

# FINAL TRANSCRIPT

**Thomson StreetEvents<sup>SM</sup>**

**\*\*ACC - Air Permitting Strategies for Coal-fired Power**

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## PRESENTATION

### **Bob Temple** - *CPS Energy - Director, Legal Services*

Good evening for half the country and good morning for the other half. If you've tuned in for the Association of Corporate Counsel - Air Permitting Strategies for New Coal-fired Power Plants, you're at the right spot. This is Bob Temple from CPS Energy. I'm here with our two representatives of our sponsor firm today. Our program today is sponsored by the law firm of Baker Botts. I'm here with Pam Giblin and Derek McDonald of the firm of Baker Botts in Austin, Texas to talk to you about air permitting strategies for new coal-fired plants. And I'd like to turn it over, at this point, to Pam Giblin, a partner with Baker Botts, who is one of the senior members of their environmental team here at that firm.

### **Pam Giblin** - *Baker Botts LLP - Partner*

Thank you, Bob. First, let me say how pleased we are to be given the opportunity to visit with you and to share with you some of our thoughts about permitting strategy. And we have been involved in permits for major facilities for many, many years. I've been doing air permits for about 35 years. And I think one of the things that's going to be evident in this presentation is the increasing complexity and the need for strategic thinking on some of these facilities.

One of the things that we always have been very focused on is the notion that are really three legs to any air permitting facility - any permitting project. [The] sound science and that's obviously very important, but there were a lot of facilities have got very, very good engineering and science behind them, but never got permitted because the other legs of the stool, that's hugely important is an effective legal strategy that analyzes the very important legal issues that are an indispensable part of this permit process. And finally, strong politics. And I use politics not just as electoral politics, but relationships with the community and all of the various sort of intangible components that go into that kind of permitting.

We have found that even though your major coal-fired power plants projects may involve many permits, the air permit is generally going to be the primary event. Now, Bob's going to talk about the need for these facilities and the distribution around the country of these various issues.

### **Derek McDonald** - *Baker Botts LLP - Partner*

Yes, this is - actually, Derek McDonald is going to kind of take this part. I thought, as we got started today, it might be helpful just to kind of do the statistics shot at the huge resurgence of interest in coal-fired power plants that's in the country today. I pulled some information from the National Energy Technology Laboratory, which is an office of the United States Department of Energy, and you'll see that summarized on your first slide there. As you can see, DOE has estimated 80 gigawatts of new coal capacity by 2025 and that is a huge, as everyone will appreciate, amount of energy that is being eyed for fueled by - to be fueled by coal, generated by coal. That's approximately 135 new coal-fired plants representing over \$100 billion in investment dollars.

And what is very interesting about the distribution of these facilities and projects is how many different states they actually impact. Projects have been either in development or have been announced in 40 states. And on slide two, you can see, as you

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work through there, there is an actual distribution of where those projects are located. You can see that some states have numerous projects while other states have one or so projects that are proposed for them. But the fact that 40 different states have projects in the development pipeline is incredibly important.

As you look through this, getting some of the dynamics here is - one of the things that we've experienced is you're seeing these major projects being planned in states that have not permitted a new coal plant in many years. In Texas, for example, a permit was recently issued for the first coal-fired power plant to have been permitted in Texas in the last 15 years. And so, as you work through the maze, that is the air permitting process for these plants, you have to be knowledgeable that, in some instances, you have state regulators who have not been on the cutting edge of many of these issues that are being used as part of the national anti-coal platform that's out there.

From technology, you'll see that NETL and DOE have summarized the various technologies that are going to be used for the new coal plants that are being proposed. A majority of them - a vast majority of them will use - still be using conventional pulverized coal technology. And with a lesser extent, you're seeing some use of circulating fluidized bed technology for lower value coal such as waste coals and some other projects. And you're seeing an fair amount of diversity in the fuel itself, western coal, eastern coal, lignite, waste coal and petroleum coke projects as well. Going back to slide two, that's just a map again that I had mentioned before that gives you an idea of where these projects are being planned. And as you see, they're fairly distributed all across the country.

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**Bob Temple** - *CPS Energy - Director, Legal Services*

Just to keep everyone on the same page, physical slide three is numbered as slide two, so Derek will - and we'll continue to refer to the number that's in the bottom right-hand corner of the page, which - that map is on slide two.

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**Derek McDonald** - *Baker Botts LLP - Partner*

Moving onto slide three, these projects are high profile projects. If there's any doubt that your project will not receive attention from the local community, from the states, from national environmental groups, put that to rest because there is a large national anti-coal movement that has been energized by this extreme interest in coal project development. The -- slide number three highlights some of the obstacles that exist to developing these projects and I think it's important to kind of highlight other project obstacles that exist because you've got to move forward on these projects with all -- with knowledge of all the different aspects that are impacting them.

One of the, obviously, power generation economics and the need for the plant and the ability to provide the plan at the right cost and provide power at the right cost are obviously key. Financing hurdles can be an impediment to the development of projects as well, especially when there are regulatory approvals and delays that can be attendant to the financing structure. Uncertainties and appeals and litigation involving the power plant will certainly have an impact on the development potential of the particular plant. What we're seeing is a lot of plants are being proposed in competition to one another and so it could be a situation where the first one to get in the pipeline, to get their permit issued, to have a permit that is issued that can withstand appeal and satisfy financing hurdles may be the one that goes forward and others may fall away at that point.

And then, the other uncertainty out there with regard to the development of coal-fired power plants is the ever evolving environmental standards that exist for these facilities. We have seen recently, the EPA proposed the Clean Air Interstate Rule, the Clean Air Mercury Rule, the Regional Haze Rule. We are in the middle of an explosion of strategies for ozone in non-attainment areas and all of these various regulatory programs are driving reductions and increased focus on NOx and Sox and particulate matter for - fine particulate matters, specifically - that creates some uncertainty about what the standards that will apply to plant when it's -- both when it's being permitted and when it's up and running. Also, another major project uncertainty now is the impact of potential regulation of greenhouse gases and how that contributes to project risk that they're moving through the pipeline.

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**Bob Temple** - CPS Energy - Director, Legal Services

Derek, one question that got in is what national groups are you seeing opposing coal-fired power plant projects at this time? And just so the listeners know, on the ACC webpage, there's a link to send questions into derek.mcdonald@bakerbotts.com.

**Derek McDonald** - Baker Botts LLP - Partner

We're seeing a fairly coordinated campaign among most of the national environmental groups. The Sierra Club is very active in this front. You'll see the Sierra Club active throughout the United States. Another national group is Environmental Defense. The Clean Air Task Force is another group that tends to get involved.

**Pam Giblin** - Baker Botts LLP - Partner

Public Citizen has also been very involved, certainly in the Southwest.

**Derek McDonald** - Baker Botts LLP - Partner

Yes. Those are probably the key federal organizations that have been involved that you'll see as you embark in the permitting of one of these projects, that they steal -- the national groups will work together and you'll see comments that have been used by Environmental Defense and Montana will then show up, line by line, in a Sierra Club filing in Kentucky and then Public Citizen will use all of that together with some resources, perhaps provided by Clean Air Task Force in a filing in Texas. So, you start seeing a remarkable similarity of the types of issues that are being raised by the groups. But nominally, the main groups that we're seeing are Sierra Club, Environmental Defense, Clear Air Task Force and Public Citizen.

**Pam Giblin** - Baker Botts LLP - Partner

They try to energize local grassroots groups and try to utilize local issues such as environmental justice to bolster their arguments.

**Derek McDonald** - Baker Botts LLP - Partner

Moving back to my slide, number three, here is a - speaking of the Sierra Club - here's a quote from a recent secret meeting that a number of the national environmental groups had in Georgia in 2005. I'm not sure why a coal publication was able to attend this secret meeting, but it gives you a sense of how much bragging is being done by the anti-coal opposition, is they believe that about 30%, one-third of proposed power plants can be prevented from being developed by citizen opposition and regulatory review. And their goal is certainly to increase that 30% to a much higher percentage.

And moving to slide four, I just thought I would give you some sense of two recent projects that have been through the -- being -- or going through the permitting process at this point and some of the challenges that they have faced. These challenges are not unique, but typical of the types of challenges that many of us will see in developing other projects throughout the state. In Montana, there was the Roundup project. It's a 780-megawatt pulverized coal plant near Billings, a mine-mouth plant using [solitisol first] subbituminous coal. And we've seen a number of challenges in that case on the best available control technology, the maximum achievable control technology challenges. We'll talk about these in more detail later on in the presentation.

Visibility impacts at Yellowstone National Park and Bend National Wildlife Refuge were -- are also a main focus of the opposition to the Roundup project. This has been to the Supreme Court of Montana at least once already and litigation associated with the project, administrative challenges continue. A permit was issued and as we sit here today, I'm not -- I don't believe that there has been any commencement of construction of that permit yet. Recently, there was a decision by the regulators in

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Montana to extend the expiration date of that permit in exchange for some tighter limits on SO<sub>2</sub> and mercury. And that decision no doubt will be subject to yet additional litigation by the project opponents.

Folks on the phone today may be familiar as well with the Thoroughbred Project in Kentucky that's received a lot of publicity recently. This was a major project in Kentucky. It was two-750 megawatt pulverized coal units burning eastern coal, I think, primarily. And it was being located about 50 miles west of Mammoth Cave National Park, also a Class I area. And an extraordinary administrative challenge by historical precedent in Kentucky led to amazing 73 days of live testimony in over a series of series of several months. Litigation involving EPA's decisions about whether they needed to consult with the Fish and Wildlife Service over impacts to animals in Mammoth Cave under the Endangered Species Act.

It's pending and all of this culminated in an adverse proposal for a decision that was issued by a hearing officer in late 2005. The final decision by the Secretary in Kentucky is still pending. That has not been issued yet and we hear that should be issued the first quarter of this year. So, you'll have the final decision on that project. But meanwhile, I think the challenges that are out there and the adverse proposal for decision has held the applicant and project developer there to not commence construction of that project as of yet.

And as we work through the -- before we lead in exactly to the air permits, I think it's real important, when you're thinking strategically about these projects, is to -- you do need to identify a project time and make sure you're coordinating and identifying all the applicable permits and approvals that you need and seeing how they work together. You need to certainly identify those permits and approvals that are preconstruction versus preoperational permits and approvals because of the long lead time for construction of these coal-fired plants. And integrate that permitting timeline with other types of regulatory approvals that will need and the expectations of your project financing entities.

It's important to know what level of approval and how far along you will need to be with regard to the issuance of permits before you can go embark on the financing step of a project. And one thing that has caught some developers by surprise, usually, is local state approvals that impose, environmental assessment, kind of mini-NEPA type reviews over the siting of coal-fired power plants in various jurisdictions. And so, it's real important to be aware any of those local regulatory type requirements that would otherwise go unnoticed.

With regard to that, that creates a -- from the legal strategy perspective, it creates a real need for the developers and the applicants to be telling the same story to all of the various regulatory agencies that are looking at this project from different reviews. Because often the environmental groups that are opposing these projects will look at what you told the public service commission, look what you told the Environmental Protection Agency or some other regulatory agency and used those sworn statements against you in various hearings process that you're moving forward with.

One of the important facts of the Clean Air Permit that I mentioned earlier is that, typically, commencement of construction is required under an air permit within 18 months after issuance. And because of that timeline, it's very important to coordinate that timeline with the rest of your project, calendar and timeline, to make sure that you're getting that permit in a time and expectation such that you would be able to avail yourselves to start commencing construction of that after the -- within 18 months after the issuance. And that can be challenging for states where the appeal process typically occurs after the permit is issued.

I'm going to move on now to the next slide, which would be slide six.

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**Pam Giblin** - Baker Botts LLP - Partner

As I alluded to earlier in the presentation, any successful permitting involves what we call three legs to the stool, which is the sound science and engineering and Derek is going to talk in more detail later about the various components of that, but in all of these areas, it really involves a team effort so that you don't have the engineers and the technical people out there sort of

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working on their own, but all working in constant coordination and harmony with the people that provide the other legs to the stool. The second leg that we talk about is the strong politics and again, this is not necessarily electoral politics, although that certainly comes into play, but it's the politics of local government, the politics of working with the communities and sort of a reservoir of goodwill that you have built up or try to build up with various groups.

And then finally, sound legal strategy because as was mentioned earlier, there are so many legal requirements that have to be harmonized and woven together and questions that have to be anticipated. For example, the issue of whether when a rule changes in mid-permit process, do you have to meet that new rule. But these are the sorts of legal judgments that can sink projects. And so, you need to have that belt and suspenders approach that goes with all of these various parts of the process well-harmonized and the team players used to playing with one another.

Now, the next slide focuses on what -- as we firmly believe is the key preconstruction approval, which is the air permit. And it's key for a number of reason, one of which is that it is preconstruction and in most states and under the federal program, you cannot break ground until you have that permit secured, unlike wastewater permits, which are pre-discharge permits. So it's extremely important and it can be a big roadblock. Moreover, it is so easily triggered. As you can see from the slide, the federal thresholds for prevention of significant deterioration - the federal air permit, essentially - are quite low and will be triggered by most projects of any magnitude.

And so, I think it is a given that you are going to have to have a federal as well as, in many states, a state permit. Just a reminder that the commencement of construction definition in the Federal Clean Air Act is actually quite broad and really would appear to prohibit the entry into certain contracts before the issuance of the permit. So, that is something that you need to be aware of, you need to examine and not give permit opponents a basis for going to court and trying to enjoin and [encap] the project.

I think Derek is going to talk in more detail about some of the technical issues that we get into in the three-prong permitting strategy.

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**Derek McDonald** - Baker Botts LLP - Partner

Sure. I think the success of the project depends on how you apply this strategy that we've outlined to both the site and the project. I mean, each of the various projects and sites will have -- differ from place to place, but you need to try and have some optimization of both the project and the site and know what the advantages and disadvantages of those two components offer you.

As you look through the project considerations, I mean, typically speaking, it's easier to permit smaller units, advanced coal technologies than it is larger conventional plants. The project -- the other project considerations, it's easier to permit cleaner coals than it is higher sulfur coals. It's easier to permit a facility that has a robust control technology suite than it is to try and permit something that has less control technologies on it. The project -- it's very important in these projects to have detailed process knowledge about your plant. And the more you know about what your -- how your plant is going to be configured, how the boiler will be configured and exactly how this plant will be designed, the easier it is to permit the project rather than trying to permit something that looks more like a black box and trying to -- which a lot of people try to do because you may not have those details up front.

And one of the big project considerations is if you're permitting a unit at an existing plant, you need to be considering the upstream and downstream impacts of this project because many times, if those aren't accurately described and quantified and evaluated as part of the permitting process that can lead to a significant substantive errors in the permit review. On the site considerations, you need to know your site because the site can -- needs to be -- plays a significant role in whether the project is viable at that location. And I've highlighted -- some of the important site considerations, the first one being the extent of the site and the available buffer for consideration of, typically, it's the ambient air impacts. Under any Clean Air permit that will be

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issued, you will have to have an -- you will have to evaluate the impacts of the concentrations of the emissions at the property line. And obviously, the larger site you have, the impacts will be lower predicted at that property line.

**Pam Giblin** - Baker Botts LLP - Partner

Let me just sort of add that this gets part of it back to the multi-disciplinary analysis that's done on the front end where you hopefully would have had your technical people working with the lawyers, working with the team to try to decide, for example, if you've got flexibility, if you do quick and dirty modeling in advance and see that you might have an off-property impact problem, can you realign the sources within the property? If those things are not thought through on the front end, then you might have a problem that you can't fix or you can't address. So, ideally, these decisions would be made before you finalize the location of various units on the property.

**Derek McDonald** - Baker Botts LLP - Partner

Some of the other site considerations, obviously, is -- from a Clean Air Act permitting standpoint, is whether you're in an attainment area or a non-attainment area. And what we're seeing now is one of the key new claims that are being raised by protestants is if you're in a near non-attainment area, either through regional transport - the impact that a particular project would have on an ozone non-attainment area that may be 100 miles away down gradient from the source you're proposing. Those are issues that are very live in these permitting proceedings.

Nearby Class I areas, I've alluded to a couple of the projects that it seems like Class I areas come up in each one of these projects and we'll talk about that in a little more detail later on. Nearby sensitive receptors, schools, churches, recreational areas, wildlife areas, all play a role in giving project opponents an opportunity to claim some adverse impact.

Moving now to slide number 9, there won't be a lot of -- probably not a lot of choice. A decision will be made pretty quickly upfront as to whether you will develop a new unit at an existing site versus a greenfield site. And really, each has the potential for advantages and disadvantages, depending on how you are able to manage certain expectations. I mean, existing sites can have a basic community support. That can be helpful, helps you with regard to the scope of the project, can be helpful for a greenfield site because you're permitting it from scratch. You know exactly that everything will be new. You know what the impacts will be. You'll have to evaluate the whole project. An existing site will have an environmental track record, which can be helpful or not, depending on how things have gone at that particular plant.

Existing sites pose the -- raise the specter of cumulative impacts where you are look at not just the one unit, but the other existing units and the emissions from those in combination and so forth through here. One of the major strategic decisions that we have seen be effectively used in permitting new units at existing sites is the opportunity for offsets and netting. And that can be a very important component of bringing in a new large pulverized coal unit. It's being used in a number of the projects that we're working on now. And it helps significantly address the concerns of impacts on fine particular standards, on ozone standards and takes some of the main opposition points on impacts to Class I areas and visibility right out off the table from the opposition when used effectively.

One of the other procedural issues that is very strategic when you're walking into permitting in a new unit at an existing site is procedurally how are you going to affect that permit. Are you going to go through a new permit proceeding or are you going to handle that as an amendment to an existing permit. And we've seen states handle that in different ways and it can help address -- limit the scope of the hearing and subsequent appeals, if you can handle that as a new permit rather than amendment.

Moving onto this next slide, slide 10, on the science side of the story, I think it's very important as you work through -- the legal team works through with the engineering and technology backing these projects is to hire experienced environmental professionals. This isn't -- these are not the types of projects that can be handled by firms that really aren't battle tested because you need people that are part of the team that know -- that have been -- that are battle tested and have been through both

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the rigors of deposition, the rigors of live testimony and trial and it's very important for the legal members of the team to assess that witness potential up front because you could have a strong technical and science story, but you also need someone who will be able to relate that story in a hearing setting convincingly.

One of the other issues that needs to be evaluated up front is when you're putting together the team for the development of the project is to evaluate any issue conflicts within the organization. One thing that has caught some applicants by surprise is to have -- one of the big issues that has been -- being litigated in these recent permitting cases is whether integrated gasification combined cycle needs to be evaluated as part of the BACT analysis for a pulverized coal plant. And it undermines the credibility of your main permitting witness if another part of that organization who works with that is essentially promoting that technology in other cases. So, you need to evaluate that and make sure that you have a strategy on how you deal with that issue up front.

The permit application is of critical importance to the success of the project, as you can imagine. The application and the permit are the foundation of these administrative record and these slides highlight some of the important components of the permit application. But one of the early strategic decisions that have to be made with regard to the permit application is do you, kind of how much do you hold back and how much do you -- or how much do you propose in the front end on the most aggressive emission limits, the most aggressive control technology options, the netting and so forth and offsets. And that's something that needs to be aired out early on in the process and discussed and it involves strategic decisions about what -- how much can you undermine opposition by putting it all in up front? How much pushback do you expect from the regulators on the limits that you would propose if you did put it all in up front. What are your capabilities to adjust those limits once you've proposed them and they've found their way into a draft permit?

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**Pam Giblin** - Baker Botts LLP - Partner

And see, this is where the integration of the technical and the legal is so crucial. In some states, if you're going to make a change to the application, even to reduce emissions, they take the position that the application has already been frozen and that you can't do that. You can't make changes after a certain point in time or that it could trigger renounce, which, of course, would be devastating to the timeline. So, these are all of the issues that have to be analyzed in advance and weigh the pros and cons of [many] shift moves involved in the permitting process.

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**Derek McDonald** - Baker Botts LLP - Partner

Slide number 11 just highlights some of the key components of the science piece of the permit application, the best available control technology and the ambient air impacts are really the two key parts of a PSD permit application that will be viewed -- reviewed by a regulator for a new pulverized coal plant. And just some kind of lessons to be learned. You - the permit application needs to be drop-dead accurate. And a method needs to be put in place during the permitting of these projects to stay continually apprised of permitting developments.

You want to be aware because it will be used against you when a plant in Idaho proposes a NOx limit of .05 or a plant in Montana proposes a limit of 0.1 for SO2 and -- because you'll be -- you'll look, you'll lose credibility if you're not aware of those developments on the leading edge of BACT analysis. And we found that there are dual purposes to your permit application, both a regulatory compliance role and also an advocacy role, telling the story end of it, describing the project in a way that can be -- that's advantageous to the applicant of the project.

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**Bob Temple** - CPS Energy - Director, Legal Services

Nuances that we saw in our recent permitting case included questions of when the permit was actually considered final, when you had to compare your technology to other technology as to what best control -- available control technology you were being held to and if the regulator's opinion was the same as what you thought it was supposed to be. So, all of these things are



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important nuances to one, nail down, and two, make sure you've got a counsel who understands the subtleties and can help you point out the potholes in the road.

**Derek McDonald** - Baker Botts LLP - Partner

Moving now, I think we're going to go ahead and move to slide number 12 and the highlights some of the political role that is inherent in this project.

**Bob Temple** - CPS Energy - Director, Legal Services

We had CPS Energy who just received on December 28, 2005, a coal -- a permit -- an air permit for a cold-fired power station that's being built at a Calaveras site. We received that with the help of the team at Baker Botts. But one of the key elements to our strategy was working for it on the political front. It's one that you have to start, probably, earlier than either the science or the actual permitting because it takes time to get the right level of support. Optimally, you want the politicians, business and community leaders encouraging your company to go forward with additional coal generation even before you've announced your company's intentions.

We have the added burden at CPS Energy of being a public power entity, which means we are even more subject to the whims of politics. That said, the more political support there is for your project, the less power that would be garnered by any opposition. We had a change in state and local administrations take place between the time we filed our permit application and the time that the permit application was approved. We had to get in front of newly elected officials early because of some of the green-leading politicians who were initially opposed to our projects. By early interaction, we won over or at least won agreement for politicians not to oppose our project.

When we asked politicians for support, we asked them to support us before the permitting agency. It helped in cementing the need for the project as well as making clear that there was community and political backing for it. Whether it is changes in BACT or finalizing mercury requirements, changes can and will happen, especially if there's a lag time between your permanent application submittal and the granting of your permit. While a crystal ball would be helpful, all that you can do is to be prudent and realistic about the impact of pending regulations and the changes to those regulations on your permit. To the extent possible, set permitting targets that accommodate the expected outcome of the change. Take an active role in rulemaking and other proceedings that can affect your permit.

If legislative actions are proposed that adversely impact your project, be prepared to meet with legislators and explain the impact and effects. Politicians have to be able to justify the burdens they impose and that those burdens are justified by the environmental solution. Proactive action on your part, being a facilitator of information, can help keep them -- keep the facts straight.

By keeping our governmental relations team up to speed on our project, I had a proactive partner when I needed help in short order. Our issue was getting support on whether alternate technology, specifically IGCC had to be considered as part of a best available control technology review. Our legislative support was able to help us get on the same page of the issue with other industry members and get support for political action. Being willing to have an open mind to achieve solutions to problems that come up all the way through the process. Keeping your governmental affairs team in the mix will allow them to help you propose alternative legislative or political solutions when you get somewhere -- stuck somewhere on the path to your permit.

Next slide, slide 13, please. And as I alluded to, when BACT issues came up, it was important to bring as much muscle to the table as possible. Many of the problems that impact you may share with other industry players. A solution that may help you may also help them in turn, so don't be afraid to ask your other industry players for help. You have to get out before the public early and often, until there is actually iron in the ground in the project and maybe even until your project is completed. Who

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should you reach out to? Anybody who can help it. There is a short list on the slide, but anyone who can influence community opinion and can help either avoid or offset opposition to your project.

As Pam said before and Derek, the national industry players try to get grassroots support from the community and, obviously, you're getting out and swaying community opinion in favor of your project, can help avoid getting opposition or at least neutralize the opposition that comes up. What should you communicate about? All of the actual perceived issues associated with the project. Beat the press to the topic. Be proactive and far reaching. Become the best source of information in the community and be able to follow up and provide information.

Again, the slide gives you some ideas, but get out there and get in front of the people and try and be as forthcoming as possible about what you're trying to do. We met with all the stakeholders and many of the plan opponents to talk to a relationship with our environmental staff, which helped neutralize a lot of the opposition to our project. And finally, help ensure the communication of these stakeholders is as complete and accurate as possible. Your credibility rides on it. Derek?

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**Derek McDonald** - Baker Botts LLP - Partner

Sure. And last, but not least, obviously, the sound legal strategy. We've referred to that throughout this presentation today. And that - my view at least has these key components - the identification of applicable requirements, the valuation of the key permitting issues, doing your due diligence on the opposition that you'll have, developing the permit appeal and litigation strategy and also looking at potential options for settlement. Settlements can happen. They have happened before and we should never rule that out.

Moving onto slide number 15 - my slide - one of the surprising things you'll discover in working on these projects is the applicable legal requirements are not always clear to you. We've had an EPA that's been in the process of finalizing a number of rules that regulate emissions for power plants, all of which have been challenged or in various stages of challenge. And what you have, in many states, especially those states that have SIP approved programs, is you have a gap issue where the rules that would be on the books, the permitting rules of the state that are on the books don't always match up with what, if you looked at the Federal CFR and what the -- what EPA believes the rules are in the permitting program in those states and you could have significant discrepancies between what the state rules are, what they think they are, what the -- with the approved program exists especially with regard to the -- what the nature of the pollutants are, whether beryllium and mercury are subject to BACT review, whether the netting was done properly and what are the applicable rules for netting if you're going to seek to net out of [DSE] review.

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**Bob Temple** - CPS Energy - Director, Legal Services

One of the things that was noted on an earlier slide was getting out early and often in front of the regulator. And one of the things that you want to make sure that you do is, with the permitting engineer, make sure you have a common understanding of what the target is that you're trying to hit. And exchange information on how you're trying to hit it so that you can manage their expectations early in the process.

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**Derek McDonald** - Baker Botts LLP - Partner

And as Bob mentioned, I mean, one of the issues that are going on -- there will be changes. It's inevitable and the rules, as you embark on these programs, one of the big changes that caught this last wave or this current wave of permitting plants is the impact of 112(g), which regulates hazardous air pollutants from utilities. And EPA's Clean Air Mercury Rule, which published a NFPF standard in lieu of a case-by-case [mat] or [me shaft] development for utilities. But that's an issue that could be impacted by the particular state laws and the SIP gap issue that I referred to.

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With regard to key permitting issues, there are really two types - procedural errors and substantive errors. And as the applicant, it is your burden to make sure that these errors do not occur. Procedural errors typically result in delay, defective public notice, administrative record issues, timing and sufficiency of response to comments. As the applicant, you're looking over the shoulder to justify and defend and identify with the regulators issues that could come back and haunt your project. The substantive errors -- and these are the areas that we see the national environmental groups and their local -- any local community groups that might have been engaged with them through their grassroots efforts are asserting. You will see a challenge on your BACT. Typically on the emission limits, startup and shutdown emissions and the IGCC issue that Bob was referring to earlier.

**Pam Giblin** - Baker Botts LLP - Partner

And let me just interject that for years people in the air arena have always relied on AP-42 as sort of the bible of the mission calculation. That is not always necessarily the Safe Harbor that it used to be because in some of these areas, the emission limits are challenged -- you haven't calculated all of your emissions. And so, whoever heads up your technical team really needs to punch through to the underpinnings of AP-42 and be able to say, "We have calculated all the emissions from all sources."

**Derek McDonald** - Baker Botts LLP - Partner

There will be a challenge on regional impacts and transport, whether the impacts of the project have been accurately quantified and identified on ozone non-attainment areas and with regard to the [PM max] and GM non-attainment areas. There will likely be a challenge on a -- based on an impact or alleged impact to a nearby Class I area. Consultation under the Endangered Species Act is an issue that has been raised in many of these new power plant cases as well as well as some notion of human health impacts under a state toxic review program, which varies from state to state.

Slide number 17 highlights some of the issues that we're seeing on the BACT. And just to kind of highlight this -- I mean, comfortable operating margins are much tougher to obtain these days. And somehow, somewhere an opponent will find a lower emission level, shorter averaging period and you have to be -- have a sound permitting strategy that allows for that to happen while still maintaining the success of the project.

And one of the things that we're also being frequently asked to consider is what is the impact of a state attainment strategy, Clean Air Interstate Rule, Clean Air Mercury Rule, to really think through those before you battle for some more generous emission limit only to not be able to get the allowances that you would need to operate at that level in the future. It's kind of a battle that you may not need to face.

Slide number 18, really, kind of just was a quick summary of the types of claims you'll see. This is based on some work that was done in one of hearings I was working on. Here is what we've been able to identify as of late last year, what the lowest permitted emission limits were for various pollutants. And gave you -- it also gives you and idea of what some of expert for the opposition will opine is achievable for a pulverized coal plant that's being permitted in today's environment.

There is a -- moving to slide number 19, there is a very focused interest on the part of EPA, especially, and the opposition to startup and shutdown emissions. It's clear that BACT applies to startup and shutdown emissions. There are EAB decisions, one after another, that say -- establish that principle, it's a key EPA regional concern. And while, for a base load pulverized coal plant, you don't have some of the same swings that you might see during a startup and shutdown tradition. There is -- this is something that requires careful legal and technical evaluation to make sure that you have a plan in place that can survive the BACT challenge on startup and shutdown initiatives.

As we've mentioned previously a couple of times, one of the main litigated issues in the power plant permitting proceedings that are ongoing today is whether this integrated gasification combined cycle technology needs to be evaluated as part of the BACT analysis for under [PFC], BACT analysis. And the states have split on that, surprisingly, on the answer to that question. You'll see a battleground now that essentially Illinois, New Mexico, Montana, Kentucky, perhaps, and some Northeastern coalition

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states are likely to say IGCC does require BACT. Other states have come down and said that BACT analysis does not include IGCC and I've listed those states out there. But there are a lot of states that are undecided on this issue and it's important, in the permitting of one of these projects, to get your state to tell you up front and make your case up front, so you have something to rely on and you know they're prepared to respond to that issue.

Bob referred to some work that was done by the industry group that resulted in a December 13, 2005 EPA policy statement on that opine and was very helpful and very timely in connection with the case that we were working on in Texas that stated that neither BACT nor LAER required considered of IGCC because they are different sources than a pulverized coal plant. But what EPA giveth, they taketh away and provide some additional opportunities for opposition to inject that issue, again, under other provisions of the Federal Clean Air Act. So, we'll have to just wait and see exactly how those applicability plays out. And just to give you a sense of what the opposition will tease environmental regulators with -- are highlighted what the -- what some experts will say IGCC will achieve from an emissions perspective. Very, very low rates.

On the permit enforceability claims, I'm not going to go through these in a lot of detail, but those are the types of issues that will be challenged when you actually have a draft permit or an issued permit. There will be any and all nature of claim that the permit conditions are not enforceable. And so, you really need to be aware of those types of challenges and how regulators have responded to them in the past and how you articulate, in a hearing, why those particular -- why your permit is enforceable.

Moving onto slide number 22, this is an evolving science. The knowledge now and the work that's been done to really evaluate the long-range transport of ozone precursors and fine particulate precursors. And with all the science that is being undertaken by EPA in the states in this area, it's not surprising that you're seeing the environmental opposition to a coal-fired power plant use that to say that you're going to -- your emissions from this plant will cause or contribute to a violation of the NAAQS at some remote distance from the facility. It's no longer enough, essentially to say, "Well, I'm in an attainment area and I comply with the NAAQS modeling protocols. The question will be asked and regulars that issue your permit will have to evaluate the impact of this plant on nearby non-attainment strategies.

And the -- and there's a lot of development on this front because we're seeing both the Eight-Hour Ozone and New Source Review. We've got the Phase II ozone implementation rule that was just adopted. We now have a screening, you used to be able to rely that if you were under 100 tons per year of VOC, that you were essentially de minimus for a pulverized coal plant and did not have to undertake any further ozone modeling or photochemical modeling to evaluate the impact. Now, under the new Phase II rule, if you're over 100 tons per year of NOx, you would have to undertake some type of analysis and those are very difficult studies to undertake.

A lot of developments on the [DMX] front. We have a proposed PM 2.5 implementation rule that needs to be evaluated in connection with all of these projects and also significant revisions to the particulate matter [next] that were proposed very recently. And slides 23 and 24 give you a sense of the areas that would be impacted both under the Eight-Hour Ozone standard, areas that are impacted. And with regard to slide 24, the counties that would exceed the proposed revisions to the PM 2.5 Max and those get a lot of areas.

As we've mentioned previously, Class I area impacts are frequently an issue in these permitting proceedings. They're entitled to special protection of the Clear Air Act and to protect air quality related values. Typically, that's visibility and asset deposition. And what's important to note is that a part of every state is within 300 kilometers of a Class I area.

And so, one of the big strategic positions up front is do you do CALPUFF modeling or not for a project if you're within 200 kilometers of a Class I area, you will need to do CALPUFF, some type of Class I area impact analysis. Over 300 kilometers, probably not, although you need to consider the impact and how you would respond to study center that exists that would suggest some impact. And so, the gray area is typically 200-300 kilometers. You need to evaluate the [inaudible] that's out there and decide and make a decision up front whether you're going to undertake that fairly difficult analysis.

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**Pam Giblin** - Baker Botts LLP - Partner

And this is one of the favorite areas to be raised by protestants because of the broad geographic suite, it gives them, potentially, standing from some members of the group that are very far away from the project so that they can argue that because of this particular impact, there are people who live 200 miles away and might have standing to challenge where the other ones would not.

**Derek McDonald** - Baker Botts LLP - Partner

And slide 26 just shows you where all the Class 1 areas are in the United States. Slide 27, another favorite issue is consultation under the Endangered Species Act. This slide kind of highlights where -- when that's required and, typically, it breaks down into where you're a SIP delegated program or a SIP approved program. I think if you're a SIP delegated program, EPA is likely to decide that they will have some obligation to consult with the Fish and Wildlife Service over your -- over the impacts of the proposed [BFD] permit on the -- under the Endangered Species Act. And with the SIP approved program, they would not need to do so.

The other -- one of the final issues that are very key in determining these projects is the state toxics evaluation. What are the impacts of the emissions facility on human health and the environment? And aside from the protection that is afforded by both the primary and secondary national ambient air quality standards is each state has a different nature of review for toxic substances impacts. And up front, you really need to determine what is a defensible scope of toxics review because this is frequent area of attack and identify what additional modeling might need to be done or how are you going to tell the story that the mercury impacts are acceptable? Silica impacts, acid gas impacts, metal, other types of impacts are acceptable from a human health perspective.

Slide 29 really outlines some of the things that we do and consider and early on in the permitting strategy, doing our due diligence on the opposition, understanding what they're going to say, how they're going to say it, who they're going to use. And developing what our strategy is to make sure, to understand all of the appeal avenues that exist and potential litigation that can flow from permit decisions and make sure that we have that permit that will withstand those appeals.

And just in conclusion, on the last slide here, it's really the goal of the permitting team should be to get a time -- the timely issuance of a permit with acceptable permit conditions and one that will withstand challenge and the ability to really achieve those goals, we believe, is dependent on how well you pay attention to all three legs of the strategy.

**Bob Temple** - CPS Energy - Director, Legal Services

We have time for just a question or two. Again, if any of you have questions, please quickly e-mail them to derek.mcdonald@bakerbotts.com. One question that has come in is back on slide 18 you have a list of lowest permitted emissions limits as BACT. And does that mean that you have to achieve that emission limit in each of the pollutants in order to have best available control technology?

**Derek McDonald** - Baker Botts LLP - Partner

It depends, in some respect, on the type of review that your state undertakes with regard to BACT. You certainly need to be in a position to explain why you're not achieving limits that other projects have proposed and accepted as BACT in pending permit proceedings. But one of the arguments of the opposition will be, BACT is like an ala carte menu. You pick the lowest one for NOx and the lowest one of CO, the lowest one for SO2 and we have always argued that it's not like that. You have to -- BACT is much more -- considers a lot more aspects than just picking the lowest number.

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You have to involve some prioritization of what the local air quality needs are for the particular area. If you have ozone considerations, you may want to focus -- BACT may allow you to focus on NOx control and DOC control and allow greater emissions of CO. There will be tradeoffs among pollutants that are considered in BACT review. And certainly, for some of these low permitted emission limits that have not yet been demonstrated as achieved in practice, I think there are claims that can be made under a BACT analysis, but those aren't yet, technically practicable.

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**Bob Temple** - *CPS Energy - Director, Legal Services*

Derek and Pam, thank you very much for making this presentation today. If they've got further question on the presentation or about the permitting process, Derek's e-mail is up on the ACC website and you can forward e-mails to him. And thank you very much.

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**Pam Giblin** - *Baker Botts LLP - Partner*

Thank you.

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