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D.C. Circuit Upholds US EPA's Greenhouse Gas Rules

Allen A. Kacenjjar, Jr., Principal, Cleveland

On June 26, 2012, the D.C. Circuit awarded US EPA a striking victory in the first round of extensive litigation over its efforts to regulate greenhouse gases (GHGs). The case, *Coalition for Responsible Regulation v. EPA*, is a challenge to: (1) US EPA's "Endangerment Finding," which concluded that GHGs may "reasonably be anticipated to endanger public health or welfare," (2) US EPA's "Tailpipe Rule," which sets emissions standards for cars and light trucks, and (3) US EPA's "Timing and Tailoring Rules," which establish the thresholds and timing for regulating GHG emissions from stationary sources. US EPA's rules were under fire from all directions, including industry groups, individual states and environmental organizations. However, despite the wide array of challenges, the D.C. Circuit issued an across-the-board reaffirmation of US EPA's rules in strong language.

The Endangerment Finding

The Endangerment Finding stems from the US Supreme Court's 2007 decision in *Massachusetts v. EPA*, which deemed GHGs "regulated pollutants" under the Clean Air Act (CAA) and directed US EPA to determine whether GHGs from vehicles may "reasonably be anticipated to endanger public health or welfare." In response, US EPA concluded that motor vehicle emissions contributed to climate change which was "reasonably anticipated to endanger public health and welfare." Petitioners in *Coalition for Responsible Regulation* challenged that determination on two primary grounds: (1) failure to properly consider policy concerns, and (2) inadequate scientific basis.

The D.C. Circuit found that the CAA's plain language and the *Massachusetts* decision precluded US EPA from considering policy issues when it made the Endangerment Finding. The Court then rejected petitioners' "inadequate science" arguments by endorsing the climate change science US EPA relied upon and noting that the Agency was entitled to substantial deference when making complex scientific decisions. Significantly, the Court upheld US EPA's authority to act even if there was still "some residual uncertainty" in the scientific record and the Agency did not provide a "rigorous step-by-step proof of cause and effect."

The Tailpipe Rule

EPA's "Tailpipe Rule" similarly flowed from the Supreme Court's decision in *Massachusetts* which found that if US EPA determined that GHG emissions from vehicles created an "endangerment" then those emissions must be regulated. The D.C. Circuit rejected the challenges to the Tailpipe Rule, on the grounds that the CAA and the *Massachusetts* decision left no statutory basis for "further inaction." Instead, the Court deemed US EPA's interpretation of the governing provisions "unambiguously correct" and upheld its resulting vehicle regulations.

The Timing and Tailoring Rules

The Court then turned to the most critical issue for industry – the impact of US EPA's Endangerment Finding and Tailpipe Rule on stationary sources. US EPA determined that, once GHG's were actively regulated under the CAA, that necessarily triggered both preconstruction and operating permit obligations for major stationary sources of GHGs. US EPA's Timing Rule concluded that GHGs

became “regulated air pollutants” on January 2, 2011, when the Tailpipe Rule first imposed requirements on car manufacturers. The Tailoring Rule then sought to modify existing statutory language in order to limit permit requirements to large sources on a phased schedule. Industry and state petitioners attacked every aspect of those determinations.

The D.C. Circuit held that both the CAA and *Massachusetts* supported US EPA’s determination that GHGs were “air pollutants” subject to permitting requirements. The Court then made the controversial ruling that state and industry petitioners lacked standing to challenge the Timing and Tailoring rules. Specifically, the panel explained that the petitioners could not establish harm by the Timing and Tailoring Rules because those rules were only **limited** to otherwise existing obligations to secure GHG permits. Thus, the Court never reached the key issue of whether US EPA could unilaterally modify the statutory permitting thresholds based on administrative and policy concerns.

So What Happens Next?

This decision sets the stage for an almost certain request for US Supreme Court review. But, several factors suggest that will be an uphill battle including: (1) the fact the D.C. Circuit’s decision was unanimous; (2) the opinion’s heavy reliance on plain statutory language and agency deference; (3) extensive use of the US Supreme Court’s recent decision in *Massachusetts*; and (4) expected opposition from the Obama Administration. Further, by avoiding the merits of US EPA’s controversial determinations in the Tailoring Rule, and focusing on the challenger’s “standing”, the D.C. Circuit deflected a key issue that might otherwise have intrigued the Supreme Court. Instead, any petition for Supreme Court review would need to focus on the holding that neither state nor industry petitioners have standing to challenge the Tailoring Rule due to lack of injury.

Key Implications

Invalidation of US EPA’s GHG permitting rules would have created renewed chaos but also relief for large GHG sources currently in the permitting pipeline or considering new projects. Instead, the D.C. Circuit’s decision continues the “new normal”, with sources obligated to struggle through PSD permitting for GHGs and obtain Title V permits with GHG obligations. However, the decision will not leave the regulatory landscape totally unchanged. Instead, US EPA (and environmentalists) will likely be emboldened to press forward with other GHG regulations. In particular, they may view the Court’s decision as support for ongoing efforts to develop New Source Performance Standards and Emissions Guidelines for large source categories.

Additionally, the Court’s statement that US EPA can act proactively to take “precautionary” steps despite scientific uncertainty may have lasting significance. While that statement was tied to specific CAA language, it will be cited by environmentalists as authority that US EPA can regulate based on the “precautionary principle,” which would allow government to curtail business activity unless it can be proven safe.

Small Particles, Big Problems: US EPA’s New Particulate Matter Standards

[Gary L. Pasheilich](#), Associate, Columbus

On June 15, 2012, US EPA issued its long-awaited proposed rule to address the primary annual fine particulate matter national ambient air quality standard, otherwise known as the PM2.5 NAAQS. As fine particulate matter can be generated from sources as varied as roads and raw material storage piles to the stacks of heavy industry, US EPA’s rulemaking will impact a wide range of industries large and small.

The proposed rule calls for a reduction of the annual health standard for fine particulate from the current standard of 15 $\mu\text{g}/\text{m}^3$ to 12-13 $\mu\text{g}/\text{m}^3$. However, US EPA is also considering whether an even tighter reduction to 11 $\mu\text{g}/\text{m}^3$ should be adopted. The proposed rule comes as a response to years of litigation by states, environmental groups and industry, culminating in a court order by the U.S. Court

of Appeals for the District of Columbia Circuit that required US EPA to explain by June 14, 2012 why the current standard of 15 $\mu\text{g}/\text{m}^3$ was protective of public health.¹

Rather than justify its original position, US EPA reversed course and proposed the additional reductions on the basis of the claimed health benefits, which US EPA estimates to be between \$2.3 billion to \$5.9 billion annually under a 12 $\mu\text{g}/\text{m}^3$ standard, and \$88 million to \$220 million under a 13 $\mu\text{g}/\text{m}^3$ standard. To rationalize the proposed reductions, US EPA claims that the regulatory burden will be minimal (EPA estimates that a 13 $\mu\text{g}/\text{m}^3$ standard will only cost \$2.9 million to implement and \$69 million under a 12 $\mu\text{g}/\text{m}^3$ standard) and that 99 percent of U.S. counties will meet and attain the proposed standard without any additional action. However, these attainment projections are based upon flawed modeling that takes into account overly optimistic reductions from other US EPA rules, including the heavily criticized and currently litigated Cross State Air Pollution Rule, the Mercury and Air Toxics Standard, as well as other emissions standards for vehicles, aircraft, locomotives and ships. Based upon 2011 data, if a new standard of 13 $\mu\text{g}/\text{m}^3$ were in place today, 40 reporting areas across the country would be in nonattainment. The number jumps to 113 if the standard were 12 $\mu\text{g}/\text{m}^3$. And if the standard were 11 $\mu\text{g}/\text{m}^3$, the number increases to 263 areas with an additional 20 reporting areas in danger of exceeding the standard. Areas in nonattainment can be subject to increased regulation, permitting requirements, control measures and even federal preemption, all of which result in increased regulatory burdens and costs.

Thus, despite US EPA's overly optimistic cost projections, there is little question that the new standard will be expensive for the regulated community. Indeed, the existing standard is already an expensive challenge. Compliance costs increase exponentially with attempts to achieve ever finer pollution reductions. For example, many industries have already installed costly controls to meet the current standard. As the standard is ratcheted down, further reductions at such facilities may only be possible from either reduced production or additional capital controls—both of which result in significant costs. Smaller industries and operations may now also be subject to control requirements putting additional financial burdens on the resources of such vulnerable businesses during uncertain economic times.

On June 29, 2012, EPA published the proposed rule in the Federal Register (77 Fed. Reg. 38890). The agency will accept comments through August 31, 2012, and also plans to hold public hearings in Sacramento, CA, and Philadelphia, PA during July. Per the court's order, US EPA must adopt final rules by December 14. Following final adoption, EPA anticipates designating attainment/nonattainment areas in 2014 that will become effective in 2015. States will then have until 2020 to meet the reduced limit. Therefore, the time to comment on these proposed reductions is now.

US EPA Extends Deadline For Chemical Data Reporting Rule Submissions Until August 13, 2012

[Stephen A. Owens](#), Of Counsel, Phoenix

On June 11, 2012, US EPA announced that it is extending the deadline for submissions under the Chemical Data Reporting (CDR) rule for roughly six weeks from June 30 until August 13, 2012. The CDR rule requires companies that manufacture, import, process and use chemicals to report a wide range of data to the US EPA. The CDR rule reporting period began on February 1, 2012, and Agency officials had previously declined to extend the June 30 deadline, despite numerous requests from companies subject to the CDR rule and members of Congress.

In the Federal Register Notice published by the Agency on June 18, US EPA said that it was extending the deadline "to allow the reporters associated with byproducts to understand and determine their reporting obligations and to allow the regulated community to adjust to electronic reporting and submit their reports." A number of companies had complained about lack of clarity in

¹ *Am. Farm Bureau Fed v. EPA*, 559 F.3d 512, 515 (D.C. Cir. 2009).

the byproducts reporting requirement in the CDR rule, as well as technical problems with US EPA's central data exchange (CDX) network. US EPA acknowledged the CDX problems in the Federal Register Notice: "With respect to the timing of this action, the need for the Agency to extend the deadline arose, in part, as a result of issues experienced by the regulated community with several aspects of electronic reporting that were brought to the Agency's attention only recently." US EPA says that this is a "one-time extension" and that it has no plans to extend the CDR rule deadline beyond August 13.

US EPA Announces List of Priority Chemicals For Risk Assessments and Potential Risk Management Actions

Stephen A. Owens, Of Counsel, Phoenix

In March 2012, US EPA unveiled a list of 83 priority "work plan chemicals" that are targeted for risk assessment and possible regulation in the next few years. Accompanying the list was a "Methods Document" that detailed the process US EPA used to select the list chemicals from the nearly 85,000 chemicals currently listed on its Toxic Substances Control Act (TSCA) Inventory. This list is the latest step by the US EPA in prioritization of chemicals for action as part of Administrator Lisa Jackson's enhanced chemicals management initiative.

US EPA selected the 83 "work plan" chemicals through a two-step process. First, relying on internal and external data, the agency identified 1,235 chemicals that met one or more of the following criteria:

- Concern for children's health (e.g., chemicals with reproductive or developmental effects).
- Persistent, bioaccumulative or toxic (PBT).
- Probable or known carcinogen.
- Used in children's products.
- Used in consumer products.
- Detected in biomonitoring programs.

US EPA then excluded chemicals that are already regulated (PCBs) or that generally do not present significant health hazards (such as polymers).

These steps resulted in a list of 345 chemicals that were further assigned scores based on three characteristics: (i) hazard; (ii) exposure; and (iii) potential for persistence and/or bioaccumulation. The hazard analysis included toxicity, carcinogenicity and respiratory sensitization. The exposure review considered a combination of the chemical's use in products, general population and environmental exposure and release information. The persistence scoring evaluated the half-life of a chemical in air, water, soil and sediment, and the bioaccumulation scoring relied on existing data on bioaccumulation/bio-concentration and, in some cases, modeling. The 83 "work plan" chemicals ranked high based on their scores. However, the list includes chemicals that may not present human health concerns but met criteria for identification as persistent, bioaccumulative and environmentally toxic.

Upon release of its list, US EPA also announced that it would be conducting risk assessments on seven of the chemicals this year, including:

- Antimony and antimony compounds
- HHCB (1,3,4,6,7,8-hexahydro-4,6,6,7,8,8,-hexamethylcyclopenta[g]-2-benzopyran)
- Long-chain chlorinated paraffins
- Medium-chain chlorinated paraffins

- Methylene chloride
- N-Methylpyrrolidone
- Trichloroethylene (TCE)

The draft risk assessments for these chemicals are expected for public review and comment later this year.

US EPA followed up on June 1 and announced that it would conduct risk assessments on 18 more of the “work plan” chemicals during 2013 and 2014, including:

- 1-Bromopropane
- Five chlorinated hydrocarbons:
 - 1,1-dichloroethane
 - 1,2-dichloropropane
 - 1,2-dichloroethane
 - Trans-1-2-dichloroethylene
 - 1,1,1-trichloroethane
- 4-tert-Octylphenol
- Three flame retardants:
 - Bis (2-ethylhexyl)-3,4,5,6-tetrabromophthalate (TBPH)
 - 2-ethylhexyl-2,3,4,5-tetrabromobenzoate (TBB)
 - Tris (2-chloroethyl)phosphate (TCEP)
- Four fragrance chemicals:
 - Ethanone, 1-(1,2,3,4,5,6,7,8-octahydro- 2,3,8,8-tetramethyl-2-naphthalenyl)-4-sec-Butyl-2,6-di-tert-butylphenol
 - Ethanone, 1-(1,2,3,4,5,6,7,8-octahydro- 2,3,5,5-tetramethyl-2-naphthalenyl)-
 - Ethanone, 1-(1,2,3,5,6,7,8,8a-octahydro-2,3,8,8- tetramethyl-2-naphthalenyl)-
 - Ethanone, 1-(1,2,3,4,6,7,8,8a-octahydro-2,3,8,8- tetramethyl-2-naphthalenyl)-
- 4-sec-Butyl-2,6-di-tert-butylphenol
- 2,4,6-Tri-tert-butylphenol
- P,p'-Oxybis (benzenesulfonyl hydrazide)
- Octamethylcyclotrasiloxane (D4)

While the risk assessments on these 18 chemicals will utilize the same data sources as the initial seven chemicals, US EPA is also encouraging interested parties to submit additional relevant information on the chemicals, such as unpublished studies or information on uses and potential exposures by August 31, 2012.

Additionally, US EPA will announce schedules for conducting risk assessments on other work plan chemicals at a later time, and it has also indicated that it will add to the priority list as more data is developed and other chemicals screened.

Any company that manufactures, imports, processes or uses any of the 83 priority chemicals should pay close attention to US EPA's actions regarding them. This prioritization approach indicates the agency's intent to continue to move aggressively on chemicals. The risk assessments on the first seven chemicals will be released later this year and will provide important insights into the actions

the agency intends to take toward both identifying potential risks associated with the chemicals and addressing those risks. The first risk assessments also will lay the groundwork for the agency's efforts with regard to the next 18 chemicals, as well the remaining chemicals on the priority list.

US EPA has stated that if its risk assessment indicates a significant risk, it will evaluate and pursue appropriate risk reduction actions. If an assessment indicates no significant risk, US EPA will conclude its current work on that chemical. How the agency determines what constitutes a significant risk, as well as determines what, if any, risk management actions may be needed, will be critical.

Environmental Organizations Lack Standing To Appeal Agency Rulemaking

Ronda L. Sandquist, Partner, Denver and Georgina Guy, Senior Attorney, Denver

The court in *Wildearth Guardians v. Salazar*² held that plaintiff environmental organizations lacked standing to challenge a decision by the Bureau of Land Management (BLM) not to recertify the Powder River Basin as a "coal production region". *Wildearth* was yet another case brought in an attempt to force the BLM to alter its management decisions concerning leasing of federal coal in Wyoming.³ Wyoming continues to produce more coal (438.5 million tons in 2011) than any other state.

The Mineral Leasing Act delegated to the Secretary of Interior the management of federal coal leasing.⁴ The Secretary enacted regulations which allow coal leasing through the designation of regional coal production areas, or, if in a non-designated area, upon lease by application.⁵ The BLM decertified the Powder River Basin Coal Production Region in 1990, so the area defaulted to site-specific leases for designated tracts upon applications by interested coal producers.

Although all BLM mineral leasing actions are subject to compliance with National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321, et seq., the plaintiffs asserted that only the regional coal approach would adequately analyze and evaluate decisions considering national energy needs, potential economic and social effects of coal leasing and the alleged environmental impacts, particularly potential climate changes. The plaintiffs sought to force BLM rulemaking to recertifying the area.

BLM's rejection of the plaintiffs' petition, however, was found insufficient to support their standing in *Wildearth*. The plaintiffs argued three theories of standing: (1) procedural standing; (2) informational standing; and (3) substantive standing.

The court found no procedural standing, because BLM satisfied the mandated procedural requirements *prior* to the denial of the plaintiffs' petition. Informational standing involves a showing that a statute requires the agency to disclose information and the plaintiffs must provide a credible claim that the information would be helpful to them – but, the plaintiffs failed to cite a statutory right to information in this case. The plaintiffs' claim of substantive standing had been based on allegations that members of the groups had "reasonable concerns that the climate and other environmental impacts of coal mining under the leasing-by-application process will harm their aesthetic and recreational interests in the Powder River Basin and its wildlife." While it is well established that potential harm to such interests may constitute an injury sufficient to confer standing, a nexus between the harm and agency action must be demonstrated.

The plaintiffs argued that their injuries would be redressed by recertification because the BLM "could

² *Wildearth Guardians v. Salazar*, No. 11-00670, 2012 U.S. Dist. LEXIS 65411.

³ In a prior related case, the same plaintiffs unsuccessfully challenged a coal lease-by-application decision on the theory that the BLM was required to recertify the region because the coal market conditions had improved. *Wildearth Guardians v. Salazar*, 783 F. Supp. 2d 61 (D.D.C. 2011).

⁴ 30 U.S.C. § 201(a)(1).

⁵ 43 C.F.R. pt. 3420.

set a ceiling on coal leasing” and there could be an overall reduction in coal production, thereby reducing the adverse environmental impacts.⁶ However, the court found that “the Plaintiffs’ argument falters.” The relief sought – recertification – would not necessarily lead to reduced coal production and diminished environmental impacts, because countless independent actions by BLM and third parties would intervene between recertification and coal production. The court noted that the plaintiffs simply failed to show that their alleged injuries could be redressed by a favorable decision, as their “theory of redressability depends on ‘a lengthy chain of conjecture,’ that piles ‘speculation upon hypothetical upon speculation.’”

This case raises the specter of when during the project approval process – rulemaking, management plans, offers to lease and lease decisions – is the connection between the agency actions and non-governmental organizations’ (NGO’s) claim sufficiently linked to warrant the NGO’s standing to appeal the decision.

Migratory Bird Treaty Act: No Criminal Liability For the “Take” of Migratory Birds If That “Take” Results From Lawful Commercial Activities

Ronda L. Sandquist, Partner, Denver and Kristi J. Livedalen, Of Counsel, Denver

Based on a broad interpretation of the Migratory Bird Treaty Act (MBTA),⁷ criminal liability has been imposed upon companies that operate ponds, transmission lines and wind turbines which have resulted in bird kills. However, on January 17, 2012, in *United States v. Brigham Oil and Gas, L.P., et al.*,⁸ the U.S. District Court for North Dakota held that oil and gas companies operating pits and ponds in North Dakota’s Williston Basin were not criminally liable under the MBTA for the deaths of protected birds. The US had charged three corporate defendants engaged in oil development with misdemeanor violations of the MBTA for “taking” protected migratory birds that were found dead near their oil reserve pits.

In *Brigham*, the defendants moved to dismiss the charges on the grounds that the United States failed to allege a crime under the MBTA. The MBTA is a criminal statute that was enacted by Congress in 1918 to implement the 1916 Convention between the US and Great Britain (for the Dominion of Canada) to protect migratory birds. The MBTA, as amended, makes it “unlawful at any time, by any means or in any manner, to . . . take . . . any migratory bird.”⁹

The court determined that the ordinary meaning of the term “take” as used in the MBTA involves deliberate, rather than accidental, conduct. Thus, the court dismissed the “taking” charges, because in the context of the MBTA, “‘take’ refers to conduct directed at birds, such as hunting and poaching, and not acts or omissions having merely the incidental or unintended effect of causing bird deaths.”¹⁰ The court concluded, as a matter of law, that conducting lawful commercial activities that may indirectly kill migratory birds does not constitute a federal crime.

As a result of the decision in *Brigham*, CITGO Petroleum Corporation and CITGO Refining and Chemical Company, L.P. (CITGO) have filed a Motion to Vacate CITGO’s conviction for violations of the MBTA in Texas.¹¹ We anticipate other companies will do the same following this significant precedent.

⁶ *Id.* at *29.

⁷ 16 U.S.C. §§ 703-712 (1918).

⁸ 2012 U.S. Dist. LEXIS 5774 (D.N.D. Jan. 17, 2012).

⁹ 16 U.S.C. § 703(a).

¹⁰ *Brigham*, 2012 U.S. Dist. LEXIS 5774, at *16.

¹¹ *United States v. CITGO Petroleum Corporation, et al.*, No. C-05-563 (S.D. Tex., Feb. 23, 2012).

PPL Montana, LLC v. Montana: SCOTUS Issues First Navigability-for-Title Decision in 81 Years

Fred E. Breedlove III, Associate, Phoenix

The last time the US Supreme Court took on a case where the primary issue was determining river navigability for title purposes under the equal footing doctrine, the country was mired in economic depression, car manufacturers were going out of business, and drought was consuming the west. No, it wasn't 2010. The year was 1931, when the Court decided *United States v. Utah*, 283 U.S. 64 (1931).

In *Utah*, the Court affirmed what was even then a long-held principle (first outlined in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870)): states admitted to the Union after adoption of the US Constitution are considered to hold title to the riverbeds if those rivers were navigable at the time of statehood just as the original states inherited that title upon achieving independence from Great Britain. The *Utah* case turned on the issue of *how* to determine navigability for title along certain segments of three rivers in Utah.

However, since that time, a number of decisions on tangential issues have muddied the law. The current US Supreme Court therefore took up and decided *PPL Montana v. Montana* on February 22, 2012, in an attempt to clarify the Court's long-held and loosely-followed precedent on this critical issue. At issue in *PPL Montana* was ownership of the riverbeds along three rivers in Montana: the Upper Missouri, the Madison, and the Clark Fork, where PPL Montana had long-standing hydroelectric projects. The State of Montana and beneficiaries of Montana's state trust lands sued PPL Montana, LLC for compensation for use of the riverbeds. The legal test of determining whether or not a river was navigable focuses on whether the river was navigable-in-fact at the time of statehood. This test was first described in *The Daniel Ball* as follows:

“Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”¹²

Following this principle, the trial court found that the three rivers were navigable and therefore owned by Montana, awarding it US\$41 million on summary judgment. The Montana Supreme Court affirmed, discarding historic evidence from various sources (including the Lewis & Clark Expedition), that portions of the Upper Missouri were impossible to navigate. The Montana Supreme Court reasoned that waterfalls and other obstructions on the three rivers were mere insignificant obstacles to free passage.

In a unanimous 9-0 decision, the US Supreme Court reversed. The Court admonished the Montana Supreme Court for failing to follow the segment-by-segment approach to determining navigability that had been described in *Utah*. The Court disagreed with the reasoning that short interruptions are insignificant, finding that the necessity for portages is almost always sufficient to find that a river segment is non-navigable.

The Court also disagreed with the Montana Supreme Court's reliance on evidence of current recreational use of the rivers by modern watercraft. The Court noted that to use such evidence in support of navigability-for-title, the party must show that (1) the watercraft is “meaningfully” the same as those used at statehood for trade and travel, and (2) that the current condition of the river is “not materially different” from its condition at statehood.

¹² *The Daniel Ball* at 563.

Finally, the Court disregarded Montana's suggestion that denying title to the riverbeds would undermine the public trust doctrine. The Court reasoned that the equal footing doctrine is a federal, constitutional issue, while "the contours of public trust do not depend upon the Constitution."

PPL Montana is an important case for property owners and those involved in activity along rivers and streams, especially in the Western US. As many states continue to struggle with determining title to the beds and banks of their rivers and streams, the *PPL Montana* decision could ultimately affect ownership to millions of acres of public and private land throughout the country, impacting hydroelectric projects, hard rock mining, pipeline siting decisions, and other industrial activities that utilize the country's waterways.

Contacts

Karen A. Winters

Chair, Environmental, Safety &
Health Practice Group
Columbus
karen.winters@squiresanders.com
+1 614 365 2750

Rob Elvin

European Head of the Environmental,
Safety & Health Practice Group
Manchester
rob.elvin@squiresanders.com
+44 161 830 5257

Jessica E. DeMonte

Editor, *Environmental, Safety & Health Review – United States*
Chicago
jessica.demonte@squiresanders.com
T +1 614 365 2809

Contributors

Fred E. Breedlove III

Phoenix
fred.breedlove@squiresanders.com
+1 602 528 4098

Georgina Guy

Denver
georgina.guy@squiresanders.com
+1 303 623 3197

Allen A. Kacenjar, Jr.

Cleveland
allen.kacenjar@squiresanders.com
+1 216 479 8296

Kristi J. Livedalen

Denver
kristi.livedalen@squiresanders.com
+1 303 623 3052

Stephen A. Owens

Phoenix
steve.owens@squiresanders.com
+1 602 528 4170

Gary L. Pasheilich

Columbus
gary.pasheilich@squiresanders.com
+1 614 365 2730

Ronda L. Sandquist

Denver
ronda.sandquist@squiresanders.com
+1 303 623 1317