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Table of Contents

Features

President Obama tackles climate change without Congress 2
Michael B. Gerrard

Tarrant Water District: Either a minimalist contractual decision or an invitation to hoard water 5
Sidney F. Ansbacher

D.C. Circuit vacates GHG Tailoring Rule deferral for biogenic sources 9
Roger R. Martella Jr. and Joel F. Visser

Offshore renewable energy leasing: Let the competition begin! 13
Peter Schaumberg, James Auslander, and John Cossa

An update on California’s cap-and-trade climate change policy: Continuing forward, perhaps beyond California 17
Nicholas W. van Aelstyn

Cybersecurity: Practical realities for environmental, energy, and natural resources lawyers..... 21
Claudia Rast

In Brief 25
Theodore L. Garrett

Section News

Views from the Chair: Section global initiatives help shape the Section’s premier forum role 28
William L. Penny

Join us for the 43rd Spring Conference! 30
Sean Dixon

President Obama tackles climate change without Congress

Michael B. Gerrard

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With a majority of the House of Representatives hostile to regulatory action on climate change, President Obama announced in his January 2013 State of the Union address, and again shortly thereafter in his second inaugural address, that he would use his existing statutory authority to move on what he called a threat to future generations. The president followed through on June 25 with a detailed action plan.

This article describes the principal elements of The President’s Climate Action Plan and the progress so far in implementing it.

Power plants – Coal-fired power plants are the largest source of greenhouse gas (GHG) emissions in the United States, and President Obama has put the U.S Environmental Protection Agency (EPA) on a timetable to regulate them. Indeed, the most prominent action EPA has taken since issuance of the plan is a proposal to control for the first time GHGs from new power plants. This was the revision and reissuance of a plan first proposed in April 2012.

The new proposal, issued on September 20 (the very day of the deadline set by the president), would establish new source performance standards (NSPS) for new fossil fuel plants. One standard would limit GHG emissions from new natural gas-fired plants; another slightly higher standard would limit them from new coal-fired plants. Modern combined cycle natural gas plants could meet the standards, but coal plants could not unless they employed carbon capture and sequestration (CCS), a method of capturing the GHGs before they leave the smokestack, piping the gas to underground reservoirs, and storing them there, presumably for at least centuries. Though billions of dollars have been spent on developing CCS technology, and a number of pilot plants have been built and commercial-scale plants are under construction, so far there are no such units actually in commercial operation anywhere in the world. Moreover, CCS would have a large “parasitic load”—it would consume so much electricity to operate that substantially more coal would have to be burned in order to get the same net power output.

There is no clear timetable for adoption of the final rule. Whenever that happens, it will surely be met by a barrage of litigation; that occurs whenever EPA issues a major new regulation. However, even if the rule survives, it is not clear whether it would have much effect on GHG emissions. That is because almost no one is building new coal-fired power plants in the United States anyway, due primarily to the low price of natural gas and to stringent new standards for the emissions of conventional air pollutants and mercury.

Of much greater environmental significance would be GHG standards for existing coal-fired power plants. Hundreds of such plants are still operating that were built in the 1950s and 1960s and that were grandfathered from most requirements of the Clean Air Act of 1970 and its 1977 and 1990 amendments. President Obama has directed EPA to regulate these plants as well. However, while EPA may regulate new plants directly under section 111(b) of the Clean Air Act, a different section—111(d)—applies to existing plants. It is much more convoluted. EPA issues guidelines, and it is then up to each state to adopt its own plan for implementation of the guidelines (or another set of actions that would meet the same objectives). These guidelines may well vary from one state to another, depending on each state's own mix of fuels and generation resources. It is possible that EPA will employ a variety of legal theories to use section 111(d) to create a multi-state emissions trading system. If any states do not adopt plans that are satisfactory to EPA, then EPA may issue its own federal plans instead. All of this will surely generate even more litigation than the standards for new plants: more steps are involved, more is at stake (since these rules would affect many actual facilities), and more legal theories are available to mount challenges. Moreover, while EPA has considerable experience in issuing standards for new plants, the provisions of section 111(d) for existing plants have been used so rarely that David Doniger of the Natural Resources Defense Council called it the "40-year-old virgin" of clean air regulation. Jean Chemnick, *New power plant rule running late, with major changes possible*, Greenwire, Mar. 18, 2013, <http://www.eenews.net/greenwire/stories/1059978031>.

President Obama has directed EPA to propose guidelines for existing plants by June 1, 2014, to finalize them by June 1, 2015, and to give the states until June 30, 2016, to submit their implementation plans. By that time, the president will have less than seven months remaining in office, and the inevitable implementation challenges and litigation will play out under his successor. The government shutdown of October 2013 and the sequester-induced funding cuts did nothing to help EPA adhere to this ambitious timetable, and many controversial EPA rulemakings have taken eight or even more years to reach fruition.

One factor that is not likely to interfere with the fulfillment of the president's pledge to regulate old and new plants—but that could otherwise affect EPA's ability to regulate GHGs—is the U.S. Supreme Court's grant of certiorari from a June 2012 decision of the U.S. Court of Appeals for the District of Columbia Circuit upholding numerous EPA actions on GHGs. (The case was called *Coalition for Responsible Regulation v. EPA* in the court below but is now called *Utility Air Regulatory Group v. EPA*. 684 F.3d 102 (D.C. Cir. 2012), *cert. granted*, 81 U.S.L.W. 3560 (U.S. Oct. 15, 2013) (No. 12-1146).) The Supreme Court chose—despite entreaties from many industry groups and anti-GHG-regulation states—not to review EPA's finding that GHGs pose a danger to human health and welfare or EPA's

regulation of GHGs from motor vehicles. However, the Supreme Court did agree to take up the applicability of the prevention of significant deterioration (PSD) program to GHGs. That program applies to a broad swath of stationary sources of air pollution (not just power plants) and requires adoption of best available control technology. The petitioners argue that application of the PSD program to GHGs would yield absurd results, as the Clean Air Act's numerical thresholds are so low that millions of sources would be swept into the regulatory net, and, therefore, EPA should apply the program only to air pollutants for which national ambient air quality standards have been met, thus excluding GHGs.

The PSD program is separate from the NSPS program discussed above, and if the Supreme Court were to keep to the question it presented, its decision would not affect the NSPS rules on coal-fired power plants. However, a decision against EPA would reduce its ability to go after other stationary sources and thus impede President Obama's objective of reducing overall GHG emissions. Just how much is unclear, because there is a dispute over whether such a ruling would apply to all facilities or only those that do not otherwise require a permit under the PSD program.

All these legal disputes highlight that use of the existing Clean Air Act is far from the ideal way to regulate GHGs. However, in the face of congressional inaction, it is the most potent tool now available to the president.

Energy systems – Though the air pollution regulations have garnered the most attention, the president's climate plan has many other elements. Several of them are aimed at reducing America's dependence on fossil fuels.

The Obama administration has devoted considerable attention and resources to advancing renewable energy technologies and promoting their use. The plan announced in June 2013 would take several additional steps. Among other things, it would encourage the development of hydroelectric power at existing dams, commit to greater use of renewable energy by the Department of Defense and by federally subsidized housing projects, and streamline the permitting and construction of new electric transmission lines to connect renewable energy sources with load.

Energy efficiency is another essential element of the plan. Already the tighter fuel economy standards for automobiles and light trucks, and separate ones for heavy-duty vehicles, are yielding major fuel savings that will save drivers thousands of dollars at the pump. The president also pledged further development of alternative fuel and electric vehicles (though one element, the future of the renewable fuel standard, is currently mired in controversy).

Appliances and buildings are major consumers of energy—and they present major opportunities for savings. The president pledged additional and tighter efficiency standards for appliances and federal buildings, more financial assistance for efficiency investments by businesses and homeowners, and an examination of how energy efficiency can be factored into the mortgage underwriting and appraisal processes.

Other GHGs – Though carbon dioxide gets most of the attention, the president’s plan also addresses other GHGs. The plan would encourage further movement away from hydrofluorocarbons (HFCs) in favor of more sustainable alternatives. Additionally, it would develop an interagency strategy for reducing emissions of methane from sources such as coal mines, landfills, and oil and gas development. (The extent and control of fugitive emissions from hydraulic fracturing for natural gas is a particularly contentious topic.)

Climate adaptation – The president’s plan recognizes that, despite all efforts to reduce GHG emissions, temperatures will continue to increase and the seas will continue to rise for many years. Thus resilience to the climate change that is coming is another focus. The president said he would direct federal agencies to support investments that would help communities and infrastructure withstand the consequences of climate change. He called for the adoption of disaster-resilience standards and the application of lessons learned from the response to Hurricane Sandy. Additional efforts would be made to manage droughts, reduce wildfire risks, and prepare for future floods.

Climate science and data – The plan would continue the development of a strong scientific basis for climate policy and include a particular focus on the development and utilization of data from multiple sources. It would also seek to disseminate scientific information in a way that would be most useful to affected publics.

International efforts – The plan calls for enhancing U.S. engagement with the other major economies of the world in cooperating on climate issues; for expanding bilateral climate cooperation with the key major emerging economies of China, India, and Brazil; for working with other countries in combatting short-lived climate pollutants including methane, black carbon, and HFCs; and for negotiating global free trade in environmental goods and services.

The final element of President Obama’s plan involves working toward an international climate agreement in 2015. Political obstacles will almost certainly prevent the president from going to the UN climate conference that year in Paris with as comprehensive a set of regulatory programs as many other countries are demanding, but implementation of his June 2013 plan will certainly be seen as a step in the right direction.

Tarrant Water District: Either a minimalist contractual decision or an invitation to hoard water

Sidney F. Ansbacher

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This article follows *Tarrant Water District: Another battle in the Texas-Oklahoma water wars*, my previous article published in Vol. 43 Trends No. 5 (May/June 2012). That piece predicted that the U.S. Supreme Court could resolve the Red River Compact dispute over water rights between the Tarrant Regional Water District in Texas and the Oklahoma Water Resources Board by interpreting the four-state compact by its contract terms. Alternatively, the Court could take the opportunity to expound on interstate water law in a time of rapidly diminishing potable water resources.

Justice Sotomayor's unanimous opinion in *Tarrant Regional Water District v. Herrmann*, 133 S. Ct. 2120 (2013), left commentators in two camps. Some opined that Tarrant is a minimalist contractual interpretation. Others alleged it is the "worst water rights" decision in years because of the resulting invitation to hoard water resources. The ruling was conservative enough to please the University of Texas's iconic coach Darrell Royal, who coined the phrase: "Three things can happen when you pass, and two of 'em are bad." Nevertheless, the opinion contained some nuggets that heartened states' rights proponents who hoped the Court would help protect intrastate waters against interstate allocation.

The case centered on a clause in the 1978 Red River Compact (compact) allocating water rights from the Red River basin among the neighboring states of Oklahoma, Texas, Louisiana, and Arkansas. Tarrant sought water from the Kiamichi River in Oklahoma, which is a tributary of the Red River, to serve consumers in the rapidly growing Arlington/Ft. Worth, Texas area. The Oklahoma Water Resources Board rejected Tarrant's agreements with multiple willing Oklahoma public entity water suppliers. Tarrant filed suit. The two key issues were whether the compact allocated excess waters and whether Oklahoma could limit or bar interstate diversion to Tarrant. The compact was silent concerning interstate diversions.

Lower courts disposed of much of the dispute on various procedural grounds. The narrow issue before the Supreme Court was interpretation of compact language governing the subbasin where the Kiamichi entered the Red. The compact provides that the four compacting states "shall have equal rights to the use of runoff originating in [this] subbasin . . . and undesignated water flowing into [this] subbasin . . . so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided no state is entitled to more than twenty-five percent (25%) of the water in excess of 3,000 cubic feet per second." Tarrant claimed the compact's language gave each of the four states a co-equal 25 percent of water rights, regardless of state boundaries. Tarrant additionally contended that the compact's silence on interstate diversions meant that the compact did not prohibit them. Tarrant also alleged that *Sporhase v. Nebraska*, 458 U.S. 941 (1982), prohibited Oklahoma's efforts to limit or prohibit interstate water sales without legislative approval.

Oklahoma countered that the compact allowed each signatory to take its 25 percent in-state. Oklahoma contended the compact's silence on the right to divert water across state lines did not allow Tarrant's argument that each state could take 25 percent of its needs from any state that entered into the compact. Rather, Oklahoma said the silence required the Court to defer to each state's sovereign right to protect its own water resources.

The Court's limited consideration of the 1982 Sporhase decision

Sporhase was a landmark Supreme Court water rights decision. A Nebraska statute prohibited interstate diversions from Nebraska unless the receiving state afforded reciprocal rights for water diversions to Nebraska. The U.S. Supreme Court reversed the Nebraska Supreme Court, which held that intrastate water is a sovereign resource that each state may regulate as it sees fit. The *Sporhase* majority struck the requirement, holding the reciprocity requirement was not narrowly tailored to serve the admittedly significant water resources goals of Nebraska. The Supreme Court held that water was a commodity in commerce that could not be hoarded in-state without undergoing dormant Commerce Clause review. The opinion emphasized the water's location in the Ogallala Aquifer, which underlies much of the Great Plains and is the region's principal source of groundwater.

The Supreme Court could have reevaluated *Sporhase*, but *Tarrant* barely discussed *Sporhase*. In footnote 11 of the *Tarrant* decision, the Court cited *Sporhase* to note: "Of course, the power of States to control water within their borders may be subject to limits in certain circumstances." 133 S. Ct. at 2133. The Court instead followed the Tenth Circuit Court of Appeals' and the Western District of Oklahoma's lead that *Sporhase* was distinguishable because it addressed unallocated water. While the Court recognized Tarrant's claim to arguably "unallocated" water over 3,000 cubic feet per second, the opinion concluded the compact did allocate the excess but only to the state where the excess water was located. *Tarrant* apparently dismissed the *Sporhase* argument for similar reasons to those the lower courts used, namely that *Tarrant* concerned the interpretation of where, not whether, the Red River Compact allocated water and that congressional approval of the compact obviated *Sporhase*.

A troubling conflation of law of submerged lands and in-state water rights

The *Tarrant* opinion acknowledged that Oklahoma could not categorically prevent the interstate allocation without the compact. Like the Tenth Circuit, *Tarrant* held Congress' approval of the compact confirmed its terms. Justice Sotomayor acknowledged that silence alone does not show congressional approval of a Commerce Clause violation. The opinion concluded the compact elsewhere implied strongly that a state's diversions subject to the compact were solely *intrastate*. Also, the parties' prior failure in over thirty years of implementing the compact to argue as Tarrant did supported Oklahoma's position. Sotomayor cited a "well-established principle that states do not easily cede their sovereign powers, including their control over waters within their own territories." 133 S. Ct. at 2132. This combined to imply that silence on interstate diversion indicates the lack of such authority rather than the absence of regulation.

The most significant portion of the opinion might be this emphasis on state sovereign's "absolute rights to all their navigable waters and the soils under them for their own common use." 133 S. Ct. at 2132 (quoting *Martin v. Lessee of Waddell*, 16 Pet. 367, 410, 10 L. Ed. 997 (1842)). One major problem

arises from the opinion's conflating of the law of sovereign submerged lands and a state's rights to regulate in-state water. State sovereign land rights arise under the Equal Footing Doctrine and are virtually per se limited to each state's static boundaries, absent accretion or erosion. *See, generally*, S. Ansbacher, *Stop the Beach Renourishment: A Case of MacGuffins and Legal Fictions*, 35 *Nova L. Rev.* 587, 626–647 (2011). Conversely, *Sporhase* confirms that water itself constitutes a commodity in commerce subject to federal preemption under certain circumstances. *See, generally*, L. Starr, *High Court Wades Into State Law Water Allocation*, 62 *Duke L.J.* 1425 (2013). *Tarrant's* blanket statement virtually equating the laws of water supply with the submerged sovereign lands public trust doctrine is arguably legally wrong. It can lead to great inequities in a thirsty region like the Great Plains that relies on the massive and overburdened Ogallala Aquifer.

The vast available data on the Ogallala Aquifer show the risks of balkanized water politics in that region. The U.S. Department of Agriculture's website on the aquifer contains numerous valuable tools discussing drawdowns and depleted water resources throughout the region reliant on the aquifer. Thus, the *Tarrant* opinion's sketchy consideration of the applicable law and simplified, conflated legal analyses can have far-reaching consequences beyond the Red River basin.

Implications of Tarrant

The Supreme Court also could have addressed whether and how federal law preempted state water law. Instead, Justice Sotomayor hewed to the narrowest path she could find: construing the compact's language. The Court conducted no policy analysis in its holding. The Court emphasized the contractual four corners and the compact's express statement that it did not supplant the states' own respective water laws. Justice Sotomayor said the compact *could* preempt state law under the Supremacy Clause. That is, a congressional approval of an interstate compact could express preemption. It just did not do so here. This narrow construction ensured a unanimous court, albeit little direct precedent of consequence.

The Supreme Court held that *Tarrant* could only establish a dormant Commerce Clause claim by alleging that Oklahoma exceeded its 25 percent share of excess waters allocated to it under the compact. That would require *Tarrant* to first seek an accounting of Oklahoma's use pursuant to the compact. *Tarrant* neither alleged Oklahoma's overuse nor sought an accounting. *Tarrant's* claim to Texas's alleged borderless common area 25 percent share failed in the face of the presumption against implied interstate diversion in a water compact. Therefore, *Tarrant's* argument foundered.

The opinion made gestures toward various policy and resource issues. The Court might have expounded on the underlying implications of water hoarding outright or in dicta. Instead, it did virtually as little as possible to address the crucial underlying policies of how to allocate disappointment among the West's increasingly parched states. The decision is likely entirely correct on the merits. Its sketchy, almost nonexistent consideration of *Sporhase* and conflation of sovereign submerged lands and water allocation law are far more troubling.

The *Tarrant* Court failed to analyze significant authority and confused two significant water law standards. Justice Sotomayor focused instead on the quotidian but daunting administrative implications of Tarrant's arguments. The Court emphasized the "herculean task" of recordkeeping that Tarrant's argument would require of the Oklahoma Water Resources Board. The other three states could request surplus water from Oklahoma, thus requiring Oklahoma to monitor and account to establish the 25 percent cap usage. Further, the other three states' shares must also be determined, to ascertain whether and where they could tap their common area quarter share. Sotomayor cautioned "the end would be a jurisdictional and administrative quagmire." 133 S. Ct. at 2134. The more legally significant point concludes the Court's analysis. *See, Starr, supra*, concerning the problems arising from the Supreme Court analyzing public trust water cases based on legally irrelevant administrative convenience. To the point, the Court noted the Red River Compact contained none of these necessarily complex mechanisms that Tarrant's argument likely required. This added inference upon inference supporting Oklahoma's position.

After this decision, Tarrant must look for other remedies to its water crisis. Tarrant's perspective of the position that Oklahoma enjoys is likely best summed up by a football figure who has connections in three of the four signatory states to the Red River Compact. As ex-Arkansas Razorback football player, then Oklahoma Sooner and Dallas Cowboy coach, Barry Switzer, said: "Some people are born on third base and go through life thinking they hit a triple." Conversely, Oklahoma's position concerning its rights to water, as confirmed by *Tarrant*, is summed up by Coach Royal again: "You dance with who brung ya."

D.C. Circuit vacates GHG Tailoring Rule deferral for biogenic sources

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Four years after the U.S. Environmental Protection Agency (EPA) finalized its first-ever suite of greenhouse gas (GHG) regulations under the Clean Air Act, one of the most controversial yet unanticipated issues remains unresolved: Whether and how to account for the carbon dioxide (CO₂) emissions from the combustion of renewable biomass ("biogenic emissions").

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This issue, which has quickly evolved from barely a glancing mention into a prominent national debate, is one of the most significant questions that remain undecided from EPA's original GHG regulations. Initially buried deep in the text of EPA's Tailoring Rule, "biomass combustion" has become a separate and distinct issue, simultaneously dividing and uniting forest owners, certain states, environmental NGOs, renewable fuel proponents, and agricultural interests throughout administrative petitions, three federal court cases, and a D.C. Circuit decision.

And now there is the distinct possibility that the U.S. Supreme Court could weigh in too.

This debate over whether and how to address biogenic emissions is as much a scientific, technical, and political issue as it is a legal one. Unlike GHG emissions from fossil fuels, biogenic emissions—as a result of the natural carbon cycle—theoretically have no net adverse effect on atmospheric CO₂ emissions. CO₂ is sequestered by trees and other types of biomass as they grow and is emitted when biomass decays or is combusted. These processes occur simultaneously across the landscape and form an ongoing cycle where emitted carbon is sequestered and vice versa.

As long as biomass carbon stocks remain stable or increase—as they have for at least the past 60 years—the CO₂ that is released during combustion is replaced by an equivalent amount of CO₂ through regeneration and thus does not increase the concentration of CO₂ in the atmosphere. The extent to which emissions and regeneration balance is highly dependent upon the spatial and temporal scales used for analysis, and studies may report different conclusions depending on the time scales and areas studied. When longer time scales or broader geographic areas are considered, biogenic emissions do not increase atmospheric CO₂ concentrations. These competing conclusions regarding the carbon neutrality of biomass have created uncertainty that EPA now seeks to resolve.

EPA's regulation of GHG emissions from stationary sources

The current dispute over EPA's treatment of biogenic emissions began when EPA first regulated stationary source GHG emissions in the Tailoring Rule. In the proposed Tailoring Rule (74 Fed. Reg. 55,292, Oct. 27, 2009), EPA did not explicitly address biogenic emissions, but directed sources to calculate a source's GHG emission by cross-referencing EPA's GHG Inventory (2009), which excludes biogenic CO₂ from Energy Sector emissions. In the final Tailoring Rule (75 Fed. Reg. 31,514, June 3, 2010), however, EPA removed all references to the GHG Inventory and announced that biogenic emissions would be counted as GHG emissions under the Prevention of Significant Deterioration (PSD) and Title V permitting programs. In response, the National Alliance of Forest Owners (NAFO) submitted a petition for reconsideration challenging EPA's inclusion of biogenic emissions.

In January 2011, EPA granted NAFO's petition and announced that it would propose to defer regulation of biogenic emissions for three years while it completed a scientific assessment of biogenic emissions. On July 20, 2011, EPA issued the Deferral Rule (76 Fed. Reg. 43,490, July 20, 2011), which temporarily excluded biogenic emissions from the PSD and Title V permitting programs for a period of three years. EPA justified the Deferral Rule by relying on the same administrative law doctrines that it used in the Tailoring Rule. Several environmental organizations petitioned for review of the Deferral Rule. A number of trade associations intervened on behalf of EPA.

D.C. Circuit decision

On July 12, 2013, the D.C. Circuit vacated the Deferral Rule in a split decision that produced three separate opinions. *Center for Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir. 2013). In the majority opinion, Judge Tatel held that the Deferral Rule was ripe for judicial review despite the interim nature of the rule and that EPA's reliance on various administrative law doctrines was not sufficiently supported in the administrative record. Regarding prudential ripeness, intervenors relied on recent D.C. Circuit case law to argue that the court should decline to review the Deferral Rule during the pendency of EPA's decision on a final approach to regulating biogenic emissions. Judge Tatel found that the case presented purely legal questions that were fit for judicial review and that petitioners would suffer hardship in the absence of review because at least one biomass energy facility had already been constructed in reliance on the Deferral Rule.

Turning to the merits, Judge Tatel found that EPA failed to create an adequate record to justify its reliance on three administrative law doctrines. With respect to the one-step-at-a-time doctrine, Judge Tatel faulted EPA for failing to explain in the record the legal theory it may rely on in a future rulemaking to treat biogenic emissions differently from other emissions. Turning next to the doctrine of administrative necessity, Judge Tatel held that EPA failed to justify in the record its rejection of a "middle-ground option" that would have required biomass facilities to obtain PSD permits in some limited circumstances. Finally, with respect to the absurd results doctrine, Judge Tatel found that EPA could not incorporate its rationale from the Tailoring Rule because the rules were aimed at different absurd results. He explained that the Tailoring Rule was intended to address the administrative burden of processing PSD and Title V permits, while the Deferral Rule was intended to address the regulation of sources with a "negligible impact on the net carbon cycle." *Id.* at 412.

In a concurring opinion, Judge Kavanaugh agreed with EPA that there may be valid policy reasons for excluding biogenic emissions but asserted that this option was foreclosed by recent D.C. Circuit precedent. Citing *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (CRR), he asserted that "there is zero basis in the text of the Clean Air Act to distinguish biogenic carbon dioxide that EPA is required (under our precedent) to regulate for purposes of the PSD and Title V permitting programs." *Id.* at 412 (Kavanaugh, J. concurring). At the same time, however, Judge Kavanaugh reiterated his belief that CRR was wrongly decided and suggested that EPA's inability to exclude biogenic emissions now can be attributed to the "broad interpretation" of the Clean Air Act that EPA advocated in prior cases.

Judge Henderson indicated in her dissent that she would have affirmed the Deferral Rule based on the one-step-at-a-time doctrine, finding that EPA reasonably balanced its duty to regulate GHG emissions with the uncertainty related to the net atmospheric impact of biogenic emissions. She concluded that "EPA's decision to stop and think before regulating in a complex—and changing—area is eminently reasonable." *Id.* at 420 (Henderson, J. dissenting). Alternatively, Judge Henderson would have found judicial review to be prudentially unripe because EPA's ongoing review of biogenic emissions would "crystallize the issues" related to biogenic emissions and because the few sources that may be built in reliance on the Deferral Rule would have a minimal impact on petitioners.

While the court's decision poses short-term challenges for EPA and for facilities that emit biogenic CO₂, it expressly does not limit EPA's ability to permanently exclude biogenic emissions. Judge Tatel's opinion focused on the content of the administrative record, and the defects he identifies can be corrected in a future rulemaking. In fact, his opinion "leaves for another day the question whether the agency has authority under the Clean Air Act to permanently exempt biogenic carbon dioxide sources from the PSD permitting program." *Id.* at 412. Even Judge Kavanaugh noted that EPA could exempt biogenic CO₂ by "tinker[ing] with the Endangerment Finding" for GHGs. *Id.* at 413 n.1 (Kavanaugh, J., concurring).

Next steps

The D.C. Circuit's decision has created near-term uncertainty for stationary sources that have (or intended to) rely on the Deferral Rule's temporary exclusion for biogenic emissions. Sources that have already commenced construction face uncertainty as to whether the vacatur will be applied retroactively, which might require them to complete a best available control technology (BACT) analysis for GHGs and other regulated pollutants. Companies considering construction of new biomass sources and existing facilities considering modification also face significant uncertainty, as biogenic emissions that would be subject to regulation under the D.C. Circuit's decision may eventually be excluded from regulation in EPA's final policy. By commencing construction now, these facilities could be required to complete a costly BACT analysis and potentially install pollution control equipment that would ultimately be deemed unnecessary under EPA's permanent policy.

The impact on sources of biogenic emissions is further complicated by ongoing litigation regarding EPA's regulation of GHG emissions from stationary sources. First, on October 15, 2013, the Supreme Court granted several petitions for certiorari challenging EPA's legal interpretation that regulation of GHG emissions under the PSD permitting program was automatically triggered by EPA's regulation of GHG emissions from mobile sources. These petitions directly challenge EPA's authority to regulate GHG emissions under the PSD program, and the Supreme Court's decision could render the D.C. Circuit's decision moot by limiting EPA's legal authority to regulate GHG emissions under the PSD permitting program. Second, in response to the Supreme Court's grant of certiorari, the Court granted Intervenor's motion to extend the deadline for future filings in that case pending the Supreme Court's decision. Petitioner's motion for immediate issuance of the D.C. Circuit's mandate was denied. After the Supreme Court issues its decision, EPA or Intervenor will still have an opportunity to seek rehearing or rehearing en banc. Third, forestry and forest products trade associations filed separate petitions for review of EPA's regulation of biogenic emissions from light-duty vehicles and from stationary sources. Those cases were severed from broader challenges to EPA's GHG regulations and held in abeyance pending EPA's ongoing reconsideration of biogenic emissions. Those cases could be reactivated and litigated.

These sources of uncertainty are unlikely to be resolved in the immediate future, given the multiple rounds of litigation that are currently possible under existing regulations. However, by issuing new regulations that definitively and finally establish EPA's policy regarding the appropriate accounting for biogenic emissions, EPA could potentially moot a significant portion of the existing biomass-specific litigation and provide a measure of certainty to biomass facilities. EPA has already made significant

progress in this endeavor since the Deferral Rule was issued, and neither the D.C. Circuit's decision nor the Supreme Court's broader review of EPA GHG regulations provides a basis for delaying completion of this important regulatory policy.

Offshore renewable energy leasing: Let the competition begin!

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After almost a decade of anticipation, the federal government recently held its first-ever competitive commercial wind energy lease sales on the U.S. Outer Continental Shelf (OCS). In July 2013, Deepwater Wind, LLC fended off two other bidders for a pair of leases offshore Rhode Island and Massachusetts with a winning bid of \$3.8 million. In a September 2013 sale, Dominion Resources, Inc. acquired a 113,000-acre lease offshore Virginia with a bid of \$1.6 million. Further lease sales offshore Maryland and New Jersey are anticipated in the near future, with another sale offshore Massachusetts likely to follow. These offshore wind projects can be huge—it is estimated that Dominion's lease offshore Virginia is capable of generating 2 gigawatts of electricity, enough to power 700,000 homes.

What is often overlooked is that obtaining an OCS renewable energy lease is only the first step of a complex multistaged process culminating in the approval and eventual construction of an offshore wind energy facility. Obtaining a lease is no guarantee of success. Look no further than the as-yet-unbuilt Cape Wind project (now entering its third year of litigation), or Statoil's recently abandoned pilot project for floating turbines offshore Maine, to see that developing wind energy offshore the United States is technically, financially, and administratively challenging.

A commercial wind project on the OCS requires a lease from, and project approval by, the U.S. Department of the Interior's (DOI) Bureau of Ocean Energy Management (BOEM). While BOEM's regulatory leasing and development process is well understood among industry participants, it is not widely

grasped by the public or advocates involved in the offshore wind energy debate. The following discussion serves as a primer on the major stages of BOEM's commercial wind energy leasing and approval process and describes the current status of the wind industry on the OCS.

Statutory authority for OCS wind development

The OCS lies beyond state submerged lands, which for most coastal states extends three nautical miles from shore. The OCS Lands Act (OCSLA) grants the Secretary of the Interior the authority to issue leases, easements, and rights of way on the OCS for the purpose of exploiting its resources. 43 U.S.C. §§ 1331 et seq. Although these "resources" traditionally consisted of minerals such as oil and gas, the Energy Policy Act of 2005 amended OCSLA to expand DOI's authority to issue leases, easements, and rights of way for the purposes of "produc[ing] or support[ing] production, transportation, or transmission of energy from sources other than oil and gas." 43 U.S.C. § 1337(p)(1)(C). The Secretary delegated this authority to BOEM, which now authorizes commercial wind projects on the OCS.

BOEM's regulations—staged leasing and development

In 2009, BOEM promulgated a comprehensive suite of rules establishing a three-stage process for the leasing and development of renewable energy on the OCS: (1) lease issuance, (2) submission and approval of a Site Assessment Plan (SAP), and (3) submission and approval of a Construction and Operations Plan (COP). See 30 C.F.R. Part 585. These stages involve the conveyance of different rights.

Lease: An OCS wind lease, like an OCS oil and gas lease, does not convey an absolute right to develop. Rather, when an applicant acquires a lease, it obtains the exclusive right to apply for the subsequent approval of its SAP and COP, which only then allows the lessee to develop renewable energy-related facilities on its lease. The lease also confers the right to project easements for installing transmission capacity and certain other appurtenances necessary for the full enjoyment of the lease, which may be sought at the COP stage. 30 C.F.R. § 585.200(b). The lease does not grant exclusive control over the entire lease area; it only gives the lessee the exclusive right to use what is necessary for its activities. BOEM may grant other rights, such as a right-of-way for cables or pipelines, across a lease area so long as they do not unreasonably interfere with lease activities. Other uses of the ocean in the lease area, such as fishing and shipping, may continue.

Pursuant to OCSLA, all renewable energy leases must be issued competitively unless BOEM determines that no competition for a lease area exists. 43 U.S.C. § 1337(p)(3). Consequently, the first step in the leasing process is the publication in the Federal Register of a Request for Interest (RFI) or Call for Information (Call), which solicits input from the public and potential developers for the primary purpose of determining whether competitive interest exists in an OCS area. See 30 C.F.R. §§ 585.210–585.214. If no competitive interest exists, BOEM may issue a lease noncompetitively. 30 C.F.R. §§ 585.231–585.232. Otherwise, BOEM must auction leases competitively under the process described at 30 C.F.R. §§ 585.210–585.216.

When auctioning leases competitively, BOEM may consider factors other than the highest monetary bid in determining which party ultimately is awarded a lease. 30 C.F.R. §§ 585.220–585.224. Such factors include whether an applicant has a power purchase agreement with an onshore utility (as Deepwa-

ter Wind had), the size and nature of the project that the developer is considering, and the nature of the technology to be deployed. BOEM will permit only those legally, technically, and financially qualified to hold a lease to participate in an auction or to indicate competitive interest in response to a RFI or Call. *See also* 30 C.F.R. §§ 585.106–585.107. To a greater extent than BOEM’s OCS oil and gas leasing program, the intention is to ensure that those who obtain wind leases are actually capable of developing them.

SAP: An approved SAP allows the lessee to construct meteorological towers and install meteorological buoys on the lease. *See* 30 C.F.R. §§ 585.605–585.618. The lessee may then gather information regarding wind and wave conditions to help with the design of its renewable energy project.

COP: A COP is the plan for the construction and operation of a renewable energy project and contains the particulars of project design, construction, operation, and decommissioning. 30 C.F.R. §§ 585.620–585.638. BOEM’s approval of the COP allows the lessee to construct and operate a renewable energy facility. COP approval has the most significant potential environmental impact and the greatest likelihood of interfering with alternate uses of the project area. Consequently, approval of a COP entails the agency’s most rigorous impact analyses under federal statutes such as the National Environmental Policy Act (NEPA), the Coastal Zone Management Act, and the National Historic Preservation Act.

The BOEM regulations require that a lessee provide the results of numerous “site characterization” surveys with its COP, including a shallow hazards survey, geological survey, geotechnical survey, and archaeological resource survey. 30 C.F.R. § 585.626(a)(1)–(5). BOEM does not require a permit authorizing these activities, although the manner in which they are conducted may appear as lease stipulations.

“Smart from the Start” streamlining initiative

Most discretionary federal actions trigger environmental review under NEPA and other applicable statutes. In November 2010 Interior Secretary Salazar announced the “Smart from the Start” Atlantic Offshore Wind initiative to accelerate commercial wind energy development on the OCS. Originally conceived as a NEPA streamlining tool, Smart from the Start adopts a landscape-scale approach to optimally siting wind projects to maximize resource recovery and minimize potential conflicts or impacts. At the core of the initiative is the identification of “wind energy areas” that represent the best prospects for siting wind projects on the OCS. The agency refers to the identification of the wind energy areas as the “planning” stage of its decision-making process, which precedes the three regulatory stages described above.

BOEM’s consideration of lease issuance in one or more established wind energy areas is the subject of an Environmental Assessment (EA) under NEPA, which is generally shorter and narrower than an Environmental Impact Statement (EIS). The EA evaluates the reasonably foreseeable impacts associated with the first two stages of the leasing and development process:

- (1) Lease issuance (including reasonably foreseeable consequences associated with site characterization activities); and
- (2) SAP approval (including reasonably foreseeable consequences associated with meteorological towers and buoys).

The process is designed to be proactive and facilitate the leasing phase so that applicants can obtain the exclusive opportunity to develop the lease area. If the lessee subsequently submits a SAP, BOEM will determine whether the EA prepared for leasing in that wind energy area adequately considered the environmental consequences of the activities proposed in the SAP. If so, no further NEPA analysis would be required; if not, BOEM would prepare additional NEPA analysis (e.g., a site-specific EA) prior to SAP approval.

The EA prepared for a wind energy area is not required to analyze the environmental consequences associated with the third stage of the process, approving a COP. Instead, when a lessee submits its COP, BOEM will prepare a NEPA document evaluating the reasonably foreseeable environmental and socioeconomic consequences associated with the specific wind project being proposed. BOEM will use this NEPA document for the purpose of deciding whether to approve the COP. 30 C.F.R. § 585.628.

The Smart from the Start initiative is intended to provide for a quicker, more targeted NEPA process that is proportionate to the impacts of each decision BOEM is making. The staged granting of rights avoids conducting unnecessarily detailed and highly speculative NEPA analysis too early in the process, only to potentially start over again when specific plans emerge that may invalidate assumptions about project design or environmental impacts. It also allows for analysis of impacts on a broad geographic scale and provides a basis for subsequent tiering. The agency is then able to limit its more comprehensive environmental review and decision-making efforts to those actions later in the process that are most likely to have significant impacts—namely, the construction and operation of wind facilities. To date, BOEM has issued two Final EAs intended to analyze the impacts of lease issuance and SAP approval: in the Mid-Atlantic (Delaware, Maryland, New Jersey, and Virginia) in 2012 and offshore Rhode Island and Massachusetts in 2013.

State of the industry

There are currently five commercial wind leases on the OCS: Cape Wind in Nantucket Sound, Bluewater Wind in the Maryland Wind Energy Area, Dominion Resources in the Virginia Wind Energy Area, and two Deepwater Wind leases in the Rhode Island/Massachusetts Wind Energy Area. All but the Cape Wind lease were issued under the Smart from the Start initiative. The Cape Wind and the Bluewater Wind leases were issued noncompetitively, while Dominion and Deepwater Wind won their leases at competitive auction. Except perhaps for Cape Wind, it does not appear that development of these leases is imminent; none of the lessees has yet submitted a SAP, and the regulations do not require the submission of a COP during the first five years.

However, BOEM has finally entered into a “leasing mode,” and Smart from the Start is the model. The agency has identified additional wind energy areas offshore Maryland, New Jersey, and Massachusetts capable of supporting numerous wind energy projects. The initial NEPA review to support lease issuance and SAP approval in the wind energy areas offshore Maryland and New Jersey is complete, with a Final EA anticipated for a new wind energy area offshore Massachusetts at the end of 2013. Barring significant changed circumstances, BOEM need only publish proposed competitive sale notices to begin qualifying individual bidders. Industry can anticipate a sale offshore Maryland in early 2014 and sales in the New Jersey and Massachusetts wind energy areas later that year. BOEM is currently working on developing wind energy areas offshore North Carolina and South Carolina, although a timetable for leasing is unclear.

OCS wind development is a daunting endeavor, both technically and financially. A flurry of offshore renewable energy leasing activities over the next two years is expected and welcome. Yet, development of actual wind projects will proceed cautiously until lessees can determine how to successfully develop their existing prospects.

An update on California’s cap-and-trade climate change policy: Continuing forward, perhaps beyond California

Nicholas W. van Aelstyn

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On October 25, 2013, the California Air Resources Board (CARB) listened patiently to testimony from all sectors about proposed amendments to what’s known as CARB’s Cap-and-Trade Regulation, promulgated pursuant to the state’s landmark Global Warming Solutions Act of 2006 (better known by its bill number, AB 32). With the exception of two issues discussed below and regardless of the sector being represented, nearly all the testimony favored the amendments. Chairwoman Mary Nichols shortened the comment period, stipulating that the Board understood that most wished to thank CARB staff for their hard work and engagement with stakeholders. This meeting encapsulated much of what is going on with AB 32—and its potential impacts beyond California.

Context: AB 32 and the progress to date

When it comes to AB 32, CARB is where the action is. AB 32 established mandatory goals and deadlines—primarily, to reduce the state’s greenhouse gas (GHG) emissions to 1990 levels by 2020—and delegated broad authority to CARB to achieve those goals. CARB has been engaged in nearly non-stop rulemaking since January 2007 to implement AB 32.

In 2008, as required by AB 32, CARB adopted the initial Scoping Plan, which is the blueprint for how it intends to achieve the required GHG emission reductions by 2020. CARB is now updating the plan and looking beyond 2020, even though AB 32 itself did not look beyond that date. However, Arnold Schwarzenegger, who was governor at the time, issued Executive Order S-3-05 establishing a goal of reducing emissions to 80 percent below 1990 levels by 2050, while current Governor Jerry Brown expanded this goal to the transportation sector (EO B-16-2012).

On October 1, 2013, CARB released a draft Updated Scoping Plan. It proposes that CARB continue its policies toward achieving Schwarzenegger’s 2050 goal and develop interim emission reduction goals for 2030. Most importantly, it proposes to continue the cap-and-trade program beyond 2020. Cap-and-trade is at the center of the CARB’s AB 32 efforts, though it’s intended to achieve only a portion of the emission reductions. The rest are to be achieved through a host of complementary measures, including the Low Carbon Fuel Standard (LCFS) (for transportation fuels), the Renewable Portfolio Standard (for electricity production), improved energy efficiency requirements, and many others. The Updated Scoping Plan modifies the balance of reductions to be achieved by the different policies (e.g., cap-and-trade now represents close to 30 percent of the reductions needed to reach 1990 levels by 2020, up from 20 percent), but it essentially calls for more of the same.

The state’s GHG emission reduction goals are ambitious. CARB’s recently released GHG emission reporting data indicates that total emissions actually increased from 429 million metric tons (MMT) in 2011 to 437 MMT in 2012. The 2020 target is 427 MMT. The goal is in sight—and certainly it’s closer than the business-as-usual (BAU) estimate for 2020 of 509 MMT, but much more progress is needed to meet AB 32’s mandate.

One point in an elaborate rulemaking process

The October 25 Board meeting exemplified much of what is taking place in the development of California’s climate change policies. First, the praise for CARB staff reflects the large degree of stakeholder participation in CARB’s rulemaking. CARB has worked closely and extensively with stakeholders throughout the process and by doing so has achieved a remarkable level of buy-in for such a large and complex program. The market also effectively endorsed CARB’s work: since CARB proposed the 2013 amendments, the price for allowances has remained flat and close to the floor CARB established.

What the Board actually did at the meeting also is important—and so too what it did not do. The Board did not actually adopt the proposed amendments to the Cap-and-Trade Regulation. Instead, it adopted a resolution that obligates CARB staff to revise the regulation still further. CARB expects to do so this spring with an expedited process that provides for a 15-day public comment period instead of the standard 45 days. Under the state’s Administrative Procedure Act, this abbreviated process is intended for minor cleanups, although CARB’s use of this approach has become common for the Cap-and-Trade Regulation.

At each major rulemaking concerning the Cap-and-Trade Regulation, CARB has adopted a companion resolution in which it lists the issues that CARB will address in future processes. This approach of continuing to work on the regulation with stakeholders has helped CARB to (largely) avoid litigation. Why challenge the regulation in court when CARB promises to tweak it? Stakeholders can hope that they will get the changes they want using the less-costly, less-controversial, and more manageable route of negotiation.

One example of this is the GHG emission benchmarks for different industrial sectors, which is how CARB applies the cap to particular facilities. In general, CARB has aimed to set the compliance benchmark at 90 percent of current BAU emissions for each sector, which it then will ratchet down in the years ahead. This is a complicated process. There are dozens of sectors, and different facilities within the same sector may utilize different technologies. Further, in many sectors there are now so few facilities remaining that it is difficult to develop benchmarks that are true industry-wide averages. Trade secret issues arise, as do issues of favoritism if a benchmark is based more on one facility's technology than another. The proposed amendments included numerous changes to different benchmarks—and CARB will be addressing many others in the upcoming 15-day rulemaking.

Included amongst the latter are the many benchmarks for the oil and gas sector, which also was a focus of many of the proposed amendments before the Board. This is because, in 2015, CARB will expand cap-and-trade to include transportation fuels, which contribute 38 percent of the state's total GHG emissions. Adding transportation fuels will bring approximately 85 percent of the state's emissions under the cap, almost doubling the amount of capped emissions and making it the world's most comprehensive cap-and-trade program.

Controversial issues: Resource shuffling and coal mine methane offsets

Two of the proposed amendments generated controversy. CARB proposed to codify previously issued guidance with respect to resource shuffling, which the Cap-and-Trade Regulation prohibits to prevent leakage. Leakage occurs when total GHG emissions are not reduced but are simply moved out-of-state. CARB defines "resource shuffling" as "any plan, scheme, or artifice" by a "First Deliverer of Electricity" into the state to substitute low carbon intensity electricity for higher intensity imports (e.g., substituting wind power for coal) for the purpose of "reduc[ing] its compliance obligation." Resource shuffling has been a complex and contentious issue since CARB first issued a discussion draft of the Regulation in 2009. The 2013 amendments propose to create certain "safe harbor" practices that would not constitute resource shuffling. Some testified that they would swallow-up the rule, allowing for leakage equal to the in-state emission reductions. At the meeting, however, the Board indicated that it would reject these arguments and adopt the amendments codifying the safe harbors.

CARB's proposed new offset protocol for coal mine methane capture also generated controversy. Critics view it as a boon to the coal industry that would encourage new coal production, while others defended it as applying only to methane that now is neither profitable to capture nor required to be captured. In its resolution, the Board specifically directed staff to, in effect, scrub the protocol one more time to ensure that it prevents any invalid crediting.

Litigation challenges

CARB has not managed to ward-off all litigation challenging its AB 32 efforts, though thus far it has fared well in court. There have been five challenges to date, one of which has been resolved (CARB won), three of which are on appeal (with CARB currently ahead in two of the three), and one that CARB had just won in the trial court at the time of this writing.

Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013). Midwestern ethanol producers contended that the LCFS program violates the dormant Commerce Clause because it places a higher compliance cost on Midwestern ethanol than in-state ethanol. CARB argues that the program does not discriminate because the lifecycle analysis used to determine the carbon intensity of each fuel must include the GHG emissions associated with transporting out-of-state fuel into California. On September 18, the U.S. Court of Appeals for the Ninth Circuit ruled in favor of CARB, reversing the district court. As of this writing, the petitioners are seeking en banc review.

Association of Irrigated Residents v. CARB, 206 Cal. App. 4th 1487 (1st Dist., Div. 3 2012) (*AIR v. ARB*). Environmental justice groups contended that the 2008 Scoping Plan violated the California Environmental Quality Act (CEQA, the state's more stringent version of the National Environmental Policy Act) by not giving due consideration to the option of a carbon tax; they also argued that CARB's cap-and-trade program violated AB 32. The trial court upheld the CEQA challenge and ordered CARB to stop work on cap-and-trade until it had conducted a full CEQA review. CARB complied with this order and later re-approved the Scoping Plan. The trial court rejected the petitioners' challenge to the Cap-and-Trade Program as violating AB 32, however, and the appellate court upheld this ruling, holding that AB 32 granted CARB "exceptionally broad and open-ended" directives. *Id.* at 1495.

POET, LLC v. CARB, 217 Cal. App. 4th 1214 (5th Dist. 2013). This case presents a CEQA challenge to the LCFS program, and in July the appellate court ruled in the petitioners' favor. CARB subsequently delayed the 2013 LCFS compliance mandates for a year while it works to complete its CEQA review of the LCFS program (much as it did previously with the Scoping Plan pursuant to the order in the *AIR v. ARB* case).

Our Children's Earth Foundation v. CARB, No. A138830 (Cal. Ct. App. 1st Dist., Div. 4. This case challenges the offset program, contending that it violates AB 32 by utilizing standards-based protocols rather than determining the additionality of each and every offset project. In January 2013, the trial court—ironically, the same judge that had held that the Scoping Plan violated CEQA in the *AIR v. ARB* case—rejected the challenge. The case is now pending before the Court of Appeal. [Full disclosure: The author represents three of the Intervenor-Appellees in this case.]

California Chamber of Commerce v. CARB, Nos. 34-2012-80001313 & 34-2013-80001464 (Sacramento Super. Ct. Nov. 12, 2013). The petitioners contend that CARB's auctioning of emission allowances exceeds its authority under AB 32 and that the auctions constitute an illegal tax because they don't qualify as an administrative fee and were not approved by a two-thirds vote of the legislature. On November 12, the trial court rejected both arguments, following the rationale of *AIR v. ARB* with respect to the first. With respect to the second, the court held that the auction "charges are more like traditional regulatory fees than taxes, but it is a close question." *Id.*, slip op. at 16. The petitioners in the two consolidated cases immediately announced that they would appeal. Assuming they do, the

court of appeal will review the trial court’s decision on this “close question” de novo. That said, the longer it takes for the case to be finally resolved, the more auction revenues will have been raised and spent, making it more difficult from a practical standpoint for the auctions to be enjoined.

Whither California’s cap-and-trade?

The tone of confidence that characterized the October 25 Board meeting also was indicative of what’s going on in California. CARB is committed to moving forward with cap-and-trade—and not only in California. On November 1, it sent its Linking Readiness Report to Governor Brown, proposing that the already approved linkage with Québec’s cap-and-trade program begin on January 1, 2014, with joint auctions to take place later in the year. Just days before, the governments of California, Oregon, Washington, and British Columbia signed a joint Pacific Coast Action Plan on Climate and Energy in which they pledged to coordinate their climate policies. And less than a month before that, Governor Brown signed a memorandum of understanding (MOU) with China’s central economic planning agency, pledging to assist China with its development of GHG emission trading programs. That MOU grew out of a prior MOU between CARB and the government of Shenzhen, China. At that time Chairwoman Nichols rang the bell to open Shenzhen’s emissions trading system, China’s first.

Will the other Pacific Coast governments and some Chinese regional governments follow Québec and link with California’s cap-and-trade program? Perhaps. Will the U.S. Environmental Protection Agency’s evolving regulation of GHG emissions under the Clean Air Act come to include endorsement of State Implementation Plans that include cap-and-trade programs like California’s? Perhaps. The future of global climate change policies may not lie in a new Kyoto Accord so much as a connected patchwork of subnational cap-and-trade programs.

Cybersecurity: Practical realities for environmental, energy, and natural resources lawyers

Claudia Rast

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It may be a hot topic in domestic and international media, and it's the stuff of thriller movies and international intrigue, but are the risks presented by cyber espionage and cyber theft true concerns for an environmental lawyer? Or an energy or natural resources lawyer? Well, unless you work in a cave with candles and a typewriter and communicate via smoke signals and the Pony Express, the answer is yes.

Let me explain why. The economic consequences are high, there are target industries squarely in a corporate lawyer's wheelhouse, and as a trusted counselor with close and constant access to these industry clients, any lawyer can represent a real risk to the very clients we seek to protect. As recently quoted in the September 2013 issue of the ABA Journal, Shane M. McGee, general counsel and vice president of legal affairs at Mandiant Corp. (the security firm that published the detailed report on the People's Liberation Army of China and its involvement in cyber espionage), noted: "Law firms need to understand that they're being targeted by the best, most advanced attackers out there. These attackers will use every resource at their disposal to compromise law firms because they can, if successful, steal the intellectual property and corporate secrets of not just a single company but of the hundreds or thousands of companies that the targeted law firm represents. Law firms are, in that sense, 'one-stop shops' for attackers."

Think about it: What better way to gain access to a high-value industry target than through its lawyer-representative who happens to be working on a mobile device, using open guest-access Wi-Fi at the hotel or nearby coffee shop where industry representatives are meeting?

Companies—and their legal counsel—are vulnerable to cyber attacks, particularly those in critical infrastructure areas

Companies face huge exposure and vulnerability from cyber threats, and these companies hire legal counsel. In this instance, we're not talking about the theft of credit card information for pure economic gain, but the loss of valuable business information and malevolent injection of code meant either to gather information or cause mayhem. These threats present themselves in two major categories: (1) the general loss of confidential information, ranging from trade secrets and other intellectual property to pre-public deal information and (2) the loss of operational integrity and availability caused by malicious interference, resulting in the malfunctioning of systems or the inability to access the systems, or both. A year ago, National Security Administration Director Keith Alexander estimated the annual economic losses stemming from cybersecurity breaches at \$250 billion. That's just based upon what we think we know.

Many companies comprise the "critical infrastructure" of this country, and they hire legal counsel. The Department of Homeland Security defines critical infrastructure as "the assets, systems, and networks, whether physical or virtual, so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof," and such critical infrastructure companies are possible high-value targets precisely because the companies' operations are so essential. Examples of such companies include petroleum refineries, water treatment plants, nuclear power plants, natural gas pipelines, chemical

manufacturers, pharmaceutical labs, hydroelectric plants, and others. A debilitating malfunction, or the inability to access the industrial control systems to correct a malfunction, at one of these facilities could lead to devastating economic, health, and environmental losses.

As legal counsel to such companies, we have a special responsibility to understand the potential security threats and to take proactive steps to guard against vulnerabilities.

The lawyer’s ethical obligations to critical infrastructure companies

We have been trusted counselors for critical infrastructure companies for many decades. We understand the environmental aspects of effective remediation; we know the compliance requirements for constituents that are released into the air, water, and soil; and we are effective and efficient counselors when unexpected events have the potential to adversely impact the environment and human health and safety.

But here’s the rub: Does the average lawyer practicing environmental, energy, or natural resources law have the technological proficiency to understand the ways and means of today’s cyber threat agents? And do we realize that it is our ethical obligation to our clients to have this proficiency? This is not to suggest that we must become information technology (IT) experts, but it does mean that we must be cautious and risk aware about using unprotected public Wi-Fi on our mobile business devices, that we don’t upload client documents to public cloud apps, and that we know enough about our firm’s or company’s IT infrastructure to keep high-value, high-risk information and documents in carefully segmented and secure locations.

The best way to understand the requirement that we have some basic level of technological competency about cybersecurity is to examine the recent changes to the rules governing our ethical obligations. But let’s go back to a fundamental premise: The care we take to protect client confidences and communications is second nature. If the care you take to protect client confidences is the same “care” that you’ve taken for the past three or more years, then you most likely are in violation of Rules 1.1 (competency) and 1.6 (confidentiality) of the ABA Model Rules of Professional Conduct, which were updated in 2012. There is a reason that law firms have become “one-stop shops” for cyber attackers. In the context of cybersecurity, one focus of the 2012 amendments to the Model Rules was on protecting client information from inadvertent disclosure by ensuring competent representation. But what does “competent representation” mean in your everyday practice?

Comment [1] to Model Rule 1.1 identifies the relevant factors when determining whether a lawyer has the requisite skill set to represent a client on a particular matter—focused on the particular field of law in question. The critical change to Rule 1.1 arises from the modification to Comment [8], noted in bold below:

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (emphasis added).

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To illustrate the point, let's use an example of a new client which is a company that has developed a game-changing solar energy technology. The client seeks help to sort through applicable federal and state environmental and energy regulations. Would you think twice about accepting that representation, assuming, of course, that you were versed in this subject matter? If this client asked you to describe the IT security protections that your firm had in place to protect the company's sensitive trade-secret information, could you? Would you have a colleague that could help? Would your IT manager's answer satisfy the client?

These questions may sound obscure, far-fetched, or paranoid, but they are becoming increasingly relevant and critical to all lawyers and corporate counsel in particular. Companies that have experienced security breaches at the hands of their unknowing, vulnerable suppliers—their lawyers—are beginning to demand confirmation of security compliance at the outset of the representation. Cybersecurity questionnaires are gaining traction among companies when they seek new legal representation or have security concerns about a particular matter, and an environmental, energy, or natural resources lawyer who hasn't seen or responded to such a questionnaire should be prepared to do so in the near future.

Separately, Model Rule 1.6 (c), which was adopted in August 2012, states in part that: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." The operative phrases here are "reasonable efforts" and "information relating to the representation of a client." Where a lawyer once could rely on locked doors, mechanical shredding of sensitive paper documents, and discreet and professional colleagues and staff, the challenges posed in a digital world of increasingly mobile devices require constant diligence and continued education. Should you know that public Wi-Fi is inherently insecure and that conducting client business in such an environment may not be a "reasonable" effort to prevent unauthorized disclosure?

Recommendations for the lawyer

What to do in the face of these risks? A great resource is *The ABA Cybersecurity Handbook* published in July 2013 and available both in paperback and eBook versions. This handbook is continually updated on the Cybersecurity Task Force's website and its "resources" webpage. Immediate Past President Laurel Bellows created this task force last year, and their work led the ABA in 2013 to formally adopt of Resolution 118, condemning "unauthorized, illegal governmental, organizational and individual intrusions into the computer networks utilized by lawyers and law firm."

There are, of course, some basic precautions you should take on your own:

- If you have an IT department, pay attention to its policies—they're intended to protect client information, not to thwart you.
- Keep your mobile devices up to date with patches and upgrades (assuming your IT department is handling computers, tablets, smartphones, servers, and other network hardware).
- Avoid accessing your secure firm/company network with your unsecured, personal device—that goes for USB devices from any third party (you don't know where it's been or what might be on it).
- Encrypt the data on your devices.

A last recommendation for you and your client or company is the new National Institute of Standards and Technology (NIST) Preliminary Cybersecurity Framework due to be released in its final form by February 2014. The Framework's focus is on critical infrastructure companies, and it provides a detailed process to assess cyber risks. Many lawyers may not think NIST has much to do with their practice, but you would be mistaken not to give this Framework serious attention.

In Brief

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Constitutional law

The Ninth Circuit affirmed a district court ruling that the state of Nevada may recover costs to clean up soil and groundwater contamination from dry cleaning chemicals, even though the events occurred solely in Nevada. *Voggenthaler v. Maryland Square*, 724 F.3d 1050 (9th Cir. July 26, 2013). The court rejected the contention that application of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in such circumstances violated the Commerce Clause. Noting that Congress made groundwater protection a priority in enacting CERCLA, the opinion states that groundwater is an article of commerce because groundwater supports irrigated farming that supplies markets worldwide and because groundwater contamination results in cleanup costs that burden commerce.

CERCLA

A party that agreed to undertake cleanup of its industrial property in a settlement with the state may sue a prior owner for contribution under section 113(f) of CERCLA, the Third Circuit held. *Trinity Indus., Inc. v. Chicago Bridge & Iron Co.*, 2013 WL 4418534 (3d Cir. Aug. 20, 2013). The court disagreed with a Second Circuit opinion to the contrary and rejected the prior owner's argument that section 113(f) contribution extends only to resolution of CERCLA claims. EPA submitted an amicus brief in support of appellant Trinity, which had settled with the state.

The Fifth Circuit *affirmed* the dismissal of CERCLA and Clean Water Act claims against BP and Transocean following the Deepwater Horizon oil spill. *Ctr. for Biological Diversity v. BP Am. Prod. Co.*, 704 F.3d 413 (5th Cir. 2013). The court held that because BP had been ordered to clean up the site and was proceeding to do so, and in the absence of concrete allegations that the cleanup was deficient, the

case was moot: “Because those efforts have been ongoing, and absent a clear reason from the Center to find them deficient, we see no error in the district court’s conclusion that it could grant no further relief to the plaintiff beyond what is already being done.”

Air quality

The court rejected industry’s argument that EPA did not have authority to establish emission standards for sewage sludge incinerators under section 129 of the Clean Air Act. *Nat’l Ass’n of Clean Water Agencies (NACWA) v. EPA*, 2013 WL 4417438 (D.C. Cir. Aug. 20, 2013). Acting under pressure of a court deadline to establish the standards, EPA used several different methods to estimate the emissions levels achieved by existing incinerators. The D.C. Circuit agreed that EPA may use statistical methods when there are insufficient data to establish maximum achievable control technology standards for sewage sludge incinerators. However, the court found that EPA did not account for the fact that incinerator emissions are affected by factors such as the fuels they use, the ages of individual units, and their use of control devices, and remanded the rule to EPA.

The Eight Circuit upheld EPA’s rejection of a North Dakota emission reduction plan to address regional haze. *North Dakota v. EPA*, 730 F.3d 750 (8th Cir. 2013). The court held that EPA’s decision to reject North Dakota’s determination that selective non-catalytic reduction technology was not best available retrofit technology (BART) for a power plant, for failing to follow guidelines and consider compliance costs, was not arbitrary and capricious. The court rejected arguments by the state and industry that EPA’s role in reviewing a state’s BART determination is limited to ensuring that at least minimal consideration is given to each factor and does not allow EPA to examine the reasonableness of the underlying decision, finding that although the states have “the primary role of determining the appropriate pollution controls within their borders, EPA is left with more than the ministerial task of routinely approving SIP submissions.”

Environmental groups lack standing to bring a Clean Air Act citizen suit to compel a state agency to regulate greenhouse gas (GHG) emissions from oil refineries, the Ninth Circuit held. *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013). The court assumed without deciding that man-made sources of GHG emissions are causally linked to climate change, but held that plaintiffs failed to establish a causal link between their asserted injuries and the refineries’ GHG emissions. The court also held that plaintiffs failed to show that their claimed injuries would be redressed by a court order requiring defendants to control GHG emissions from the refineries.

Water quality

The Seventh Circuit reversed a decision that a mining company was unlawfully discharging stormwater without a National Pollutant Discharge Elimination System (NPDES) permit. *Wis. Res. Prot. Council v. Flambeau Mining Co.*, 727 F.3d 700 (7th Cir. 2013). The state Department of Natural Resources had terminated the company’s Wisconsin Pollutant Discharge Elimination System (WPDES) permit and advised the company that storm water discharges would be regulated by its mining permit. The Seventh Circuit ruled that because the company did not have fair notice that its mining permit was not sufficient, and because the state deemed the mining permit a WPDES permit, the company was protected by the NPDES permit shield.

A U.S. Army Corps of Engineers' decision that a wetland is a "water of the United States" is not subject to judicial review, a district court held. *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 2013 WL 3974484 (D. Minn. 2003). The court distinguished the Supreme Court's decision in *Sackett*, where violations of an EPA order gave rise to penalties. A jurisdictional decision is not final agency action because the Corps' jurisdictional determination "does not fix [plaintiffs'] rights or obligations" and "does not order Plaintiffs to take any kind of action."

A district court held invalid an EPA order finding that rainfall runoff of manure, dander, and litter from the farmyard of a poultry operation without a permit is in violation of the Clean Water Act. *Lois Alt v. EPA*, 2013 WL 5744778 (N.D. W.Va. Oct. 23, 2013). The opinion concludes that "the litter and manure which is washed from the Alt farmyard to navigable waters by a precipitation event is an agricultural stormwater discharge and therefore not a point source discharge," thereby rendering it exempt from the NPDES permit requirements of the act. The court also rejected EPA's argument that the discharge did not have an agricultural purpose.

A district court rejected EPA's motion to dismiss a suit by environmental groups challenging EPA's failure to review a state area-wide plan under section 208 of the Clean Water Act. *Conservation Law Found. v. EPA*, 2013 WL 4581218 (D. Mass. Aug. 29, 2013). As part of the EPA's annual review process, the court ruled, EPA has a duty to ensure that states are administering their state revolving funds in accordance with an applicable area-wide plan.

RCRA

Offers of judgment pursuant to Fed. R. Civ. P. 68 may be made in the context of attorneys' fee disputes under the fee-shifting provisions of the Resource Conservation and Recovery Act. *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 719 F.3d 281 (3d Cir. 2013). The court of appeals rejected appellees argument that offers of judgment were inconsistent with Congress' decision to allow citizen suits because Rule 68 facilitates settlement without abridging a substantive right.

Energy

The Fourth Circuit upheld a trial court order granting summary judgment to the defendant, Chesapeake Appalachia, in a lawsuit for common law trespass. *Whiteman v. Chesapeake Appalachia LLC*, 729 F.3d 381 (4th Cir. 2013). The Whitemans, who lived on and raised sheep on 101 acres of land, claim that the defendant, which owns lease rights to minerals beneath the Whitemans' property, used an open system of drill waste disposal for its gas wells. Plaintiffs sought injunctive relief to remove the waste pits in order to eliminate the owners' possible future liability. The appeals court concluded that the trial court correctly found that creating drill waste pits was lawful and reasonably necessary for enjoyment of the mineral estate (i.e., recovery of natural gas) and did not impose a substantial burden on the plaintiffs' surface property.

Views from the Chair: Section global initiatives help shape the Section's premier forum role

William L. Penny

William L. Penny is a member of the Environmental, Natural Resources and Energy Service Group of Stites & Harbison PLLC in Nashville and is chair of the ABA's Section of Environment, Energy, and Resources.

The ABA's Section of Environment, Energy, and Resources provides numerous benefits and resources for our Section members and members of the ABA at large. Less may be known of our work with international partners and global initiatives on rule of law and sustainability. This work includes our participation with the World Justice Project® (WJP), our coordination with the Canadian Bar Association's National Environment, Energy and Resources Law Section (NEERLS), and the Section's leadership on the ABA's Presidential Task Force on Sustainability. These efforts by Section members help broaden our view of environment, energy, and resources law and strengthen our mission as the premier forum in these areas.

The World Justice Project® is an independent, non-profit organization with a mission to develop communities of opportunity and equity by advancing the rule of law worldwide. The central focus is the development of a WJP Rule of Law Index®, which is an innovative quantitative assessment tool offering a detailed and comprehensive picture of the extent to which countries adhere to the rule of law in practice. The WJP's website notes that “[w]ithout an effective system of regulations and enforcement—systems predicated on the rule of law—threats to the environment will remain unresolved and present ever-greater challenges to society.”

The Section is actively participating in the WJP, which will result in the first Environmental Report on the Rule of Law. The Environmental Report is building upon the Section's expertise developed in its soon-to-be-published international environmental law book, *International Environmental Law: A Practitioner's Guide to the Laws of the Planet*. This book, edited by Roger Martella and Brett Grosko, lays the groundwork for WJP's Rule of Law Index® survey, building on contacts made with environmental professionals from around the world to offer local insight and perspective into the status of environment, energy, and resources rule of law globally. Thus, the Environmental Report, to be included in the next iteration of the WJP Rule of Law Index®, will be developed in close coordination with the Section and the diverse and talented leaders contributing to the Section's *Laws of the Planet*. As part of this endeavor, a number of our members represented the Section in one or more of the four World Justice Forums that have been held in various locations around the world.

The Section’s relationship with NEERLS began when the Section’s Council met jointly with the NEERLS Council in Ottawa in 2008. Since then, the councils met again in Vancouver in 2012. The Section has amended its bylaws to provide that a NEERLS representative is an ex officio member of the Section’s Council and the Section has a corresponding representative on the NEERLS Council. This partnership provides opportunities for dialogue and understanding of environmental and energy law of our neighbors to the north.

Recently I attended and had the privilege of speaking at the NEERLS annual environmental conference in Yellowknife, Northwest Territories. I also spoke at the NEERLS 25th annual meeting in Ottawa held in conjunction with Canada’s Department of Justice, and the Section welcomed a number of NEERLS members to the 21st Fall Conference in Baltimore last October. The opportunity to share mutual experiences with two countries’ different approaches to regulation and development provides much-needed insights because we see a more global legal system emerging.

Another major Section initiative is directed at global sustainability. The sustainability efforts by the Section are described in part in the July/August 2013 edition of *Trends*. At the ABA Annual Meeting in San Francisco this past August, the House of Delegates approved the Section’s proposed resolution confirming the ABA’s commitment to sustainability. ABA President James Silkenat announced the establishment of the Presidential Task Force on Sustainable Development to review and make recommendations on the involvement of the ABA in implementing sustainable development matters throughout the world. He named former Section Chair and House of Delegates representative Lee DeHihns as the task force’s chair. Lee has assembled a blue ribbon group of leading sustainability lawyers in the United States.

The task force will focus on ways that the ABA can provide leadership, nationally and internationally, on sustainable development issues, as well as assisting the United Nations (UN) in implementing “The Future We Want” report that it adopted at the Rio+20 Conference. The report is a common vision on how sustainable development issues will be managed by UN member entities and related organizations. The task force is meeting regularly and continues to develop an aggressive agenda. Last April at ABA Day at the UN, UN Secretary General Ban Ki-moon made it clear to then ABA President Laurel Bellows and ABA President-Elect Silkenat that he wants ABA lawyers play a stronger role in the area of environmental sustainability.

These global initiatives continue to emphasize the Section’s mission of being the premier forum for practitioners of environment, energy, and resources law. The Section’s role of serving member needs and in keeping abreast of the latest developments in the United States continue to be significant and provide the needed emphasis. However, the Section’s global initiatives place the Section in a much larger role in environment, energy, and resources law throughout the world.

Join us for the 43rd Spring Conference!

Sean Dixon

Sean Dixon is a coastal policy attorney at Clean Ocean Action in Highlands, New Jersey, and co-founder of Village Fishmonger in New York City.

The ABA's Section of Environment, Energy, and Resources invites you and your colleagues to Salt Lake City for the 43rd Spring Conference! We are proud once again to offer a broad array of sessions providing attendees with inside information on the most recent developments in the core areas of environmental law. From federal enforcement priorities to new litigation standards, from air regulations to cybersecurity, this conference has everything you need for your practice—whether you work at a firm, on a bench, for a corporation, in government, or in the public interest sector.

Taking place March 20–22, 2014, a Thursday through Saturday, the 43rd Spring Conference is a perfect opportunity for you to augment your practice, network with colleagues, meet some of the nation's legal leaders, and spend a weekend in the Rockies. We will return once again to the spectacular Grand America Hotel in downtown Salt Lake City. This location offers easy access to points of interest in the city as well as nearby Park City and other excellent destinations for winter recreation. Last year the region saw over a foot and a half of fresh snow for Sunday skiers!

Over three days, several whole-conference plenary sessions will bring all attendees together to hear from national environmental law leaders. From perennial favorites such as the Supreme Court review and an in-depth examination of energy law on state lands to a discussion from top-level Department of Justice lawyers about enforcement priorities, these topics will certainly pack the room.

In addition to providing cogent and timely discussion of our core areas, and in an effort to live up to the true scope of our Section's membership, this year's conference will offer nine diverse break-out sessions on Friday. These sessions offer opportunities for environmental, energy, and resources practitioners to explore the legal issues most relevant to their practices. Transactional specialists will find a panel devoted to environmental considerations in the context of real estate sales, new angles for renewable energy, and corporate mergers and acquisitions. Litigators will have the opportunity to hear from past and present agency judges on the effect that guidance and policy documents have in enforcement actions. A panel of in-house counsel will delve into the most relevant environmental and natural resource issues affecting global, multijurisdictional organizations.

Beyond these skill-set-focused sessions, other panels will update conference attendees on the high-profile issues facing environmental lawyers in 2014 and beyond. One session will look at the intersection and potential conflict between renewable energy development and NEPA implementation. In another, panelists will discuss strategies for successful redevelopment of brownfields into both renewable and traditional energy projects. A third will give much-needed attention to the issue of climate-ready infrastructure.

The 2014 conference wraps up on Saturday in the greenest way we know how—with a tree-planting public service project—which is becoming an annual tradition. As in years past, we'll be joining TreeUtah for an afternoon of (ecological and social) community building. Join your colleagues as we give back to the city that has welcomed us for these past five years!

In addition, this year we are proud to offer an additional half-day program co-sponsored with the University of Utah's S.J. Quinney College of Law Natural Resources Law Forum that will be **free for all pre-registered attendees of the Spring Conference**. This fantastic program will be held on Thursday morning, before the start of the ABA conference, at the University of Utah—a short mass-transit ride away from the Grand America Hotel. The program will focus on cross-disciplinary communication tools, social media, and dispute resolution and will explore how environmental, energy, and natural resources lawyers can activate media and incorporate science into their practices. This program will wonderfully complement the litigation, practice, policy, and regulatory sessions offered as part of the ABA Spring Conference. Join Section leaders, local environmental lawyers, and law students for three sessions, morning refreshments, and lunch before heading “down the hill” to the Grand America for the opening keynote of the 43rd Spring Conference!

Bring a friend, bring the family, rope-in a colleague, and book your flight and your ski ticket at the same time—however you join us, we're looking forward to seeing you in Salt Lake!