward" frequently used by a favorite colleague, Professor Nicholas A. Robinson of Pace Law School, at the end of his letters—*excelsior*!

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

Christopher B. Amandes recently joined Morgan, Lewis & Bockius LLP's environmental practice group as a partner in the firm's Houston office. Amandes's practice focuses on environmental issues in transactions, regulatory compliance, counseling, enforcement defense, and resolution of environmental disputes. He was previously a partner at Vinson & Elkins LLP.

Scott Deatherage has joined Gardere Wynne Sewell LLP in the firm's Dallas office. Deatherage's practice focuses on environmental, energy, and greenhouse gas regulatory matters. He represents oil and gas, pipeline, mining, and manufacturing industries. Deatherage was previously a partner at Patton Boggs LLP.

Joseph L. Jenkins recently joined Lewis Glasser Casey & Rollins, PLLC in Charleston, West Virginia. Jenkin's practice focuses on energy and natural resources law, environmental law, and legislation, rule-making, and litigation with an emphasis in oil and natural gas, mining, and quarrying. He previously served as senior counsel for the West Virginia Department of Environmental Protection. Jenkins is a *Year in Revie*w co-vice chair for the Section's Mining and Mineral Extraction Committee.

Kermit Rader has joined Spector Gadon & Rosen, P.C. in Philadelphia where he will head the firm's environmental and energy law practice. Rader's practice focuses on environmental remediation, compliance, enforcement, transactions, and litigation. He also represents landowners in oil and gas leasing and pipeline agreements. Rader was previously with Hamburg, Rubin, Mullin, Maxwell & Lupin, PC.

This and that

Walter L. Sutton, Jr. was recognized by the ABA Commission on Racial and Ethnic Diversity in the Profession with a Spirit of Excellence Award at the ABA 2013 Midyear Meeting in Dallas. This award is given to ABA members who excel in their profession settings, who personify excellence, and who have a demonstrated commitment to racial and ethnic diversity in the legal profession. Sutton is Associate General Counsel, Legal Administration and External Relations for Wal-Mart Stores, Inc. in Bentonville, Arkansas. He has held a number of leadership positions in the Section.