

The Environmental FORUM[®]

Advancing Environmental Protection Through Analysis • Opinion • Debate



Today's Pirate, Yesterday's Laws: The Challenge for Governance

Next Generation
*Regulations with
Compliance Built In*

Agency in Peril
*Despite Attacks, EPA
Takes on Climate*

The Merger
*Are Environmental,
Energy Law Linked?*



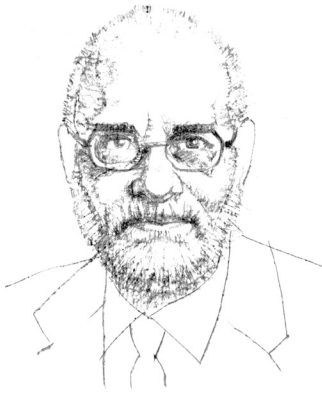
THE FORUM

The Merger Between Energy Law and Environmental Law: The View From the Micro-level

For several decades, since the beginning of the modern environmental era, there has been a call for the merger of environmental law and energy law. After all, energy production and use has environmental consequences, and reducing pollution can be accomplished by reducing energy consumption and its effects on public health. But the two fields have often drifted apart; in fact, the 1970s saw both the first environmental laws and the

founding of the Environmental Protection Agency, but also the passage of a suite of energy laws and the creation of a separate Department of Energy.

Nonetheless, there are examples of such a merger in diverse fields of endeavor, with attorneys playing a leading role. We asked a suite of environmental lawyers to look at their every-day work for evidence of a concilience, and to report back to our readers what they found.



Bruce Diamond

General Counsel
NATIONAL NUCLEAR SECURITY
ADMINISTRATION

“From its earliest days, EPA’s mobile source program had as a key element improvement in fuel efficiency.”



Monica Derbes Gibson

Of Counsel
VENABLE LLP

“Both areas affect the daily lives of individuals as well as national and international policy.”



Sheila Slocum Hollis

Member, Executive Committee
DUANNE MORRIS LLP

“There is no use pretending that any major energy matter can proceed without integration of environmental considerations.”



Bob Martineau

Commissioner
TENNESSEE DEPARTMENT
OF ENVIRONMENT AND
CONSERVATION

“We are struggling with decisions with clear recognition that energy investments will impact the environment.”



Kelly McQueen

Assistant General Counsel—
Environmental
ENTERGY SERVICES INC.

“I do not believe there will be a unification. This is because, fundamentally, each governs different things.”



Vickie Patton

General Counsel
ENVIRONMENTAL DEFENSE FUND

“While there is a tie between energy use and environmental impacts, crafting integrated policies has proven intractable.”

When Were the Two Fields Apart?

BRUCE DIAMOND

Based on my personal experience as an environmental lawyer with extensive energy-related practice, my response to this question is: when were the fields of energy law and environmental law ever apart? One of my very first assignments at EPA back in 1974 was to work with the oil spill program under Section 311 of the Clean Water Act. This program had a significant impact on the transportation and storage of energy products. I also worked on regulations for cooling water intake structures and cooling water outfalls under Section 316 of the CWA, requirements that remain controversial to this day due to their impact on nuclear power plants.

When I shifted to work under the Clean Air Act I joined the long running wrestling match between EPA and the electric power (coal fired) generating sector. From its earliest days, EPA's mobile source and transportation planning programs had as a key element improvement in fuel efficiency and the development of less fuel-intensive modes of transportation. The energy companies I worked for had large and very busy environmental departments and strategic planning took careful account of anticipated changes in environmental rules. As an attorney in a law firm I worked on such issues as the cleanup of old manufactured gas plants and the environmental rules affecting operation of an airport fuel servicing company. At the Department of Energy I provided advice to DOE's \$6-billion-per-year environmental cleanup program.

Certainly there are areas of energy law and environmental law that don't significantly overlap. There's

no reason why experts on FERC ratemaking should be environmental experts as well. Similarly, FIFRA and TSCA practitioners need not (usually) spend a lot of time on energy-related issues. I don't envision a time when the overlap between energy law and environmental law would be complete enough to justify a full *merger*. But, at the same time, there have been and will continue to be very substantial, even vital, cross connections. My point is that these may change form, but they're not new.

I guess the recent talk about a merger is largely stimulated by the issue of climate change. Certainly, global warming presents a dramatic energy-environmental convergence. Indeed, while this is not the first time the coal sector has predicted their environmental requirements-based demise, this time it might really be an existential struggle. But while the stakes may be raised, the fundamental conflicts are not at all new. And in some ways, the issue of climate change, important as it is, may obscure other very important environmental issues affecting the energy sector which have been the subject of conflict for decades. For example, it seems a distortion to have the coal versus natural gas debate cast entirely in terms of carbon emissions. Natural gas may have roughly half the carbon emissions of coal, but it also practically eliminates mercury releases, has no appreciable particulates, and emits dramatically less SO₂. These more traditional environmental advantages are practically never mentioned these days, yet may be quite significant to those who breathe the air.

Now a few words about terminology. I have a pretty firm grasp of what an "environmental" attorney does. But the term "energy" lawyer seems less clear to me, at least in the context of the intersection of environmental and energy issues. Most lawyers at the Department of Energy, for example, characterize

themselves as various specialists, but not as energy lawyers, and this is particularly true of the environmental group. (Of course, when marketing oneself, all bets are off.) When I participated in the Center for Clean Air Policy Air Quality Dialogue, we spent hours discussing retirements of coal-fired power plants, carbon capture and sequestration, the potential for coal gasification technology and similar issues of intense interest to the energy industry, but I believe that all the attorneys in that room would call themselves environmental lawyers. I know that the Energy Bar Association has an environmental section, but in my experience, "environmental" lawyers have largely captured the playing field.

Bruce Diamond has practiced environmental law for 38 years, principally at EPA. He has also been in private practice and has been vice president for environment, health & safety for the former Columbia Energy Group. He is now with the Department of Energy, where he has headed the environmental law group and currently serves as general counsel of the National Nuclear Security Administration. The views expressed in this article are solely those of the author and do not reflect the position of the Department of Energy, the NNSA, or anyone else for that matter.

How Can the Two Branches of Law Not Overlap?

MONICA DERBES GIBSON

Much of my career has focused on environmental issues related to electricity generation. I can talk at yawn-inducing length about power plants from fuel delivery to the stack plume, but for many years my understanding stopped when the steam reached the turbine. Then, last year, I was invited to step through the looking glass: the energy regulatory group at Venable LLP invited me to collaborate on a project. This work gave me the opportunity to learn about what happens after the fuel is combusted.

Energy law and environmental law are similar in many ways, but perhaps most important is that both areas affect the daily lives of individuals as well as national and international policy. It is essential that energy lawyers and environmental lawyers work together to make sure that policymakers consider the environmental impacts of energy decisions and the energy impacts of environmental decisions.

Both sets of law are technical and complex. It should not be necessary for environmental lawyers to learn the intricacies of FERC Order 1000 or for energy lawyers to understand the procedures for establishing Maximum Achievable Control Technology standards under the Clean Air Act. However, critical aspects of the two practice areas overlap. For example, a company might think of switching from coal to natural gas in order to reduce emissions of air pollutants. But in making this decision, the company would also have to consider whether it would have access to a consistent fuel supply and whether or not it would be able to comply with reliability standards.

The Energy Information Administration's 2013 Annual Energy Outlook identifies factors likely to affect the U.S. energy sector; these factors include increased production of natural gas and decreasing reliance on coal. However, coal remains the fuel for approximately 40 percent of U.S. energy production.

On May 9, the House Energy and Commerce Subcommittee on Energy and Power held hearings on "American Energy Security and Innovation: Grid Reliability Challenges in a Shifting Energy Resource Landscape." Witnesses included representatives of fossil fuel burning electricity generators, industrial energy users, the renewable energy industry, and environmental groups. They spoke about the need to ensure that the electricity grid and pipeline capacity evolve to reflect how the nation's electricity generation is changing. These developments show that lawmakers and policymakers are considering the impacts of changes to the country's energy portfolio.

The availability of different energy sources, plus new regulation to address global warming, is changing electricity generation in the U.S. Increased domestic natural gas production has allowed more widespread use of gas for electricity. The percentage of electricity generated from renewable sources is projected to increase from 9 percent in 2011 to 13 percent in 2040. EPA's proposed New Source Performance Standards anticipate the use of carbon capture and storage at newly constructed coal-fired units. President Obama recently called on EPA to promulgate regulations limiting emissions of greenhouse gases from generation.

Changes to electricity generation and distribution will have widespread environmental impacts. If the United States relies more heavily on natural gas, for example, there will be environmental impacts at the production, transmission, and combustion stages. Construction of wind energy generation projects can

affect wildlife. Updating electricity transmission infrastructure will likely involve discussions about whether existing power lines should be moved or buried, and each option brings environmental consequences. The people making these decisions have to understand the potential environmental impacts of their choices and the possibility that environmental concerns could affect the timing or footprint of a planned project.

The importance of coordination between energy and environmental laws goes beyond those working with electricity generators and distributors. All industrial sectors, as energy consumers, are interested in having reliable sources of energy. Similarly, household electricity consumers have a keen interest in uninterrupted service. Decisions made without communication between environmental and energy lawyers are not likely to lead to long-term solutions.

My goal of practicing environmental law informed by energy law is still under construction. I continue to learn about the system of energy regulation and to place that knowledge into the context of my experience as an environmental lawyer. And now, when I examine environmental issues, I have learned to ask questions about energy-related issues, like fuel supply, that would not have occurred to me two years ago. My growing experience with energy law has helped my usefulness to clients: to be able to speak the language on both sides of the looking glass. And, someday, I will be able to make people yawn by talking about electricity from fuel delivery all the way to the energy-efficient light bulb.

Monica Derbes Gibson is of counsel at Venable LLP.

When the Two Become As One

SHEILA SLOCUM HOLLIS

The two worlds of energy and environmental law are merged and we need to invent a new description. Perhaps the updated profession is now, in capital letters, *Enermental Law* or *Envirergergy Law*. The actual term doesn't matter; there is no use pretending that any major energy matter can proceed before any forum without integration of environmental considerations.

This practitioner believes that the energy practice has evolved to an environmental practice and vice versa. Let me count the ways that this marriage of ideas and laws has joined together. Take virtually any form of energy and discuss it without the examination of environment and ecology — impossible. And, the consequences of energy decisions are usually long-lasting and laden with cost and politics. The issues it raises are world-wide in scope.

Carbon-carrying fuels are laden with heavy history, politics, international debates, studies, regulation, and restriction. Why? Very simply, environmental law is pervasive and overarching.

Coal is the centerpiece of the climate change wars. And, oil and natural gas extraction, development, storage, transportation, importing, and exporting on public or private lands is one of the hottest—forgive the expression—issues of the day. And, I haven't even "drilled" down to the unique challenges of the hydraulic fracturing technique.

Yes, land development and use, air and water, noise and environmental justice regulations, policies, and passions go with the territory. Environmental law issues are typically central when considering whether coal, oil, and gas are to be exploited. Yes, reliability, affordability, safety, economic,

and security issues are of great significance as well; yet environmental considerations at the core of the issues in the debate on energy always seem to be *the* central ones. Virtually every federal, state, and local energy regulatory agency expends the greater part of its resources analyzing and regulating from the standpoint of environmental issues, even in the context of rate cases, licensing cases, and allocation and siting matters. Nowhere is the debate and deliberation exacerbated more than in matters in which the source of fuel for electric generation is central. Because not only all the fuel-related issues but the generating facility as well become parts of the decision process.

But the goal of life without oil, coal, and gas in the mix is difficult to achieve even without debate of environmental issues. Witness the obvious nuclear energy example. Approximately 100 nuclear generating stations continue to supply a meaningful portion of electric power to the nation's grid. Yet, they are aging, and are often at the center of intense scrutiny for their existing and long term environmental consequences after decommissioning. At the center of the nuclear debate is the outrageously complex issue of long-term storage of the spent fuel.

And, even the non-nuclear, non-emitting energy sources, a major building block of national energy policy, are not free from environmental debate and controversy. Witness the issues of endangered and threatened species, land use, water pollution, and environmental justice issues that often encroach on the emissions-free energy sources. Hydroelectric power is the largest source of renewable power, but it is usually the most controversial due to impacts on fish, water availability, and other environmental issues. Old facilities are being removed and new ones are being subjected to the close review of energy and environmental agencies. Large hydroelectric development has dwindled in the United States and even small projects face hurdles in licensing and oversight.

The development of wind and solar

powered generation projects are often controversial on a variety of fronts, the most notable with respect to endangered species (e.g., raptors and other avian life), noise produced from some wind farms, visual issues, and land use and associated issues with large wind and solar projects.

These issues arise most often for environmental agencies, but have become central to energy policy and regulatory bodies as well. Yet, energy regulators must consider other traditional components of a complete and reasoned evaluation of the desirability and legality of a particular project's development, licensing, and continuing operation, including complicated power transmission development and pricing. Even proposals to reduce or eliminate demand for power intersect as "energy" pricing, and are weighed for environmental effect. The policy-makers and administrators bearing the responsibility of determining the public interest must make the often tough decisions endorsing or rejecting an energy project in large part based on environmental law, but taking into consideration the need of the country for secure, reliable, and affordable electric and other energy supply.

Thus, the legal representatives of the energy industry, including large energy consumers, and the regulatory agency decisionmakers must be cross-trained to see the entire landscape of legal, security, safety, reliability, and cost issues as well as the critical environmental issues. They must see the energy landscape holistically, realizing the tradeoffs in ensuring that energy is available while embracing and responding to the legitimate environmental concerns that permeate virtually all their decisions.

Take your pick: whether *Enermental Law* or *Envirergergy Law*, either will reflect the complete merger of the two fascinating and fast-moving legal worlds.

Sheila Slocum Hollis is a member of the firm executive committee and chair of the Washington, D.C., office at Duane Morris LLP

Convergence of Fields Is a Natural Outcome

BOB MARTINEAU

There is no doubt that the practice of environmental and energy law is merging. Ample evidence of this integration exists. Law firms that once advertised “environmental practices” are now referring to those practices as “energy and environment practices.” Law schools with well-known environmental law programs are now competing to develop and offer just as many energy law classes. The number of energy-related legal conferences has grown. We once referred to attorneys in the energy field as “public utility lawyers,” but they are now “energy attorneys” who answer questions about greenhouse gas emissions and their future regulation before utility commissions scrutinizing significant public investment decisions.

As an environmental attorney in private practice, I regularly represented energy companies with specific siting and energy production environmental issues, but was not frequently involved in my client’s early investment choices. Since becoming commissioner of Tennessee’s environmental agency in 2011, I continue to talk about energy and energy-related issues regarding a project’s direct impact on the natural environment, but I also now address investment decisions for energy-consuming products, battle the rising costs of energy through conservation measures and other initiatives, and consider long-term legacy issues associated with historic energy decisions. The overall topics of energy and the environment remain the same, but the conversation and the timeframe under consideration have clearly broadened.

Energy and the environment have

always been intimately intertwined. Energy extraction, transportation, production, and waste by-products have always had a direct impact on the environment and we have regulated that impact for some time. Early conservationist Theodore Roosevelt said, “We have become great because of the lavish use of our resources. But the time has come to inquire seriously what will happen when our forests are gone, when the coal, the iron, the oil, and the gas are exhausted, when the soils have still further impoverished and washed into the streams, polluting the rivers, denuding the fields and obstructing navigation.”

Roosevelt was keenly aware of the consequences of resource extraction as well as the pollution created when our natural environment is disturbed. This awareness led to the development of laws and regulations aiming to control resource extraction and the pollution and waste by-products created from energy production. These laws, in turn, created an entire generation of environmental attorneys, of which I am one. The laws and regulations, however, are all structured with the purpose of controlling choices we have already made; they do not seek to specifically help us make decisions. The National Environmental Policy Act of 1969 is one of the few exceptions, with its purpose to direct the federal government to analyze and consider the direct, indirect, and cumulative impacts to the environment from any given choice and various alternatives. To what extent the act has actually informed or driven decisionmaking is highly debated.

I see evidence of a merging environmental and energy legal field because today, more than any other time in history, we are actively engaged in a larger, broader conversation about energy and energy investments. We have entered a time where we better understand and accept the full lifecycle cost of a specif-

ic energy investment decision. Most importantly, we now perform that analysis. There are probably a number of reasons for this fateful confluence: a large portion of our energy portfolio is nearing the end of its useful life; future regulation and/or cost associated with greenhouse gas emissions is still uncertain; we have lived with the existing energy fleet for a while and are well aware of its costs and benefits; technology continues to advance our capabilities and options in the energy sector; or the generational transition occurring in the American workforce.

Regardless of the reasons, we are engaged in a very important and public dialogue about our energy investments. Attorneys are playing a pivotal role in that debate as they seek to represent their client’s interests before public utility commissions, judges, and in the court of public opinion. As we look ahead, I am struck by how much the voices of our past guide us today. Roosevelt, in his time, said, “I recognize the right and duty of this generation to develop and use the natural resources of our land; but I do not recognize the right to waste them, or to rob, by wasteful use, the generations that come after us.” We have the benefit of history, we now understand the weight and consequences of our decisions, and, most importantly, we are struggling with those decisions with clear recognition that energy investment decisions made today will impact not only the environment, but the generations that come after us.

Bob Martineau is commissioner of the Tennessee Department of Environment and Conservation.

Everyday Overlap — but Not Yet a Merger

KELLY McQUEEN

On a daily basis my legal practice as an environmental attorney delves into issues and considerations that have been historically in the domain of energy, as opposed to environmental, law. That is perhaps primarily a function of the fact that I am a utility environmental attorney — which has at its core the challenge of how to produce and deliver energy in a cost-effective manner while cognizant of and in compliance with the myriad regulatory and practical realities of modern environmental law. There is much functional overlap in my daily practice between what I will call traditional energy law (by which I refer to utility regulatory law at the state and federal levels) and environmental law as well as many recent instances where the concepts of each are being incorporated into the other. But I do not believe there is or will be an actual unification of the two legal disciplines. This is because, fundamentally, each governs different things.

There are many examples of the intersection of energy and environmental law: Energy efficiency as a mechanism to decrease emissions of pollutants, renewable energy measures as a part of Clean Air Act State Implementation Plans, continual requests for utility commissions to review and approve generation resource decisions in light of the increasing complexity of EPA-driven regulatory requirements, and NGOs' heightened involvement in lawsuits and regulatory matters at the state and federal levels in an effort to influence fuel choices for a company's generation mix, to name just a few.

It's evident that in many ways

the nature of the utility business, at both the retail and wholesale level, is being transformed by the shifting landscape that is 21st century environmental law. Compliance with EPA regulations was — in time past — a simpler reality: Know the relevant requirements, plan for compliance, reporting, and maintenance as necessary, and have programs in place to audit and correct deficiencies. For many of the regulations, it is a wholly different exercise now.

Due to the size of the necessary investments, the complexity of requirements, and the perceived truncated compliance timelines, compliance with environmental regulations applicable to the electric generation sector — such as the mercury and air toxics standards, greenhouse gas regulations, air transport laws, the increasingly stringent National Ambient Air Quality Standards, the Regional Haze program, and cooling water intake structure rules, among others — means compliance planning decisions now equate to resource planning decisions. They are, in essence, state and national energy policy decisions. Compliance with EPA regulations, in other words, increasingly drives the policy choice of how — and how much — energy will be produced. With such a quickly changing set of obligations and uncertainties interjected by the inevitable legal challenges against each rule EPA publishes, merely getting a handle on when compliance with an environmental regulation will be required is one of the hardest parts of this environmental-obligation-driven resource planning. Many of my days are spent working through the forecasts of when an EPA regulation will actually translate into a legal obligation.

An interesting development in this situation where environmental obligations are driving resource and planning decisions — and one which I expect will take up more and more of my practice in years to come — is the increasing role of

the utility commissions in environmental compliance, and similarly the enhanced collaboration between these commissions with the environmental regulatory agencies. No longer can the environmental regulator develop requirements to protect the environment without considered regard for the affect on the grid or generation fleet. Nor can the utility regulator be ignorant of the intensifying challenges attendant with compliance with environmental requirements. Although, in many ways, this intersection is a difficult one, due in part to unique lexicons, a different set of expectations, and historical procedural norms (to say nothing of the utility industry's love of certainty in decisionmaking), I see on a near daily basis the efforts of each sphere (utility commission and environmental regulator) to learn about the other and be ready for the work ahead to ensure that environmental compliance does not mean lessened reliability or unsustainable costs to consumers.

But for all these instances of intersection — and there are an increasing number — I do not believe that one area is transforming into the other or that they will merge at the macro level, for each field occupies its own legal space, and necessarily serves a different function. Environmental law is at its core the (legal) management of humanity's impact on the environment and our natural resources. Energy law governs the production and distribution of energy for the benefit of humanity. So while there are occasions recently when these lines blur and at times in such a way as to cause confusion of roles, expertise, and objectives, regulators of each stripe must be mindful of the other and that neither system can trump the other. Each area's function is vital to a coherent system of governance.

Kelly McQueen is assistant general counsel—environmental at Entergy Services Inc.

Greater Environmental Gains at Less Cost

VICKIE PATTON

Our nation's production and use of energy has an indelible imprint on our environment. The fossil fuel combustion in the power sector is the largest single source of carbon dioxide, mercury, and sulfur dioxide emissions. While there is a tight tie between energy use and its environmental impacts, crafting integrated policies has proven difficult.

Through years of testing and adjustment, it is now plain that by more effectively integrating energy and environmental policies, we can achieve greater environmental gains at less cost. The national standards for clean cars and Colorado's integrated planning for power plants are illustrative.

Several years ago, the U.S. auto industry argued that the Department of Transportation's fuel efficiency requirements for new cars could not co-exist with EPA's greenhouse gas emission standards and, therefore, protections under the nation's energy laws must displace environmental safeguards.

In *Massachusetts v. EPA*, decided in 2007, the Supreme Court settled the auto question, holding that the Department of Transportation's issuance of fuel efficiency standards "in no way licenses EPA to shirk its environmental responsibilities." While the obligations of the agencies "may overlap" there is "no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."

Now the resulting clean car standards are curbing our nation's dependence on oil, cutting carbon pollution by six billion tons, saving families money at the gas pump, and revving new technologies that have accelerated the U.S. auto industry's resurgence

in the global marketplace. These extensive societal benefits were achieved through coordinated efficiency and emissions standards addressing both energy and the environment. And these carefully crafted standards were supported by the U.S. automakers.

In my home state of Colorado, we face a suite of air pollution challenges across the Front Range. Summer smog violates health standards, Denver's brown cloud casts a pall over winter days, nitrogen deposition is altering fragile high alpine lakes and forests, the grand vistas of the Rockies are too often obscured by air pollution, and mercury emissions have both near and distant reach. We have been especially hard hit by the grim impacts of extreme weather. Our families and communities have been afflicted by deadly wildfires and devastating drought.

The region's aging coal-fired power plants are the single largest source of many major emissions. And some of the coal units in urban Denver were constructed before the Broncos were chartered as a member of the American Football League in 1960. Not surprisingly, policy makers have looked to Xcel Energy, the largest power provider in Colorado, to help meet the region's clean air challenges through cleaner energy. And Xcel has responded with pioneering solutions emblematic of Colorado's western tradition.

Colorado deployed innovative — and integrated — air quality and modern energy solutions to chart a more comprehensive path to cleaner air. The bipartisan Colorado Clean Air–Clean Jobs Act of 2010, led by Governor Bill Ritter Jr. and by prominent Republican and Democratic members of the General Assembly, provided a legislative blueprint for the Colorado Public Utilities Commission and the Colorado Air Quality Control Commission to coordinate and optimize clean air compliance through integrated energy and air quality planning. The state law directed both regulatory bodies to evaluate

and determine, on the basis of rigorous economic and technical analysis, air quality protective and cost effective cleaner energy solutions.

Today, the resulting plan provides for the phase out of the old coal-fired units in the Denver metro area, and optimized investments in modern energy and clean air infrastructure that will cut major contaminants by over 80 percent. Carbon pollution across Xcel's power plant fleet will be reduced 28 percent by 2020 through the combination of the Clean Air–Clean Jobs Act, the state's clean energy standards (calling for 30 percent of Xcel's power to be generated by renewables), and expansive energy efficiency programs.

Members of the Colorado General Assembly recognized the environmental and economic benefits of integrated air quality planning. The Clean Air–Clean Jobs Act declares that a "coordinated plan of emission reductions from coal-fired power plants will enable Colorado utilities to meet the requirements of the [federal Clean Air Act] and protect public health and the environment at a lower cost than a piecemeal approach."

So the question now is whether we will have the courage to act by deploying innovative solutions across our nation before it is too late. This is the question President Obama presented to the nation in his June 25 address announcing the U.S. Climate Action Plan, including carbon pollution standards for the nation's fleet of fossil fuel power plants. The country's automakers and some major power companies have already shown the way. There are governors, legislators, manufacturers, energy companies, innovators, and concerned citizens who have the courage to act — by recognizing that the environmental impacts of energy production can be optimally addressed with solutions that consider both in forging forward progress.

Vickie Patton is general counsel at the Environmental Defense Fund in Boulder, Colorado.