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Justice Kennedy and environmental water cases: A pragmatic approach to water from a Western perspective

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“Go west, young man” was the famous advice given to Civil War veterans. Justice Kennedy’s opinions in U.S. Supreme Court cases involving the Clean Water Act have a similar western flavor. The Justice grew up and practiced law in Sacramento, California. Although Kennedy moved east to Washington, D.C., with his unanimous Senate confirmation in 1988, he still kept some of this western perspective throughout his opinions in key water cases during his tenure on the Court.

**SWANCC (2001)**

In *Solid Waste Agency of Northern Cook County v. U.S. Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), Justice Kennedy joined a 5–4 majority opinion authored by Chief Justice Rehnquist holding that the so-called “migratory bird” rule issued by the U.S. Army Corps of Engineers was invalid. Justice Kennedy did not write separately, and his subsequent discussion of the Court’s holding in *SWANCC* is reflected in a critical concurring opinion that he authored five years later.

**Rapanos (2006)**

In *Rapanos v. U.S.*, 547 U.S. 715 (2006), Justice Kennedy wrote a separate opinion that left an indelible impression on Clean Water Act jurisdiction. Kennedy was the sole vote in the middle of two warring 4-person separate opinions, one plurality authored by Justice Scalia and the dissent authored by Justice Stevens. By concurring only in the judgment but diverging dramatically from Justice Scalia’s rationale, Justice Kennedy’s separate concurring opinion resulted in a 4–1–4 split that still animates the debate over the scope of “navigable waters” today. Critically, it was in part Justice Kennedy’s California roots that led to this stunning departure from what might otherwise have been a conservative majority that would have definitively limited the jurisdictional scope of the Clean Water Act.

In *Rapanos*, the Court considered two consolidated cases from Michigan involving the scope of the Clean Water Act’s jurisdiction over wetlands and specifically the actions of two sets of individuals who deposited fill materials into three separate wetlands areas, all of which had either man-made or other intermediary connections that lead to undisputed navigable waters (such as Lake Huron). As Justice Scalia noted for the plurality, it was unclear whether the connections between the wetlands and the nearby drains or ditches were continuous or intermittent or whether those drains were the source of continuous or merely occasional flows of
water. 547 U.S. at 729. For four Justices, Scalia, Chief Justice Roberts, and Justices Thomas and Alito, the lack of a demonstrated permanent water connection or flow was fatal to the attempt to regulate the wetlands under the Clean Water Act. Instead, Justice Scalia reverted to a 1954 second edition of Webster’s New International Dictionary to define the word “waters” as those “found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes.” 547 U.S. at 732. Justice Scalia then took his “originalist” dictionary-based definition to conclude that none of the terms “encompasses transitory puddles or ephemeral flows of water.” 547 U.S at 733. Hence, Scalia wrote for four justices and concluded for the plurality, the “plain language of the statute simply does not authorize this ‘[Wet]Land is Waters’ approach to federal jurisdiction.” 547 U.S. at 734.

Justice Kennedy took an entirely different approach to the scope of the Clean Water Act. He started by noting that the plurality opinion’s limitation of the statutory term “waters of the United States” to a permanent standing body of water of more or less continuous flow makes “little practical sense.” He then cited as an example the Los Angeles River, which Justice Kennedy, the Californian, notes “ordinarily carries only a trickle of water and often looks more like a dry roadway than a river.” Rapanos, 547 U.S. at 769 (Kennedy, J., concurring). Justice Kennedy, as a long-term western resident, knew that such a seemingly innocent river or stream bed can periodically “release water volumes so powerful and destructive that it has been encased in concrete and steel over a length of some 50 miles.” Id. Kennedy then observed that although Congress could have excluded irregular waterways from the scope of the Clean Water Act, “nothing in the statute suggests it has done so.” He took direct and devastating aim at a footnote in the plurality opinion suggesting that its favorite dictionary’s (Webster’s Second) reference to “flood or inundation” could be summarily ignored (as Justice Scalia attempted to do) as merely a “poetic reference.” Rapanos, 547 U.S. at 770 (Kennedy, J., concurring).

Justice Kennedy next rejected the plurality’s attempt to construe the Court’s prior opinion in SWANCC as support for a proposition that there must be a direct wetlands–surface-water connection to impose regulatory requirements on the wetlands area. In rejecting the plurality’s assertion that dredged or fill material such as that deposited by Rapanos into a wetlands area was unlikely to wash downstream, Justice Kennedy again took a utilitarian approach, noting that fill or silt could indeed wash downstream and have serious consequences for aquatic environments and waterways. Justice Kennedy cited several newspaper articles about the impacts of dams and other projects in creating silt and debris that damage the environment. Among his citations was a 1987 article from the Los Angeles Times discussing the impact of deforestation in Hawaii and in California on downstream water systems. Rapanos, 547 U.S. at 775 (citing, inter alia, MacDougall, Damage Can Be Irreversible, LOS ANGELES TIMES, June 19, 1987, pt. 1, p.10, col.4). The real-world observations Justice Kennedy used in rejecting the proposed plurality interpretation of the Act stem in part from his practical approach sharpened by personal knowledge and reading about western states.
Justice Kennedy’s statutory interpretation concluded with a final rejection of the plurality’s tone and approach to the interests of the United States in this area as “unduly dismissive.” Rather, Justice Kennedy emphasized that: “Important public interests are served by the Clean Water Act in general and by the protection of wetlands in particular.” Rapanos, 547 U.S. at 777 (Kennedy, J., concurring). Once again, his approach to the statute’s outer jurisdictional boundaries was founded in a pragmatic approach. The Justice specifically observed that: “Scientific evidence indicates that wetlands play a critical role in controlling and filtering runoff.” Id.

Finally, Justice Kennedy rejected the plurality’s heavy reliance upon the Court’s SWANCC opinion issued five years earlier. Justice Kennedy noted that the Court in SWANCC employed the “significant nexus” test to avoid a potential constitutional difficulty and federalism concerns. Rapanos, 547 U.S. at 776. Kennedy dismissed the applicability of such concerns, including federalism concerns, by noting that some 33 states plus the District of Columbia had filed an amici brief supporting a broader interpretation of the Clean Water Act. Rapanos, 547 U.S. at 777.

Coeur Alaska, Inc. v. Southeast Alaska Conservation Council (2009)

In this case, Justice Kennedy wrote for a conservative-minded majority of the Court holding that provisions of the Clean Water Act allowed the Army Corps, rather than the U.S. Environmental Protection Agency (EPA), to issue a permit under the act for a “slurry” discharge from a gold mining operation.

Kennedy’s opinion is notable in two distinct ways: First, he stressed that the environmental damage to a small lake (an agreed-upon “navigable water”) was temporary and that the alternative would be to place a pile of mining tailings on nearby wetlands which would rise “twice as high as the Pentagon.” Coeur Alaska, Inc., 557 U.S. 261, 269 (2009). Thus, Justice Kennedy for the majority was careful to emphasize that in this case there was at least a valid argument that the balance of environmental impacts tilted in favor of the issuance of the permit. Id. at 270.

Second, Justice Kennedy invoked a form of deference to an internal EPA memorandum, finding that both the statutory text and existing regulations were ambiguous. As a tie-breaker, Justice Kennedy for the majority deferred to the EPA memorandum interpreting the statutory text, citing to Auer v. Robbins, 519 U.S. 452, 461 (1997). The notion of deference to agency internal determinations under Auer is, however, the subject of considerable recent judicial skepticism, see Keys v. Barnhart, 347 F.3d 990, 993 (7th Cir. 2003) (Posner, J.), and even prompted a special concurrence by Justice Scalia about whether the type of administrative deference that the Court was according was really old-fashioned Chevron deference to agency interpretation of an ambiguous statute. 557 U.S. at 295–296.
From voluntary disclosures to regulatory push: Recent trends in sustainability reporting
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Twenty years ago, the Global Reporting Initiative (GRI) established sustainability reporting guidelines at a time when it was rare for companies to disclose non-financial information. Today, more than 90 percent of the largest 250 companies in the world report sustainability information, and 75 percent of them use the GRI Standards.

In two decades, sustainability reporting has gone from a small and voluntary undertaking that only a few, mostly large, companies engaged in, to a mainstream activity that can provide actionable business insights. This article explores the main trends that have led us to this point and poses a question: While so many more companies are reporting now, is this practice producing the results we seek?

Reputation vs. action

In all candor, sustainability reports are still often issued to bolster a company’s reputation. But we are seeing that regulatory filings, financial reports, and investor demands increasingly incorporate information that was once relegated to the sustainability report. This is adding more scrutiny to company disclosures and has increased interest from the legal and financial professions into the wealth of non-financial data that sustainability reporting makes available. More importantly, by engaging key stakeholders with this information, the renewed interest supports the fundamental purpose of sustainability reporting—to advance sustainable development.

Growth of reporting mandates

Along with heightened scrutiny, there is a growing regulatory push, from both governments and capital markets, encouraging more transparency on sustainability impacts. GRI is currently monitoring some 450 policies in more than 100 countries that require some level of environmental, social, and governance (ESG) disclosure; about 150 of them are capital-market listing requirements. One of the most recent and comprehensive policies is the European Union (EU) Non-Financial Information Directive, adopted by all EU member states, which is now being implemented.

As more and more mandates come into force, there will be even more pressure to align on a single global ESG disclosure standard, and many of the current policies either mandate or mention GRI as the benchmark disclosure standard.
Smaller companies

While ESG reporting is common practice amongst larger firms, it has yet to be adopted widely by small and medium sized (SME) companies. The practice is perceived as being too complex and costly for many SMEs. GRI is working on ways to both simplify the process and add more value.

Reporting and the Sustainable Development Goals

The Sustainable Development Goals (SDGs) are the global roadmap for sustainable development. But, with 17 goals and 169 targets, they can confound even the most experienced reporting organization. With some company revenues exceeding a nation state’s gross domestic product (GDP) and supply chains that stretch around the world, it is obvious that companies play a central role in reaching the SDGs. Currently, the leading companies are reporting on how their corporate responsibility programs match the SDGs. If we want to realize these goals, however, we must dig deeper and figure out how to go from mapping to action.

Working with the UN Global Compact (UNGC) and the Principles for Responsible Investment (PRI), GRI is developing new guidance for how companies and investors can assess their role in helping achieve the SDGs.

Reporting goes digital

As a field of practice, ESG reporting is behind the times when it comes to digitalization and data analytics. Many reports are still issued in PDF format or the information is spread out throughout company webpages. To encourage digital reporting in a format that allows for better data analysis, GRI has recently issued an open-source digital reporting tool. The tool is aimed at helping organizations collect and disclose ESG data. Going forward, the analytics from the aggregation of these disclosures will allow for better benchmarking and, ultimately, help advance the cause of sustainable development.

The myth of fragmentation

Stakeholders engaged in sustainability reporting often complain about the myriad of reporting frameworks and the confusion this creates. The fact is that there are very few disclosure standards that deal with the full range of ESG information in broad use today. The two most adopted disclosure frameworks are GRI and CDP (The Carbon Disclosure Project) and they are completely aligned. The GRI Standards cover a broad range of ESG topics, while CDP requests detailed data on three focused topics—carbon, water, and forests.
In addition to disclosure standards, there are a few frameworks aimed at helping to integrate ESG disclosures—including the International Integrated Reporting Council (IIRC) and the Carbon Disclosure Standards Board (CDSB). There is also a plethora of “indexes” that aggregate ESG disclosures into ratings and rankings such as the Dow Jones Sustainability Index. But these frameworks and indexes are not disclosure standards. They serve to organize and aggregate information and as such should not be lumped together with sustainability reporting standards.

The road ahead

These trends are reason for optimism. But we cannot become complacent. Past progress rests on a voluntary system underpinned by disclosure standards that are only sparsely supported by the industry that relies upon them. Going forward, public scrutiny, regulatory mandates, and investor demands will lead to the continued growth, consolidation, and maturity of the ESG disclosure landscape.

We have come a long way in a short time. To quote Robert Frost, “I have promises to keep...and miles to go before I sleep.” While ESG disclosure has become ubiquitous, we must integrate it into mainstream financial decision-making. Certainly, the regulatory push for reporting mandates will be crucial in this endeavor. Integrating ESG disclosure sounds easier said than done, but the payoff is that we will align capitalism with the needs of our world.

The Honest H.R. 1430 Act and science at EPA
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On March 8, 2017, Representative Lamar Smith (R-TX) proposed an act that could significantly affect the consideration of science by the U.S. Environmental Protection Agency (EPA). The act is H.R. 1430, also known as the Honest Act. Although the scientific community has long advocated sound and effective approaches to the consideration of science by policy makers, it has also raised concerns about this particular approach of limiting EPA’s regulatory actions to only considering research for which the underlying data is publicly available. This article provides a brief explanation of the Honest Act and similar EPA actions, concerns raised by the scientific community, and some surmises about the future of science at EPA.
The Honest Act

The Honest Act would require EPA—when it issues any “risk, exposure, or hazard assessment, criteria document, standard, limitation, regulation, regulatory impact analysis, or guidance”—to rely upon “(A) the best available science; (B) specifically identified; and (C) publicly available online in a manner that is sufficient for independent analysis and substantial reproduction of research results, except that any personally identifiable information, trade secrets, or commercial or financial information obtained from a person and privileged or confidential, shall be redacted prior to public availability.”

The act itself does not specify how these requirements are to be implemented, but simply restricts the agency from justifying any listed actions using data that fails to fulfill the described standards. Thus, a number of questions remain regarding the actual effect of the Act, should the Act be passed: Will EPA create internal procedural rules to restrict its reliance on such data, and, if so, how will those rules be structured? Will EPA, as a grant-giving agency, change its funding of policy-relevant studies to respond to these efforts—for example, by creating procedures for ensured redactability of personal information? And how will these concerns intersect with the human subjects’ research requirements discussed below?

The proposed EPA Data Transparency Rule

The Honest Act is not the only proposed restructuring of the EPA’s use of data in its activities. On April 24, 2018, EPA submitted a proposed rule on data transparency, Strengthening Transparency in Regulatory Science (Transparency Proposal), containing many provisions similar to the Honest Act. The coverage of the Transparency Proposal would pertain to “dose response data and models underlying pivotal regulatory science that are used to justify significant regulatory decisions regardless of the source of funding or identity of the party conducting the regulatory science,” a category that arguably overlaps with, but does not replicate that of, the covered actions under the Honest Act. Moreover, the Transparency Proposal would exempt:

significant regulatory decisions on a case-by-case basis if [the EPA] determines that compliance is impracticable because it is not feasible to ensure that all dose response data and models underlying pivotal regulatory science are publicly available in a fashion that is consistent with law, protects privacy and confidentiality, and is sensitive to national and homeland security

and may therefore allow for more tailoring than the Honest Act.
Critiques of the Honest Act and proposed rule

The changes may hinder EPA’s ability to protect human health

Several critiques have been raised against these proposals. The first is that the requirement that foundational data for listed EPA actions be publicly available could drastically limit the numbers of public health studies that EPA could use, thus weakening the agency’s ability to engage in health-protective actions. Many studies used by EPA to assess the health impacts of pollutants have guaranteed confidentiality to their participants, due to privacy concerns related to releasing an individual’s health status. The structures of these studies’ data collection often make after-the-fact redaction impossible.

For example, one of the major peer-reviewed studies of air pollution and public health, known as the “Six Cities” study—foundational for much of current air pollution regulation by establishing connections between air pollution and premature deaths—focused on how air pollution affected the health of around 22 thousand individuals for two decades. Under the proposed act/rule, EPA could not rely upon this study without significant data revision for future actions because the researchers had signed confidentiality agreements to track these individuals.

Implementation of these changes may interfere with other regulatory requirements for human subjects’ research

Guarantees of confidentiality are not granted only to protect individuals’ requests for privacy; they are often required by funding agencies. Most federal agencies require their grantees to follow what is known as the Common Rule, developed in response to ethical lapses associated with the Tuskegee Experiment that were brought to light in the 1970s. Among other things, the Common Rule requires researchers to follow basic provisions of informed consent, including that “[w]hen appropriate, [human subjects research must contain] adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data.” 45 C.F.R. § 46.111(a)(7).

These changes may be inconsistent with Administrative Procedure Act requirements

Finally, legal academics have raised concerns that the Honest Act and Transparency Proposal may interfere with the EPA’s ability to fully comply with the arbitrary and capricious judicial review standards of the Administrative Procedure Act (APA). Under the APA, 5 U.S.C. § 706(2)(A), agency actions can be overturned by courts if they are “arbitrary [or] capricious.” Failure to consider published peer-reviewed studies, even if they do not follow the requirements of the Honest Act or the Transparency Proposal, could be regarded as “arbitrary and capricious” by courts, given the APA’s silence on any transparency requirements.

The future of science at EPA

At the time that this article was written, neither the Honest Act nor the Transparency Proposal has been passed. The act was passed by the House on March 29, 2017, but is still pending before the Senate. EPA has extended the notice-and-comment period for the Transparency Proposal
until August 16, 2018. Moreover, questions about the implementation of these proposals (for example, if the Honest Act is passed or if the Transparency Proposal survives legal challenge) remain. Nevertheless, both the act and the proposal signal the importance of paying attention to the ways in which science is considered before EPA, in addition to its substantive decisions.

“Waters of the United States”: Practical advice on determining jurisdiction
Neal McAliley

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The geographic scope of Clean Water Act jurisdiction, always murky, is more muddled than ever. Until the Trump administration promulgates—and the courts uphold—new regulations delineating the “waters of the United States,” private parties have no clear guidance for determining whether any given water is federally regulated under the act. This article discusses their options in the absence of certainty.

No clear answers from the Supreme Court

The regulation of so-called “isolated waters,” which lack a clear hydrological connection to other navigable waters, has been uncertain since the U.S. Supreme Court ruling in Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers (2001) (SWANNC). Freshwater wetlands that do not directly abut actually navigable waters are questionable after Rapanos v. United States (2006). Small tributary features, such as ditches, creeks, or intermittent waterways, may not be regulated either. These all are the types of waters that are most likely to be privately owned and the location of activities that may—or may not—need a Clean Water Act permit. Given the state of the law, private parties are left with a few options.

Request a jurisdictional determination

As a starting point, one can ask the U.S. Army Corps of Engineers (Corps) whether a given water is part of the “waters of the United States.” The Corps can issue an approved jurisdictional determination regarding the status of any specific water, which is binding on the agencies for five years. In issuing a jurisdictional determination, the agency considers information from the property owner, which provides an opportunity for private parties to engage with the agency over the scope of its jurisdiction. Since the courts generally defer to agencies’ interpretations of statutes they administer, a jurisdictional determination offers the simplest way to obtain an answer.
Often one of the biggest challenges is to persuade the agency that a given water is not regulated. The 1980s-era regulations, which are being applied in most states while the agencies seek to promulgate new rules, define what waters are included and are written such that they arguably regulate any water that could be the site of an economic activity. Those regulations have only two exclusions, for “prior converted croplands” and “waste treatment systems.” (In those states where the 2015 Obama regulation remains in effect as a result of recent court rulings blocking the Trump administration’s delay of that rule, there are express exclusions that define what waters are not regulated.) Relatively few cases address the scope of the “waters of the United States.”

In most of the country this leaves private parties to advocate based on guidance documents issued by the agencies. The Federal Register preambles to the 1980s regulations identified several categories of waters that the agencies did not generally claim were regulated. The agencies have issued other forms of guidance, including “regulatory guidance letters” by the Corps and memoranda by the Corps and the U.S. Environmental Protection Agency, that address jurisdiction in specific circumstances. Corps district offices also often make their jurisdictional determinations available on their websites, which can be useful in identifying which facts the agency found conclusive in determining jurisdiction. By definition, these guidance documents are not legally binding, so their value is usually in their ability to help persuade agency officials. This usually happens in the context of issuing a jurisdictional determination or, in some circumstances, if there is a question whether a private party needed a permit for work that already has been done.

**Litigate**

As a last resort, private parties can turn to a court to decide the issue. Historically, federal courts have been reluctant to rule on the scope of Clean Water Act jurisdiction until after an agency has granted or denied a permit. However, that changed when the U.S. Supreme Court ruled in *Corps v. Hawkes Co.* (2015) that private parties can directly challenge jurisdictional determinations. Two of the Court’s cases, *SWANCC* and *Rapanos*, hold that there are limits on federal jurisdiction. These cases provide the opportunity for private parties to try to persuade a court to apply such limits to the facts of their cases. This can be a difficult task when arguing against the agency position, because courts generally give substantial deference to agency interpretations of statutes and their own regulations. An unsuccessful challenge may result in the validation of the agency’s conclusion and cost the challenger more in legal fees than it would have spent if it had simply obtained a Clean Water Act permit in the first place. But given that courts will now hear challenges to jurisdictional determinations, there are opportunities to litigate the scope of the “waters of the United States” that did not exist even a few years ago.
Conclusion

Until the scope of the “waters of the United States” is clearly defined in a new regulation that binds both private parties and the agencies nationwide, regulated parties will remain at a substantial disadvantage in disputes with the agencies. However, the lack of clarity reflects the absence of consensus regarding the scope of Clean Water Act jurisdiction, which means agencies and courts may be willing to consider new limits on the applicability of the act in individual cases.

Fracking and the public trust doctrine: Did the court of appeals silently adopt an 800-year-old legal principle disavowed in Colorado?
Bradley H. Oliphant and Lindsey E. Dunn

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In Martinez v. Colorado Oil & Gas Conservation Commission, ---P.3d ---, 2017 COA 37 (Colo. App. 2017), the Colorado Court of Appeals succeeded in doing what various public interest groups in Colorado have been trying to do for decades when it adopted the public trust doctrine to curtail fracking in the state—at least, that is, according to the Colorado Attorney General’s office.

In January 2018, the Colorado Supreme Court agreed to review Martinez, which elevated the protection of public health and the environment to “a condition that must be fulfilled” before oil and gas drilling can commence in Colorado. In asking for that review, Colorado’s Attorney General argued that the court of appeals not only rewrote Colorado’s Oil and Gas Conservation Act, but “in substance, adopt[ed] the public trust doctrine.” The Court has scheduled oral argument for October 16, 2018.

What is the public trust doctrine and why is the Colorado Attorney General worried about it?

Back in 1215, as part of the deal struck in the Magna Carta, the unpopular British monarch agreed to forfeit private fishing rights previously granted to members of his court. The theory behind this agreement was that certain public interests and rights were inalienable and that any title granted to public trust resources was subject to the rights of the public.
This concept was eventually codified as the public trust doctrine, under which “all the public lands of the nation are held in trust [by the government] for the people of the whole country.” Light v. United States, 220 U.S. 523, 537 (1911). Where adopted, the government owes a duty to protect and preserve the lands and natural resources for the public. While each state is free to adopt the public trust doctrine, Colorado’s voters and courts have rejected it. See City of Longmont v. Colo. Oil & Gas Ass’n, 369 P.3d 573 (Colo. 2016).

In Martinez, Colorado’s Attorney General faces the prospect of the doctrine gaining a toehold in Colorado precedent. That concern undoubtedly was heightened by lawsuits throughout the country that have tried to advance environmental causes using public trust doctrine litigation, most recently on the issue of global climate change. Indeed, in neighboring New Mexico, a court of appeals recently declared that the atmosphere was a public trust resource for the benefit of the people. More importantly, the public trust doctrine clearly has the potential to morph into a principle of extremely broad application—covering a host of public health, human safety, and environmental impact issues.

**Does Martinez allow the public trust doctrine to emerge in Colorado?**

In short, no. While petitioners’ briefing to the Supreme Court emphasized that the children’s rulemaking petition relied on and was rooted in the public trust doctrine, Martinez neither adopted, approved, nor implicitly endorsed the doctrine. In fact, the court disclaimed the public trust doctrine and stated that it was not addressing any arguments related to it because they had been abandoned on appeal.

Martinez, at its core, was an exercise of statutory interpretation. Its facts begin in 2013, when six children asked the Colorado Oil and Gas Conservation Commission (the body charged with regulating the state’s oil and gas production) to promulgate a rule requesting that it:

> not issue any permits for the drilling of a well for oil and gas unless … that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado’s atmosphere, water, wildlife, and land resources, does not adversely impact human health and does not contribute to climate change.

The commission denied the petition, determining that the proposed rule was beyond its authority, contradicted its nondelegable duties, and relied on the public trust doctrine, which it noted “has been expressly rejected in Colorado.” It further declared that it was statutorily required to “balance” oil and gas development with public health and safety. Thus, the commission concluded, it could issue drilling permits unless the harm to public health and safety outweighed the public benefit of oil and gas development. The district court affirmed the denial.

On appeal, the children argued that the commission and district court ignored the “plain and ordinary meaning” of the statute, which states that it is in the public interest to:
[f]oster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources.

C.R.S. § 34-60-102(1)(a)(I) (emphasis added). A divided court of appeals panel agreed, holding that the term “in a manner consistent with” did “not indicate a balancing test but rather a condition that must be fulfilled.” In other words, fostering balanced, nonwasteful development is in the public interest only when that development is completed “subject to” the protection of public health, safety, and welfare.

The Colorado Supreme Court recognized Martinez for what it is—a question of statutory interpretation

While petitioners raised the specter that the public trust doctrine had gained hold, the Colorado Supreme Court granted the petitions for writ of certiorari filed by the Colorado Oil and Gas Conservation Commission, American Petroleum Institute, and Colorado Petroleum Association, on a narrow issue of statutory interpretation. Specifically: “[w]hether the court of appeals erred in determining that the … Commission misinterpreted section 34-60-102(1)(a)(I), C.R.S. as requiring a balance between oil and gas development and public health, safety, and welfare.” In so doing, the Court gave no indication that it was focused on the public trust doctrine or concerned that the court of appeals had implicitly endorsed or adopted it. The Supreme Court is more likely to focus on the contagion effect suggested by amici National Association of Manufacturers, et al.—that other states with similarly constructed statutes will consider Martinez persuasive authority.

In short, while petitioners may raise and the Court may address public trust arguments, it is likely that the Supreme Court will resolve Martinez on standard principles of statutory interpretation and not resort to a foray into an ancient doctrine repeatedly rejected in the state. Thus, for now at least, it seems the public trust doctrine will remain dead in the (public) water in Colorado.

Pennsylvania court opens door to claims of trespass by fracking

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In the first decision of its kind, Pennsylvania’s intermediate appellate court has rejected the rule of capture in favor of recognizing trespass claims where hydraulic fracturing (fracking) extends
to adjoining unleased lands. If the court’s decision stands, it could pave the way for a wave of trespass claims based on fracking, as well as changes to fracking operations themselves.

The dispute

In Briggs v. Southwestern Energy Production Co., 2018 Pa. Super. 79 (2018), the Briggs family owned an unleased, 11-acre parcel in Susquehanna County, in Pennsylvania’s far northeast corner. The parcel was adjacent to a parcel on which Southwestern Energy Production Company was undertaking fracking operations. The family claimed that Southwestern trespassed on their land through its fracking operations, resulting in the conversion of Briggs’ natural gas.

Southwestern countered that, as a matter of law, it could not be liable for trespass or conversion under the well settled rule of capture, which insulates operators who capture hydrocarbons draining from adjacent lands, even when those lands are not leased.

The trial court agreed with Southwestern, and the family appealed.

Rejecting the rule of capture

In rejecting Southwestern’s defense and overturning the trial court, the Superior Court of Pennsylvania held that the rule of capture did not apply to fracking of unconventional wells. The court opined that the rule was the product of geological practicality because, with historical conventional drilling, a pool of gas or oil will naturally flow to adjacent land. In contrast, with unconventional wells and shale gas, it is necessary for fracking to first reach the shale to release its hydrocarbons. Thus, the court held that the extension of that fracking to release the gas from the Briggs’s shale could be deemed a trespass. Accordingly, the Superior Court remanded the case to the trial court to allow the plaintiffs to try to prove their case, including damages—a task that the court noted could be a complicated undertaking.

Procedural status

Southwestern, as well as a number of amici curiae, asked for rehearing of the case before an en banc panel of the Superior Court. The court rejected that request on June 8, 2018. Southwestern has since filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court, which as of the date of publication of this article remains pending. Those joining in that petition through amicus briefs included the American Petroleum Institute, the American Exploration and Production Council, the Independent Petroleum Association of America, the Marcellus Shale Coalition, and the Pennsylvania Chamber of Commerce.
What’s at stake

If the Briggs decision stands, the repercussions could be significant. The case is being closely watched in many oil and gas producing jurisdictions because only one other state, Texas, has definitively ruled on these issues. In Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W. 3d 1 (Tex. 2008), the Texas Supreme Court upheld the rule of capture as a bar to trespass by fracking claims. But the Briggs court rejected Garza and, in fact, explicitly adopted its dissent.

For operators, the concern is that Briggs opens the door for trespass claims by any unleased landowner with land next to, or even within, a drilling unit. What remains unresolved is how the plaintiffs in such cases would prove their claims, how operators would defend against them, what experts would be needed, and how damage models would have to be utilized and critiqued. Clearly, the law of trespass by fracking would take years to develop, as cases are litigated in the trial courts and then wind their way through the appellate courts.

The practical operational effects of Briggs could be just as significant. To avoid trespass by fracking claims, operators may feel forced to limit the area to which their fracturing extends. Similarly, operators may also limit the lengths of their laterals to provide more of a buffer to unit boundaries. They may even be forced to limit the number of laterals in a particular drilling unit due to self-imposed spacing limitations. The ultimate effect could be to reduce oil and gas recovery, thus straining the economics of their operations.

In Brief

John R. Jacus

John R. Jacus is a partner and the Environmental Practice Group Leader in the law firm of Davis Graham & Stubbs LLP in Denver. He is a past Section Council member and Environmental Committees chair and vice-chair and a contributing editor of Trends.

CERCLA

Genuine Parts Co. v. EPA, Nos. 16-1416, 16-1418 (D.C. Cir. May 18, 2018).

The U.S. Circuit Court of Appeals for the D.C. Circuit rejected an EPA listing of a potential Superfund site on the National Priorities List (NPL) as arbitrary and capricious. Two potentially responsible parties, the owner of a former auto parts remanufacturing, degreasing, and industrial waste property, and the owner of a shopping center where dry cleaning solvents were discharged into a leaky sewer line, challenged EPA’s final agency action in placing the affected site on the NPL due to putative drinking water contamination. In assessing the site’s upper and lower aquifers, EPA determined that the aquifers were interconnected and treated them as a single hydraulic unit when applying the Hazard Ranking System (HRS) for possible NPL listing of the
site. If EPA treated the aquifers as separate unconnected water bearing zones, then the final HRS score would not have qualified the site for NPL listing. EPA’s own studies, however, demonstrated that the aquifers were separated by a “confining layer” of materials with lower hydraulic conductivity that water cannot easily move through. Upon review, the D.C. Circuit vacated the NPL listing and held that EPA ignored substantial evidence and acted arbitrarily and capriciously in relying on portions of studies that supported its position regarding the interconnectivity of the aquifers, while ignoring cross sections in those studies that did not. The court also noted that while EPA’s listing decisions are highly technical and entitled to “significant deference,” conclusory explanations where there is considerable evidence in conflict do not suffice to meet the deferential standard of review.

*Bartlett v. Honeywell Int’l, Inc.*, No. 17-1907 (2nd Cir. May 25, 2018) *(per curiam).*
The U.S. Circuit Court of Appeals for the Second Circuit summarily affirmed the dismissal of a complaint brought by residents living near a waste disposal area at the Onondaga Lake Superfund site in New York. The court held that it had subject matter and diversity jurisdiction and that the plaintiffs’ state tort law claims were preempted by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Conflict preemption applied because the state tort law claims conflicted with the intent of Congress in promulgating CERCLA and with the obligations of Honeywell International (Honeywell) in complying with a CERCLA remediation plan enforced by a federal consent decree. Plaintiffs argued that under state law Honeywell should have departed from the consent decree’s terms by conducting additional or different remedial actions such as containing contaminants in a closed system, selecting a different perimeter air monitoring system due to alleged deficiencies, etc. The court agreed that CERCLA’s provisions prohibit any potentially responsible party, like Honeywell, from commencing any remedial action except for those expressly authorized in the consent decree. The court also noted that the federal remedy was “comprehensive, but flexible and dynamic,” meticulously negotiated and resulting from over “two decades of legal and technical efforts, including public notice and comment and extensive supervision by a federal court and state and federal expert agencies…..” Accordingly, the court found that CERCLA preempted the residents’ claims because the allegations amounted to “nothing more than a belated challenge to the adequacy of the consent decree itself,” rather than Honeywell’s failure to comply with or properly implement the consent decree.

**Clean Air Act**

The U.S. Circuit Court of Appeals for the D.C. Circuit rejected two environmental organizations’ challenge to a 2016 rule defining a “natural event” under EPA’s exceptional events rule, which allows states to not report exceedances of the national ambient air quality standards that are caused by “exceptional events.” At issue was whether some human activity might contribute to an otherwise “natural event” under the exceptional events rule. The court reviewed EPA’s definition of natural event in the 2016 rule under the two-step analysis required by *Chevron USA,*
Inc. v. NRDC, 467 U.S. 837 (1984). At step one, the court considered the plain meaning of “natural event,” which does not seem to accommodate a human-caused contribution, but then acknowledged that “the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” In so reading the term “natural event,” the court observed that “[t]he point at which human contributions convert a natural event into one caused by human activity is blurry at best,” and concluded that “EPA must draw that line, and the Act provides little guidance beyond establishing that the distinction exists.” Thus, in step two of its *Chevron* analysis, the court held that Congress left a gap for EPA to fill in a reasonable fashion. After considering the petitioners’ concerns, the court found that, while some risk that “extreme and unforeseen applications of the rule may have problematic results” likely remained, the rule was reasonable and the definition of natural event therein was permissible under the Clean Air Act.

*Nat’l Env’tl Dev. Ass’n’s Clean Air Project v. EPA*, No. 16-1344 (D.C. Cir. June 8, 2018) (*NEDACAP II*).

In *NEDACAP II*, the U.S. Circuit Court of Appeals for the D.C. Circuit denied a petition from environmental organizations seeking review of EPA amendments under the Clean Air Act regarding inter-circuit non-acquiescence by EPA when federal court decisions regarding locally or regionally applicable actions may affect its application of national programs, policy, and guidance. The EPA amendments were promulgated in response to a prior case, *NEDACAP I*, 752 F.3d 999 (D.C. Cir. 2014), which granted a petition for review because EPA’s then-effective regulations precluded inter-circuit non-acquiescence by EPA. The petitions for review were prompted by the U.S. Circuit Court of Appeals for the Sixth Circuit’s decision in *Summit Petroleum Corp. v. EPA*, 609 F.3d 733 (6th Cir. 2012), wherein the Sixth Circuit Court rejected EPA’s interpretation of the word “adjacent” when treating multiple pollution-emitting activities under common control as a single stationary source under the Clean Air Act. In evaluating the updated regulations under the Clean Air Act in *NEDACAP II*, the court determined that the Clean Air Act only requires uniformity regarding delegation of the EPA Administrator’s powers and does not address court-created inconsistencies. Instead, inter-circuit inconsistency is an “inevitable consequence” of the Clean Air Act’s bifurcated system of requiring review of “nationally applicable” regulations to the D.C. Circuit or the U.S. Supreme Court and directing review of “locally or regionally applicable” regulations to the appropriate regional circuit. In the concurring opinion, Senior Circuit Judge Silberman noted that in cases like *Summit*, the congressional scheme would be followed if the EPA Administrator declared the issue national and channeled any appeal to the D.C. Circuit.


The U.S. Circuit Court of Appeals for the D.C. Circuit considered petitions for review of EPA’s rule entitled “NESHAP for Brick and Structural Clay Products Manufacturing; and NESHAP for Clay Ceramics Manufacturing,” (the Brick/Clay Rule) for alleged violations of the Clean Air Act. In the rule, EPA set (a) Maximum Achievable Control Technology (MACT) standards to regulate heavy metal emissions from kilns and (b) health thresholds to regulate their acid gas emissions. The court addressed separate challenges to the Brick/Clay Rule brought by
environmental and industry groups and ultimately granted the petitions for review of all but one of the issues raised by the environmental groups while denying all the industry petitions. The D.C. Circuit reviewed EPA’s action under the *Chevron* process, *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), noting that if the statute is silent or ambiguous on an issue, the court will defer to EPA’s interpretation of the statute, so long as it is reasonable. The court granted the petitions of the environmental groups on multiple issues, including: (1) EPA acted unreasonably by concluding that it is “established” that the acid gas pollutants pose no cancer risk, (2) EPA acted unreasonably in finding that the non-carcinogenic health threshold for hydrogen chloride was established, without providing a supporting basis, (3) EPA did not adequately explain how a hydrogen fluoride emissions limit based on an “established health threshold” can permit potential health risks from acute exposure, (4) EPA did not meet the Clean Air Act requirement to include an ample margin of safety in the health threshold for the acid gases, and (5) EPA’s provision of alternate emissions standards is contrary to the statutory requirement of a standard based on the “best” performing sources. Finally, while the court did find that EPA had sufficiently explained the upper prediction limit to small data sets, it granted the petition relating to five cases where EPA failed to explain adjustments made to individual upper prediction limit calculations.

Regarding the Brick Industry Association’s petition, the court found that (1) EPA did not violate the Clean Air Act by using emissions data from synthetic minor sources to set the MACT floor for particulate matter and non-mercury metal emissions for brick plant major sources, (2) EPA was not arbitrary or capricious when it used data from kilns that did not use fabric filters to set the MACT floor for particulate matter emissions, and (3) EPA relied on substantial evidence to conclude that technological controls are available to achieve the MACT floor without raw material substitution and made a reasoned decision not to subcategorize based on the mercury content of raw materials.

**Clean Water Act**


The United States and California state agencies filed suit against an oil and gas production company (Greta), claiming that a series of oil spills violated the Clean Water Act, the Oil Pollution Act (OPA), and California state law. The court granted in part and denied in part the United States’ motion for partial summary judgment and determined that the government’s removal costs were reasonable and incurred in good faith. The court also held that the narrowly construed third-party defense under OPA did not apply because the defendant could not show that vandalism from a third party solely caused the spill, which was also due to failure of an injunction pump and a failure by defendant to take proper precautions to prevent a release from vandals or otherwise.

Defendant did not contest that the 12 spills at issue constituted an unpermitted discharge of oil from a point source as defined by the Clean Water Act, but claimed that it could not be liable under the act because the oil did not discharge into “navigable waters” protected under the act. Relying on Ninth Circuit Court of Appeals’ precedent, *United States v. Robertson*, 875 F.3d
1281 (9th Cir. 2017), and its interpretation of the U.S. Supreme Court’s decision in *Rapanos v. United States*, 547 U.S. 715 (2006), the district court applied Justice Kennedy’s “significant nexus” test to determine whether the tributaries at issue are navigable waters within the meaning of the Clean Water Act. The court held that the test applies to wetlands and tributaries and is a “flexible ecological inquiry” that may be supported by “quantitative or qualitative evidence.” Additionally, per *Robertson*, the court considered the existence of an ordinary high water mark (OHWM) as “one factor” in its significant nexus analysis. Regarding discharges into three tributaries at issue, the court concurred with the opinion of the government’s expert witness and found that these water bodies possessed OHWMs and had documented hydrological connections and water flow that significantly affected the “physical, biological and chemical integrity of a downstream [traditional navigable water (‘TNW’)].” Conversely, the court found that the defendant’s expert report did not address these facts and his criticisms were not supported by authority. Additionally, the court held that the presence of OHWMs, low water flow, and a long distance to navigable waters do not defeat a “significant nexus” to a TNW finding. Citing Justice Kennedy in *Rapanos*, the court noted that to find otherwise, particularly in the western part of the country, would make “little practical sense in a statute concerned with downstream water quality.” Accordingly, the court granted the government partial summary judgment regarding the “significant nexus” of these tributaries to TNW.

**Ohio Valley Env'tl. Coalition (OVEC) v. Pruitt,** 893 F.3d 225 (4th Cir. 2018).

The U.S. Circuit Court of Appeals for the Fourth Circuit reversed summary judgment based on allegations that EPA failed to perform a nondiscretionary duty to promulgate total maximum daily loads (TMDLs) for biologically impaired waters in West Virginia. Pursuant to the Clean Water Act, each state must develop TMDLS for impaired waters that it places on the “303(d) list” of impaired waters. A state must submit TMDLs to EPA “from time to time,” and according to the impaired water body’s “priority ranking.” Once a state submits a TMDL, EPA must approve or disapprove the state’s TMDL within 30 days and, if disapproved, EPA must develop and finalize its own TMDL 30 days after a disapproval. In 2012, West Virginia enacted a state law to delay the development of TMDLs for biologically impaired waters. In 2014, responding to pressure from plaintiffs and EPA, West Virginia projected specific dates for developing ionic toxicity TMDLs from 2020 to 2025 for the 573 waters at issue. Based on the state’s delay, plaintiffs brought suit, claiming EPA’s duty was triggered due to West Virginia’s “constructive submission” of no TMDLs. Relying on significant precedent from other circuits, the court held that the constructive submission doctrine was inapplicable here because the doctrine only applies when a state “clearly and unambiguously” expresses a decision not to submit TMDLs and has no plan to remedy the situation. As of now, West Virginia is still within the 8–13 years set out in EPA guidance to develop TMDLs, is making a good-faith effort to comply with its state law and has submitted a “credible plan” with EPA to produce those TMDLs.

**City of Taunton, Mass., v. EPA,** No. 16-2280 (1st Cir. July 9, 2018).

The U.S. Circuit Court of Appeals for the First Circuit affirmed EPA’s decision to impose a limit, through the National Pollutant Discharge System (NPDES) permit, on the amount of
nitrogen discharged from the City of Taunton, Massachusetts’ wastewater treatment plant (City). Applying the Administrative Procedure Act (APA) and deference due to the “scientific and technical nature of EPA’s decision-making,” the court found that EPA’s permitting decision was based on a reasonable interpretation of the Clean Water Act and was not arbitrary and capricious. The court declined to reopen the administrative record pursuant to section 509(c) of the Clean Water Act. The court found the section inapplicable because the public hearings regarding NPDES permits need not be “on the record” and are therefore informal agency adjudication under the APA. EPA regulations require that a draft NPDES permit include a fact sheet that “briefly” sets forth the significant facts, methods, and policies considered in preparing the draft permit. In this instance, the fact sheet identified the datasets and studies relied upon and sufficiently described why it was necessary to include an effluent limit in the draft permit because the City’s nitrogen discharges had a “reasonable potential” to violate the applicable water-quality standards. Regarding the City’s substantive challenges, the court found that EPA properly determined that the Taunton Estuary was nutrient impaired and that nitrogen discharges from the City caused or contributed to “cultural eutrophication” in violation of Massachusetts’ narrative water quality criterion. To translate the narrative criteria into a numeric water quality criterion, EPA relied on a state report and a three-year water quality monitoring study and properly used a “reference-based” approach to determine the target nitrogen concentration.

Climate change litigation


The U.S. District Court for the Northern District of California dismissed a suit by California cities who sued major oil and gas companies in a nuisance action under federal common law. The cities, alleged that defendants’ sale of their fossil fuels while knowing they contribute to climate change and rising oceans constitutes a nuisance and sought billions of dollars to abate the local effects of rising sea levels in Oakland and San Francisco. As the district court observed at the outset, plaintiffs’ action rests on the “sweeping proposition that otherwise lawful and everyday sales of fossil fuels, combined with an awareness that greenhouse gas emissions lead to increased global temperatures, constitute a public nuisance.” Applying the Restatement (Second) of Torts § 821B(1) (1979)(Restatement), the court observed that a successful public nuisance claim requires proof that a defendant’s activity unreasonably interferes with the use or enjoyment of a public right and thereby causes the public-at-large substantial and widespread harm. The court found that where the alleged interference is intentional, “it must also be unreasonable,” and this determination involves “the weighing of the gravity of the harm against the utility of the conduct” under sections 826 through 831 of the Restatement. In so doing, it is necessary to consider the extent and character of the interference, the social value that the law attaches to it, the character of the locality involved, and the burden of avoiding the harm placed upon members of the public. In making that consideration, the court acknowledged that carbon dioxide released from fossil fuels has caused (and will continue to cause) global warming, but also observed that our industrial revolution and the development of our modern world has literally been fueled by oil and coal, without which “virtually all of our monumental progress would have been
impossible.” The court found that the cities’ allegations that the sale of fossil fuels is a nuisance is equally displaced by the Clean Air Act. Turning to the plaintiffs’ allegations regarding international sales of fossil fuels, beyond the displacement reach of the act, the court then reasoned that these claims are foreclosed by the need for federal courts to defer to the legislative and executive branches when it comes to such international problems.

**Energy Policy and Conservation Act and Corporate Average Fuel Economy standards**

The U.S. Circuit Court of Appeals for the Second Circuit granted in April 2018 various petitions challenging a rule published by the National Highway Traffic Safety Administration (NHTSA) that indefinitely delayed the effective date of a rule adjusting civil penalties that the agency had promulgated several months prior. In its opinion issued after the order granting the petitions, the court noted that NHTSA’s original rule would have increased civil penalties for violations of corporate average fuel economy (CAFE) standards for motor vehicles adopted in 1975 under the Energy Policy and Conservation Act. It then considered NHTSA’s about-face decision to delay that rule. The rule was first frozen pursuant to a memorandum by former White House Chief of Staff Reince Priebus dated January 20, 2017, concerning the imposition of a “regulatory freeze pending review,” and then was the subject of NHTSA’s rule postponing the CAFE standards penalty adjustments indefinitely, referred to as the “suspension rule.” Given Congress’s determination to ensure that civil penalties retain their value over time through regular inflationary adjustments, as reflected in the “highly circumscribed schedule” for the penalty increases Congress imposed, the court concluded that the statute does not authorize NHTSA to indefinitely delay implementation of the penalty increases. And although Congress preserved in the statute a narrow window of discretion for agencies regarding the amount of the initial catch-up adjustment, it afforded no such discretion regarding the timing of the adjustments. The court disagreed with NHTSA’s argument that essentially there is categorical authority for an agency to delay an effective date of an earlier rule pending its reconsideration, noting that a decision to reconsider a rule does not simultaneously convey authority to indefinitely delay the existing rule pending that reconsideration.

**NEPA**

The U.S. Circuit Court of Appeals for the D.C. Circuit rejected environmental organizations’ action against the Secretary of the Interior, seeking an order compelling him to update the Federal Coal Management Program’s (Program) programmatic environmental impact statement (PEIS) under the National Environmental Policy Act (NEPA). The Program’s Record of Decision and final rule were promulgated in 1979. The court affirmed the district court’s dismissal, because neither NEPA nor the Department of the Interior’s rules created a legal duty for DOI to update the Program’s PEIS. The court applied the U.S. Supreme Court’s seminal decision in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (SUWA), which
examined when a court may compel agency action under section 706(1) of the APA. In response to plaintiffs’ arguments that the existence of new data regarding coal combustion’s impact on greenhouse gases in the atmosphere and the fact that “environmentally significant” decisions remained, the court noted that “as SUWA makes clear, the fact that actions continue to occur in compliance with the Program does not render the original action incomplete.” Accordingly, the court found that DOI’s NEPA obligations for the Program terminated with its adoption in 1979.

**South Carolina v. U.S., No. 1:18-cv-01431 (D.S.C. June 7, 2018).**
The U.S. District Court for the District of South Carolina granted the state’s preliminary injunction against the U.S. Department of Energy (DOE) and other federal defendants enjoining the federal defendants from terminating the mixed oxide (MOX) fuel fabrication facility project (MOX Facility) currently under construction at the Savannah River Site located in South Carolina. The MOX facility is being constructed to irradiate some of the country’s surplus weapons-grade plutonium in MOX fuel to be used in existing domestic, commercial reactors, pursuant to specific statutory requirements. The federal defendants argued that South Carolina’s claims were not justiciable, and that the statutory certifications required to terminate the project were mere “notifications,” “responses,” and “reports.” The court disagreed, noting that the commitments and certifications required of DOE were much more than a “purely informational” report; rather, they were evidence of final agency action to terminate the MOX Facility. Because that action has significant legal consequences, the State’s claims under the APA were justiciable. Finally, with respect to the issuance of a preliminary injunction, the court found (1) South Carolina did enjoy a “likelihood of success on the merits” because the Secretary of Energy’s purported commitments and certifications have no basis in law or fact, (2) that “irreparable harm” exists when, as in this case, agencies become entrenched in a decision uninformed by the proper NEPA process, (3) that, although issuance of the requested injunction would result in continued expenditures of $1.2 million per day, the balance of equities weighs heavily in South Carolina’s favor, and (4) an injunction preventing the federal defendants from taking any action to terminate the MOX Facility until NEPA compliance can be assured furthers the public interest.

**Views from the Chair**
Amy L. Edwards

*Amy L. Edwards became the Section of Environment, Energy and Resources’ 92nd chair during the Section’s annual business meeting in August 2018. A long-time Section member, Edwards has previously served as education officer, Council member, 21st Fall Conference planning chair, and chair of the Environmental Transactions and Brownfields Committee. She is a partner with Holland & Knight LLP in Washington, D.C.*
It is a true honor and privilege to serve as your Section chair during the 2018–2019 ABA year. I look forward to an exciting year of top-notch programming, publications, online content, and other member benefits.

Why does your Section membership matter?

So why does your membership in the Section matter? The Section remains the premier forum for environmental, energy, and resource lawyers in the United States. During these turbulent times, it is more important than ever to have a place where we can have a vigorous debate about the ongoing vitality and merit of any given issue, program, or institution and how it might affect our practices and clients. My goal is to provide an open platform and to encourage lively debate on the issues which impact our members.

My goals for the year ahead

During the year ahead, I intend to emphasize three primary goals: engagement, recruitment, and outreach.

- **Engagement:** Are you a member of a committee? Remember, there is no limit on the number of committees you can join. Committees produce online content and host committee programming calls. Moreover, they are a vehicle by which you can get involved—by publishing an article or moderating a webinar. You will get even more out of the Section by actively participating. Use the online “Members Seeking to Become Active in the Section” questionnaire to indicate your interest in becoming more involved in a committee—or just call or email a committee chair.

- **Recruitment:** I hope you share with others the value you find in being a Section member and that you encourage nonmembers to join. Is your colleague a member of the Section? What about that speaker listed on a recent webinar announcement? Feel free to reach out to our Membership Officer, Jeff Dennis; or to the co-chairs of our Special Committee on Diversity Bar Outreach and Engagement, Roger Martella and Dawn Lettman; or to the co-chairs of our Special Committee on Young Lawyers, Kelly Poole and Taylor Hoverman; or to the membership vice chair of your favorite committee, if you would like to help.

- **Outreach:** The Section prides itself on reaching out to state, local, international, and specialty bar associations, including the Environmental, Energy and Resources Law Section of the Canadian Bar Association, as well as to other like-minded organizations, such as the Environmental Law Institute, Rocky Mountain Mineral Law Foundation, and United Kingdom Environmental Law Association. We will continue our collaborative efforts in order to strengthen these relationships. If you have new ideas about opportunities for outreach, please let the chair of our Special Committee on Outreach, Alf Brandt, know.
I will emphasize three additional goals as well: refining member benefits, mentoring younger members, and content convergence.

- **Member benefits**: In light of the ABA’s intent to implement a New Membership Model in the near future, we have begun to take a new look at the bundle of benefits that we offer our Section’s members. Stay tuned and help us be creative about new forms of content (e.g., podcasts, blogs, video).
- **Mentoring** younger lawyers: Many of us have been practicing environmental, energy, and resources law for decades. As lawyers, we have a rich legacy of passing on our knowledge and experience to the next generation. One way the Section does so is through our [Leadership Development Program](https://www.abanet.org/lawyers/getinvolved/leadership-development-program) and [Membership Diversity Enhancement Program](https://www.abanet.org/lawyers/getinvolved/diversity-enhancement-program). We also plan to build up our library of podcasts and free CLEs. What else should the Section be doing? The Council members and I welcome your thoughts.
- **Content convergence**: I will continue the work begun by former chairs Seth Davis and John Milner on content convergence: making sure that our Section leaders collaborate in developing programming and written content and that committees with overlapping interests are coordinating with one another. If you have ideas on topics for convergence and coordination, please reach out to the co-chairs of our Special Committee on Content Convergence and Coordination (C3), Rich Ericsson and Stephen Smithson.

**Join us at our upcoming Fall Conference**

I hope you will join me and the rest of the Section’s leadership team at the [26th Section Fall Conference](https://www.abanet.org/lawyers/getinvolved/leadership-development-program) in San Diego October 17–20, 2018. As past section chair Seth Davis said about the Section in his initial “Views” column, “everyone is welcome, everyone is needed, and everyone can have a meaningful role.” He meant it, and so do I. Our Fall Conference Planning Committee has developed a stellar CLE program with lots of opportunities for networking. We encourage you to participate in our day of leadership meetings on October 20 as well. Come make new friends and catch up with old ones in sunny San Diego!

**People on the Move**

James R. Arnold

*Jim Arnold* is the principal in The Arnold Law Practice in San Francisco and is a contributing editor to *Trends*. Information about Section members’ moves and activities can be sent to Jim’s attention, care of ellen.rothstein@americanbar.org.

Charles Howland has joined Curtis, Mallet-Prevost, Colt & Mosle, LLP as a partner in its New York City office and as chair of its Environmental group. Howland served at USEPA for 28 years, as a senior assistant regional counsel in Region 3 and, most recently, as a senior advisor to
OECA working on Superfund Taskforce implementation. He advises clients on compliance with environmental laws generally, with a focus on real estate and other commercial transactions and related potential liabilities under CERCLA, RCRA, and state law counterparts. Howland works with energy and other developers advancing projects on environmentally impaired land and helps clients to comply with risk management, spill, and emergency response planning laws. He frequently lectures on environmental and energy law, having taught courses at the University of Pennsylvania Law School and Villanova University Charles Widger School of Law. Howland was appointed to the Fulbright Specialist Program Roster for a three-year term beginning August 2017. His article, *Brightfields: Sustainable Opportunities for Renewable Energy Projects on Environmentally Impaired Lands*, was published in the Section’s *Natural Resources & Environment* magazine (Vol. 29, No. 2). Howland is a planning committee member for the Section’s Brownfields/Superfund conference scheduled for June 2019 in Atlanta.

**Jesse James** has joined InfraSource, a Quanta Services Company, as the senior quality manager. James joins InfraSource after serving as a deputy consumer counselor with the State of Indiana, representing the state’s energy and utility consumers in matters before the Indiana Utility Regulatory Commission. Previously, James worked at NiSource in various legal, compliance, and regulatory roles. At InfraSource, James works to address compliance programs that are implemented across the natural gas industry. InfraSource provides utility infrastructure solutions for gas operators nationally. James is chair of the Section’s Committee on Electronic Communications.

**Erin Flannery Keith** has transferred to the U.S. Environmental Protection Agency’s Region 1 Office of Regional Counsel in Boston. Flannery Keith was previously in EPA Headquarters’ Office of Water for nine years. She will focus on New England water law, information law, and environmental justice issues. Flannery Keith is a member of the editorial board of *Natural Resources & Environment* magazine.

**Matthew Sanders** has left private practice to rejoin the government, this time as a deputy county counsel for San Mateo County, California. Sanders’s clients include the county’s Parks and Recreation Department, Peninsula Clean Energy, a community choice aggregator (CCA), and the county’s City and County Association of Governments. He continues to teach at Stanford Law School, is a member of the *Trends* Editorial Board, and is co-chair of the Section’s Public Land and Resources Committee.