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Table of Contents

Features

Justice John Paul Stevens: An appreciation .................................................................2
John C. Dernbach

SAFE Rule: Federal-state tension in auto emission regulation ................................4
Peter Whitfield and Aaron L. Flyer

Knick v. Township of Scott: A procedural boost for takings claimants ......................7
John Echeverria

State water quality certification: What’s all the fuss about? .....................................11
Susan L. Stephens

Fifth Circuit reprimands EPA for perpetuating outdated effluent limitations guidelines ...14
Thomas Cmar

In Brief ..........................................................................................................................16
John R. Jacus

Section News

Views from the Chair ..................................................................................................22
Karen A. Mignone

People on the Move ....................................................................................................23
James R. Arnold
Justice John Paul Stevens: An appreciation
John C. Dernbach

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Justice John Paul Stevens served on the U.S. Supreme Court from 1975 until he retired in 2010. Stevens died on July 16, 2019, at the age of 99. Appointed by Republican President Gerald Ford, he charted a more independent course over his long Supreme Court career. While he wrote opinions on a wide variety of legal issues, some of the most important involved environmental law.

One measure of his influence is his role in key environmental cases. Professors J.B. Ruhl and Jim Salzman have polled environmental professionals about the most important environmental cases of all time. The top two, they wrote in the Environmental Forum, are Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984), and Massachusetts v. EPA, 549 U.S. 497 (2007), respectively. Justice Stevens wrote the majority opinion in both. The third-ranked case is Rapanos v. United States, 547 U.S. 715 (2006), in which Stevens wrote the dissenting opinion. A common theme in these and other Stevens opinions is his willingness to defer to environmental agencies—but only when they faithfully implement the statutes they are charged with administering.

Chevron v. NRDC

In Chevron, the Supreme Court upheld a 1981 U.S. Environmental Protection Agency (EPA) regulation under the Clean Air Act that contained a plant-wide definition of “stationary source.” The regulation embodies a “bubble concept,” treating a facility with multiple pollution sources as a single source, and thus allowing the facility to modify its operation without needing a permit so long as total emissions from the facility do not increase.

The Chevron case, of course, is known more for its articulation of a two-part test for judicial review of an agency’s construction of the legislation it administers. The Chevron test requires courts first to “give effect to the unambiguously expressed intent of Congress,” and, where Congress has not directly addressed the issue, requires courts to defer to an agency’s reasonable construction of a statutory provision.

The Court first concluded that Congress had not directly addressed the “bubble concept” in the Clean Air Act. The Court then determined that the regulation was “entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasonable fashion, and the decision involves reconciling conflicting policies.” Chevron has had enormous influence; according to a 2014 study, “it is the most cited administrative law decision

**Massachusetts v. EPA**

EPA has authority under section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1), to regulate any air pollutant from motor vehicles that “may reasonably be anticipated to endanger public health or welfare.” *Massachusetts v. EPA* was a challenge to EPA’s rejection of a petition to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act. In a 5–4 majority opinion authored by Justice Stevens, the Court held that greenhouse gases are “air pollutants” under the Act. The Court also rejected other reasons given by George W. Bush’s EPA for not regulating greenhouse gases from motor vehicles (e.g., existence of voluntary programs, interference with the president’s foreign affairs power), because they were not anchored in section 202(a)(1). The Court remanded the matter to EPA to decide whether greenhouse gases meet the “cause or contribute” standard in section 202(a)(1).

The case may be understood as a reflection of the Court’s concern about the politicization of law and science concerning climate change that occurred during the George W. Bush administration, under which EPA decided not to regulate greenhouse gases from motor vehicles. “The harms associated with climate change are serious and well recognized,” the Court said in its analysis of whether Massachusetts had standing, acknowledging “the existence of a causal connection between man-made greenhouse gas emissions and global warming.” The Court gave no deference to EPA’s refusal to decide and obliged EPA to decide the question on the basis of the Clean Air Act alone. As Professors Jody Freeman and Adrian Vermeule have argued, the Court simply forced EPA to apply its expertise and do its job. J. Freeman & A. Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 Sup. Ct. Rev. 51, 76 (2007).

The Court’s holding made the statute available to reduce greenhouse gas emissions from both mobile and stationary sources, even in the absence of new federal climate change legislation. In 2009, EPA issued an endangerment finding under section 202(a)(1). Then, after comprehensive federal legislation to address climate change failed to pass Congress in 2009 and 2010, EPA (and, for vehicles, the National Highway Traffic Safety Administration) adopted regulations to reduce greenhouse gas emissions from existing stationary sources, new stationary sources, light duty vehicles, and heavy duty vehicles. All of these regulations (but not the endangerment finding) are now subject to attempted rollbacks by the Trump administration.

**Rapanos v. United States**

In *Rapanos*, the Supreme Court limited the ability of the U.S. Army Corps of Engineers to regulate the filling of wetlands as “waters of the United States” under the Clean Water Act. The case was a challenge to the application of regulations that the Corps had long administered. The Court articulated two different legal tests for regulating wetlands not adjacent to navigable
waters, neither of which commanded a majority. These are whether these wetlands have a "continuous surface connection with the water, making it difficult to determine where the water ends and the wetland begins" (Scalia and three other Justices), and whether these wetlands have a substantial chemical, physical, or biological nexus to navigable waters (Kennedy).

Justice Stevens, in dissent (with three other Justices), would have simply applied and upheld regulations that reflected “more than 30 years of practice” by the Corps. Rejecting the “creative criticisms” offered by Scalia and Kennedy, he described the then-existing regulations as “a quintessential example of the Executive’s reasonable interpretation of a statutory provision,” citing *Chevron*.

**Conclusion**

The issues of deference and climate change continue to be both significant and controversial. In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Court narrowly upheld the principle in *Auer v. Robbins*, 519 U.S. 452 (1997), that courts should generally defer to agencies’ interpretations of their own regulations. This principle, of course, is a cousin to that in *Chevron*. Many of the challenges to the Trump administration’s rollbacks on climate change regulation under the Clean Air Act will likely be decided by the Supreme Court. On both issues, Justice Stevens laid down markers that will be hard to ignore.

**SAFE Rule: Federal-state tension in auto emission regulation**

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As far back as the 1960s, California has adopted its own air quality standards for tailpipe pollution. This has set the pace for advancements in vehicle emissions controls nationwide. However, California’s delegated authority to administer its own regulatory programs under the Clean Air Act and other federal environmental laws has been revisited by the Trump administration. This federal-state tension is, perhaps, most pronounced in the U.S. Environmental Protection Agency (EPA)’s proposed Safer Affordable Fuel-Efficient Vehicle
Rule (SAFE Rule). This rule proposes to rescind California’s authority to administer its Zero-Emission Vehicle mandate and relax federal greenhouse gas (GHG) and fuel economy requirements that were previously adopted by the past administration. The SAFE Rule and ensuing litigation challenging the rule will determine what room, if any, exists for California and state regulation of fuel economy and tailpipe emissions.

Statutory and regulatory background

Vehicle GHG emissions and fuel economy are directly related to fuel consumption. Therefore, they are inextricably intertwined—both in how they are controlled within a vehicle and how they are regulated by the federal government. But the regulation of these standards occurs in two different federal agencies. EPA regulates tailpipe emissions pursuant to its authority under the Clean Air Act while the National Highway Traffic Safety Administration (NHTSA) sets annual Corporate Average Fuel Economy (CAFE) standards pursuant to its authority under the Energy Policy and Conservation Act. Congress arguably reserved room for some state regulation of automobile emissions in Clean Air Act section 209(b), which authorizes EPA to waive Clean Air Act preemption of overlapping state standards where those “standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.” In contrast, Congress provided no room for states to regulate fuel economy in the Energy Policy and Conservation Act, which provides merely that “a State may not adopt or enforce a law or regulation related to fuel economy standards.”

In 2009, under the Obama administration, EPA and NHTSA jointly established federal GHG and fuel economy requirements, and EPA granted California’s requested preemption waiver under the Clean Air Act, allowing the state to set its own GHG standards. Subsequently, in January 2013, EPA granted California a waiver to enforce its “Advanced Clean Car” program and update regulations for zero- and low-emission vehicles. Collectively, these actions were part of the federal government’s “National Program,” which intended to harmonize compliance requirements for manufacturers that need to sell vehicles meeting both federal and California standards. Thereafter, EPA and NHTSA set forth GHG and fuel economy requirements for vehicles through model year 2025, requiring an average fleet-wide fuel economy of up to 54.5 miles per gallon by model year 2026.

This trajectory changed on August 24, 2018, when EPA and NHTSA proposed the SAFE Rule. Under the proposal, GHG and fuel economy requirements for model years 2021–2026 would be frozen at model year 2020 levels, with fleet-wide requirements holding at approximately 37 miles per gallon. EPA also proposed to rescind California’s Clean Air Act preemption waiver. In justifying the proposal, EPA and NHTSA suggested that the prior fuel economy and GHG requirements were cost-prohibitive and overly restrictive for vehicle manufacturers, and that EPA’s prior preemption waiver was both invalid and no longer appropriate. On September 27, 2019, under a bifurcated final rule, EPA and NHTSA formally withdrew California’s Clean Air Act preemption waiver and found that a state’s ability to regulate GHG emissions is preempted.
under the Energy Policy and Conservation Act (SAFE Rule Part 1). EPA and NHTSA delayed promulgating final federal GHG and fuel economy standards (SAFE Rule Part 2) for “the near future.” The SAFE Rule puts California’s Zero-Emission Vehicle mandate (and other state laws adopting it) in a predicament—can California’s program survive as a regulation of tailpipe emissions despite the revocation of the Clean Air Act’s preemption waiver or is it impermissibly regulating fuel economy under the Energy Policy and Conservation Act?

SAFE Rule: Key legal questions and challenges

The forthcoming revision to the federal GHG and fuel economy standards, or SAFE Rule Part 2, will undoubtedly have a major impact on vehicle manufacturers, consumers, and petroleum producers. However, the legal issues are relatively straightforward under the Administrative Procedure Act—were the agencies “arbitrary and capricious” in making a decision following review of a detailed and highly technical administrative record? In comparison, SAFE Rule Part 1 raises the most interesting and important legal questions. First, does EPA have a valid legal basis to invalidate and rescind California’s prior Clean Air Act preemption waiver? Second, what effect, if any, does Energy Policy and Conservation Act preemption have on California’s ability to regulate GHGs under a Clean Air Act waiver?

EPA and NHTSA maintain that California’s GHG regulations frustrate the Energy Policy and Conservation Act’s underlying goal of ensuring that NHTSA establish uniform, nationwide fuel economy standards. Central to the final rule are EPA and NHTSA’s conclusions that (1) California's GHG regulations directly “relate to” fuel economy, which falls solely under NHTSA’s purview, (2) any preemption waiver under the Clean Air Act does not “federalize” state requirements otherwise preempted by the Energy Policy and Conservation Act, and (3) there is no “particularized nexus” between California’s requested waiver and local environmental conditions the state seeks to address. While the Clean Air Act provides a standard for EPA to apply in initially granting a waiver, no such standard exists for retroactively rescinding one. Moreover, the need for a “particularized nexus” to local environmental conditions appears to be a new hurdle for the state. Unsurprisingly, SAFE Rule Part 1 drew immediate legal challenge. The initial lawsuit came from a coalition of 23 states and the District of Columbia challenging NHTSA’s preemption determination in D.C. federal district court. Similar challenges from environmental groups and local California air quality management districts filed shortly thereafter have been consolidated before Judge Ketanji Brown Jackson. Before addressing the merits, however, the court will need to wrestle with whether it can even hear the case, as Clean Air Act section 307(b) limits judicial review of issues on “nationally applicable regulations” to the D.C. Circuit. Though the actions purport to only challenge NHTSA’s preemption determination, there is significant overlap with EPA’s Clean Air Act preemption waiver determination. It is for this reason that the final rule directs challengers to file suit in the D.C. Circuit. Relying on the justification in the final rule, NHTSA filed a motion to dismiss, which has been fully briefed and is currently pending review.
Separately, many of these same plaintiffs have filed petitions for review in the D.C. Circuit, which have also been consolidated. These challenges are substantively limited to EPA’s portion of the final rule but also preserve petitioners’ rights to challenge NHTSA’s action should the government prevail on its motion to dismiss in the district court. In both venues, a number of automotive manufacturers, through representation by various trade groups, have intervened on the government’s behalf.

While the D.C. Circuit is likely to resolve the merits of the challenges eventually—either on appeal or direct review—the jurisdictional question may delay ultimate resolution, possibly with the challengers’ hope of having a new administration in place by the time the merits are actually entertained. Regardless, vehicle manufacturers remain in regulatory limbo as they await clear guidance on what GHG and fuel economy standards they must follow, and unless these petitioners are successful, California’s Zero-Emission Vehicle mandate, along with similar programs in a number of other states that rely on California’s preemption waiver, will vanish.

**Knick v. Township of Scott: A procedural boost for takings claimants**

**John Echeverria**

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On June 21, 2019, the U.S. Supreme Court ruled in **Knick v. Township of Scott, Pennsylvania**, ___ U.S. ___, 139 S. Ct. 2162 (2019) (Knick) that a property owner suing a city or town under the Takings Clause of the Fifth Amendment can file her lawsuit in federal district court, jettisoning the Court’s long-standing rule that a taking claim against a local government must be filed, at least in the first instance, in state court.

**The issue presented in Knick**

The Knick case arose from an ordinance adopted by a community in rural eastern Pennsylvania mandating public access to ancient cemeteries located on private lands. Rose Mary Knick, owner of a 90-acre parcel with several grave markers, sued under the Takings Clause on the theory that the cemetery ordinance resulted in a physical occupation of her property. A federal district court dismissed her lawsuit, saying she was required to pursue her claim in a Pennsylvania court, justiciability issues precluded the court from
proceeding further. The Pacific Legal Foundation succeeded in persuading the Supreme Court to review Ms. Knick’s case.

The sole issue presented to the Court was whether it should overturn its 1985 decision in *Williamson Cty. Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) (*Williamson County*), which also involved a dispute between a landowner and a local government, and in which the Court established that a claim under the Takings Clause is not “ripe” in federal court unless and until the claimant has pursued a state inverse condemnation claim in state court. The *Williamson County* ruling was built on two propositions—that the Takings Clause does not proscribe takings but only requires payment as a condition of takings, and that compensation need not be paid in advance of a taking because all the Takings Clause requires is a reasonable process for obtaining compensation after the fact. Building from these premises, *Williamson County* ruled that no “violation” of the Takings Clause can occur as a result of a local land use decision unless and until the claimant pursues available state procedures for obtaining compensation and is denied relief.

**The Supreme Court’s holding**

In *Knick*, the Court, splitting five to four, overruled *Williamson County*. Chief Justice John Roberts, writing for the majority, articulated the new theory that a violation of the Takings Clause occurs when the government takes property without making a prior or contemporaneous payment of compensation. The upshot of the Court’s new theory is that, once the regulatory action is final, a claim based on an alleged violation of the Takings Clause can immediately be brought in federal district court (or state court, if the claimant prefers).

The Chief Justice grounded this new theory in prior Court precedent establishing that, once a regulation has been held to be a taking, the government cannot avoid liability by subsequently rescinding it and that a compensation award must include accrued interest calculated from the date of the taking. *Knick*, 139 S. Ct. at 2169. While he acknowledged that the Court had frequently said in other cases that a taking by itself does not violate the Takings Clause if the owner can seek after-the-fact compensation, the Chief Justice explained these cases as resting on the traditional rule that equitable relief is unavailable where there is an adequate remedy at law.

The Chief Justice also based the Court’s overruling of *Williamson County* on the fact that, under conventional full faith and credit doctrine, as the Court itself had recognized, once a taking claimant has pursued an inverse condemnation claim to a final judgment in state court, resort to federal court is usually barred by claim or issue preclusion. The Chief Justice thought this amounted to a catch-22 in the sense that a claimant must file in state court to “ripen” a federal taking claim, but once she ripens the claim she is foreclosed from pursing it in federal court.
The dissent

Justice Elena Kagan filed a dissent on behalf of herself and three other justices. She emphasized that the Takings Clause, unlike other provisions of the Bill of Rights, does not proscribe unconstitutional conduct, but instead affirmatively authorizes the taking of private property for public purposes—on the single condition that compensation is paid. Knick, 139 S. Ct. at 2181 (Kagan, J., with whom Ginsburg, Breyer, and Sotomayor, JJ., join, dissenting). In addition, Justice Kagan pointed out, the Court has long recognized that compensation need not be paid prior to or contemporaneously with the alleged taking to satisfy the Takings Clause. From these first principles, she contended, the rule of Williamson County follows “as night follows the day.” She accused the majority of violating the principle of stare decisis by “smashing a hundred-plus years of legal rulings to smithereens.”

As to the alleged catch-22, Justice Kagan pointed out that Congress can easily amend the full faith and credit doctrine to eliminate the preclusive effect of a state court judgment in a taking case but has so far declined to do so. Although she did not directly so argue, Justice Kagan also might have argued, as the Township and its amici did, that the Court has rejected the idea that a citizen necessarily has a right to pursue a federal constitutional issue in federal rather than state court, and that even when a citizen is compelled to litigate a federal constitutional issue in state court, and that even when a citizen is compelled to litigate a federal constitutional issue in state court, standard claim and issue preclusion may bar relitigation of the issue in federal court.

The future of takings litigation after Knick

The Justices’ competing arguments will continue to hold considerable interest for academics, but they represent water over the dam, so to speak, from a practical standpoint. Henceforth, property owners suing local governments under the Takings Clause have the option to sue in either federal or state court.

The most interesting and consequential question going forward is what Knick portends for the ability of property owners to sue to enjoin alleged takings that, in the Court’s new terminology, “violate” the U.S. Constitution. The Court’s opinion contains absolute statements that takings claimants will be limited to compensatory relief, and other statements that are more nebulous. For example, the Court said, “As long as just compensation remedies are available . . . injunctive relief will be foreclosed,” but the Court also said, “Given the availability of post-taking compensation, barring the government from acting will ordinarily not be appropriate.” To add to the uncertainty, Justice Thomas filed a concurring opinion arguing that injunctive relief should sometimes be available in takings litigation; he read the opinion of the Court, which he joined, as not foreclosing the application of “ordinary remedial principles.” Knick, 139 S. Ct. at 2180 (Thomas, J., concurring).

Prior to Knick, it was clear that a property owner could not seek injunctive relief for an alleged taking of private property, because a taking did not “violate” the Takings Clause so long as the
property owner could secure compensation later, as numerous Supreme Court decisions recognized. Thus, for example, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 976 (1984), the Court rejected a request for injunctive relief because “[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking.” *Id.* at 1016.

*Knick*, it will no doubt be contended, undermines this analysis because it establishes that a taking claim does assert a violation of the Takings Clause. To the extent that *Knick* undermines the reasoning of prior precedents barring requests for injunctive relief in takings cases, it can be argued that it opens the door to the injunctive remedy. If a taking claimant asserts a constitutional violation, why can’t she seek to enjoin such a violation in the same way that any other plaintiff can seek to enjoin any other federal constitutional violation?

On the other hand, even after *Knick*, the Takings Clause can still be read to preclude requests for injunctive relief, at least so long as the pathway is open for seeking compensatory relief. As discussed, the Takings Clause contains an implicit authorization for government to take private property for a “public use,” that is, a public purpose, on the condition that compensation be paid. *Knick*’s holding that a “violation” occurs when the government takes property without paying compensation may simply mean that an owner now has an immediate right to sue for compensation, a right that can now be pursued in either state or federal court. The Court’s embrace of the term “violation” does not necessarily disturb the bedrock understanding, affirmed by the Court many times, that the Takings Clause “is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.”

To be sure, a request for injunctive relief has long been appropriate under the Takings Clause in particular circumstances. A property owner asserting that an alleged taking is not for a “public use,” that is, not a legitimate public purpose, is entitled to seek injunctive relief; as the Supreme Court has said many times, a taking for other than a public use is unlawful and subject to an injunction whether or not the government is able and willing to pay compensation. On the other hand, if the alleged taking is for a public use, and the only remaining condition to be satisfied is payment of compensation, then a request for an injunction arguably should never be available, again assuming the claimant has the opportunity to secure compensation after the fact.

In terms of practical implications for future takings litigation, the *Knick* decision unquestionably gives property owners significant new tactical advantages. In particular, the option to select either a federal or state forum will allow claimants to forum shop based on which one offers the most favorable precedent or is more likely to provide a probable plaintiff-friendly judge.

At the same time, *Knick* will undoubtedly make takings litigation more procedurally complex, at a cost to both plaintiffs and government defendants. Prior to *Knick*, a property owner with competent legal representation suing a local government for a taking filed suit in state court.
Period. But *Knick* raises new questions about whether and when takings cases should be transferred in whole or in part from federal court to state court or vice versa. A threshold issue in every takings case is the nature and scope of the property interest allegedly taken. That issue is almost always governed by state rather than federal law. If a takings case is filed in federal district court, the federal court may wish to abstain in favor of state court, or invoke the certification process (where available), to obtain an authoritative resolution of the threshold property issue. The U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit commonly certify state law issues in takings cases against the United States to the highest court of the relevant state, and federal courts handling takings cases against local governments may well emulate this practice. Enlisting the aid of the state courts in resolving federal court land use cases will make the takings litigation process more protracted than it would be if plaintiffs simply filed in state court in the first instance.

Furthermore, if the owner sues under the federal Takings Clause in state court, the local government defendant may now seek to remove the case to federal court. Prior to *Knick*, some local government defendants sought to remove takings cases to federal court, but that tactic was problematic because, under *Williamson County*, only the state courts could adjudicate takings claims in the first instance. After *Knick*, of course, federal courts have jurisdiction over takings claims against local governments. Thus, removal should now be freely permitted when a government defendant sees some advantage in taking that step.

Ironically, despite the major victory achieved by property rights advocates in *Knick*, it remains to be seen if Ms. Knick will prevail in her lawsuit. A group of “cemetery scholars” filed an amicus brief documenting that Pennsylvania and many states recognize that citizens have a protected common law property right to visit the graves of their ancestors on private property, a right which Ms. Knick’s acquisition was purportedly subject to at the time of her purchase. The case has now been remanded to the federal district court in Pennsylvania to resolve whether this “background principle” of state property law may defeat this lawsuit.

**State water quality certification: What’s all the fuss about?**

Susan L. Stephens

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Recent proposed amendments to rules implementing the Clean Water Act may substantially change the way states and tribes interact with federal agencies on permits affecting water quality. The extent of the changes will vary program to program and state to state, as discussed below.
Under section 401 of the Clean Water Act (CWA), a federal agency cannot issue a permit or license for activities or projects that may discharge to a navigable water without the appropriate sign-off from the states or authorized tribes (hereinafter states/tribes) where the discharge will occur. Specifically, states/tribes must certify that the discharge will comply with their water quality requirements—or waive certification.

Under the CWA, states/tribes must act on their section 401 authority “within any reasonable time not to exceed one year,” and that action can take number of forms. The state/tribe can voluntarily or involuntarily waive, deny, or grant water quality certification, with or without conditions.

The Environmental Protection Agency (EPA) enacted rules implementing section 401 in 1971, at 40 C.F.R. part 121. Authorizations subject to CWA section 401’s requirements include section 402 discharge and section 404 dredge and fill permits, Federal Energy Regulatory Commission (FERC) hydropower licenses, and Rivers and Harbors Act (RHA) section 9 permits.

**Setting for change**

40 C.F.R. part 121 has not been updated in nearly 50 years and, according to EPA, is inconsistent with the text of CWA section 401, leading to confusion and delay in certain states. Accordingly, on August 22, 2019, EPA issued a proposed rule updating EPA’s water quality certification rules. 84 Fed. Reg. 44,080 (Aug. 22, 2019). This rulemaking is in response to President Trump’s April 15, 2019, Executive Order 13868, “Promoting Energy Infrastructure and Economic Growth.” Under the executive order, EPA is scheduled to finalize the rule in May 2020. 84 Fed. Reg. 15,495 (Apr. 15, 2019).

**Summary of proposed rule**

According to the preamble, the proposed rule is intended to provide consistency with CWA section 401, increase efficiencies, and clarify aspects of certification that have been unclear or subject to differing legal interpretations in the past. EPA is proposing a wholesale replacement of 40 C.F.R. part 121. Compared to the existing rule, the proposed rule:

- Clarifies that the scope of the section 401 certification process applies only to licenses or permits to conduct an activity that may result in a discharge from a point source into navigable waters.
- Specifies that certification is limited to assuring the licensed or permitted activity will comply with water quality requirements.
- Specifies the contents and form of a request for certification, including the time to respond.
- Specifies that the “reasonable period of time” to act on a certification request cannot exceed one year under any circumstances, and that the requesting agency shall specify the applicable “reasonable period of time” for the state/tribe to respond. The rule provides
factors to consider in establishing what is “reasonable,” such as complexity of the project. The federal agency may modify the time period upon written request, but the state/tribe cannot ask the project proponent to withdraw or modify its action to restart the clock.

- Clarifies that the scope of review is limited to potential water quality impacts caused by the point source discharge.
- Specifies under what conditions a state/tribe may request additional information. Additional information must be within the scope of certification and directly related to the discharge and its potential effect on water quality.
- Requires that the project proponent request a pre-filing meeting with EPA when EPA is the certifying authority.

**Expected impacts**

The rule changes affect only federal permitting actions; where the state/tribe has assumed CWA permitting authority, section 401 certification is not required. For CWA section 402 discharges pursuant to the National Pollution Discharge Elimination System (NPDES) program, the states have largely assumed the NPDES discharge permitting program. EPA issues section 402 NPDES discharge permits in only four states (Idaho, Massachusetts, New Hampshire, and New Mexico) as well as the District of Columbia and U.S. territories and on federal and tribal lands. In areas where states have NPDES permitting authority, the new rule will have no effect. For CWA section 404 permits, the situation is almost entirely reversed, with only New Jersey and Michigan issuing section 404 permits in lieu of the U.S. Army Corps of Engineers (Corps); water quality certification is required for section 404 permits elsewhere. States may have operating agreements in place with the Corps that address how water quality certifications for section 404 permits will be handled; these agreements may need to be modified, for example by changing the form and content of certification requests. See, e.g., Memorandum of Agreement Between the U.S. Army Corps of Engineers and the Texas Natural Resource Conservation Commission on Section 401 Certification Procedures (Aug. 17, 2000); Operating Agreement Among the Jacksonville District of the U.S. Army Corps of Engineers, the State of Florida Department of Environmental Protection et al. (Sept. 4, 2012). The rule changes will also affect FERC licensures and RHA section 9 permitting.

Over 1,000 comments were received on the proposed rulemaking. The biggest change is expected to be the time frames under which states/tribes must act or waive the certification requirement. Objectors claim the rules would allow the federal agency to dictate the time in which states/tribes can respond, notwithstanding the one-year backstop in the CWA. Many also claim the new rules inappropriately narrow the scope of certification review. The Association of Clean Water Administrators, Western Governors Association, and Environmental Council of the States, along with attorneys general from 16 states, have all raised objections to the proposed rules, arguing the rules improperly restrict states’ CWA authority. The bipartisan Western States Water Council concedes that improvements are needed to allow for more timely review, but stresses that legitimate reasons for delay must be recognized and authorized.
Fifth Circuit reprimands EPA for perpetuating outdated effluent limitations guidelines

Thomas Cmar

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On April 12, 2019, the U.S. Court of Appeals for the Fifth Circuit issued a decision in Southwestern Electric Company v. U.S. Environmental Protection Agency, Case No. 15-60821. The case involved legal challenges by a number of parties, including environmental groups, to the U.S. Environmental Protection Agency’s (EPA’s) 2015 revision of Clean Water Act wastewater treatment technology standards for coal-burning power plants (known as Effluent Limitations Guidelines or ELGs).

EPA is required to set nationwide ELGs for each major industry that discharges pollutants to U.S. waters but, notwithstanding that the power industry is by far the largest industrial discharger of toxic pollutants to U.S. waters, EPA had not updated the ELGs for power plants since 1982. The 1982 standards, which remained in effect for over 30 years, did not set discharge limits on toxic pollutants such as arsenic, mercury, and selenium based on the “Best Available Technology Economically Achievable” (BAT) and, inter alia, allowed coal-burning power plants to rely on unlined ponds (also known as impoundments) as their primary method for managing wastewater.

2015 rule required more stringent discharge limits for some wastestreams but not others

When EPA updated the power plant ELGs in 2015, it established new, more stringent discharge limits based on BAT for coal-burning power plants’ three largest wastestreams: (1) fly ash transport water, which is used to flush out ash particles that are captured in the smokestack after the coal is burned; (2) bottom ash transport water, which is used to flush out ash from the bottom of the boiler; and (3) wastewater from flue gas desulfurization (FGD or scrubber) systems that many plants use to remove pollutants from their air emissions. The 2015 rule required compliance with these new, more stringent discharge limits “as soon as possible” on or after November 1, 2018 (later extended to November 1, 2020, for bottom ash and FGD) and ultimately no later than December 31, 2023.

For two smaller power plant wastestreams, however, the 2015 rule did not establish more stringent discharge limits. Instead, the rule allowed power plants to avoid any new treatment requirements for both “legacy wastewater”—defined as wastewater that had already been generated as of the compliance date and sent to an impoundment for storage and eventual discharge—and leachate percolating out of on-site impoundments or landfills.
EPA and industry defended the rule

Environmental groups challenged both the legacy wastewater and leachate provisions of the 2015 rule in their petition before the Fifth Circuit. They argued that EPA’s failure to require more stringent treatment technology for legacy wastewater and landfill leachate was unsupported by the record and contrary to the Clean Water Act’s mandate that pollutants not be discharged by industrial sources without treatment to eliminate pollution to the maximum extent achievable using BAT.

Both EPA and an industry intervenor, the Utility Water Act Group, defended the exemption of legacy wastewater and leachate from more stringent requirements. Respondents argued that the approach was justified because EPA lacked information showing that more advanced wastewater treatment technologies were available to treat legacy wastewater. With respect to leachate, respondents argued that it was a small wastestream relative to the other, larger wastestreams for which the ELG rule set more stringent discharge limits, and that the more stringent limits on larger wastestreams constituted “reasonable progress” toward eliminating pollutant discharges from power plants. EPA argued that it had reasonably determined that it did not need to impose more stringent discharge limits on leachate.

Court held that standards must be based on state-of-the-art technologies

The Fifth Circuit held that EPA’s failure to require the most effective treatment technologies for both legacy wastewater and leachate was unlawful, strongly emphasizing EPA’s responsibility to require that industry use modern, state-of-the-art technologies to eliminate its pollution. The court further noted that EPA’s failure to collect sufficient data concerning the availability of treatment technologies to address legacy wastewater was a problem of its own making. With respect to leachate, the court agreed with petitioners that EPA’s justifications for not setting more stringent discharge limits were not adequately supported. Noting that EPA’s failure to require the most effective technologies was, in effect, a decision to continue allowing them to meet only the 1982 ELG standards, the court observed that, “[i]t was as if Apple unveiled the new iMac, and it was a Commodore 64.” The Fifth Circuit struck down the provisions of the ELG rule that did not require the industry to meet new treatment standards and remanded them back to EPA.

Now EPA must conduct a new rulemaking to set BAT-based discharge limits for these two wastestreams. EPA has not yet sought public input as part of this new rulemaking, but recently issued a separate proposed rule revising other provisions of the power plant ELGs in which it is proposing to continue to allow power plants to use surface impoundments under certain circumstances. EPA’s latest proposed rule suggests that it might seek only improve its rationale and not the substance of its standards on power plant legacy wastewater and leachate in response to the Fifth Circuit’s decision.
In Brief
John R. Jacus

John R. Jacus is a senior partner in the Environmental Practice Group 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

The U.S. District Court for the Northern District of Illinois held that the seller of a railroad right-of-way was fully indemnified by the purchaser under an asset purchase agreement, and that the scope of the indemnity covered the seller’s costs of response with respect to land not exchanged as part of the sale. Wisconsin Central Ltd. (Buyer) entered into an asset purchase agreement (Agreement) with Soo Line Railroad Company (Seller) to purchase certain railroad assets, including a right-of-way that became part of a larger area listed as a Superfund site. The Agreement provided for the Seller’s indemnification for all environmental claims arising from the ownership of the assets or operations of the transportation division of the Seller’s company up to 10 years after the closing. For claims asserted after the 10-year anniversary of the Agreement, the Buyer indemnified the Seller for all claims related to ownership of the assets or operation of Seller’s transportation division. Following a 2014 settlement with the U.S. Environmental Protection Agency’s (EPA) in which both the Seller and the Buyer contributed equally to settle the Superfund claims, the Buyer sued the Seller seeking indemnification for the amounts the Buyer paid to settle the Superfund claims. The Seller denied its liability and filed a counterclaim asserting that the Buyer was obligated to indemnify the Seller for amounts it had contributed to settle the Superfund claims. The court held that the Buyer must indemnify the Seller because the environmental claim occurred after the 10-year anniversary. The Seller sought to recover its full $5,259,555 contribution to the Superfund settlements, but the Buyer argued that the Seller was not entitled to the full amount because the “property footprint” of the assets Buyer purchases from the Seller constituted 54.1 percent of the total acreage at issue in the Superfund site. The court held that the Buyer’s arguments failed because the Agreement did not impose any asset-specific limitation upon the indemnification provision and expressly provided for indemnification of environmental claims for the entire transportation division of the Seller. The court also awarded the Seller attorneys’ fees and prejudgment interest.

Clean Air Act

The U.S. Court of Appeals for the District of Columbia Circuit held that EPA’s rule implementing the “Good Neighbor” provision of the Clean Air Act (Act) violates the Act.
because it failed to require upwind states to reduce emissions when downwind nonattainment areas are required to adopt more stringent control measures to attain national ambient air quality standards (NAAQS). The Act’s Good Neighbor provision requires upwind states to eliminate their significant contributions to nonattainment of air quality standards in downwind states. Multiple parties challenged EPA’s 2016 rule implementing this provision, including environmental nongovernmental organizations (NGOs) and downwind states that argued the rule was too lenient, as well as upwind states and industries that argued the rule was too stringent. All challenges to the rule failed save for one. That challenge asserted that the rule was inconsistent with the Act because it permitted upwind states found to be significantly contributing to downwind states’ nonattainment (or interfering with their maintenance of federal standards) to continue their activities contributing to nonattainment beyond the statutory deadlines by which the affected downwind areas must demonstrate attainment of the NAAQS at issue. The court observed that the EPA’s rule allowed upwind states to continue their contributing activities beyond the statutory deadlines that required downwind states to demonstrate attainment. By not subjecting upwind states to any deadline to address their significant contribution or interference, the court held that EPA had exceeded its authority in promulgating the rule. The court remanded the rule to EPA to address the lack of any deadline for significantly contributing upwind states. Notably, the court rejected a variety of other challenges by the various parties to (1) the modeling and implementation options available under the rule, (2) whether the rule’s benefits outweighed its costs, and (3) whether EPA had impermissibly accounted for biogenic sources of ozone precursors in its modeling provisions.


The U.S. Court of Appeals for the District of Columbia Circuit held EPA’s action to withdraw its greenhouse gas emissions standards issued in 2012 for model year 2022 to 2025 light duty motor vehicles and issue a notice for a new rulemaking to reconsider these standards (Revised Determination) was not subject to judicial review and dismissed the petitions filed by various states, environmental organizations, and electric power industry groups. The court held that the Revised Determination did not constitute judicially reviewable final agency action under the two-prong test set forth by the U.S. Supreme Court in _Bennett v. Spear_, 520 U.S. 154, 178 (1997). The court found that the Revised Determination “did not itself effect any change in the emissions standards that were established by the 2012 final rule for model year 2022–2025 vehicles,” but instead created only the possibility that there may be a change in the future to those standards. The court further observed that while EPA had concluded that the emissions standards for future model year vehicles were “not appropriate” because they “may be too stringent,” EPA had taken the position that the Revised Determination did not dictate the outcome of further rulemaking regarding the standards in question. Therefore, the court concluded that the Revised Determination failed to meet the second prong because it “neither determines rights or obligations or imposes any legal consequences, nor alters the baseline upon which any departure from the currently effective 2012 emission standards must be explained.”
Clean Air Act, greenhouse gas regulation


The U. S. Court of Appeals for the District of Columbia Circuit granted EPA’s and several other parties’ motions to dismiss long-pending petitions for review of the Clean Power Plan (CPP), developed by the Obama administration to reduce carbon dioxide emissions from existing power plants under the Clean Air Act (Act). Several states and industry groups had challenged the CPP as exceeding statutory authority under the Act, and other states and environmental organizations had intervened to defend the CPP. The U.S. Supreme Court stayed implementation of the CPP in 2016, and following the stay, the D.C. Circuit held *en banc* oral argument in lieu of panel review, but stayed the case in 2017 before ruling on the merits. EPA argued in its motion to dismiss that litigation over the CPP was mooted by EPA’s publication of a final CPP replacement rule, the Affordable Clean Energy rule, on July 8, 2019, and the court agreed.

Clean Water Act


The U.S. Circuit Court of Appeals for the Eleventh Circuit ruled that EPA has discretion not to institute the withdrawal of Clean Water Act (CWA or Act) delegation from a state not in full compliance with discharge permitting requirements under section 402 of the Act. Petitioner Riverkeeper and other environmental organizations petitioned EPA in 2010 to commence proceedings to withdraw Alabama’s authority to administer the National Pollutant Discharge Elimination System (NPDES) permit program pursuant to EPA’s withdrawal authority under the CWA. The petitioners cited numerous alleged violations of NPDES program requirements in support of their withdrawal petition, but in 2017, EPA chose not to initiate program withdrawal from Alabama. The petitioners sued EPA under the federal Administrative Procedure Act (APA), asserting that EPA did not have discretion not to withdraw the NPDES program under the CWA and its decision was arbitrary and capricious. The court held that EPA did have discretion and noted that while this was an issue of first impression in the Eleventh Circuit, other courts have ruled that EPA does have discretion not to withdraw CWA program delegation. The court reasoned that the statutory text at issue encompasses both a discretionary and a nondiscretionary component that plainly mandates the withdrawal of state permitting authority under particular circumstances, but requires EPA to make a judgment whether a petition for withdrawal sufficiently demonstrates that a state program does not comply with CWA requirements. After reviewing four alleged violations by Alabama, the court found none to be severe enough to warrant withdrawal. Citing EPA regulations that construe the CWA as providing the agency with discretion to determine what type of violation would warrant withdrawal, the court held EPA’s decision was not arbitrary.
Geothermal Steam Act

*Pit River Tribe v. Bureau of Land Mgmt.*, 939 F.3d 962 (9th Cir. 2019).
The U.S. Court of Appeals for the Ninth Circuit affirmed the federal district court’s summary judgment in favor of appellees Pit River Tribe and several environmental organizations who challenged the Bureau of Indian Affairs (BIA) and other federal agencies administration of numerous unproven geothermal leases located in California’s Medicine Lake Highlands. The federal leases had primary terms of 10 years with an allowance for their extension for as long as geothermal steam is produced in commercial quantities. The parties agreed that the Geothermal Steam Act (GSA) requires that any lease be allowed to continue if it is producing geothermal steam in commercial quantities, or is shown to be capable of doing so, within its primary ten-year term. *See* 30 U.S.C. § 1005(a) (1994). The Bureau of Land Management (BLM) argued that section 1005(a) of the GSA allows production-based extensions to be granted to all leases in a unit if any one of them becomes productive during the primary term. The Appellees argued that the BLM’s decision to continue the terms of the unproven leases for up to 40 years violated the GSA. The court held that although section 1005(c) of the GSA provides that leases subject to “unit plans” may be extended even if not productive during the initial 10-year term, that provision permitted only production-based 40-year extensions at the end of the primary term on a lease-by-lease basis, and BLM failed to provide a compelling reason for the court to depart from the GSA’s plain language.

NEPA, FLPMA

The U.S. Department of the Interior’s Board of Land Appeals (IBLA or Board) overturned a Bureau of Land Management (BLM) decision to replace thousands of acres of native forests in the Grand Staircase-Escalante National Monument with foraging plants for livestock. The Southern Utah Wilderness Alliance and several other environmental nongovernmental organizations (NGOs) had appealed the BLM decision to the IBLA, arguing that BLM violated the Federal Land Policy and Management Act (FLPMA) and the National Environmental Policy Act (NEPA) when it approved the project’s planned removal of more than 30,000 acres of pinyon pine and juniper forest and sagebrush from an area within the national monument. Both BLM and NGOs argued that a previous IBLA decision over cumulative impacts supported their respective positions. The BLM’s environmental assessment identified the purpose of the project to be improvement of land health and enhancement of sagebrush-steppe habitat, but the NGOs emphasized that the project’s vegetation treatments would have removed native pinyon pine and juniper trees from the project area by shredding the trees with a wood chipper mounted on a front-end loader. The Board found the BLM had violated NEPA when it failed to consider adequately the adverse cumulative impacts of the project’s vegetation treatments on migratory
birds in the national monument. The NGOs also argued that the project’s use of non-native seed was inconsistent with the applicable Monument Management Plan, which prioritized the use of native plants and seeds. In its review of the Plan, the Board found BLM’s proposed use of non-native seed failed to conform to the applicable land use plan under FLPMA.

**NEPA, Bald and Golden Eagle Protection Act**

*Protect Our Communities Found. v. LaCounte*, 939 F.3d 1029 (9th Cir. 2019).

The U.S. Court of Appeals for the Ninth Circuit upheld the Bureau of Indian Affairs’ (BIA) approval of the second phase of a California wind farm on tribal lands, holding the agency had properly considered the potential to harm eagles before entering a lease between the Ewiaapaayp Band of Kumeyaay Indians and the project developer. The court rejected the appellant conservation group’s argument that BIA had improperly relied on an environmental impact statement (EIS) that concluded harm to golden eagles from the project was unavoidable, citing to the BIA’s Record of Decision (ROD) for the project that found no significant impact to eagles based on the Supplemental Project Specific Avian and Bat Protection Plan. The appellant also argued that BIA had failed to explain its decision not to implement one of the measures in the EIS to mitigate eagle impacts, but the court agreed with the BIA that the agency did follow that mitigation measure. The court further rejected the appellant’s arguments that BIA did not consider a project alternative or should have crafted a supplemental EIS. Finally, the court upheld BIA’s decision not to require the project developer to obtain a permit pursuant to the Bald and Golden Eagle Protection Act (BGEPA) from the U.S. Fish and Wildlife Service (FWS) to kill or injure golden eagles before starting construction, as opposed to before starting operation. FWS had previously urged BIA to obtain such a permit before construction of the project. The BIA decided instead to make the developer obtain a BGEPA take permit from the FWS before it started operating wind turbines. The court acknowledged that it was “troubling” that the project could lead to some eagle deaths but observed that NEPA and BGEPA do not provide absolute protection by outlawing the killing of eagles. The court stated that “[w]hile we recognize the legitimate concerns about the well-being of protected eagles raised by plaintiffs and FWS, we are persuaded that those concerns can be addressed through the BGEPA permitting process,” and specifically noted the benefits of the project to the Tribe and to the United States.

**PFAS, emerging contaminants**


The U.S. Court of Appeals for the Sixth Circuit denied the motions to dismiss of defendant manufacturers of per- and polyfluoroalkyl substances (PFAS) in a putative class action tort suit. The plaintiff is a firefighter who claims he has been exposed to PFAS in firefighting foam and equipment and, as a result, has PFAS in his blood. The defendants are a group of PFAS
manufacturers that the plaintiff claims are responsible for environmental contamination with PFAS as a result of various commercial operations that result in PFAS releases into the air, water, and soils. The plaintiff further alleges that despite their knowledge of adverse impacts, the defendants encouraged continued release of PFAS into the environment and human exposure to PFAS through continued manufacturing, marketing, and use of their PFAS-containing products. The plaintiff brought claims for negligence, battery, conspiracy, and declaratory judgment, and sought equitable relief in the form of an independent scientific panel to study health impacts of PFAS exposure on humans and to make binding recommendations including appropriate testing and medical monitoring to be funded by the defendants. The defendants moved jointly to dismiss the case for failure to state a claim and lack of subject matter jurisdiction. The court denied the motions to dismiss, ruling that the complaint had established subject matter jurisdiction and personal jurisdiction sufficient to move forward, the defendants’ manufacture and distribution of PFAS-containing products in Ohio is sufficient to establish personal jurisdiction, an alleged increased risk of injury is an injury, and the request for medical monitoring is an available injunctive remedy that can redress the plaintiff’s alleged injury. The court made no determination about whether the case is appropriate for class certification.

RCRA, Clean Air Act


The U.S. District Court for the Western District of New York allowed citizen suits under the Clean Air Act (CAA) and the Resource Conservation and Recovery Act (RCRA) brought by residents living near a landfill to continue after the landfill’s owner and New York City, which sends its solid waste there for disposal, sought dismissal. Denying defendants’ motion to dismiss in part, the court dismissed two of the plaintiffs’ claims for private nuisance and trespass but allowed the plaintiffs’ CAA and RCRA citizen suit claims to proceed. The defendants argued _Burford_ abstention was applicable because New York’s Department of Environmental Conservation had denied much of the same relief the plaintiffs were seeking, had required remedial measures, and was investigating New York City’s solid waste disposal. The court held that when the statutory conditions for a citizen suit are met under the CAA or RCRA, _Burford_ abstention or the comparable doctrine of primary jurisdiction do not apply to prevent enforcement of those federal statutes. The court also rejected the defendants’ assertion of the political question doctrine, finding that federal courts were well suited to adjudicate the questions posed by the plaintiffs’ suit. On the substance of the RCRA claim, the court ruled that the plaintiffs had adequately alleged a RCRA endangerment, including sufficient causal nexus between New York City’s conduct and the alleged RCRA violation, and the requisite “imminent and substantial” endangerment to health or the environment. The court dismissed the private nuisance claim because the alleged nuisance conditions were too widespread and threatened more than a few individuals. The court also allowed claims for public nuisance, negligence, and gross negligence to proceed.
Views from the Chair
Karen A. Mignone

Karen A. Mignone is the chair of the Section of Environment, Energy, and Resources.

This is the time of year when the Section’s chair-elect, Howard Kenison, is contemplating the approximately one hundred chair-level appointments he needs to have in place before August. Having been in Howard’s spot just one year ago, I can attest to how challenging it is to identify the appropriate people to take on leadership roles, especially as none of us are able to know every Section member.

In light of this, I am asking anyone who has an interest in a committee chair-level appointment to please contact Howard in early 2020. He will be very busy filling all the open jobs in April and needs to wrap them up by June to have everyone in place before the 2020–2021 Leadership Training program in July. In addition to appointing substantive committee chairs, there are potential leadership positions in programming, publications, public service, and governance. While it is impossible to give everyone their first choice of role, by making your interest known, Howard can consider your request and also pass the information along to the Section Vice Chair Michelle Diffenderfer for the following ABA year. As with most things in life, patience pays off. Speak up and you may find yourself taking an active and critical role moving forward with our Section now or in the future.

Early in the calendar year is also the time when the immediate past chair, Amy Edwards, will convene the Nominating Committee to recommend members for 2020–2021 Council and officer positions. The Nominating Committee is responsible for recommending the five new Council members for three-year terms commencing in August. In addition, the committee recommends the officers, consisting of Membership and Diversity, Publications, Education, Secretary, and Budget. Most people in these roles are renominated for a second year, so not every position is open every year. Other positions include representatives to the larger ABA through House of Delegates and Board of Governors (although these openings are less frequent) and, of course, the Section vice chair position, which is filled each year. Section’s membership votes on the committee’s nomination recommendations at the Section’s annual business meeting during the ABA Annual Meeting, which for 2020 is scheduled for July 29–August 4.

Again, as with Howard’s appointments, Amy and her committee have no way of knowing everyone who might be interested in serving in one of the open positions. Each has its own unique requirements, and, for some, the Section has some informal qualifications. For example, to be an officer, typically a candidate will have already served on Council and chaired a substantive committee or conference planning committee or have held other significant roles in Section leadership. Even if you don’t currently have that level of Section leadership experience,
having a discussion and learning the prerequisites will allow you to start down the road to a possible future Council or officer position.

One thing about which you should be aware is that each of these jobs requires a time commitment above that of typical committee vice chair roles. There are frequent conference calls, and Council and officers travel at least four times per year to attend meetings. In-person participation is required, absent an approved reason, and travel reimbursement is provided at a nominal rate.

When I joined the Section, I never thought of having a leadership role, much less that I would be one day be the Section chair. Early in my career I was content with the opportunities to build a network and learn as much as I could about my practice area, and enough about other areas to understand when I needed to ask for help. The unexpected benefit of all this was making wonderful friends from across the country, many with different practices and viewpoints. This enriched both the experience in our Section and my practice. Over time, I became more interested in Section leadership and, when asked to serve on Council, I jumped at the opportunity. It was both challenging and rewarding as our Section has faced a number of challenges and issues over the past few years. I have been honored to be part of the team working to address these issues and move the Section forward. It isn’t always easy, but it is also a whole lot of fun because we work as a team with our dedicated Section staff.

Our Section membership is made up of a variety of people from a wide range of practice settings, with everything from one to 30 years or more of practice. It is important that our leaders reflect this spectrum of its members, so I encourage you to think about what might interest you. I also encourage you to reach out to any officer or Council member to ask about the responsibilities, the opportunities, and, of course, the rewards for contributing to our Section’s success. And if the idea of higher-level leadership isn’t for you, you may like to serve as a vice chair of a substantive committee or program planning committee or as a member of a publication’s editorial board. There are lots of opportunities available and every one of them is important to the Section and its members. So please speak up. We all look forward to working with you going forward.

People on the Move
James R. Arnold

Jim Arnold is the principal in The Arnold Law Practice in San Francisco. He is a past Section secretary, Council member, and chair of the Sponsorships Committee, the Superfund and Hazardous Waste Committee, co-chair of the 1999 Section Fall Meeting, and chair of the Hard Minerals Committee, 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
Shelly Geppert has joined the Department of Professional Standards in Perkins Coie’s Chicago office, from Eimer Stahl also in Chicago, where she was of counsel. At her prior law firm, Geppert practiced civil litigation with a focus on environmental, products liability, and toxic tort matters. She has been active in the Section, serving for several years as co-chair of the Section’s Environmental Litigation and Toxic Torts Committee. She organized and co-chaired podcasts for the committee. Geppert served as vice chair of the Section’s 26th Fall Conference in San Diego and chaired the Section’s 27th Fall Conference held in Boston in September 2019. She is currently The Year in Review vice chair of the Special Committee on Ethics and the Profession.

Mary Ellen Ternes has been elected president-elect of the American College of Environmental Lawyers (ACOEL), to serve as president in 2020. Ternes is a partner with Earth & Water Law, LLC, in its Oklahoma City office. An ACOEL fellow since 2008, she previously served ACOEL as secretary and chaired strategic planning efforts as well as substantive committees. Ternes chaired the Environmental Committee of the ABA Business Law Section from 2017–2019 and is a fellow of the American Institute of Chemical Engineers, where she currently serves on the Public Affairs and Information Committee and the Environmental Progress and Sustainable Energy editorial board. She is a long-serving leader in the ABA Section of Environment, Energy, and Resources, serving on Council as well as chairing the Special Committee on The Year in Review; the Air Quality, Climate Change, Sustainable Development, and Ecosystems, and Ethics Committees; and the Annual Conference on Environmental Law. Ternes continues today as a member of the Natural Resources & Environment editorial board.